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Nos. 17-6385

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL MILLER, PH.D.; KAREN ANN ROBERTS; SHANTEL BURKE;
STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY;
L. AARON SKAGGS; BARRY W. SPARTMAN
Plaintiffs – Appellees

v.

KIM DAVIS, in her official capacity as Rowan County Clerk
Defendant/ Third-Party Plaintiff – Appellee

ROWAN COUNTY, KENTUCKY
Defendant – Appellee

v.

MATTHEW G. BEVIN, in his official capacity as Governor of Kentucky;
TERRY MANUEL, in his official capacity as State Librarian and Commissioner of the Kentucky Department for Libraries and Archives
Third-Party Defendants – Appellants

On Appeal from the United States District Court for the Eastern District of Kentucky
In Case No. 0:15-cv-00044 before the Honorable David L. Bunning

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BRIEF OF APPELLANTS, GOVERNOR MATTHEW G. BEVIN AND COMMISSIONER TERRY MANUEL, IN THEIR OFFICIAL CAPACITIES

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Statement in Support of Oral Argument

Appellants, Matthew G. Bevin, in His Official Capacity as Governor of Kentucky, and Terry Manuel, in His Official Capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives, respectfully request oral argument because it will aid the Court in understanding the issues of law presented by the appeal and clarify the Record. Among other things, oral argument may aid the Court's understanding of the unique position held by county clerks under Kentucky law insofar as it impacts the determination of whether attorneys' fees are owed and, if so, by whom.

Introduction

This case began as a challenge to the unilateral policy of Rowan County Clerk Kim Davis ("Davis") concerning the issuance of marriage licenses. Plaintiffs alleged that Davis violated their constitutional rights when she refused to issue any marriage licenses following the decision of the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015). Plaintiffs' claims, asserted against Davis in her individual and official capacities, became moot upon the voluntary decision of the Commonwealth of Kentucky to create a new form for marriage licenses. At that point, the District Court vacated its preliminary injunction and dismissed the plaintiffs' claims. Despite this conclusion to the action, the District Court overruled a recommendation of the United States Magistrate Judge and awarded attorneys' fees and costs to the plaintiffs.

The District Court erred; the plaintiffs are not entitled to recover attorneys' fees. Plaintiffs obtained only a preliminary injunction that ultimately was vacated when the claims they had asserted were dismissed as moot. Given this result, plaintiffs do not qualify as "prevailing parties" and thus cannot recover attorneys' fees. Plaintiffs did not achieve success on the merits of their claims, and the plaintiffs did not receive an enforceable judgment. Because the plaintiffs did not receive a *judicially sanctioned* change in the legal relationship between the

plaintiffs and the Rowan County Clerk's Office, the plaintiffs cannot qualify as "prevailing parties." Importantly, if Davis reinstated her "no marriages policy"—perhaps by refusing to issue licenses to the plaintiffs who did not already obtain them—the plaintiffs could not invoke the District Court's vacated orders to command Davis to comply. Instead, the plaintiffs only could hope to return to court and seek an actual resolution on the merits of their claims against Davis. The District Court's determination that the plaintiffs were "prevailing parties" must be reversed.

Even if the plaintiffs could be considered to have prevailed in their litigation, any fees awarded to them cannot be imposed against the "Commonwealth of Kentucky." To the extent the plaintiffs prevailed, they did so against Davis individually or in her official capacity as Rowan County Clerk. Davis unilaterally defied existing law when she created a "no marriage licenses" policy for Rowan County. Her policy controlled her office and her county—not the Commonwealth. Indeed, the Commonwealth had made clear its official position that county clerks must follow the law established in *Obergefell* and even stood in a position adverse to Davis until her third-party claims were dismissed against the offices of the Governor and of the State Librarian and Commissioner of Kentucky Department for Libraries ("Third-Party Defendants"). Because Davis's singular policy violated the law, it cannot be said to represent the official policy of the Commonwealth.

Instead, it represented only the policy of the Rowan County Clerk's office, and so the Rowan County Clerk's office must be liable for any award of fees arising from her policy. Moreover, because Davis's actions were neither directed nor approved by any state official, it would be unjust under the circumstances to award fees and costs against the Commonwealth of Kentucky. Because the District Court erred in determining that Davis was acting solely as a state official, the fee award must be reversed and imposed against Davis in her official capacity as the Rowan County Clerk.

Statement of Jurisdiction

The District Court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367 over this action brought under 42 U.S.C. § 1983. On August 18, 2016, following the remand of a previous appeal in this action, the District Court vacated its preliminary injunction orders. (Vacating Order, R. 181, Page ID ## 2706-07). The District Court also denied all pending motions as moot, and it dismissed the action from its active docket. (Dismissal Order, R. 182, Page ID ## 2709-10). Thereafter, the plaintiffs moved for an award of attorneys' fees. The District Court referred the plaintiffs' motion for fees to United States Magistrate Judge Edward B. Atkins for a report and recommendation. (Referral Order, R. 184, Page ID # 2801). After an extensive analysis of relevant precedent, Magistrate Judge Atkins found that the plaintiffs were not prevailing parties and recommended that the District Court deny their motion. (Report and Recommendation, R. 199, Page ID ## 2900-02). After considering the plaintiffs' objections to the Report and Recommendation, the District Court instead granted the motion on July 21, 2017. (First Fee Order, R. 206, Page ID # 2944). Because Third-Party Defendants had been dismissed, and because no relief was sought against them in the request for attorneys' fees, Third-Party Defendants did not participate in the briefing on the fees issues. On October 23, 2017, the District Court denied Third-Party Defendants' motion to amend its rulings regarding attorneys' fees. (Second Fee

Order, R. 222, Page ID # 3073). Third-Party Defendants filed a timely notice of appeal of this final order on November 21, 2017. (Notice of Appeal, R. 224 Page ID ## 3088-3089). This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

This appeal involves the award of attorneys' fees and costs following the dismissal of the dispute over the unilateral decision of Kim Davis, the Rowan County Clerk, not to issue marriage licenses to any couples in Rowan County, Kentucky. The issues presented are:

1. Whether the District Court erred, as a matter of law, in concluding that the plaintiffs were "prevailing parties" for purposes of 28 U.S.C. § 1988, where the plaintiffs obtained neither a judgment on the merits nor a consent-ordered decree in this litigation.

2. Whether, in analyzing a potential award of attorneys' fees and costs, the District Court erred, as a matter of law, in using an inapplicable standard to determine that Kim Davis acted solely on behalf of the Commonwealth of Kentucky, rather than Rowan County.

3. Whether, even if the plaintiffs were "prevailing parties" for purposes of 28 U.S.C. § 1988, the District Court erred, as a matter of law, in awarding fees and costs against the Commonwealth of Kentucky, rather than the Office of the Rowan County Clerk, where the District Court's conclusion was based on its erroneous determination that Kim Davis, in her role as Rowan County Clerk, represented only the Commonwealth of Kentucky.

4. Whether, even if the plaintiffs were "prevailing parties" for purposes of 28 U.S.C. § 1988, the District Court erred, as a matter of law, in granting an award of fees and costs given the circumstances of the case, which would render an award against the Commonwealth of Kentucky unjust.

Statement of the Case

A. Kim Davis Refuses to Issue Marriage Licenses in Rowan County.

On June 26, 2015, the United States Supreme Court held that, because "same-sex couples may exercise the fundamental right to marry," Kentucky's definition of marriage as union between one man and one woman violated the Fourteenth Amendment of the United States Constitution. *Obergefell*, 135 S. Ct. at 2604-05.[1] As a result, Kentucky could not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605. That same day, in a letter to Kentucky county clerks, then-Governor of Kentucky, Steven L. Beshear, acknowledged the decision reached in *Obergefell*, explained the Commonwealth's action to assist county clerks with their statutory duties, and reminded the county clerks of their obligations as constitutional officers. (Letter to County Clerks, R. 1-3, Page ID # 26).

By June 27, 2015, Kim Davis ("Davis"), as Rowan County Clerk, unilaterally announced that her office would no longer issue any marriage licenses at all. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 250). She had contemplated how she might react to that ruling, "[s]o it wasn't just a spur-of-the-moment decision." (*Id.*). Under Kentucky law, county

[1] Kentucky was a party to the *Obergefell* group of cases and the Court's decision included ruling against Kentucky in No.14-574, *Bourke v. Beshear, Governor of Kentucky*. Thus, *Obergefell* specifically addressed Kentucky's marriage regime.

clerks—like Davis—have exclusive authority for issuing marriage licenses. These statutes place the sole responsibility for issuing marriage licenses with the county clerks, who are separately elected constitutional officers, or their deputy clerks. Ky. Rev. Stat. § 402.080 ("[t]he license shall be issued by the clerk of the county . . ."); *see also* Ky. Rev. Stat. §§ 402.100, 402.110, 402.210, 402.230.[2] Given this statutory authority, Davis did not seek approval for her new policy from any state official.

On June 30, 2015, April Miller and Karen Roberts sought a marriage license from the Rowan County Clerk's Office. (Transcript of Preliminary Injunction Hearing on July 13, 2015, R. 21 at 25, Page ID # 125). Ms. Miller and Ms. Roberts were informed that the office was not currently issuing any marriage licenses. (*Id.* at Page ID # 127). Over the next few days, other couples were denied licenses. (*Id.* at Page ID # 135). At this same time, pursuant to Kentucky law, the seven counties directly neighboring Rowan County were issuing marriage licenses. (Transcript of Preliminary Injunction Hearing on July 20, 2015, RE 26, Page ID # 269).

[2] Kentucky's county clerks are a relic of its former judicial system, and the county clerk is technically the "County Court Clerk." Ky. Const. § 99. *See also* Chapman, Shawn, *Removing Recalcitrant County Clerks in Kentucky*, 105 KY. L.J. 261, 273-74 (2016) (explaining how this status coupled with an omission in a 1976 amendment to the Kentucky Constitution placed county clerks outside the traditional oversight of state government).

B. Plaintiffs File Suit Against Kim Davis.

Having been denied marriage licenses in Rowan County, the plaintiffs, April Miller, Karen Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, Aaron Skaggs, and Barry Spartman ("Plaintiffs"), initiated this action on July 2, 2015 against Rowan County and Davis, individually and in her official capacity as Rowan County Clerk. (Complaint, RE 1, Page ID ## 1-2). Plaintiffs alleged that Davis and her office had violated their civil rights through the "no marriage licenses" policy. (*Id.* at Page ID # 4). Plaintiffs sought (1) class certification under Federal Rule of Procedure 23, (2) a preliminary injunction, (3) a permanent injunction, (4) a declaratory judgment, (5) damages, (6) attorneys' fees and costs, and (7) a trial by jury. (*Id.* at Page ID ## 10-14). On August 4, 2015, Davis, in turn, filed a verified third-party complaint against Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives.[3] (Third-Party Complaint, R. 34, Page ID # 745). Davis

[3] The Third-Party Complaint named then-Governor Steven L Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of the Kentucky Department for Libraries and Archives. After the 2015 election, newly elected Governor Matthew G. Bevin, in his official capacity as Governor of Kentucky, was substituted for former Governor Steven Beshear. (Notice of Substitution, R. 155, Page ID # 2591). Likewise, Terry Manuel, in his official capacity as State Librarian and Commissioner of the Kentucky Department for Libraries and Archives, was substituted for Wayne Onkst. (Notice of Substitution, R. 170, Page ID # 2677).

alleged that "Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst" violated her rights of free exercise of religion, free speech, and to be free from religious tests for public office. (*Id.* at Page ID # 759-68). Third-Party Defendants sought dismissal of Davis's claims against them, but as discussed below, their pending motions were denied as moot.

C. Preliminary Injunction, Appeals, and Contempt.

On August 12, 2015, the District Court granted Plaintiffs' motion for preliminary injunction and preliminary enjoined Davis, in her official capacity as Rowan County Clerk, from refusing to issue marriage licenses in response to future requests from Plaintiffs. (Order Granting Preliminary Injunction, R. 43, Page ID # 1173). On August 12, 2015, Davis appealed this decision to this Court. (Notice of Appeal, R. 44, Page ID #1174). She also sought a stay of the preliminary injunction pending her appeal. This Court denied that request, concluding that "[i]n light of the binding holding of *Obergefell*, it cannot be defensibly argued that the holder of the Rowan County Clerk's Office … may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." *Miller v. Davis*, No. 15-5880, 2015 U.S. App. LEXIS 23060, at *3-4 (6th Cir. Aug. 26, 2015). Less than a week later, the Supreme Court likewise denied her application for a stay. *Davis v. Miller*, 136 S. Ct. 23 (2015).

Nevertheless, Davis persisted. Davis continued to defy the District Court and was jailed following a hearing on September 3, 2015—to be held until she would comply. (Minute Entry Order, R. 75, Page ID ## 1558-89).[4] Under the direction of the District Court, the Rowan County Clerk's Office began issuing marriage licenses again while Davis was incarcerated, and by September 8, 2015, some, but not all, Plaintiffs had received licenses. (Status Report, R. 84, Page ID # 1798). Based upon an agreement by Davis not to interfere with the issuance of marriage licenses by staff members of the Rowan County Clerk's Office, the District Court lifted the contempt. (Order Lifting Contempt, R. 89, Page ID ## 1827-28). Davis returned to work on September 14, 2015. (Motion to Enforce, R. 120, Page ID # 2316). As Davis's appeals (Case Nos. 15-5880, 5961, and 5978, the "Consolidated Appeals"), were pending, marriage licenses continued to be issued by deputy clerks. (*See, e.g.*, Status Report, R. 176, Page ID # 2692).

Meanwhile, before any decision on the merits of Plaintiffs' action or Davis's appeals of the injunctions issued against her, the Commonwealth of Kentucky voluntarily addressed the form of marriage licenses. First, Governor Matthew G. Bevin addressed the issue soon after taking office in December 2015. On December 22, 2015, Governor Bevin issued Executive Order 2015-048 (the

[4] The District Court also modified its preliminary injunction to clarify that it applied to requests for marriage licenses from Plaintiffs and from "other individuals who are legally eligible to marry in Kentucky." (Order Modifying Preliminary Injunction, R. 74, Page ID # 1557).

"Executive Order") that prescribed a revised marriage form that did not contain the name of the county clerk under whose authority the license is issued. (Executive Order, R. 157-2, Page ID ## 2616-18). The Executive Order directed the Kentucky Department for Libraries and Archives to publish the revised marriage license form to all county clerks immediately. (*Id.*). In a press release issued the same day as the Executive Order, Davis's counsel praised the action and stated that the revised form will allow county clerks "to do their jobs without compromising religious values and beliefs." (Press Release, R. 157-3, Page ID # 2621). The litigation, however, continued.

Next, the Kentucky General Assembly considered and approved Kentucky Senate Bill 216 ("SB 216") which amended Ky. Rev. Stat. § 402.100 by creating a new marriage license which did not require the signature of a county clerk. 2016 Ky. Acts 132. On April 13, 2016, Governor Bevin signed the bill into law, and it went into effect on July 15, 2016. Ky. Rev. Stat. § 402.100. On April 19, 2016, this Court dismissed Davis's appeal (Case No. 15-5961) from an order delaying consideration of her motion for a preliminary injunction against Third-Party Defendants. (Order Granting Third-Party Defendants' Motion to Dismiss Appeal, R. 171, Page ID ## 2680-82). Third-Party Defendants were also removed as appellees in Davis's Consolidated Appeals.

According to the remaining parties, this legislative action rendered the Consolidated Appeals moot. On June 21, 2016, Davis filed a motion to dismiss the consolidated appeal. On July 1, 2016, Plaintiffs responded to the motion and noted that they did not oppose the motion, because "subsequent to the briefing in these consolidated appeals, the Kentucky General Assembly enacted, and Kentucky's Governor signed into law, Kentucky Senate Bill (S.B.) 216 which modifies Kentucky law governing marriage licensing." Thus, on July 13, 2016, this Court dismissed the appeals and remanded them to the District Court "with instructions to vacate" the District Court's preliminary injunction orders. (Order Dismissing and Remanding, R. 179, Page ID ## 2698-99). The District Court followed those instructions. On August 18, 2016, the District Court vacated its preliminary injunction orders, denied all pending motions as moot, and dismissed the action. (Dismissal Order, R. 182, Page ID ## 2709-10). Among the motions denied as moot were two motions to dismiss filed by Third-Party Defendants, which sought dismissal of Davis's claims because Third-Party Defendants could not be liable to Davis. (Motion to Dismiss filed September 8, 2015, R. 92, Page ID ## 1845-47; Motion to Dismiss filed on January 11, 2016, R. 157, Page ID # 2605-07). Following dismissal, Plaintiffs moved for an award of attorneys' fees and costs pursuant to 42 U.S.C. 1988. (Motion for Fees, R. 183, Page ID # 2711-13).

D. Statutory Framework.

As a limited exception to the American Rule requiring each party to bear its own costs, 42 U.S.C. § 1988 ("§ 1988") allows for the award of a reasonable attorney's to the prevailing party in certain civil rights actions. *See Binta B. v. Gordon*, 710 F.3d 608, 639 (6th Cir. 2013). Section 1988 provides, in relevant part:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

As the statutory framework plainly states, a threshold requirement for a fee award is that the party seeking the award must be a "prevailing party." "Prevailing party" is "a legal term of art." *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 603 (2001). "A prevailing party is 'one who has been awarded some relief by the court'—say, by entry of a consent decree or judgment in the party's favor." *United States v. Tennessee*, 780 F.3d 332, 336 (6th Cir. 2015) (quoting *Buckhannon*, 532 U.S. at 603). These categories of relief "create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n v. Garland*

Independent School Dist., 489 U.S. 782, 792-93 (1989)). The party seeking fees carries the burden of establishing it was a prevailing party. *Tennessee*, 780 F.3d at 336. Even if a party meets that burden and qualifies as a prevailing party, it may not be entitled to a fee award if "special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). This Court has "opted for a case-by-case approach" when considering whether such circumstances exist. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 421 F.3d 417, 422 (6th Cir. 2005). Finally, this Court has explained that "the purpose of § 1988 is not to generate 'satellite' disputes over fees." *Binta B.*, 710 F.3d at 625 (citing *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

E. The District Court Awards Attorneys' Fees and Costs.

The District Court referred Plaintiffs' motion for fees to United States Magistrate Judge Edward B. Atkins for a report and recommendation. In the report and recommendation, Magistrate Judge Atkins conducted an extensive analysis and found that Plaintiffs were not entitled to fees and recommended that the District Court deny their motion. (Report and Recommendation, R. 199, Page ID ## 2900-02). Within the permitted time period, Plaintiffs objected to the Report and Recommendation. (Objections to Report and Recommendation, R. 201, Page ID ## 2911-17).

On July 21, 2017, the District Court sustained Plaintiffs' Objections and awarded Plaintiffs $220,695.00 in attorneys' fees and $2,008.08 in costs. (First Fee Order, R. 206, Page ID ## 2991-2992).

First, the District Court held that Plaintiffs qualified as "prevailing parties." It explained that because "Plaintiffs obtained marriage licenses that could not be revoked," they prevailed within the meaning of § 1988. (*Id.* at Page ID # 2964). The District Court acknowledged that actions of Kentucky General Assembly mooted the case, but the District Court concluded that the "legislative change did not render Plaintiffs' legal success unnecessary." (*Id.* at Page ID # 2962).

Second, the District Court determined that, because Plaintiffs were entitled to attorneys' fees, the Commonwealth of Kentucky must pay them. (*Id.* at Page ID ## 2979-80). The District Court reached this conclusion by applying an analysis reserved for sovereign immunity issues. The District Court acknowledged that "courts undertake this analysis at the beginning stages of litigation, when attempting to determine whether the government entity is shielded by sovereign immunity." (*Id.* at Page ID # 2968, citing *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015). Applying this sovereign immunity analysis, the District Court concluded that, when defying the law by refusing to issue marriage licenses, Davis acted solely as a state official. (*Id.* at Page ID # 2970). Thus, the District Court held the Commonwealth of Kentucky, without any further specificity, liable for Plaintiffs'

fees. The District Court did, however, recognize "that the result in this case runs counter to the conclusion that usually follows a determination that a State has potential liability." (*Id.* at n. 27).

Third, the District Court awarded Plaintiffs the full amount of the costs they sought, $2,008.08, to be paid by the Commonwealth of the Kentucky. (*Id.* at Page ID # 2980). The District Court awarded Plaintiffs their attorneys' fees at the request hourly rates, which ranged from $250 to $350 per hour for local counsel and $350 to $700 for out-of-town counsel. (*Id.* at Page ID ## 2983-84). The District Court, however, reduced the total requested hours to eliminate certain block billing entries (*Id.* at Page ID ## 2986-87). Based on this slight reduction, the District Court ordered the Commonwealth of Kentucky to pay Plaintiffs $222,695.00 in attorneys' fees. (*Id.* at Page ID # 2991).

On August 18, 2017, Third-Party Defendants filed a motion asking the District Court to amend its award of fees and costs such that the fees and costs were to be assessed against Davis in her official capacity as Rowan County Clerk. (Motion to Amend, R. 208, Page ID ## 3004-05). Applying the standards found in Federal Rule of Civil Procedure 60, the district court denied the motion. (Second Fee Order, R. 222, Page ID # 3085). This appeal followed.

Summary of the Arguments

I. Plaintiffs are not entitled to an award of attorneys' fees and costs.

Plaintiffs cannot qualify as "prevailing parties," because they did not achieve success on the merits of their claims. Plaintiffs neither received an enforceable judgment on the merits nor a court-ordered consent decree. Because the plaintiffs did not receive a *judicially sanctioned* change in the legal relationship between the plaintiffs and the Rowan County Clerk's Office, the plaintiffs cannot recover fees. Indeed, should Davis renew her "no marriage licenses" policy, Plaintiffs could not invoke the District Court's vacated orders for any preclusive effect against Davis. In other words, any relief Plaintiffs have obtained is fleeting and not permanent.

II. The Office of the Rowan County Clerk is responsible for the payment of any fees award. To the extent Plaintiffs are entitled to an award of attorneys' fees and costs, that award must run against the Office of the Rowan County Clerk. That office is the party against which Plaintiffs prevailed, if at all, because that office's unilateral policy—only applicable to Rowan County—is the one at the heart of this case. Importantly, Davis, as Rowan County Clerk, acted as a county official in setting her unlawful policy for Rowan County. She is elected by the residents of Rowan County, she is paid by the fees collected by the Rowan County Clerk's Office, and she is considered a "county officer" by Kentucky law. Moreover, she expressly defied the directives of the state government, the

Commonwealth of Kentucky. In short, Davis could not represent the state when she defied federal law. Given these facts, the District Court erred in concluding that Davis acted solely as a state official when she implemented her "no marriage licenses" policy. The District Court's error flowed from its application of an incorrect legal standard to the only question before it: whether an award of fees was proper. The District Court incorrectly applied a test used to determine the scope of immunity for official-capacity suits. That test is not appropriate for determining the propriety of a fee award. Regardless, Davis must be considered a county official, and thus any award of fees against her runs against her office. The result is the same even if Davis is considered a state official in this context, because she held the office of Rowan County Clerk, and that is the office which must bear the burden of any award of fees.

Standard of Review

"A district court's determination of prevailing-party status for awards under attorney-fee-shifting statutes—such as 42 U.S.C. § 1988—is a legal question that [this court] reviews *de novo*." *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007). Therefore, the District Court's finding that Plaintiffs qualified as "prevailing parties" is to be reviewed *de novo*. Beyond this threshold question, an award of attorney's fees is generally reviewed for an abuse of discretion. *Binta B.*, 710 F.3d at 617-18. However, "the question of whether a district court has appropriately apportioned fees among multiple parties arguably raises a legal issue to be reviewed de novo." *Garner v. Cuyahoga Cty. Juvenile Court*, 554 F.3d 624, 641 (6th Cir. 2009). Accordingly, Third-Party Defendants believes that all issues presented in this appeal are subject to *de novo* review. Even if an abuse of discretion standard is applied to the District Court's apportionment of fees, the District Court's order should be reversed.

Arguments

I. Plaintiffs are not "prevailing parties" entitled to attorneys' fees, because Plaintiffs obtained neither a judgment on the merits nor a court-ordered consent degree in this litigation.

A. The District Court failed to apply the proper standard in concluding that Plaintiffs are "prevailing parties."

To qualify as a "prevailing party" under § 1988, the party seeking an award of attorneys' fees must "receive at least some relief on the merits of his claim" amounting to "a court-ordered change in the legal relationship between the plaintiff and the defendant." *Buckhannon*, 532 U.S. at 603-04 (internal quotation marks and alterations in original omitted).

In *Buckhannon*, the Supreme Court encountered a similar set of facts as those presented here. In that case, the plaintiffs challenged a West Virginia law related to nursing home safety. *Id.* at 600. While the case was pending, the West Virginia Legislature enacted two bills that eliminated the provisions at issue. *Id.* at 601. Because the legislation mooted the dispute, the case was dismissed. *Id.* After the dismissal, the plaintiffs moved for attorneys' fees, which the district court denied. *Id.* at 602. The Supreme Court affirmed this decision and clarified the meaning of a "prevailing party." *Id.* at 603. The Supreme Court explained that a proper basis for an award of fees would include a judgment on the merits or a consent decree, but "[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." *Id.* at 605.

This limitation in *Buckhannon* is critical. As later explained by then-retired Justice O'Connor, a member of the majority in *Buckhannon*, the prevailing party standard "requires more than a mere judicial statement favoring one party." *Biodiversity Conservation All. v. Stem*, 519 F.3d 1226, 1230 (10th Cir. 2008). "More specifically, a party is entitled to attorneys' fees only if it could obtain a court order to enforce the merits of some portion of the claim it made in its suit." *Id.* For example, the *Buckhannon* plaintiffs could only "hope for another chance to present their case on the merits to a court" if West Virginia's legislature reinstated the nursing home law. *Id.*

The Supreme Court has reiterated that the "material alteration of the parties' relationship" remains a prerequisite for prevailing party status, including in cases involving injunctive relief. "Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole v. Wyner*, 551 U.S. 74, 83 (2007). In *Sole*, the Supreme Court specifically rejected a litigant's argument that a preliminary injunction, ultimately dissolved, did not confer prevailing party success because "[t]hat fleeting success, however, did not establish that she prevailed on the gravamen of her plea for injunctive relief." *Id.* at 83 (but not

addressing the question about "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees").

From this precedent, this Court has concluded that "a contextual and case-specific inquiry" is required in cases involving fees requested following preliminary injunctions. *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010). However, in keeping with *Buckhannon* and *Sole*, this Court explained that the "'preliminary' nature of the relief … will generally counsel against fees in the context of preliminary injunctions." *Id.*

In the present case, the District Court erred in determining that Plaintiffs were prevailing parties by misapplying the legal test enunciated in *Buckhannon* and by this Court in *Binta B.* and *McQueary*. The context of this case makes clear that Plaintiffs cannot be considered "prevailing parties."

B. Under the proper legal test, Plaintiffs are not "prevailing parties."

In concluding that Plaintiffs were "prevailing parties," the District Court relied, in part, on the fact that Plaintiffs obtained a preliminary injunction before the case was dismissed in light of changes to Kentucky law. However, a preliminary injunction is not a judgment on the merits, and thus does not confer prevailing party status, especially where, as here, any relief obtained by Plaintiffs

did not achieve a lasting change in their legal relationship with Davis and the Rowan County Clerk's Office.

The Supreme Court has been clear that "liability on the merits and responsibility for fees go hand in hand." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). *See also Farrar v. Hobby*, 506 U.S. 103, 109 (1992). A preliminary injunction—by its very nature—falls short of resolving the underlying lawsuit on the merits. Indeed, the appropriateness of a preliminary injunction and the resolution on the merits "are significantly different." *University of Texas v. Camensich*, 451 U.S. 390, 393 (1981).

When issuing a preliminary injunction, a court does not decide that a plaintiff has "prevailed" or even will prevail. In granting a preliminary injunction, a court can "refer only to the *likelihood* that respondents ultimately would prevail." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (emphasis added). Likelihood of ultimate success is just one of several "factors to be balanced, and not prerequisites that must be met." *In re Eagle Picher Indus., Inc.*, 963 F.3d 855 (6th Cir. 1992). Section 1988, however, predicates an award of attorney's fees on *actually prevailing*. As the Supreme Court noted, a court must not "improperly equate[] 'likelihood of success' with 'success.'" *Camensich*, 451 U.S. at 394.

Granting prevailing party status based on the obtainment of a preliminary injunction is particularly unjustified in this case. Here, while some Plaintiffs did

receive marriage licenses following the issuance of the District Court's preliminary injunction, not all of them did. (First Fee Order, R. 17 n. 13, Page ID # 2959). The District Court's vacated preliminary injunction provides these unmarried Plaintiffs with nothing; these vacated orders have no power to force Davis to issue marriage licenses should she again decide she prefers not to grant them. Importantly, the District Court's preliminary evaluation of Plaintiffs' claims would not even be binding had the court eventually decided the claims on their merits. *Camensich*, 451 U.S. at 394; *see also McQueary*, 614 F. 3d at 599 ("Our review of a preliminary injunction ruling, even one that turns on the merits and even one that is resolved through a published opinion, is not binding on the panel that reviews the ultimate final injunction decision."). Instead, any relief Plaintiffs still enjoy flows from the voluntary actions of the Kentucky General Assembly and not from any action taken by the District Court. *Id.* at 598 ("Absent a direct benefit, the plaintiff achieves only a symbolic victory, which § 1988(b) does not compensate.").

Additionally, the Plaintiffs' case is not like the First Amendment protest cases analyzed by this Court in *McQueary*, and upon which the District Court based, in part, its finding that Plaintiffs were prevailing parties. *Id.* at 599 (discussing *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000)). In such cases, the plaintiffs sought *only* to delay the enforcement of a particular statute

until a particular time. *Id.* Unlike in those cases, Plaintiffs in the present case did not receive all they sought. Plaintiffs sought a permanent injunction to ensure their requested relief (and that of their proposed class of plaintiffs). Unlike in *McQueary*, another injunction would have been necessary to ensure that Davis issued marriage licenses.

In cases in which a preliminary injunction has allowed a litigant to claim "prevailing party" status, the preliminary injunction must provide a lasting change for the litigant. In other words cases, "the plaintiffs obtained all of the relief they requested once the preliminary injunction served its purpose." *McQueary*, 614 F.3d at 599. This occurs when a plaintiff seeks to enjoy rights at a specific place and time, and the preliminary injunction is all that is needed to deliver that relief. Importantly, this Court recognized, such preliminary injunctions must have more than a "catalytic effect." *Id.* at 599. It "must create a lasting change in the legal relationship between the parties." *Id.* at 601. This is a high standard, and rightly so, because the purpose of § 1988 is not to generate—as here—"satellite" fights over fees. *Id.* at 598.

As Magistrate Judge Atkins correctly found, Plaintiffs did not achieve such a victory, and thus they do not qualify as "prevailing parties" under the standards enunciated in *Buckhannon* and *McQueary*. In this case, Plaintiffs sought to permanently force Davis to issue them marriage licenses. The vacated preliminary

injunctions did not provide this relief, and so they cannot be said to have given Plaintiffs "all of the relief they requested." *McQueary*, 614 F.3d at 599; *see also Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2002) (denying an award of fees in a case, because although the litigant won a preliminary injunction to obtain a temporary certificate of occupancy, the injunction did not provide the litigant with its ultimate goal). Indeed, not even all Plaintiffs succeeded in obtaining marriage licenses during the time the preliminary injunctions were in effect.

Critically, it was the voluntary conduct of the Commonwealth of Kentucky—in the form of Governor Bevin's Executive Order and the General Assembly's SB 216—that brought the litigation to a close. That voluntary change in the parties' relationship cannot support an award of fees. At most, Plaintiffs can claim to have "catalyzed" this voluntary action. That argument has been expressly rejected, and so it must be rejected here as well. *Buckhannon*, 532 U.S. at 605. Accordingly, Plaintiffs' symbolic and incomplete victory does not place them in the position of prevailing parties.

II. The Rowan County Clerk's Office is responsible for the payment of any award of fees or costs, because Davis is a county official.

A. The District Court erred, as a matter of law, when it applied an incorrect standard to determine the nature of Davis's role.

Under Kentucky law, county clerks—like Davis—are considered "county officials." County clerks are elected by the residents of their own county. Ky.

Const. § 99. According to Davis, the county clerk's office "is a fee office;" it is funded by the fees it generates, not from funds allocated by the Commonwealth of Kentucky. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 241). County clerks draw their salaries from these fees, not the Commonwealth of Kentucky. Ky. Rev. Stat. § 64.345(4). In 2015, the Rowan County Clerk's Office budgeted $4.2 million in revenue, but as of June 2015, the office had a surplus of $733,000 in revenue. (*Id.* at Page ID # 242-43). At the end of the year, any excess fees are provided to the Rowan County Fiscal County, not the Commonwealth of Kentucky. (*Id.* at Page ID # 243). It is the Rowan County Fiscal Court that provides oversight of the Rowan County Clerk's Office, but only by annually reviewing and approving the budget submitted annually by the county clerk. (*Id.* at Page ID # 234). Beyond that, the Rowan County Fiscal Court has no authority to sanction or otherwise censure an elected county clerk. (*Id.* at Page ID # 235). In short, county clerks are in no way directly supervised by state government.[5]

Despite these facts, the District Court found that Davis is instead a state official by incorrectly applying a test used to determine the scope of sovereign

[5] The District Court incorrectly focused on the ability of the General Assembly to impeach a county clerk. However, this is an exceedingly rare remedy that has been invoked eight times in Kentucky's 226 years of statehood. *See* Chapman, *supra* note 2, at 283.

immunity.[6] Acknowledging that the test did not fit the present circumstances, the District Court incorrectly applied a multi-factor test from *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015). In *Crabbs*, this Court considered whether a sheriff could invoke his state's sovereign immunity. 786 F.3d at 429. The sheriff faced a §1983 action for forcing an acquitted defendant to submit a DNA check swap. *Id.* at 428. Because "law-enforcement officers sometimes wear multiple hats," this Court applied a multi-factor test to determine if the sheriff enjoyed immunity for his DNA-collection policy. *Id.* Applying these factors, this Court found that the sheriff acted as a county official. *Id.* This conclusion rested, in part, on the fact that "[t]he county, *not the State*, would satisfy any judgment against the sheriff in this case." *Id.* (emphasis added).

In *Crabbs*, this Court also specifically rejected the sheriff's argument that he was a state actor simply because state law controlled, generally, DNA-collection policies. *Id.* at 430. State law, however, did not *require* the sheriff to act as he did, so "the State's sovereign immunity offers him no refuge." *Id.* Rather than act in

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[6] Notably, "[t]he *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 288 (1997). Moreover, the *Ex Parte Young* doctrine "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal immunity, *he is not the State* for sovereign immunity purposes." *Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (emphasis added).

conformance with state law, the sheriff exercised his discretion when he applied his DNA-collection policy. *Id.* Like that sheriff, Davis also exercised discretion in implementing her "no marriages policy"—a policy not required by Kentucky law.

Accordingly, even under *Crabbs* and similar precedent, Davis acted as a county official. *See, e.g.*, *Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994) (where a defendant exercised discretion in enforcing commands of the state, he acted as county, not state, official). The District Court even acknowledged that several factors in this test pointed toward characterizing Davis as a county official. The District Court's analysis, however, was not necessary: Davis is a county official, and so it is her county office that must bear the burden of her actions.

In similar circumstances, courts routinely conclude that county officials are not considered officials for the state. For example, this Court concluded that the Hamilton County Coroner was an agent of Hamilton County, not Ohio, when he voluntary implemented a policy. *Brotherton v. Cleveland*, 173 F.3d 552, 565-66 (6th Cir. 1999). In that case, the Hamilton County Coroner chose to act unilaterally. "Rather than rotely enforce prescribed Ohio law, he voluntarily implemented a policy of corneal harvesting, and he chose the means of enforcing his policy." *Id.* at 566. Therefore, the Hamilton County Coroner "acted as a county, not state, official." *Id.* Like that coroner, Davis was not sued for actions she took on behalf of the state; she was sued for actions she took on behalf of the

Rowan County Clerk's Office. Unlike in cases in which courts find that a county official is acting as a state official, Davis was not simply complying with a state mandate that affords no discretion. Instead, she exercised her discretion, and she chose not to comply with the law established by Obergefell.

Any award against her, therefore, "must run against the County" office she holds. *Crane v. Texas*, 759 F.2d 412, 432 (5th Cir. 1985). In *Crane*, certain county officials were sued for their system of issuing certain warrants without an appropriate finding of probable cause. Id. at 414. The system was found to violate Texas law and fees were awarded to the prevailing parties. However, the fees could not been assessed against the state, because the county officials' actions were not taken on behalf of the state. *Id.* at 431-32. Fees were properly assessed against the county for the actions of the county officials, because "[t]he system they created and controlled violated Texas law; thus, it can scarcely be said to represent the official policy of the State of Texas." *Id.*

The same is true in this case. The official position of the Commonwealth of Kentucky—that county clerks were obligated to follow the law—was clear and was clearly communicated to Davis; it was Davis who chose not to follow the law as established in *Obergefell*. (Letter to County Clerks, R. 1-3, Page ID # 26). As

such, she cannot be considered a state official and any fees awarded against her run against her office as Rowan County Clerk.[7]

Regardless, the District Court erred by ignoring the factors relevant to the imposition of attorney's fees under § 1988. In order to prevail over a defendant for purposes of a fee award under § 1988, a plaintiff must "prove the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 110 (1992) (quotations and citation omitted). A plaintiff prevails over a defendant "if, and only if, [the judgment] affects the behavior of the defendant toward the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). As noted above, the "touchstone" of the inquiry under § 1988 is "the material alteration of the legal relationship of *the parties*." *Texas State Teachers Assn.*, 489 U.S. at 792-93. Here, to the extent the plaintiffs prevailed against any party it was against Davis as the Rowan County Clerk in her Official Capacity. This Court's injunction was expressly entered against Kim Davis in her Official Capacity as Rowan County Clerk. (Order Granting Preliminary Injunction, R. 43, Page ID # 1173). It follows that the unsuccessful party over which Plaintiffs prevailed is the Office of the Rowan County Clerk. Therefore, the Office of the Rowan County Clerk is responsible for Plaintiffs' fees.

[7] Furthermore, the Governor had no authority to order Davis to do anything, because The Governor does not possess supervisory authority over other elected constitutional officers. *See Brown v. Barkley*, 628 S.W.2d 616, 618 (Ky. 1982).

B. The District Court erred, as a matter of law, in assessing fees against the Commonwealth of Kentucky, because such fees should be obtained from the funds within Davis's control as Rowan County Clerk.

The Supreme Court has recognized that fee awards "should generally be obtained 'either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).'" *Hutto v. Finney*, 437 U.S. 678, 700 (1978) (quoting S. Rep. No. 94-1011, p. 5 (1976)). In *Hutto*, the Supreme Court analyzed the allocation of fees following an injunctive action against prison officials. The Supreme Court affirmed a fee award to be paid by the funds of the agency at issue, the Department of Correction, because "the Department of Correction is the entity intended by Congress to bear the burden of the counsel-fees award." *Id.* This same general rule must apply here, and any fee award must be obtained from the funds controlled by Davis as Rowan County Clerk.

Under Kentucky law, the county clerk's "acts are the acts of the county." *Ewing v. Hays*, 77 S.W.2d 946, 948 (Ky. 1934). In this case, Davis's acts certainly went no further than Rowan County, and were clearly "county" actions only. She was acting on behalf of the Rowan County Clerk's Office, the agency under her control. As discussed above, the District Court failed to apply the proper analysis to the issue before it: the imposition of attorney's fees under § 1988. Indeed, as made clear in *Graham*, such fees are to be imposed against the official entity that

was the unsuccessful party. 473 U.S. at 159. In other words, "it is clear that the logical place to look for recovery of fees is to the losing party -- the party legally responsible for relief on the merits." *Id.* at 164. In this case, that entity is the Rowan County Clerk's Office. That was the office targeted by Plaintiffs' claims, and it is that office that implemented the policy at issue here. It was the party responsible for any relief Plaintiffs received on the merits, because the Rowan County Clerk's Office was the party actually issuing marriage licenses in compliance with the District Court's preliminary injunction orders. As a result, any fee award must run against the funds of the Rowan County Clerk's Office.

This Court has approved the same conclusion before. In a similar case involving county officials and issues of religious expression, this Court approved of *fees assessed only against a Kentucky county*. *Granzeier v. Middleton*, 173 F.3d 568, 572 (6th Cir. 1999). In *Granzeier*, Kenton County's judge executive and other county officials were sued for closing the Kenton County Courthouse, including the county's fiscal, district, and circuit courts, on Good Friday. *Id.* at 571. Other defendants included officers and judges of the state courts with offices in the Kenton County Courthouse. *Id.* Among other things, the plaintiffs challenged a sign announcing the closure which contained an image of the crucifixion. *Id.* The deputy judge executive had made the sign "without the knowledge or authorization of any defendant." *Id.* The plaintiffs succeeded in

earning a judgement on the merits that enjoined against the defendants from posting overtly religious signs. *Id.* at 572. The judgment included an award of "appropriate attorney's fees" to the plaintiffs. *Id.* The state defendants "moved to amend the judgment to reflect that they are not responsible for any attorney's fees awarded to Plaintiffs," and the district court granted that motion. *Id. Fees were only assessed against the county. Id.* The amount of the fees also was reduced in proportional to the plaintiffs' limited success, which occurred early in the litigation before most fees were incurred. *Id.*

The same conclusion is required here. Like the state defendants in *Granzeier,* Third-Party Defendants must not be liable for any fees awarded. Like the state defendants in *Granzeier,* no actions of Third-Party Defendants were the subject of any injunction. Accordingly, like in *Granzeier,* only the entity against which the plaintiffs actually succeeded—the Rowan County Clerk's Office—can be liable for any award of fees. Indeed, the entity actually enforcing a challenged policy is properly liable for any award of fees, because "[f]ee awards against enforcement officials are run-of-the-mill occurrences." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 738 (1980) (finding that fees were properly assessed against the Virginia Supreme Court for its unconstitutional rule prohibiting certain advertising by attorneys) *superseded on other grounds by* 42 U.S.C. § 1983 (as amended). *See also Venuti v. Riordan*, 702 F.2d 6, 8 (1st Cir.

1983) (rejected a city's argument that the state be liable for a fee award because "civil rights action costs (including attorney's fees) are often assessed against defendants who enforce the laws instead of those who enact them."); *Clay v. Edward J. Fisher, Jr., M.D., Inc.*, 588 F. Supp. 1363, 1366 (S.D. Ohio 1984) ("We conclude, therefore, that it is not unfair to assess attorney's fees against [the county officials], rather than against the state."). Here, there is no dispute that Davis controlled the Rowan County Clerk's Office in its enforcement of her "no marriages policy." Therefore, that office must be liable for any fees awarded for its actions.

C. The District Court erred, as a matter of law, in assessing fees against the Commonwealth of Kentucky, because such an award is unjust under these circumstances.

Even if a party meets that burden and qualifies as a prevailing party, fees may not be awarded if "special circumstances would render such an award unjust." *Hensley*, 461 U.S. at 429. Here, there are special circumstances which render an award against the Commonwealth of Kentucky unjust. As the District Court noted, it is the Rowan County Clerk's Office which takes the lion's share of fees paid for marriage licenses. (Order, R. 43, Page ID # 1149). Those fees and others provided the Rowan County Clerk's Office with a surplus of $733,000 at the time Plaintiffs' claims arose. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 242-43). There is no dispute that it was the Rowan County Clerk's

Office that established its own "no marriage licenses" policy. And it is the Rowan County Clerk's Office which must be liable for any fees awarded related to that policy.

Among the purposes of § 1988(b) is deterring conduct that violates civil rights. *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). That purpose is not vindicated if the offending office—the Rowan County Clerk's Office—suffers no liability. Indeed, there is little to deter the Rowan County Clerk's Office from developing policies that violate the Kentucky or United States Constitutions. As the District Court noted, the Rowan County Clerk's Office has sufficient funds to satisfy the fees awarded for its actions. It would be unjust for the Rowan County Clerk's Office to keep those funds, including the fees collected for issuing marriage licenses after the District Court's preliminary injunctions.

In this case, the Office of the Governor informed Davis (and all other county clerks) of their responsibility to comply with the law within hours of the issuance of the decision in *Obergefell*.[8] In 119 of Kentucky's 120 counties, the county clerks did so. Only Davis refused to comply with the law as was her obligation

[8] Davis testified that she understood that, in the Governor's letter, county clerks "were instructed that Kentucky would recognize as valid all same-sex marriages performed in other states, and we were to start issuing licenses." (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 260).

and as required by the oath of office she took. The citizens of the Commonwealth of Kentucky should not have to collectively bear the financial responsibility for Davis' intransigence. The Office of the Rowan County Clerk has the funds to satisfy any award of attorney' fees should the propriety of the award be upheld.

It certainly would be unjust, under the circumstances, to place the burden for these fees on the Commonwealth of Kentucky—which stood directly adverse to Davis and her Rowan County Clerk's Office. It was the Rowan County Clerk's Office which Davis controlled. It was the Rowan County Clerk's Office which was the subject of the District Court's preliminary injunctions. To the extent any party must bear the cost of Davis's unlawful actions, it must be her Rowan County Clerk's Office.

Conclusion

The District Court erred, as a matter of law, in finding that Plaintiffs were entitled to any award, because Plaintiffs cannot qualify as "prevailing parties." For purposes of a fee award, "prevailing parties" are limited to litigants who achieve a material and judicially sanctioned change in the legal relationship of the parties to that litigation. While Plaintiffs obtained preliminary injunctions, these were vacated, and so Plaintiffs have no enforceable rulings on the merits of their claims. Under the standard applicable here, Plaintiffs have not prevailed. Any lasting relief gained by Plaintiffs came through the voluntary actions of the

Commonwealth of Kentucky—actions taken while the preliminary injunctions still were being challenged in this Court. Such voluntary conduct does not bear the judicial *imprimatur* necessary to support prevailing party status. This is because unlike a litigant who holds a final judgment, Plaintiffs possess no means of making their success permanent.

Even if Plaintiffs qualified as "prevailing parties," the District Court erred, as a matter of law, by finding the "Commonwealth of Kentucky" was responsible for the fees awarded to Plaintiffs. Such a finding was in error because it rested on the incorrect conclusion that Davis, as Rowan County Clerk, represented the state when she unilaterally opposed the law of the land as established by *Obergefell*. Given the direct conflict between her actions and the stated position of the Commonwealth of Kentucky, she cannot be considered to be acting as a state official in this context. Indeed, her policy was not to act all. The District Court reached its erroneous conclusion by incorrectly using a test inapplicable to a determination regarding fees. Even under the balance of that test's factors, Davis must be considered a county official—the way Kentucky law characterizes county clerks. In any event, her actions represented only her office, the Rowan County Clerk's Office. If any county or state agency must bear the consequences of her actions, it must be the Rowan County Clerk's Office, rather than the Commonwealth of Kentucky. It would be particularly unjust to award fees against

the Commonwealth of Kentucky, as a whole, when it was adverse to Davis at all relevant times. For these and all foregoing reasons stated above, this Court should reverse the award of attorneys' fees and costs entered by the District Court.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief complies with the type-face and type-volume limitations because it was produced using the Times New Roman 14-point typeface and contains 9,209 words as calculated through Microsoft Word.

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Addendum

Third-Party Defendants designate the following relevant district court documents, which are part of the District Court's electronic record:

Document Entry	Document Description	Page ID # Range
R. 1	Complaint	1-15
R. 1-3	Letter to County Clerks	26
R. 34	Third-Party Complaint	745-76
R. 21	Transcript of Preliminary Injunction Hearing on July 13, 2015	100-211
R. 26	Transcript of Preliminary Injunction Hearing on July 20, 2015	217-99
R. 43	Order Granting Preliminary Injunction	1146-73
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R. 75	Minute Entry Order	1558-89
R. 84	Status Report	1798-1800
R. 89	Order Lifting Contempt	1827-28
R. 92	Motion to Dismiss Filed September 8, 2015	1845-47
R. 92-1	Memorandum in Support of Motion to Dismiss Filed September 8, 2015	1848-70
R. 120	Motion to Enforce	2316
R. 155	Notice of Substitution	2591
R. 157	Motion to Dismiss filed on January 11, 2016	2605-07
R. 157-1	Memorandum in Support of Motion to Dismiss filed on January 11, 2016	2608-14
R. 157-2	Executive Order	2615-19
R. 157-3	Press Release	2621
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R. 171	Order Granting Third-Party Defendants' Motion to Dismiss Appeal	2680-82
R. 176	Status Report	2692
R. 179	Order Dismissing and Remanding	2698-99
R. 181	Vacating Order	2706-07
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R. 208	Motion to Amend	3004-05
R. 208-1	Memorandum in Support of Motion to Amend	3007-15
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R. 222	Second Fee Order	3072-85
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