No. _____

IN THE

Supreme Court of the United States

MARYVILLE BAPTIST CHURCH; DR. JACK ROBERTS,
Petitioners,

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a classic vehicle for this Court to clarify that a judicial decision which changes legal precedent cannot be applied retroactively to divest a private party of vested rights. A judicial decision that changes legal precedent should only be applied retroactively where private rights have not vested.

This critical question cannot be presented more clearly than in this case. Here the Court can compare side-by-side two cases involving the same facts, same law, same injunction, same judicial panel, but different results *solely* because the Sixth Circuit Court of Appeals *retroactively* applied this Court's recent decision in *Lackey v. Stinnie*,145 S. Ct. 659 (2025), and its new construction of 42 U.S.C. §1988, to deprive Petitioners of their vested rights.

The Questions Presented are as follows:

1. Whether retroactive application of *Lackey v. Stinnie*, 145 S. Ct. 659 (2025) and its new construction of 42 U.S.C. §1988, that results in the depravation of a vested, substantive, and unreviewable judgment to attorney's fees violates the Due Process Clause of the Fourteenth Amendment.

2. Whether a judicial decision that changes legal precedent violates the Due Process Clause of the Fourteenth Amendment when it is applied retroactively to deprive a party of a vested right.

PARTIES

Petitioners are Maryville Baptist Church and Dr. Jack Roberts. Respondent is Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky.

DIRECTLY RELATED PROCEEDINGS

Maryville Baptist Church, Inc. v. Beshear, No. 24-5737, Opinion affirming denial of attorney's fees is reported at 132 F.4th 453 (6th Cir. 2025) and reproduced in the Appendix at 1a-7a.

Maryville Baptist Church, Inc. v. Beshear, No. 24-5737, Judgment (6th Cir. Mar. 25, 2025) is unreported and is reproduced in the Appendix at 8a.

Maryville Baptist Church, Inc. v. Beshear, No. 24-5737, Order denying rehearing/rehearing en banc is available electronically at 2025 WL 1409319 (6th Cir. Apr. 24, 2025) and reproduced in the Appendix at 9a.

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JURISDICTION

The Sixth Circuit issued its opinion affirming the district court's denial of Petitioners' post-judgment motion on March 25, 2025, and denied Petitioners' timely petition for rehearing en banc on April 24, 2025. App. 1a-8a, 24a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Civil Rights Attorneys' Fees Award Act, 42 U.S.C. §1988(b), provides that, "[i]n any action or proceeding to enforce a provision of section . . . [1983], 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."

STATEMENT OF THE CASE

I. Introduction.

This case presents a classic vehicle for this Court to clarify that a judicial decision which changes legal precedent on which the rights of a party are defined violates the Due Process Clause of the Fourteenth Amendment when it is applied retroactively to divest a private party of substantive, vested rights.

This critical question is clearly presented in this case. This case provides a comparison between *Maryville Baptist Church v. Beshear,* 2023 WL 3815099 (6th Cir. June 5, 2023) and *Roberts v. Neace*, 65 F.4th 280 (6th Cir. 2023). These two cases involve the same facts, same law, same injunctions, same judicial panel, but different results *solely* because the Sixth Circuit Court of Appeals *retroactively* applied this Court's recent decision in *Lackey v. Stinnie*, 145

S. Ct. 659 (2025), and its new construction of 42 U.S.C. §1988, to deprive Petitioners of their vested rights.

The Sixth Circuit granted prevailing party status to the plaintiffs in *Roberts*, 65 F.4th at 284, *before* this Court's decision in *Lackey*, but then denied prevailing party status to Petitioners in this identical case *after Lackey*, App. 2a, even though the same rights vested in both cases arising out of the same litigation. This result cannot be squared with the Due Process Clause.

As the Sixth Circuit previously held involving the facts and law in this case, "[Petitioners] prevailed." *Roberts*, 65 F.4th at 284. That decision was made on the basis of the standards applicable *at the time of Petitioners' judgments*. Petitioners secured two final judgments in this case, one from the district court, and another from the Sixth Circuit, noting their entitlement to attorney's fees and costs. *Maryville Baptist*, 2023 WL 3815099. In those instances, the preliminary injunctions Petitioners obtained below can never be taken away. These judgments resulted in constitutionally vested rights. Then came *Lackey*, that changed the interpretation of Section 1988, which then was applied *retroactively* to deprive Petitioners of the fees and costs to which they were otherwise entitled at the time of their final judgments 880 days before *Lackey*.

As this Court declared over 100 years ago, "the private right of parties which have been vested by the judgment of a court cannot be taken away." *Hodges v.*

Snyder, 261 U.S. 600, 603 (1923). Here, Petitioners have been deprived of their unquestionably vested right to attorney's fees and costs under 42 U.S.C. §1988 by a decision that came *880 days after* their right to prevailing party fees had already vested by final and unreviewable judgment.

The decisions regarding prevailing party status from two judges involving the same factually identical cases were decided on September 29, 2022 (*Roberts*) and September 30, 2022 (*Maryville*). They were appealed on October 27 (*Maryville*) and October 28 (*Roberts*). The Sixth Circuit decided the *Roberts* plaintiffs were prevailing parties and affirmed attorneys fees and costs in the amount of $272,142.50. 65 F.4th at 283.

After ruling in *Roberts* on April 10, 2022, the Sixth Circuit then ruled in *Maryville* on June 5, 2022, instructing the district court to follow its directive in *Roberts*. 2023 WL 3815099, *1.

In the *Roberts* case decided on April 10, 2022, the Sixth Circuit, reviewing the identical facts and law as in *Maryville*, held: "Gauged by these principles, [Petitioners] prevailed." 65 F.4th at 284. "These principles" were the standards applicable *at the time of Petitioners' judgments*. Petitioners secured two final orders and judgments in this case, one from the district court, R.917, and a judgment from the Sixth Circuit. 2023 WL 3815099.

In the *Maryville Baptist Church* case decided on June 5, 2022, the Sixth Circuit wrote that "*Roberts*

addressed Beshear's COVID-19 restrictions, preliminary injunctions, mootness, and *attendance at Maryville Baptist Church*—all features of *this case*." 2023 WL 3815099, *1 (emphasis added).

Prior to *Lackey*, both the *Roberts* and *Maryville* plaintiffs were prevailing parties under the then existing legal precedent. But the district court in *Maryville* waited over a year to follow the Sixth Circuit's order, and then this Court decided *Lackey*. Following *Lackey*, the Sixth Circuit wrongly applied it retroactively to the *Maryville* plaintiffs, thus divesting Petitioners of a vested right.

The district court in *Maryville Baptist Church* first denied prevailing party status on September 30, 2022. R.1120-1125. Petitioners appealed, and the Sixth Circuit reversed, citing the clear and unequivocal holdings of the Sixth Circuit in *Roberts*. 2023 WL 3815099. On remand, the district court, after waiting more than a year, refused to follow the holding of the Sixth Circuit in *Roberts* and denied Petitioners the fees to which they had acquired a vested right. R.1191-1203.

While the case was pending at the Sixth Circuit, this Court decided *Lackey*. Applying *Lackey* retroactively, the Sixth Circuit divested Petitioners of their vested right.

The violation of the Due Process Clause is evident when comparing side-by-side the result in *Roberts* versus the result in *Maryville Baptist Church*. The two cases are identical. But the retroactive

application of *Lackey* deprived the plaintiffs in *Maryville Baptist Church* of their vested right.

A timeline comparison between *Roberts* and this case demonstrates the injustice:

Event	***Maryville***	***Roberts***
First Injunction	Apr. 20, 2020 (6th Cir)	May 4, 202 (EDKY)
Second Injunction	May 8, 2020 (WDKY)	May 9, 2020 (6th Cir.)
Order of Dismissal	Oct. 6, 2021 (WDKY)	Aug. 26, 2021 (EDKY)
Fee Order	Sept. 30, 2022 (WDKY)	Sep. 29, 2022 (EDKY)
Fee Appeal	Oct. 27, 2022 (WDKY)	Oct. 28, 2022 (EDKY)
6th Cir. Decision	June 5, 2023 (6th Cir.)	Apr. 10, 2023 (6th Cir.)
Second Fee Order	July 16, 2024 (WDKY)	N/A
Second Fee Appeal	Aug. 2, 2024	N/A

The cases were identical, the injunctions were identical, and the timeline was virtually identical. Yet, because the district court in *Maryville Baptist Church* took over one year to issue a decision on remand (refusing to follow the Sixth Circuit's explicit ruling regarding *this case*), Petitioners were kicked down the road, and then this Court issued the precedent-changing decision in *Lackey v. Stinnie*, 145 S. Ct. 659 (2025). Although the *Roberts* and the *Maryville Baptist Church* cases are identical, the

Roberts plaintiffs are prevaling parties under Sixth Circuit precendet, but the *Maryville Baptist Church* Plaintiffs/Petitioners are not. The only difference between the two cases is timing relative to this Court's *Lackey* decision and the Sixth Circuit's retroactive application of *Lackey*.

Applying *Lackey* retroactively to vested rights that accompany prevailing party status violates the Due Process Clause. Despite being earlier and more successful than the plaintiffs in *Roberts,* who were mere visitors from another county, not members of Maryville Baptist Church, and who did not represent the church or the pastor who blazed the trail and established the legal precedent, Petitioners have been deprived of a vested right by the retroactive application of *Lackey*. And the result of that denial of a vested, substantive, final, and unreviewable right to fees came from a decision issued 880 days after Petitioners' right vested. Due process requires more.

As the Sixth Circuit stated in the first appeal concerning the denial of Petitioners' attorney's fees and costs, "*Roberts* addressed Beshear's COVID-19 restrictions, preliminary injunctions, mootness, and *attendance at Maryville Baptist Church*—all features of *this case*." 2023 WL 3815099, at *1 (emphasis added). Both the *Roberts* plaintiffs (who received their fees and costs), and Petitioners (who did not because of the retroactive application of *Lackey*), secured a vested right to the construction of Section 1988 the day of their identical judgments. But, because the district court forced Petitioners to appeal twice, an intervening change in interpretation issued 880 days

after those judgments worked a manifest injustice on Petitioners.

The facts, the Church, the Pastor, and the people were the same. The Governor's unconstitutional orders were the same. The preliminary injunctions were the same. The right to prevailing party status vested the same. The results *should* have been the same.

Retroactive application of judicial decisions is neither constitutionally nor statutorily required, and it is explicitly to be avoided where—as here—it would work a manifest injustice. Petitioners prevailed. At the time the judgment of dismissal in this case was entered, the interpretation of every Circuit Court, including the Sixth Circuit below, was that they were entitled to prevailing party status under Section 1988. At the moment the district court entered the judgment of dismissal, Petitioners' rights to that prevailing party status permanently and irreversibly vested.

A subsequent decision from this Court in *Lackey* cannot and—as a matter of justice and equity—should not preclude awarding Petitioners the fees and costs to which they were entitled and in which their right had vested at the time of the judgment (long before *Lackey*) below, under the interpretation of the law at the time that right vested. The subsequent interpretation of Section 1988 that changes the legal precedent applied retroactively to a vested right is a manifest injustice on Petitioners, and deprives Petitioners of due process in a manner that directly

conflicts with this Court's precedent and the authoritative precedent of other courts.

Roberts and *Maryville Baptist Church* are virtually indistinguishable except for the case number. The facts, the Church, the Pastor, and the people were all the same. The Governor's unconstitutional orders were all the same. The preliminary injunctions enjoining those unconstitutional orders were all the same, and were initially obtained by *this case*, *Maryville Baptist Church Baptist Church,* which led the entire litigation. Indeed, this case, *Maryville Baptist Church*, was the first decision in the country by any federal court of appeals granting a preliminary injunction against the COVID lockdowns applied to churches and places of worship. *Maryville Baptist Church Baptist Church v. Beshear*, 977 F.3d 561 (6th Cir. 2020). After the Sixth Circuit Court of Appeals unanimously issued the injunction, the same Sixth Circuit panel issued an injunction in the *Roberts* case, which arose out of the *same* Easter Sunday service. *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020). The prevailing party status should be the same.

As John Adams famously opined, "facts are stubborn things." *Perez v. Cucinnelli*, 949 F.3d 865, 880 (4th Cir. 2020) (quoting David McCullough, *John Adams* 52 (Simon & Schuster 2001) (cleaned up)). The facts and the history of this case dictate that Petitioners prevailed over the Governor's unconstitutional COVID-19 orders, which entitled Petitioners to prevailing party status under the law in effect at the time of the final judgment—880 days

before *Lackey*. The Sixth Circuit's decision below applying Lackey retroactively and divesting Petitioners of a vest right is in conflict with this Court's due process precedent.

II. Statement of the Facts and Procedural History.

A. The Governor's COVID-19 Orders.

On March 6, 2020, the Governor of the Commonwealth of Kentucky declared a state of emergency in response to COVID-19. R.56. On March 16, 2020, the Governor issued his first liberty-restricting order concerning COVID-19, banning on-site food consumption and demanding the now-debunked idea that six-foot social distancing was required throughout the Commonwealth. R.61. The next day, March 17, 2020, the Governor demanded all public facing businesses (except those specifically exempted) close and cease operations. R.62. On March 19, two days later and for the third time in four days, the Governor issued another executive order prohibiting mass gatherings—including for present purpose, "faith-based" religious worship services. R.66-67. On March 22, 2020, the Governor issued another executive order demanding that all in-person retail business that were not classified as life-sustaining to close. R.69-70. On March 25, 2020, the Governor issued the stay-at-home order that required all citizens in the Commonwealth to remain at home except for traveling to and from so-called essential businesses. R.72-78. Those orders on their face and as applied by the Governor and the Kentucky State Police purported to prohibit the constitutionally

protected exercise of Plaintiffs' religious assembly and worship.

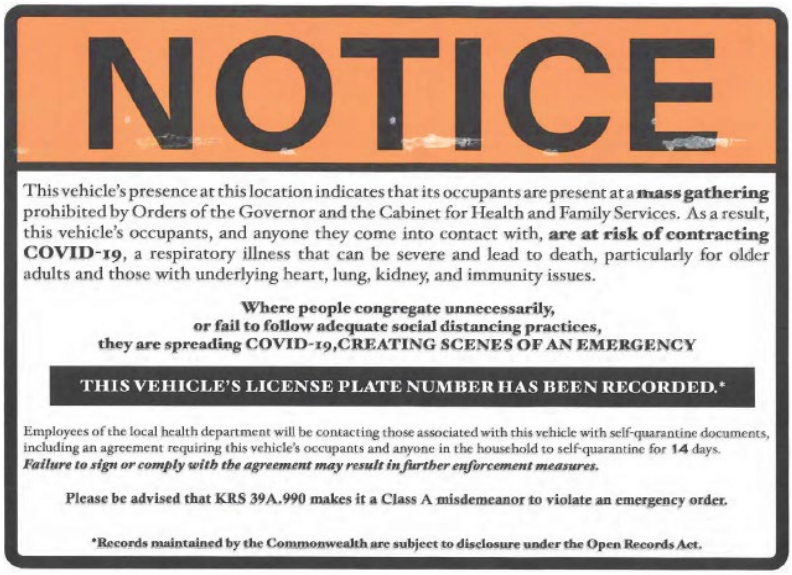
B. The Governor's Unconstitutional Enforcement of His Orders.

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. R.12. 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. R.12, 92.

On the morning of Easter Sunday, April 12, pursuant to the Orders and Governor's press statements, Kentucky State Police Troopers stationed themselves at 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 Petitioner Pastor Roberts (hereafter Pastor or Pastor Roberts),[1] and including the vehicles of those attending the worship service only by "drive-in"—staying in their cars while the service was broadcast

[1]For the sake of clarity, Dr. Jack Roberts—the Pastor of Maryville Baptist Church, and a Petitioner in this case, was not the lead-named plaintiff in *Roberts v. Neace*. The *Roberts* in that parallel litigation was Theodore Jospeh Roberts who attend the Church as an out-of-county visitor on that Easter Sunday.

to the parking lot by loudspeaker. R.12-14, 400. 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. R.13-14, 103. *See also* Fig.1, *infra*.



NOTICE

This vehicle's presence at this location indicates that its occupants are present at a **mass gathering** prohibited by Orders of the Governor and the Cabinet for Health and Family Services. As a result, this vehicle's occupants, and anyone they come into contact with, **are at risk of contracting COVID-19**, a respiratory illness that can be severe and lead to death, particularly for older adults and those with underlying heart, lung, kidney, and immunity issues.

Where people congregate unnecessarily,
or fail to follow adequate social distancing practices,
they are spreading COVID-19,CREATING SCENES OF AN EMERGENCY

THIS VEHICLE'S LICENSE PLATE NUMBER HAS BEEN RECORDED.*

Employees of the local health department will be contacting those associated with this vehicle with self-quarantine documents, including an agreement requiring this vehicle's occupants and anyone in the household to self-quarantine for **14** days.
Failure to sign or comply with the agreement may result in further enforcement measures.

Please be advised that KRS 39A.990 makes it a Class A misdemeanor to violate an emergency order.

***Records maintained by the Commonwealth are subject to disclosure under the Open Records Act.**

Figure 1.

Pursuant to the notice, on April 15, 2020, Pastor 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 Pastor Roberts' car was parked at the

church during its Easter service. R.16, 104, 400. 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." R.104.

The Governor's Orders prohibiting assembly for worship and the enforcement of his Orders against Maryville Baptist Church and Pastor Roberts, and the out-of-county visiting congregant plaintiffs in *Roberts v. Neace*, burdened their exercise of religion every Sunday the Orders were in effect by subjecting Petitioners and the *Roberts* congregants to criminal and other sanctions for assembling for worship according to the dictates of their consciences. R.31–32.

C. Petitioners' Challenge to the Governor's Orders.

On April 17, 2020, Petitioners Maryville Baptist Church Baptist Church and Pastor Roberts filed their Verified Complaint and a Motion to Temporary Restraining Order and Preliminary Injunction, seeking to enjoin the Governor's unconstitutional orders and the Governor's enforcement actions undertaken by dispatching the Kentucky State Police to Maryville Baptist Church Baptist Church for simply holding a worship serve. R.2. Petitioners 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 not forsake the assembling of themselves together weekly to worship God, and that the essential purpose of their church ("ekklesia" in Greek, meaning "assembly") is to assemble with other Christians to worship God in obedience to Scripture. R.30–31. Petitioners challenged the Governor's Orders prohibiting religious worship services as a violation of *inter alia* the First and Fourteenth Amendment to the United States Constitution and the Kentucky Religious Freedom Restoration Act. R.27-47.

Petitioners sought emergency injunctive relief against the Governor's prohibitions on religious worship, including injunctive relief:

> enjoining Governor Beshear, all Commonwealth officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the GATHERING ORDERS or any other order to the extent any such order prohibits drive-in church services at the Church, or in-person church services at the Church if the Church meets the social distancing and hygiene guidelines pursuant to which the Commonwealth allows so-called "life-sustaining" commercial and non-religious entities (e.g., beer, wine, and liquor stores, warehouse clubs, and supercenters) to

> accommodate large gatherings of persons without numerical limit.

R.48, 177. Petitioners similarly sought a preliminary injunction and permanent injunction requesting the same relief against the Governor's Orders. R.48-49. And Petitioners sought a declaration that the Governor's Orders violated Petitioners right to the free exercise of religion, free assembly, freedom of speech under the First Amendment, that the Orders violated the First Amendment's Establishment Claus, and Petitioners right to equal protection under the Fourteenth Amendment. R.50-51.

The plaintiffs in *Roberts v. Neace* filed their complaint on April 14, 2020, and their preliminary injunction motion was denied by the Eastern District of Kentucky on May 4, 2020, *see Roberts v. Neace*, 457 F. Supp. 3d 595 (E.D. Ky. 2020), two days *after* Petitioners obtained the first injunction from any Circuit Court in the nation. *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020).

D. The Preliminary Injunctions against the Governor's Unconstitutional Worship Restrictions.

On April 18, 2020, the district court entered an order denying the TRO and preliminary injunction request of Petitioners. R.221. *See Maryville Baptist Church v. Beshear*, 455 F. Supp. 3d 342 (W.D. Ky. 2020). On April 24, the Petitioners appealed the TRO/PI Order to the Sixth Circuit. R.252. On May 2, the Sixth Circuit granted Petitioners an emergency injunction pending appeal, finding they were "likely

to succeed on [their] state and federal claims, especially with respect to the [worship] ban's application to drive-in services." R.288. *See Maryville Baptist Church*, 957 F.3d 610. Less than a week later and before Petitioners sought to assemble again for Sunday worship, on May 8, after remand, the district court granted Petitioners both an injunction pending appeal and preliminary injunction as to in-person worship services R.575, *see also* 2020 WL 2393359, likewise finding that "Plaintiffs have a strong likelihood of success on the merits of their [state] KRFRA claim" R.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. R.578–580.

On May 8, 2020, the plaintiffs in *Maryville Baptist Church* received an injunction pending appeal and a preliminary injunction from the district court pursuant to the Sixth Circuit's ruling. *Maryville Baptist Church v. Beshear*, 2020 WL 2393359 (W.D. Ky. 2020). Then on May 9, 2020, the plaintiffs in *Roberts v. Neese* received a preliminary injunction from the Sixth Circuit. 958 F.3d 409.

On May 9, after the Sixth Circuit and the district court had both issued preliminary injunctions against the Governor's Orders, the Kentucky Cabinet for Health and Family Services issued an order amending its Gatherings Order to permit gathering for religious worship. R.583. On May 10, the Governor filed the new order in the district court and asserted that it mooted Petitioners' case. R.581.

On October 19, 2020, the Sixth Circuit dismissed Plaintiffs' appeal of the district court's original TRO/PI Order as moot, finding the district court's subsequent IPA/PI Order on remand gave Plaintiffs what they sought in the appeal, R.752, and suggested that the district court consider whether the whole case is moot. R.754. The district court ordered briefing on the mootness issue. R.758, and after briefing, R. 761–827, on October 6, 2021, 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.*, [635 S.W.3d 788 (Ky. 2021)], and the legislation addressed therein." R.917.

The referenced legislation comprised a series of four enactments by the Kentucky General Assembly during the 2021 regular session restricting the Governor's emergency powers under Kentucky law, including Kentucky Revised Statutes (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.

E. The Lasting and Enduring Relief Obtained by Petitioners' Injunctions.

Petitioners' preliminary injunctions from the Sixth Circuit and the district court permitted them to exercise their constitutional rights despite the Governor's unconstitutional restrictions. From May 2, 2020, when the Sixth Circuit granted Petitioners their first preliminary injunction against the

Governor's Order until February 2, 2021, when the enactments restricting the Governor's authority took effect, Petitioners assembled for religious worship each Sunday. The preliminary injunctions Petitioners obtained thus permitted them (and the visiting congregant plaintiffs in *Roberts*) the ability to exercise their constitutionally protected right to free exercise of religion and religious assembly *for 40 consecutive Sundays* without fear of reprisal and criminal punishment from the Governor's unconstitutional orders.

F. The District Court's First Denial of Petitioners' Fee Motion.

On December 14, 2021, Petitioners filed their Motion for Attorney's Fees and Nontaxable Expenses, R.932, and Bill of Costs, R.1014, along with supporting materials. R.949, 1009. On June 16, 2022, the magistrate issued a Report and Recommendation, R.1082, denying Petitioners' motion for attorney's fees and costs, concluding that Petitioners were not prevailing parties. Petitioners filed their Objections to Magistrate's Report and Recommendation on June 30, 2022, R.1092, and the district court entered its Order overruling the objections, adopting the Report and Recommendation, and denying attorney's fees and costs on September 30, 2022. R.1120. Petitioners filed their Notice of Appeal from the district court's Order on October 27, 2022. R.1126.

G. The Sixth Circuit's Reversal of the District Court's Denial of Petitioners' Fee Motion.

On September 29 (*Roberts*) and 30 (*Maryville*) the respective orders regarding prevailing party status

were released by two different judges. *Roberts v. Neace*, 2022 WL 4592538 (E.D. Ky. Sept. 29, 2022); R.1120-1125. On October 27 (*Maryville*), R.1126, and 28 (*Roberts*) the respective cases were appealed to the Sixth Circuit.

On April 10, 2022, the Sixth Circuit ruled in favor of the *Roberts* plaintiffs, finding prevailing party status and affirming an award of $272,142.50. *See* 65 F.4th at 283.

On June 5, 2023, the Sixth Circuit entered its Opinion and Judgment in Petitioners' first appeal of the denial of their motion for attorney's fees and costs. R.1132-1133. *See Maryville Baptist Church, Inc. v. Beshear*, No. 22-5952, 2023 WL 3815099 (6th Cir. June 5, 2023). Based on the Sixth Circuit's prior decision in *Roberts v. Neace*, 65 F.4th 280 (6th Cir. 2023), the court vacated the district court's denial of Petitioners' motion for attorney's fees and costs and remanded the matter to the district court for it to reconsider Petitioners' status as prevailing parties in light of the binding decision in *Roberts*. R.1132.

H. The *Roberts* Plaintiffs' Fee Award.

In its original *Roberts* decision issuing a preliminary injunction, the Sixth Circuit noted that the plaintiffs there attended "Maryville Baptist Church . . . *the same church at issue in our case*." *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020) (emphasis added). The Sixth Circuit, *in Petitioners' case*, likewise recognized that the plaintiffs and their claims in both cases arose from the same worship services held at the same church—Maryville Baptist

Church—under the same pastor—Plaintiff Pastor Jack Roberts. *See Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020) (noting that "*Maryville Baptist Church's lawsuit*" was filed by "[t]he church and pastor challeng[ing] the Governor's executive orders," and "*[t]he congregants' lawsuit*" was filed by "Theodore Roberts, Randall Daniel, and Sally O'Boyle, *each an attendee at Maryville's Easter service*" (emphasis added)). The district court's conclusion was thus that while those "congregants who went into the church" may be prevailing parties for purposes of Section 1988, *Roberts*, 958 F.3d at 412, the Pastor, Jack Roberts—to whom those congregants listened—and the Church, Maryville Baptist Church—in whose pews those congregants assembled—were not prevailing parties despite receiving identical injunctions against identically unconstitutional orders.

One need look no further than a child's nursery rhyme to defeat this contention

Here is the church,
Here is the steeple,
Open the doors,
And see all the people.

See Grandma's Nursery Rhymes, *Here Is The Church*, https://www.grandmasnurseryrhymes.com/hereisthechurch.html (last visited July 15, 2025).

In this case, here is the Church—Petitioner Maryville Baptist Church—accompanied by its Pastor—Petitioner Pastor Jack Roberts—who

preached to the people—the *Roberts* congregant plaintiffs—under the same steeple. Each one of those parties received a preliminary injunction on the merits of their First Amendment claims against the same Governor. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (enjoining the Governor from enforcing his prohibitions on worship services against "Mayville Baptist Church . . . its ministers, and its congregants"); *Roberts*, 958 F.3d at 416 (enjoying the Governor from enforcing his prohibitions on worship services against "Maryville Baptist Church, its ministers, and its congregants"); and R.580 (enjoining Governor from enforcing his prohibitions on worship services against "Maryville Baptist Church . . . its ministers, and its congregants").

Those injunctions opened the doors to Maryville Baptist Church for the Pastor and congregants to worship without fear of reprisal. Without Maryville Baptist Church and its Pastor in this case, there would be neither steeple nor people, and the *Roberts* congregants would have had no church in which to worship. All the people who exercised their First Amendment rights to assemble for worship under the Mayville Baptist steeple obtained identical, vested, substantive rights to attorney's fees upon the final and unreviewable judgments from the courts below. The district court's conclusion to the contrary deprived Petitioners of their substantive and vested right to fees. The *Roberts* plaintiffs, on the other hand, did not suffer the same delay or manifest injustice, and were awarded $272,142.50 in attorney's fees and costs based upon the same substantive and

unreviewable final judgment obtained by Petitioners. *Roberts*, 65 F.4th at 283. Petitioners, on the other hand, were left out in the cold and deprived of their right to fees.

I. The District Court's Second Denial of Petitioners' Fee Motion.

Four months after the Sixth Circuit remanded Petitioners' first appeal for reconsideration in light of *Roberts*, R.1132, on October 27, 2023, the district court finally ordered supplemental briefing on the import of this Court's binding *Roberts* decision concerning the congregants of Maryville Baptist Church and parishioners of Pastor Roberts to Maryville Baptist Church and Pastor Roberts' motion in this case. R.1143. Petitioners submitted their supplemental briefing on November 27, 2023, R.1144-1150, noting that the clear import of the Sixth Circuit's *Roberts* decision dictated that Petitioners were prevailing parties for the same reason and for the same unreviewable final judgments the congregants of Maryville Baptist Church and parishioners of Pastor Roberts were prevailing parties in *Roberts*. Over 13 months after the Sixth Circuit's remand, the district court ignored the binding *Roberts* decision and entered its second order denying Petitioners' motion for attorney's fees and costs. R.1191-1203. On August 12, 2024, Petitioners' timely appealed. R.1204.

J. The Court's *Lackey* Decision.

On February 2, 2025, while Petitioners' second appeal on their entitlement to attorney's fees was pending in the Sixth Circuit below, this Court issued its decision in *Lackey*, 145 S. Ct. 659. There, the Court

held that preliminary injunctions were not sufficient to entitle a prevailing plaintiff to an award of fees and costs under 42 U.S.C. §1988. 145 S. Ct. at 671. And the Court held that events which render a case moot do not otherwise alter this conclusion. *Id.* Thus, going forward, preliminary injunctive relief is no longer sufficient to warrant status as a prevailing party for any *future* final judgments that did not conclusively determine the rights and liabilities of the parties and for *future* cases that did not involve a party's entitlement to status as a prevailing party under a final and unreviewable judgment that vested them with certain rights at the time it was entered.

K. The Sixth Circuit's Opinion Below.

After this Court issued its decision in *Lackey*, the Sixth Circuit issued its decision below in the instant appeal. There, it stated: "The U.S. Supreme Court recently answered the question. It held that a party who receives a preliminary injunction, and whose case becomes moot before the court reaches a final judgment, does not count as a prevailing party under § 1988." App.2a (citing *Lackey* 145 S. Ct. 659 (2025)). It thus held, "Consistent with that decision, we affirm the district courts denial of attorney's fees." App.2a. "Our line of cases that permitted attorney's fees in the context of a narrow set of preliminary injunctions cannot be reconciled with *Lackey*'s bright-line rule that the statute never authorizes them in that setting." App.6a. "It goes without saying, but we will say it anyway, that in a 'hierarchical system of precedent,' our decisions must yield to the Court's contrary decisions." App.6a. It concluded, "Because the Church "gained only preliminary injunctive relief

before this action became moot," it does not qualify as a prevailing party eligible for attorney's fees." App.7a.

Petitioners timely sought en banc review of that decision, noting that their right to prevailing party status had vested ***880 days before*** the Court's decision in *Lackey* by a final and unreviewable judgment that vested their right to prevailing party status under the law in effect ***at the time*** of final judgment. The Sixth Circuit denied that petition on April 24, 2025. App.24a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Depriving Petitioners' of a Vested and Unreviewable Judgment and Right to Attorney's Fees and Costs Conflicts with this Court's Precedent and Violates Due Process.

The Sixth Circuit's decision below conflicts with this Court's precedent and the precedent of numerous other state and federal courts that entitlement to fees is determined by the law in force at the termination of the action, and the right to fees and costs vest at the termination of the action based on then-existing law. The Sixth Circuit's decision below conflicts with this Court's precedent that Petitioners' action terminated upon entry of the final judgment of dismissal with prejudice, and collateral proceedings as to attorney's fees and costs cannot undo that termination. The Sixth Circuit's decision below conflicts with this Courts precedent that termination of the underlying case, Petitioners had a substantive,

vested, and presumptive right to attorney's fees and costs, which cannot be eliminated retroactively without violating due process.

A. The Sixth Circuit's decision conflicts with this Court's precedent and the precedent of numerous other state and federal courts that entitlement to fees is determined by the law in force at the termination of the action, and the right to fees and costs vest at the termination of the action based on then-existing law.

1. The Sixth Circuit's decision conflicts with this Court's precedent.

The Court long ago settled that retroactive application of intervening judicial decisions can violate the due process rights of litigants before the Article III tribunal. *E.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (holding that judicial construction of statutes to retroactively change substantive rights can violate due process); *id.* ("Deprivation of the right to fair warning . . . can result both from vague statutory language *and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face*" (emphasis added)).

In another context, albeit legislative retroactivity, the Court settled this issue more than a century ago. *See, e.g.*, *McCullough v. Com. of Virginia*, 172 U.S. 102, 123–24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending,

but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Having achieved finality, ... a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."); *cf. Martin v. Hadix*, 527 U.S. 343, 360 (1999) ("[F]rom the beginning of these suits, the parties have proceeded on the assumption that 42 U.S.C. § 1988 would govern. The PLRA was not passed until well after respondents had been declared prevailing parties and thus entitled to attorney's fees. To impose new standards now, for work performed before the PLRA became effective, would upset the reasonable expectations of the parties.").

It is well settled that "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *see also, e.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964) ("a retrospective operation will not be given to a statute which interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (cleaned up)). The same is true of judicial decisions.

The Sixth Circuit's decision below directly conflicts with this precedent. The Sixth Circuit held: "The U.S. Supreme Court recently answered the question. It held that a party who receives a preliminary injunction, and whose case becomes moot

before the court reaches a final judgment, does not count as a prevailing party under § 1988." App.2a (citing *Lackey*). It thus held, "Consistent with that decision, we affirm the district court' s denial of attorney's fees." App.2a. "Our line of cases that permitted attorney's fees in the context of a narrow set of preliminary injunctions cannot be reconciled with *Lackey*'s bright-line rule that the statute never authorizes them in that setting." App.6a. "It goes without saying, but we will say it anyway, that in a 'hierarchical system of precedent,' our decisions must yield to the Court's contrary decisions." App.6a. It concluded, "Because the Church "gained only preliminary injunctive relief before this action became moot," it does not qualify as a prevailing party eligible for attorney's fees." App.7a.

Here, under this Court's precedent, antecedent rights to prevailing party attorney's fees vested in Petitioners at the time of their judgment in the district court on October 6, 2021, R.917, and from the Sixth Circuit on June 5, 2023, 2023 WL 3815099, foreclosing retroactive application of a new application of Section 1988 attorney's fees.

As in *Martin*, Petitioners operated under "the assumption that 42 U.S.C. § 1988 would govern," 527 U.S. at 360, that the Sixth Circuit's decision in *Roberts* and *Maryville Baptist* would control, and that they would be awarded their prevailing party fees under the construction of Section 1988 operative at the time of their final judgments and vested rights. It was only after *Lackey*—which came *880 days after Petitioners obtained a final and unreviewable*

judgment—that any question arose from the Sixth Circuit as to Petitioners' entitlement to the attorney's fees to which their right had vested upon judgment. The Sixth Circuit's retroactive application of *Lackey* depriving the Petitioners of a vested right cannot be reconciled with this Court's precedent.

2. The Sixth Circuit's decision conflicts with the precedent of other state and federal courts.

The well-settled rule that governs the right at issue here is: "the right to attorney fees and costs is statutory, and *depends upon the statute in force at the termination of the proceedings*." *Bankers Tr. Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (emphasis added). Numerous courts across the United States have so held, uniformly and repeatedly. *See, e.g.*, *Igoe Bros. v. Nat'l Sur. Co.*, 112 N.J.L. 243, 251–52 (1934) ("the right to costs and the amount and items taxable are as a general rule governed by the statute in force at the time of the termination of the action") (affirming award of attorney's fees because "allowance of the counsel fee in the instant case was made in pursuance of and in compliance with the terms of the statute existing at the time judgment was signed and entered"); *Petersen v. Port of Seattle*, 94 Wash. 2d 479, 487 (1980) ("the right to attorney fees, as well as the determination of the amount thereof, is governed by the statute in force at the termination of the action") (quoting *In re Bellingham*, 10 Wash. App. 606, 608 (1974) (cleaned up)); *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 376–77 (1986) ("We follow *the settled rule* that recoverable litigation costs [including attorney's fees] are subject

to change by the legislature and are governed by the law in effect at the time of judgment.") (emphasis added) (awarding attorney's fees based on statute in existence at termination of action) (citing *Am. Bank and Trust Co. v. Cmty. Hosp.,* 36 Cal.3d 359 (1984); *Coast Bank v. Holmes,* 19 Cal.App. 581 (1971); *Songer v. State Farm Fire & Cas. Co.,* 91 Ill. App. 3d 248 (1980)). *See also* Robert L. Rossi, *Attorneys' Fees* § 6:10 (3d ed. May 2024) ("[i]t has been held that the allowance of an attorney's fee as part of the costs or expenses of an action is generally dependent upon the statute in force at the time of the termination of the action").

Because entitlement to fees is determined based on the law as it exists at the termination of an action, the right to fees necessarily accrues and vests when an action is terminated upon judgment—*not 880 days later when a change in the interpretation of Section 1988 occurs*:

> The right to costs [including fees] *accrues* at the termination of the proceedings and this right exists solely by virtue of the statute. The extent of the right can be governed only by the statute in existence *at the time the right vests*. Therefore, Iowa Code section 625.22 (1981) controls attorney fees to be taxed as part of the costs in the present case.

Bankers Tr. Co., 326 N.W.2d at 278 (emphasis added). *See also Pub. Media Lab, Inc. v. D.C.*, 276 A.3d 1, 9 (D.C. 2022) (explaining that "causes of action that have reached final, unreviewable judgment" "in *that*

sense have vested" for retroactivity purposes) (emphasis in original) (quoting *D.C. v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008)).

Here, the understanding of Section 1988 in effect at the time of the termination of this action was that Petitioners were prevailing parties. That understanding continued existed when the Sixth Circuit issued its opinion in *Roberts*, 65 F.4th at 284, and the prior decision in this case. *Maryville Baptist*, 2023 WL 3815099. The substantive rights had vested and entitled Petitioners to be treated as the law was interpreted at the time of the judgment of dismissal. Petitioner were forced to appeal twice to obtain what the law had already substantively vested in them at the time of their two final judgments. The *Roberts* plaintiffs obtained what was due them under the law in existence at the time of their judgment. Petitioners here suffered manifest error by being subjected to retroactive application of a judicial decision that divested them of a substantive right that could never have been overturned.

The Sixth Circuit's decision applying this Court new interpretation of Section 1988 to judgments rendered 880 days prior cannot be reconciled with this Court's precedent. The Court should grant the Petition and resolve the conflicts.

B. The Sixth Circuit's decision conflicts with this Court's precedent that Petitioners' action terminated upon entry of the final judgment of dismissal with prejudice, and collateral proceedings as to attorney's fees and costs cannot undo that termination.

The Sixth Circuit's decision conflicts with this Court's precedent that Petitioners' action terminated upon entry of the final judgment of dismissal with prejudice, and collateral proceedings as to attorney's fees and costs cannot undo that termination. "It is well established that a federal court may consider collateral issues *after an action is no longer pending*." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–96 (1990) (emphasis added). "For example, district courts may award costs [including attorney's fees] after an action is dismissed for want of jurisdiction." *Id.* "A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Id.* (citing *United States v. Mine Workers*, 330 U.S. 258, 294 (1947)). But, critically, the existence of collateral post-judgment proceedings over costs, fees, and the like, does nothing to alter the termination of the action in which those proceedings arise:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what

> sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Cooter, 496 U.S. at 396 (emphasis added).

Indeed, disputes over attorney's fees are collateral and supplemental to the action in which they arise, and that their consideration is proper "after an action is no longer pending," which necessarily means that their consideration does not alter the termination or revive the action: "Courts may consider collateral issues after an action is no longer pending following a voluntary dismissal. Those collateral issues include awards of attorneys' fees, which involve independent proceedings supplemental to the original proceeding." *Jacobson v. Clack*, 309 A.3d 571, 578 n.4 (D.C. 2024) (quoting *Cooter*, 496 U.S. at 395) (cleaned up).

The Court has repeatedly held that an action is terminated upon final judgment, and attorney fee disputes and proceedings post-judgment do not alter that termination. *See, e.g.*, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988) (holding that decision on merits is "final decision" for purpose of appeal, whether or not there remains for adjudication a request for attorney fees attributable to case); *Purcell v. Thomas*, 28 A.3d 1138, 1141 (D.C. 2011) ("Generally, a 'request for attorneys' fees raises issues that are, for all practical purposes, collateral to and separate from the decision on the merits' of the underlying litigation." (quoting *Weaver v. Grafio*, 595 A.2d 983, 986 (D.C. 1991)) (cleaned up).

Petitioners had two judgments, including one from the Sixth Circuit making their entitlement to fees final on June 5, 2023, *at the latest*. An intervening decision from this Court 880 days later altering the interpretation of Section 1988 cannot retroactively deprive Petitioners of that to which they were entitled on judgment. The Sixth Circuit's decision below depriving them of that vested, substantive right cannot be reconciled with this Court's precedent.

C. The Sixth Circuit's decision conflicts with this Courts precedent that termination of the underlying case, Petitioners had a substantive, vested, and presumptive right to attorney's fees and costs, which cannot be eliminated retroactively without violating due process.

Petitioners' right to attorney's fees is also a substantive right to which due process attaches. The Court's decision in *Martin v. Hadix*, 527 U.S. 343 (1999), reaffirms the fundamental principle that retroactivity cannot alter obligations that have already attached. There, Congress enacted the Prison Litigation Reform Act (PLRA), which imposed a cap on attorney's fees in prisoner rights litigation. The government argued that this cap should apply to all fee awards, including those for legal work performed before the PLRA's enactment. The Court rejected that argument, holding that applying the cap to pre-enactment work would impermissibly "attach new legal consequences" to completed conduct. *Id.* at 359 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The attorneys had worked under a

system where fees were calculated at market rates, with no expectation that Congress would retroactively reduce them. The Court held that the PLRA could not retroactively alter that settled expectation, and that *the attorneys were entitled to recover their fees under the statutes as they existed when their clients "had been declared prevailing parties and thus entitled to attorney's fees." Id*. at 360 (emphasis added).

In direct conflict with that decision, the Sixth Circuit issued its decision below in the instant appeal and decided that substantive revisions in the interpretation of Section 1988 could be applied to Petitioners, despite their substantive rights having vested years prior. "The U.S. Supreme Court recently answered the question. It held that a party who receives a preliminary injunction, and whose case becomes moot before the court reaches a final judgment, does not count as a prevailing party under § 1988." App.2a (citing *Lackey*, 145 S. Ct. 659). It thus held, "Consistent with that decision, we affirm the district court' s denial of attorney's fees." App.2a. "Our line of cases that permitted attorney's fees in the context of a narrow set of preliminary injunctions cannot be reconciled with *Lackey*'s bright-line rule that the statute never authorizes them in that setting." App.6a. "It goes without saying, but we will say it anyway, that in a 'hierarchical system of precedent,' our decisions must yield to the Court's contrary decisions." App.6a. It concluded, "Because the Church "gained only preliminary injunctive relief before this action became moot," it does not qualify as a prevailing party eligible for attorney's fees." App.7a.

The decision of the Sixth Circuit cannot be reconciled with the Court's decision in *Martin*. This Court should grant the Petition and resolve the conflict.

II. The Sixth Circuit's Decision Depriving Petitioners' of a Vested and Unreviewable Judgment and Right to Attorney's Fees Conflicts with the Authoritative Precedent from Numerous Federal and State Courts.

The right to attorney's fees vested when Petitioners gained a substantive right to upon entry of a final, unreviewable judgment. To deprive them of such a right, as the Sixth Circuit's decision below does, directly conflicts with the precedent of numerous other state and federal courts.

As the District of Columbia Court of Appeals has held, there is a critical difference "between causes of action that have reached final, unreviewable judgment—and in *that* sense have vested—and all others, pending and future, which may be modified by rationally grounded retroactive legislation." *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008). "[A] court must refrain from applying an intervening change to pending petitions where to do so would violate a right which had matured or become unconditional." *Holzsager v. D.C. Alcoholic Beverage Control Bd.*, 979 A.2d 52, 57–58 (D.C. 2009) (cleaned up). Here, Petitioners' right to prevailing party attorney fees matured and became unconditional upon entry of the district court's order of dismissal, or

no later than Petitioners' respective motions for prevailing party attorney's fees. *See, e.g.*, *Pony v. Cnty. of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006) ("*Once the prevailing party exercises her right to receive fees, the attorney's right to collect them vests*, and he may then pursue them on his own." (emphasis added)); *accord Route Triple Seven Ltd. P'ship v. Total Hockey, Inc.*, 127 F. Supp. 3d 607, 616 (E.D. Va. 2015). Here, Petitioners prevailed in every sense of the word, as the Sixth Circuit previously recognized, *Roberts*, 65 F.4th at 284; *Maryville Baptist Church*, 2023 WL 3815099, and their right to collect on their right to fees was vested. The panel's decision deprives them of that vested right

The Florida Supreme Court has likewise reached a contrary conclusion to that reached by the Sixth Circuit below. *See, e.g.*, *Menendez v. Progressive Exp. Ins. Co.*, 35 So.3d 873, 878–79 (Fla. 2010) ("we have previously held that the statutory right to attorneys' fees is not a procedural right, but rather a substantive right," and, therefore the "statutory amendment cannot be applied retroactively because it allows an insurer to avoid an award of attorneys' fees, which constitutes a substantive change to the statute in effect at the time the insureds' insurance policy was issued"); *Water Damage Express, LLC v. First Protective Ins. Co.*, 336 So.3d 310, 312–13 (Fla. Dist. Ct. App. 2022) ("the statutory right to attorney's fees is substantive, and accordingly statutes limiting the right to recover attorney's fees do not apply retroactively.").

Additionally, as one federal court observed,

> Even if the Florida Legislature intended for retroactive application, *a court must reject such an application if the statute impairs a vested right, creates a new obligation, imposes a new penalty, or attaches new legal consequences to events completed before the statutory enactment*. Retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations. Florida courts have consistently held that *statutes limiting the right to recover attorney fees impair a substantive right and do not apply retroactively*.

Procraft Exteriors, Inc v. Metro. Cas. Ins. Co., 2020 WL 5943845, at *2 (M.D. Fla. May 13, 2020) (emphasis added) (cleaned up).

The Sixth Circuit's decision conflicts with these precedents. The Court should grant the Petition.

III. The Sixth Circuit's Decision Conflicts with this Court's Precedent that Depriving Petitioners of a Vested and Unreviewable Judgment Imparting a Right to Attorney's Fees Would Work a Manifest Injustice.

When retroactive application of a new judicial decision or statute would work manifest injustice, the rule that the appellate court should apply the new construction is inapplicable. *E.g.*, *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 716 (1974) ("exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision had

been made *to prevent manifest injustice*" (emphasis added)); *id.* ("Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in *Schooner Peggy* suggested that such injustice could result in mere private cases between individuals, and implored the courts to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." (cleaned up)). The Constitution does not compel retroactive application where it would work an injustice. *Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("retroactive application is not compelled, constitutionally or otherwise.").

In its original *Roberts* decision issuing a preliminary injunction, the Sixth Circuit noted that the plaintiffs there attended "Maryville Baptist Church . . . *the same church at issue in our case*." *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020) (emphasis added). The Sixth Circuit, *in this case*, likewise recognized that the plaintiffs and their claims in both cases arose from the same worship services held at the same church—Maryville Baptist Church—under the same pastor—Plaintiff Pastor Jack Roberts. *See Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020) (noting that "*Maryville Baptist Church's lawsuit*" was filed by "[t]he church and pastor challeng[ing] the Governor's executive orders," and "*[t]he congregants' lawsuit*" was filed by "Theodore Roberts, Randall Daniel, and Sally O'Boyle, *each an attendee at Maryville's Easter service*" (emphasis added)).

Petitioners obtained their final, unreviewable judgment in this case entitling them to prevailing party status. The Sixth Circuit's retroactive application of this Court's decision in *Lackey* to deprive Petitioners of their vested right 880 days after that right accrued violates the Due Process Clause of the Fourteenth Amendment and cannot be reconciled with this Court's precedent in *Bradely* and *Solem*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition, resolve the conflicts, and award Petitioners the substantive right to which they were entitled when they obtained their final and unreviewable judgments.

July 2025

Respectfully submitted,

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TABLE OF APPENDICES

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0067p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARYVILLE BAPTIST CHURCH; JACK ROBERTS, *Plaintiffs-Appellants*,	]	
v.	]	No. 24-5737
ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky, *Defendant-Appellee.*	]	

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 3:20-cv-00278–David J. Hale, District Judge.

Decided and Filed: March 25, 2025

Before: SUTTON, Chief Judge; McKEAGUE and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Mathew D. Staver, Daniel J. Schmid, LIBERTY COUNSEL, Orlando, Florida, for Appellants. Mitchel T. Denham, MCBRAYER, PLLC, Louisville, Kentucky, Travis Mayo, Taylor Payne,

Laura Tipton, OFFICE OF THE GOVERNOR, Frankfort, Kentucky, for Appellee.

OPINION

SUTTON, Chief Judge. Maryville Baptist Church sought, and obtained, a preliminary injunction against the Kentucky Governor's COVID-19 restrictions on religious gatherings. As time passed and the pandemic waned, the case became moot. In view of its early success in the case under the Free Exercise Clause of the United States Constitution and 42 U.S.C. § 1983, the Church sought attorney's fees as a "prevailing party" under 42 U.S.C. § 1988. The district court denied the motion, and the Church appealed. The U.S. Supreme Court recently answered the question. It held that a party who receives a preliminary injunction, and whose case becomes moot before the court reaches a final judgment, does not count as a prevailing party under § 1988. *See Lackey v. Stinnie*, 145 S. Ct. 659 (2025). Consistent with that decision, we affirm the district court's denial of attorney's fees.

I.

At the outset of the COVID-19 pandemic, Governor Andy Beshear declared a state of emergency in Kentucky and entered a series of orders intended to slow the virus's spread. Two of those orders bear on this case. The first order, issued on March 19, 2020, prohibited all "mass gatherings" in the Commonwealth. R.1-5 at 1. That included "faith-based" gatherings, but it exempted gatherings at

"airports, bus and train stations," and "shopping malls and centers," among other places. R.1-5 at 1. The second order, issued on March 25, closed all organizations that were not "life-sustaining." R.1-7 at 2. That included religious organizations, except when they provided "food, shelter, and social services," but it exempted laundromats, law firms, hardware stores, and several other businesses. R.1-7 at 2-4.

On April 12, 2020, Maryville Baptist Church held an Easter service. Some congregants sat inside the church for the service, while others sat in their cars and listened over loudspeakers. Kentucky State Police arrived and notified all of the congregants that their attendance violated the Governors orders.

The Church and its pastor sued the Governor under § 1983, alleging violations of the First and Fourteenth Amendments to the U.S. Constitution. The district court declined to issue a preliminary injunction. The Church appealed. We expedited the appeal and issued a partial stay during its pendency, which barred the Governor from enforcing his orders against the Church's outdoor worship. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (per curiam). Six days later, while the underlying appeal remained pending, the district court granted a preliminary injunction prohibiting the Governor from enforcing his orders against the Church's indoor and outdoor worship. *See Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-CV-278-DJH-RSE, 2020 WL 2393359, at *3-4 (W.D. Ky. May 8, 2020). After the Church obtained its desired preliminary relief, we dismissed its appeal as moot.

See Maryville Baptist Church, Inc. v. Beshear, 977 F.3d 561, 564-65 (6th Cir. 2020) (per curiam).

On May 9, 2020, a day after the district court awarded the Church its preliminary injunction, the Governor allowed places of worship to reopen. Less than a year after that, the Kentucky General Assembly limited the Governor's authority to issue similar COVID-19 orders in the future. *See Cameron v. Beshear*, 628 S.W.3d 61, 67, 78 (Ky. 2021). With the controversy at an end due to actions by the state executive and legislative branches, the third branch of the federal government dismissed the underlying action as moot on October 6, 2021.

The Church moved for attorney's fees. *See* 42 U.S.C. § 1988(b). The district court eventually denied the motion on the ground that the Church did not prevail. The Church appeals.

II.

In the American legal system, each party usually pays its own attorney's fees. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 602 (2001). Congress has created some exceptions to that default rule. The most conspicuous one covers lawsuits that vindicate constitutional and statutory rights under federal law. Under 42 U.S.C. §1988(b), courts may grant "a reasonable attorney's fee" to "the prevailing party" in a in a § 1983 action. For today's purposes, the key language is "prevailing party." That phrase frames the sole question on appeal: May we treat a party who receives a preliminary injunction, but never obtains a final judgment because the case becomes moot, as a prevailing party?

Until now, we "usually" answered no but made an "occasional exception[]" in discrete circumstances. *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010). "[W]hen a claimant wins a preliminary injunction and nothing more," we explained, "that usually will not suffice to obtain fees under § 1988." *Id.* That remained the rule in our court for over a decade. "Ordinarily," we said under that line of cases, "a preliminary injunction by itself does not suffice." *Roberts v. Neace*, 65 F.4th 280, 284 (6th Cir. 2023). During that time, we permitted attorney's fees in this situation a handful of times because the underlying preliminary injunction "mainly turn[ed] on the likelihood-of-success inquiry and change[d] the parties' relationship in a material and enduring way." *Id.*; *see, e.g.*, *Tenn. State Conf. of NAACP v. Hargett*, 53 F.4th 406, 411 (6th Cir. 2022); *Miller v. Caudill*, 936 F.3d 442, 450 (6th Cir. 2019); *Planned Parenthood Sw. Ohio Region v. Dewine*, 931 F.3d 530, 546 (6th Cir. 2019).

The U.S. Supreme Court recently decided that the "ordinar[y]" rule is the only rule. In *Lackey v. Stinnie*, a Virginia statute required state courts to suspend the licenses of drivers who failed to pay court fines. 145 S. Ct. at 664. A group of drivers challenged the law, and the district court preliminarily enjoined its enforcement. *Id.* at 664-65. The Virginia General Assembly repealed the statute before the district court reached a final judgment, which mooted the underlying case. *Id.* at 665. The drivers sought attorney's fees anyway. *Id.* The Supreme Court rejected the drivers' bid. A plaintiff "prevails," the Court explained, "when a court conclusively resolves a claim by granting enduring judicial relief on the

merits that materially alters the legal relationship between the parties." *Id.* at 669. A plaintiff who receives a preliminary injunction before the case becomes moot does not fit the bill, it concluded. *Id.* at 666-69. A preliminary injunction, the Court explained, reflects only "temporary success at an intermediary stage of the suit," not enduring relief based on a conclusive determination that the plaintiff won, and not relief that changes the relationship between the parties. *Id.* at 667 (quotation omitted).

Our line of cases that permitted attorney's fees in the context of a narrow set of preliminary injunctions cannot be reconciled with *Lackey*'s bright-line rule that the statute never authorizes them in that setting. It goes without saying, but we will say it anyway, that in a "hierarchical system of precedent," our decisions must yield to the Court's contrary decisions. *Hawver v. United States*, 808 F.3d 693, 694 (6th Cir. 2015). That means that *Lackey*, not any of our contrary precedents, determines whether the Church prevails with only a preliminary injunction to its name. Gauged by *Lackey*, the Church does not count as a prevailing party. The Church, like the drivers in *Lackey*, enjoyed only a "transient victory" when our court and the district court preliminarily enjoined the Governor from enforcing his orders against drive-in and in-person church services. 145 S. Ct. at 669. When events outside the courthouse, as in *Lackey*, mooted the dispute, that mooted any chance of obtaining attorney's fees. *See id.* at 665. Any ongoing relief the Church enjoys at this point comes from the Governor's revised orders and later legislation by the General Assembly, not from a federal court's orders. The same reality in *Lackey*

leads to the same conclusion here. Because the Church "gained only preliminary injunctive relief before this action became moot," it does not qualify as a prevailing party eligible for attorney's fees. *Id.* at 671.

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5737

MARYVILLE BAPTIST CHURCH; JACK ROBERTS,
Plaintiffs-Appellants,

v.

FILED
Mar 25, 2025
KELLY L STEPHENS, Clerk

ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky,
Defendant-Appellee.

Before: SUTTON, Chief Judge; McKEAGUE and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of attorney's fees is AFFIRMED

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

MARYVILLE BAPTIST CHURCH, INC.
and DR. JACK ROBERTS,

Plaintiffs,

v. Civil Action No. 3:20-cv-278-DJH-RSE

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

Defendant.

* * * * *

MEMORANDUM AND ORDER

After the Court dismissed this action as moot (Docket No. 68), Plaintiffs Maryville Baptist Church, Inc. and its pastor, Dr. Jack Roberts, filed a bill of costs (D.N. 75) and a motion for attorney fees and nontaxable expenses (D.N. 74). The Court denied both (D.N. 92), and Plaintiffs appealed. (D.N. 93) While the appeal was pending, the Sixth Circuit decided a related case, *Roberts v. Neace*, 65 F.4th 280 (6th Cir. 2023). It then vacated and remanded this action for the Court "to apply *Roberts* in the first instance." (D.N. 95, PageID.1132) After careful consideration, the Court will again deny Plaintiffs' motion and request for costs.

I.

Early in the COVID-19 pandemic, Kentucky Governor Andy Beshear and the Cabinet for Health and Family Services (CHFS) used their emergency powers to implement various temporary measures

designed to prevent the spread of the virus. (*See* D.N. 1-2; D.N. 1-3; D.N. 1-4; D.N. 1-5; D.N. 1-6; D.N. 1-7) One such measure prohibited "[a]ll mass gatherings," including those for "faith-based" activities. (D.N. 1-5, PageID.66) On April 12, 2020, while the mass-gathering ban was in effect, Plaintiffs held an Easter service, during which congregants were "inside the Church building for the worship service or in their vehicles for the 'drive in' version of the service." (D.N. 1, PageID.2) After "receiv[ing] approximately six complaints regarding Maryville Baptist Church having in-person services on April 12, 2020," the Kentucky State Police arrived at the church to record the license-plate information of the vehicles in the parking lot during the service. (D.N. 31-4, PageID.459 ¶¶ 6–7) KSP also posted notices on the vehicles detailing "the potential consequences of participating in a mass gathering." (*Id.* ¶ 8; *see* D.N. 1-11) The owners of the vehicles subsequently received letters from the CHFS that expanded on the information and warnings in the notices. (D.N. 1-12)

On April 17, 2020, Plaintiffs filed this 42 U.S.C. § 1983 action against Governor Beshear, challenging the gathering restrictions. (D.N. 1) The same day, Plaintiffs moved for a temporary restraining order and preliminary injunction allowing them to hold church services otherwise barred by the mass-gathering ban. (D.N. 3) The Court denied Plaintiffs' motion for a TRO, Maryville Baptist Church, Inc. v. Beshear, 455 F. Supp. 3d 342, 347 (W.D. Ky. 2020), and Plaintiffs appealed. (D.N. 16) Plaintiffs also moved for an injunction pending appeal. (D.N. 17) The Sixth Circuit granted in part Plaintiffs' motion for injunction pending appeal, enjoining Beshear "and all

other Commonwealth officials . . . during the pendency of th[e] 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." Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 616 (6th Cir. 2020). The Sixth Circuit left the issue of in-person services to this Court. Id. Following the Sixth Circuit's decision, Plaintiffs filed a renewed motion for injunction pending appeal with respect to in-person services. (D.N. 25) The Court granted Plaintiffs' renewed motion for injunction pending appeal, as well as Plaintiffs' initial motion for preliminary injunction, thereby enjoining enforcement of the mass-gathering ban as to in-person services. *Maryville Baptist Church, Inc. v. Beshear*, No. 3:20-CV-278-DJH-RSE, 2020 WL 2393359, at *3–4 (W.D. Ky. May 8, 2020).

On May 8, 2020, before the Court entered the injunction regarding in-person services, Beshear promulgated public-health requirements for churches to safely resume in-person services by May 20, 2020. (D.N. 34; D.N. 34-1) Beshear also filed a motion to dismiss Plaintiffs' claims for lack of jurisdiction and for failure to state a claim. (D.N. 33) The next day, on May 9, 2020, Beshear and the CHFS issued an amended order removing the prohibition on in-person religious services. (D.N. 36-1) On May 12, 2020, Beshear filed an amended motion to dismiss, arguing that the May 9, 2020 order mooted Plaintiffs' claims. (D.N. 38) Beshear later moved to dissolve the injunctions. (D.N. 46)

While Beshear's motions were pending, the Sixth Circuit dismissed Plaintiffs' appeal for lack of

jurisdiction and instructed the Court to "consider in the first instance whether [the case had] become moot in light of the Governor's new orders." (D.N. 57-1, PageID.754) The Court then denied Beshear's motions without prejudice and ordered supplemental briefing on the mootness question. (D.N. 58)

In their supplemental briefing, Plaintiffs argued that the case was not moot because Beshear's "sudden change in policy [wa]s neither permanent nor irrevocable." (D.N. 61, PageID.784 (citing *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983))) The Court ultimately dismissed 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., LLC*, 635 S.W.3d 788 (Ky. 2021), and the legislation addressed therein," which limited the Governor's emergency powers. (D.N. 68) Plaintiffs then moved for an award of costs, attorney fees, and expenses, arguing that they were prevailing parties and thus entitled to such an award. (D.N. 74; D.N. 75)

In September 2022, the Court denied Plaintiffs' motion, concluding that Plaintiffs were not prevailing parties within the meaning of 42 U.S.C. § 1988.[1] (D.N. 92) Plaintiffs again appealed. (D.N. 93) While that appeal was pending, the Sixth Circuit decided *Roberts*, holding that the *Roberts* plaintiffs, who received preliminary injunctions against Beshear's gathering restrictions on faith-based services, were prevailing parties entitled to attorney fees. 65 F.4th at 283. The Sixth Circuit then vacated this Court's

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[1] 42 U.S.C. § 1988(b) provides that courts may award "the prevailing party" in a § 1983 action "a reasonable attorney's fee as part of the costs."

denial of Plaintiffs' motion and remanded for reconsideration in light of *Roberts*. (D.N. 95) The parties have fully briefed their positions regarding application of *Roberts* to this case. (*See* D.N. 105; D.N. 108; D.N. 109) The Court will briefly outline *Roberts* before determining whether Plaintiffs are entitled to an award of costs.

II.

In *Roberts*, congregants of Maryville Baptist Church sought to enjoin enforcement of the Governor's COVID-19 restrictions. 65 F.4th at 283. They challenged two of Beshear's orders in particular: one prohibiting mass gatherings—which Plaintiffs also challenged in this case—and another prohibiting most travel in or out of Kentucky. *Id.* "The congregants received preliminary injunctions against both orders." *Id.* But the district court ultimately dismissed the congregants' case as moot after this Court enjoined the Governor from prohibiting gatherings at Maryville Baptist Church (D.N. 35) and "the Kentucky legislature limited the Governor's authority to issue similar COVID-19 orders." *Roberts*, 65 F.4th at 283 (citing *Cameron v. Beshear*, 628 S.W.3d 61, 78 (Ky. 2021)). The congregants then moved for attorney fees, which the district court awarded. *Id.* The Governor appealed, arguing in part that the congregants were not prevailing parties. *Id.*

The Sixth Circuit concluded that the congregants in *Roberts* were prevailing parties for purposes of § 1988(b) because the preliminary injunctions they received "mainly turn[ed] on the likelihood-of-success inquiry and chang[ed] the parties' relationship in a material and enduring way." *Id.* at 284 (citing *Miller v. Caudill*, 936 F.3d 442, 448 (6th Cir. 2019); *Dubuc v.*

Green Oak Twp., 312 F.3d 736, 753 (6th Cir. 2002)). The Sixth Circuit noted that "[o]ne 'touchstone' of th[e] la[tter] inquiry is a 'material alteration of the legal relationship of the parties.'" *Id.* (quoting *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)). In affirming the district court's fee award, the Sixth Circuit concluded that "[b]oth injunctions 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.'" *Id.* (quoting *McQueary v. Conway*, 614 F.3d 591, 600 (6th Cir. 2010)). The court also concluded that the injunctions "qualif[ied] as enduring" based on "[t]he nature of the injunctions, the longevity of the relief, and the irrevocability of the relief." *Id.*

Plaintiffs here argue that "'all features' of the *Roberts* decision are present in the instant action" and that *Roberts* thus "compels a finding that Plaintiffs are prevailing parties under Section 1988." (D.N. 105, PageID.1146 (quoting *Maryville Baptist Church v. Beshear*, No. 22-5952, 2023 WL 3815099, at *1 (6th Cir. June 5, 2023))) In response, Beshear contends that *Roberts* is distinguishable because the injunctions "in this case did not change the legal relationship between the parties" and did not result in "a court-ordered change." (D.N. 108, PageID.1160 (emphasis removed)).

Specifically, Beshear argues that Plaintiffs did not get the relief they sought because the Sixth Circuit enjoined enforcement of the mass-gathering order only as to drive-in services, which were already allowed. (*Id.*, PageID.1161) The Governor further

contends that "this Court's preliminary injunction extending the order to in-person services likewise did not result in a material, court-ordered change" because "the Governor voluntarily stopped enforcement of the relevant orders" before the Court issued the injunction. (*Id.*, PageID.1161–62) Finally, Beshear argues that "Plaintiffs conceded the relief they achieved was neither court ordered nor enduring" when they argued that "the case was not moot because neither the preliminary injunction nor the Governor's voluntary cessation of the challenged order was permanent or irrevocable." (*Id.*, PageID.1164 (citing D.N. 92, PageID.1123)).

In reply, Plaintiffs assert that Beshear mistakenly draws a distinction between themselves and the plaintiff-congregants in *Roberts*. (D.N. 109, PageID.1169) According to Plaintiffs, "[a]ll the people who exercised their First Amendment rights to assemble for worship under the Maryville Baptist steeple are prevailing parties." (*Id.*, PageID.1170–71) Plaintiffs also contend that drive-in services *were* prohibited by the mass-gathering order. (*Id.*, PageID.1174) And Plaintiffs argue that the injunctions issued in this case must be lasting and enduring because they were issued before the injunctions in *Roberts*, which the Sixth Circuit deemed lasting and enduring. (*Id.*, PageID.1176).

Contrary to Plaintiffs' contention, the preliminary injunctions in this case did not "change[] the parties' relationship in a material and enduring way." *Roberts*, 65 F.4th at 284. First, the injunctions did not allow Plaintiffs to act in ways that Beshear "previously resisted." *Id.* Despite the general prohibition on mass gatherings, Beshear permitted—and encouraged—

churches to offer drive-in services as an alternative to in-person gatherings, particularly for the Easter holiday. (*See* D.N. 31-2, PageID.456 ¶ 48 (explaining that leading up to Easter, "the Governor encouraged churches to explore other ways to worship, including online services and even drive-in church services")) During a COVID-19 briefing on March 20, 2020, for example, Beshear affirmed that drive-in church services were allowed under the mass-gathering restrictions, describing such services as "a creative solution." Governor Andy Beshear, *Update on COVID-19 in Kentucky – 3.20.2020 PM*, YouTube (March 20, 2020),https://www.youtube.com/watch?v=vG_nreWckWw. Similarly, during an April 11, 2020 briefing, Beshear stated that he had "been in favor of drive-in services" and detailed the social-distancing rules for drive-in services. Governor Andy Beshear, *Update on COVID-19 in Kentucky — 4.11.2020*, YouTube (April 11, 2020), https://www.youtube.com/watch?v=X_1NS02f0CI.[2]The Sixth Circuit's injunction against enforcement of the mass-gathering orders as to drive-in services thus merely reaffirmed Beshear's position that such services were permissible.[3]

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[2] Both YouTube videos were cited in Beshear's response to Plaintiffs' renewed motion for injunction pending appeal. (*See* D.N. 31, PageID.414 n.37)

[3] Plaintiffs argue that because the Kentucky State Police recorded the license plates of those attending the April 12 service, the mass-gathering order did not actually allow drive-in services. (*See* D.N. 109, Page.ID.1173) But as set out in the plaintiffs' verified complaint, the April 12 drive-in service was a live audio broadcast of an *in-person* service, attended by congregants inside the church, in violation of the Governor's prohibition on mass gatherings. (D.N. 1, PageID.2, 18; *see* D.N. 31, PageID.415–18; D.N. 31-2, PageID.456 ¶ 49) The Kentucky

Moreover, by the time this Court issued its injunction, Beshear had already announced that in-person services would be allowed to resume. (D.N. 34, PageID.570; *see* D.N. 34-1) And "[a] defendant's voluntary change, even one precipitated by litigation, does not amount to a 'court-ordered change in the legal relationship' between the plaintiff and defendant, as required to establish prevailing-party status." *McQueary*, 614 F.3d at 597 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 604 (2001)); *see also Miller v. Davis*, 267 F. Supp. 3d 961, 976–77 (E.D. Ky. 2017), *aff'd sub nom. Miller v. Caudill*, 936 F.3d 442 (6th Cir. 2019) ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." (internal quotation marks omitted) (quoting *Buckhannon*, 532 U.S. at 605)); *Tennessee State Conf. of NAACP v. Hargett*, 53 F.4th 406, 412 (6th Cir. 2022) (Nalbandian, J., dissenting) ("[W]e must deny attorney's fees in preliminary-injunction cases if a defendant's voluntary action moots the case." (collecting cases)). Thus, the lifting of the ban on in-person services was not a "court-ordered change" because Beshear proactively created an exception for

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State Police recorded the license-plate numbers of all vehicles in the church's parking lot at the time of the offending gathering. (D.N. 1, PageID.2) Although the Sixth Circuit described the April 12 service as "a drive-in Easter service," *Maryville Baptist Church*, 957 F.3d at 611, the verified complaint makes clear that some congregants were inside the building for a concurrent in-person service. (D.N. 1, PageID.2 ¶ 2; *see also* D.N. 57-1, PageID.752 (stating that some congregants "enjoyed" the Easter sermon "from the pews of the church"))

in-person services. (*See* D.N. 34-1) Indeed, this Court's injunction noted Beshear's "new guidelines for in-person worship services." (D.N. 35, PageID.580 n.3) The injunctions in this case therefore did not materially alter the legal relationship between the parties. *Cf. Roberts*, 65 F.4th at 284.

Lastly, the relief granted to Plaintiffs was not enduring because it was revocable. *See Caudill*, 936 F.3d at 448 ("[F]or the change to have been enduring, it must have been irrevocable, meaning it must have provided plaintiffs with everything they asked for." (emphasis removed)). Plaintiffs themselves argued that the Governor's "change in policy [wa]s neither permanent nor irrevocable" (D.N. 61, PageID.784 (citing *City of L.A.*, 491 U.S. at 101)), noting that "absent a permanent injunction, the challenged policies c[ould have] be[en] reinstituted at any time." (*Id.* (emphasis removed)) Plaintiffs now contend that "[n]othing could be more enduring than the eternal nourishment Plaintiffs[] received" from being "able to attend church each Sunday during the pendency of those injunctions." (D.N. 105, PageID.1148) But the relief Plaintiffs received must have caused an "enduring change in the *legal* relationship between the parties." *Caudill*, 936 F.3d at 448 (emphasis added). The relief plaintiffs received through the legal process—the injunction allowing them to attend church in person each Sunday—was, by its own terms, temporary. As Magistrate Judge Regina S. Edwards previously explained in this case,

> [w]hen partially granting the injunctive relief Maryville Baptist sought, the Sixth Circuit explicitly limited it to "the pendency of this appeal" and limited its application to

> drive-in services so long as the church complied with public health requirements. And when the district court granted Maryville Baptist's preliminary injunction and allowed in-person services to resume, it required the same compliance with the state's public health directives.

(D.N. 87, PageID.1087) Plaintiffs' relief was therefore conditional; the Court retained the power to revoke it at any time. *Cf. Dubuc*, 312 F.3d at 754 ("This Court agrees with the district court that the injunction was not a clear victory for Appellant. The injunction was specifically called temporary, and was only issued subject to Appellant applying with seven conditions.").

Because the injunctions here did not result in a "court-ordered, material, enduring change in the legal relationship between the parties," *Caudill*, 936 F.3d at 448, this case is distinguishable from *Roberts*. In *Roberts*, the Commonwealth made an exception to the challenged gathering restrictions for in-person services *after* the preliminary injunctions had issued. 65 F.4th at 285. The Sixth Circuit rejected Beshear's argument that he "voluntarily changed the orders"; on the contrary, as the court observed, he changed them because "[a]n immediately enforceable preliminary injunction compelled [him] to" do so. *Id.* (internal quotation marks omitted) (quoting *McQueary*, 614 F.3d at 599). In contrast, the first injunction issued here conformed with Beshear's ongoing acceptance—and encouragement—of drive-in services (*see* D.N. 31-2, PageID.456), and by the time the second injunction issued, Beshear had already released guidelines for in-person worship services to resume. (D.N. 34, PageID.570; *see* D.N. 34-1) Thus, in this case—unlike

Roberts—Beshear "relent[ed] of his own accord." 65 F.4th at 285 (citing *Buckhannon*, 532 U.S. at 605). Additionally, the relief the congregants in *Roberts* received was enduring, while the relief Plaintiffs received in this case was not. In *Roberts*, the congregants requested an injunction shielding them from prosecution for attending Maryville Baptist's Easter service. *See Roberts v. Beshear*, No. 220CV054WOBCJS, 2022 WL 4592538, at *2 (E.D. Ky. Sept. 29, 2022), *aff'd sub nom. Roberts v. Neace*, 65 F.4th 280 (6th Cir. 2023). The congregants' injunction thus became irrevocable once the Easter service had occurred. *Id.* at *3 (citing *McQueary*, 614 F.3d at 598). Here, in contrast, the mere passage of time was insufficient to make Plaintiffs' relief permanent, as the district court in *Roberts* explained:

> In [*Maryville Baptist Church v. Beshear*], the plaintiff church sought and received preliminary injunctive relief to permit it to continue its regular services for an indefinite period but did not seek injunctive relief regarding any specific service. Thus, that relief could have been revoked had the case not been dismissed as moot. However, here, plaintiffs sought relief from prosecution for a specific violation, which could not be revoked after the statute of limitations ran.

Id. Because Plaintiffs' relief had no built-in end date, this case less like is *Roberts* and more like *McQueary*.

In *McQueary*, a religious protestor challenged certain provisions of a Kentucky law that he claimed infringed on his right to protest at military funerals. 614 F.3d at 595. He had protested such funerals in the

past and wanted to continue doing so. *Id.* at 596. The district court preliminarily enjoined enforcement of the challenged provisions, and the Kentucky legislature later voluntarily repealed those provisions. *Id.* The protestor moved for attorney fees, but the district court denied his motion. *Id.* On appeal, the Sixth Circuit considered "whether or when the winner of a preliminary injunction may be treated as a 'prevailing party' entitled to attorney's fees." *Id.* The Sixth Circuit held that "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988," but the court remanded the case for the district court to determine "when the occasional exceptions to that rule should apply" using a "contextual and case-specific inquiry[.]" *Id.* at 604.

On remand, the district court concluded that the protestor was not entitled to a fee award because he was not a prevailing party. *McQueary v. Conway*, No. 06-CV-24-KKC, 2012 WL 3149344, at *3 (E.D. Ky. Aug. 1, 2012), *aff'd*, 508 F. App'x 522 (6th Cir. 2012). The court noted that "the [protestor's] claim did not become moot when a particular event occurred . . . . nor did the [protestor's] claim become moot because the preliminary injunction granted him all the relief he sought." *Id.* at *2. "Instead," his claim "became moot because the [legislature] voluntarily repealed the challenged provisions," but "the [legislature's] voluntary conduct cannot serve as the basis for an award of attorney's fees." *Id.* (citing *Buckhannon*, 532 U.S. at 600, 605). As the court further explained,

> where a plaintiff is granted preliminary injunctive relief that enjoins the government from acting at a particular time

> and place, the preliminary relief becomes, in effect, permanent relief after the event occurs. After the passage of the event, the preliminary injunction can no longer be meaningfully revoked. In contrast, preliminary injunctive relief like that granted by the Court in this case that enjoins the defendant only while the case is pending is truly temporary and revocable. Such relief cannot confer prevailing-party status because it is not "'enduring' and irrevocable." *McQueary*, 614 F.3d at 597 (citing *Sole v. Wyner*, 551 U.S. 74, 86 (2007)). Section 1988 "requires lasting relief, not the temporary 'fleeting success'["] that an injunction effective only while the case is pending represents. *Id.* (citing *Sole*, 551 U.S. at 83).

Id. at *3; *see also McQueary*, 508 F. App'x at 524 (affirming that "[t]he nature of the relief [the protestor] sought . . . was permanent[, but] the relief he received from the court was temporary").

Like the protestor's relief in *McQueary*, the injunctions in this case did not provide Plaintiffs relief that became permanent after a specific event. Instead, their relief was temporary. As mentioned previously, Plaintiffs themselves recognized that "absent a permanent injunction, the challenged policies c[ould have] be[en] reinstituted at any time." (D.N. 61, PageID.784 (emphasis removed)) In other words, Plaintiffs did not receive "everything they asked for." *Caudill*, 936 F.3d at 448. And Plaintiffs' claims became moot when Beshear, like the legislature in *McQueary*, voluntarily amended the mass-gathering

order—an action that "cannot serve as the basis for an award of attorney's fees." 2012 WL 3149344, at *2. Indeed, under applicable Supreme Court and Sixth Circuit precedent, the Court may not award fees if the plaintiff "achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 600; *see McQueary*, 614 F.3d at 597 ("[A] prevailing-party victory must create a lasting change in the legal relationship between the parties and not merely 'catalyze' the defendant to voluntary action . . . ."). In sum, *Roberts* is distinguishable, and Plaintiffs are not prevailing parties under 42 U.S.C. § 1988. *See McQueary*, 614 F.3d at 597. Accordingly, Plaintiffs are not entitled to fees or costs.[4]

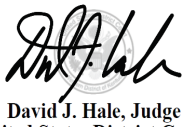
III.

For the reasons set forth above, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** as follows:

(1) Plaintiffs' motion for attorney fees and expenses (D.N. 74) and their bill of costs (D.N. 75) are **DENIED.**

(2) Plaintiffs' motion for an expedited supplemental-briefing schedule, or in the alternative, a hearing (D.N. 110),is **DENIED** as moot.

(3)This matter remains **CLOSED** and **STRICKEN** from the Court's docket.



David J. Hale, Judge
United States District Court

[4] In light of this conclusion, the Court need not reach Beshear's alternative argument that the requested fees are excessive. (*See* D.N. 108)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5737

MARYVILLE BAPTIST CHURCH; JACK ROBERTS,
Plaintiffs-Appellants,

v.

FILED
Apr. 24, 2025
KELLY L STEPHENS, Clerk

ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky,
Defendant-Appellee.

Before: SUTTON, Chief Judge; McKEAGUE and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk