No. 17-6404

IN THE 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 - Appellant
v.
ROWAN COUNTY, KENTUCKY
Defendant - Appellee

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 Parties/ Defendants - Appellees.

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

PRINCIPAL BRIEF OF APPELLANT KIM DAVIS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Defendant/Third Party/Plaintiff-Appellant, Kim Davis ("Davis"), states that she is an individual person. Thus, Davis is not a subsidiary or affiliate of a publicly owned corporation, nor is there any publicly owned corporation, not a party to the appeal, that has a financial interest in its outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendant/Third Party/Plaintiff-Appellant, Kim Davis ("Davis"), hereby requests oral argument because this case presents important issues of federal law concerning liability of elected state officials, and religious liberty accommodations, in the wake of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Moreover, the competing constitutional claims and defenses involved in this case significantly impact the societal costs of suits against public officials recognized by the Supreme Court in *Harlow v. Fitzgerald*: "The societal costs include the expenses of litigation, the diversion of official energy from pressing pubic issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. 800, 814 (1982).

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over Davis' appeal of the district court's final order awarding prevailing party attorney's fees to Plaintiffs. Davis timely filed her Notice of Appeal from the district court's order on November 22, 2017. (R.226, Not. Appeal, PgID.3095.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that Plaintiffs were prevailing parties for purposes of 42 U.S.C. § 1988, based entirely on vacated preliminary relief.

2. Whether the district court erred in concluding that no special circumstances render the award of attorney's fees to Plaintiffs unjust.

3. Whether the district court erred in concluding that no reduction to the lodestar fee amount was due based upon the limited results obtained by Plaintiffs in the litigation.

INTRODUCTION

In this continuation of the Kentucky marriage litigation, stemming from the Supreme Court's 2015 *Obergefell* decision, several points bear repeating. This litigation was never about whom a person may marry under Kentucky law, whether Kentucky must license the marriage of same-sex couples, or even whether Plaintiffs could obtain a Kentucky marriage license when they wanted one. Nor was the

litigation about a county clerk who wanted to re-litigate *Obergefell*, or to prevent Plaintiffs or any other couple from receiving a marriage license in Kentucky.

Rather, this litigation has always been about Plaintiffs' attempt to force an "all or nothing" choice between same-sex marriage on the one hand, and religious liberty on the other, with no regard whatsoever for any reasonable accommodation. By contrast, Davis always and only sought a simple accommodation of her religious conscience rights, which would provide for the issuance of marriage licenses to Plaintiffs and others through any of numerous available alternatives, and which would not coerce Davis to violate her conscience.

Davis obtained the accommodation she always sought, while Plaintiffs achieved only preliminary relief, which was vacated as moot due to a voluntary change in law by Kentucky state officials. Nonetheless, Plaintiffs moved for an award of prevailing party attorney's fees, and contrary to this Court's precedent, the district court granted the motion. The fee award should be reversed because Plaintiffs are not prevailing parties in this litigation.

STATEMENT OF THE CASE

A. Pre-*Obergefell* Kentucky marriage licenses required the name and authorization of the county clerk, and were available in all Kentucky counties regardless of county of residence.

Prior to *Obergefell*, Kentucky constitutionally and statutorily defined marriage as the union between one man and one woman. (Ky. Const. § 233A; Ky.

Rev. Stat. § 402.005.) The statutory marriage licensing scheme directed county clerks to issue Kentucky marriage licenses on "the form proscribed by the Department for Libraries and Archives [KDLA]" (KY. REV. STAT. § 402.100 (2015); R.34, Verified Third-Party Complaint ("VTC"), PgID.748), and further required that "[t]he form of marriage license prescribed in KRS 402.100 shall be uniform throughout this state." (KY. REV. STAT. § 402.110 (2015); R.34, VTC, PgID.748.) Adults could (and still can) obtain a Kentucky marriage license from the county clerk in any of Kentucky's 120 counties, **irrespective of their county of residence**. (KY. REV. STAT. § 402.080; R.34, VTC, PgID.748.[1])

The pre-*Obergefell* statutory marriage license form included a license and authorization to marry under the name and authority of the county clerk. (KY. REV. STAT. § 402.100(1)(a) (2015) (requiring form of "marriage license which provides . . . [a]n authorization statement of the county clerk issuing the license"); R.34, VTC, PgID.748-749.) The statutory form also included a marriage certificate which, upon solemnization, was to be returned to the county clerk's office with "**the name of the county clerk under whose authority the license was issued** . . . ." (KY. REV. STAT. § 402.100(3)(a) (2015) (emphasis added); R.34, VTC, PgID.748-

[1] Because some counties have multiple branch offices, there are approximately **137 marriage licensing locations** throughout Kentucky. (R.34, VTC, PgID.748.)

749.) Kentucky marriage licenses are valid for only thirty days. (Ky. Rev. Stat. § 402.105; R.193-1, Decl. Kim Davis (Oct. 27, 2016), PgID.2860.)

B. Then-Governor Beshear changed the Kentucky marriage license form to accommodate same-sex couples in response to *Obergefell*, but refused to accommodate the religious beliefs of any county clerk.

On June 26, 2015, moments after the Supreme Court announced its decision in *Obergefell*, then-Governor Steven Beshear issued a directive to all Kentucky county clerks (the "SSM Mandate") to "recognize as valid all same sex marriages performed in other states and in Kentucky." (R.1-3, SSM Mandate, PgID.26.) In this SSM Mandate, Governor Beshear further commanded that "Kentucky . . . must license and recognize the marriages of same-sex couples," and he ordered the creation and distribution of new marriage license forms to accommodate same-sex couples. (*Id.*) The new form retained the requirement to issue the license and authorize the marriage under the name and authority of the county clerk. (R.34, VTC, PgID.753-754; *see also* R.34-1, Pre-*Obergefell* Marriage License, PgID.778; R.34-4, Post-*Obergefell* Marriage License, PgID.784.)

Following Governor Beshear's decree, county clerks across Kentucky began issuing the SSM Mandate licenses, with almost no exception. (R.34, VTC, PgID.754.) According to Governor Beshear, "government officials in Kentucky . . . must recognize same-sex marriages as valid and allow them to take place," and "[s]ame-sex couples are now being married in Kentucky and such

marriages from other states are now being recognized under Kentucky law." (*Id.*) In these same pronouncements, Governor Beshear stated that the "overwhelming majority of county clerks" are "iss[uing] marriage licenses regardless of gender" and only "two or three" county clerks (of 120) were "refusing" to issue such licenses due to their "personal beliefs" and "personal feelings." (*Id.*) In subsequent pronouncements, Governor Beshear maintained that county clerks must issue the SSM Mandate licenses despite their "own personal beliefs." (*Id.*) For Governor Beshear, the only options available to county clerks who had a conscientious objection to authorizing same sex marriages and issuing the SSM Mandate licenses were (1) issue the licenses against their "personal convictions," or (2) resign. (*Id.* at PgID.754, 757.)

C. Davis' "no marriage licenses" policy treated all couples equally and was in response to Governor Beshear's refusal to accommodate Davis' sincerely-held religious belief that she cannot authorize and endorse the marriage of same-sex couples.

Davis has served as the elected county clerk for Rowan County, Kentucky since January 2015. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.240; R.34, VTC, PgID.746-747.) Before taking office as the county clerk in January 2015, she worked at the Rowan County clerk's office as a deputy clerk for nearly thirty years. (*Id.*) Davis is a Christian who possesses a sincerely-held religious belief that marriage is a union between one man and one woman, only. (R.26, Prelim.

Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.245-248; R.34, VTC, PgID.746-47, 751.) Davis cannot authorize the marriage of same-sex couples because it violates her core religious beliefs: In her sincere belief, the endorsement of her name and authorization equates to approval and agreement. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.254-258, 277-278, 283, 291, 296; R.34, VTC, PgID.751.)

On June 27, 2015, following the SSM Mandate, Davis obeyed her conscience and discontinued authorizing all marriage licenses. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.249; R.34, VTC, PgID.755.) Under this "no marriage licenses" policy, as named by the district court, Davis withdrew her authorization to issue any marriage license in her name to any couple, same-sex or different-sex, expressly to avoid disparate treatment of any couple and to ensure that all individuals and couples were treated the same. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.259, 278, 283, 286; R.34, VTC, PgID.755; R.43, Mem. Op. and Order (Aug. 12, 2015), PgID.1146.)

Davis sent a letter appealing to Governor Beshear to uphold her religious conscience rights, and to call a special session of the Kentucky General Assembly to legislatively address the conflict between her and other clerks' religious beliefs and the SSM Mandate, but received no response. (R.34, VTC, PgID.755; *see also* R.34-5, Ltr. to Governor Beshear, PgID.788.)

D. Despite the availability of marriage licenses in all surrounding counties and throughout Kentucky, Plaintiffs sued to force Davis to violate her conscience for any Plaintiff or other person who wanted a Kentucky marriage license under Davis' name.

On July 2, 2015, less than one week after Governor Beshear issued his SSM Mandate, the eight Plaintiffs (four couples; two same-sex and two different-sex) filed this lawsuit alleging federal constitutional claims and demanding the issuance of new-form Kentucky marriage licenses to them in Rowan County, **under Kim Davis' name and authority**. (R.1, Compl., PgID.1-2.) Plaintiffs filed the action on behalf of themselves and "a putative class of individuals who are qualified to marry and who intend to seek a marriage license from the Rowan County Clerk." (*Id.*) On behalf of themselves, Plaintiffs sought preliminary and permanent injunctive relief compelling Davis to issue them marriage licenses, compensatory and punitive damages from Davis, and damages from Rowan County. *(Id.*) On behalf of the putative class, Plaintiffs sought a declaration that Davis' discontinuance of marriage licenses violated their constitutional rights, and preliminary and permanent injunctive relief barring Davis' actions. (*Id.*)

As support for their claims and injunctive relief, Plaintiffs pointed to the SSM Mandate. (R.1, Compl., PgID.7-8 (referring to the June 26, 2015 "directive from the Chief Executive [Governor Beshear]" that was sent to "all of Kentucky's County

Clerks"); R.2-1, Mem. Supp. Pls.' Mot. Prelim. Inj., PgID.42 (contending that Davis' refusal to act "is contrary to the direct admonition of the Governor").)

In their motion for preliminary injunction, "Named Plaintiffs" moved to enjoin Davis "from enforcing the challenged policy of refusing to issue marriage licenses against them," (R.2, Pls.' Mot. Prelim. Inj., PgID.34), and sought to enjoin Davis in her official capacity "from enforcing the policy of refusing to issue marriage licenses to **any future marriage license applications submitted by the Named Plaintiffs**." (R.2-2, Proposed Prelim. Inj. Order, PgID.48). Within less than twenty days after the complaint was filed, and before any discovery, the district court held evidentiary hearings on Plaintiffs' motion for preliminary injunction in Ashland and Covington. (R.21, Prelim. Inj. Hr'g (July 13, 2015); R.26, Prelim. Inj. Hr'g (July 20, 2015).). The first hearing in Ashland occurred before Davis was even served with Plaintiffs' Complaint. (R.21, Prelim. Inj. Hr'g (July 13, 2015), PgID.105-06, 117-122; R.10, Order (July 13, 2015), PgID.77-78.) The district court designated this fundamental jurisdictional deficiency as mere "roadblocks to getting to the merits" and commenced taking the record testimony of multiple Plaintiffs,[2] while summarily denying a motion to terminate the hearing until the court acquired jurisdiction over

[2] Neither member of the alleged couple comprising Plaintiffs Shantel Burke and Stephen Napier testified.

Davis by service of process. (R.21, Prelim. Inj. Hr'g (July 13, 2015), PgID.117, 119, 122-147; R.10, Order (July 13, 2015), PgID.77-78.)

Evidence adduced at the preliminary injunction hearing included that Rowan County is bordered by seven counties, and the clerks' offices in these counties are all within 30-45 minutes from the Rowan County clerk's office. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.269.) More than ten other clerks' offices are within a one-hour drive of the Rowan County clerk's office, and these counties were issuing marriage licenses, along with the two counties where the preliminary injunction hearings were held. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.269-270.) Plaintiffs admitted that they never even attempted to obtain a license in any other county, despite the widespread availability of such licenses, and even though Plaintiffs had the economic means and no physical handicap preventing such travel. (R.21, Prelim. Inj. Hr'g (July 13, 2015), Plaintiffs' Testimony, PgID.123, 127-128, 130, 133, 136, 140, 146-147.) In fact, no Plaintiff attempted to obtain a marriage license in Rowan County until after becoming aware of Davis' religious objections to same-sex marriage. (*Id.* at PgID.124-127, 130, 134-135, 142, 146-147.)

E. Davis sued Governor Beshear and moved for a preliminary injunction to obtain a simple accommodation of her religious conscience rights by providing for Kentucky to issue marriage licenses to Plaintiffs through any of numerous available alternatives which would not coerce Davis to violate her conscience.

Davis filed a verified third-party complaint on August 4, 2015 against Governor Beshear, the issuer of the SSM Mandate, and Wayne Onkst the State Librarian and Commissioner of KDLA (collectively, the "Beshear Defendants"). (R.34, VTC, PgID.745-776.) Davis' Third-Party Complaint, sought, *inter alia*, declaratory and injunctive relief under Kentucky RFRA, the First and Fourteenth Amendments, and various provisions of the Kentucky Constitution. (*Id.* at PgID.774.) Specifically, Davis sought from the Beshear Defendants a simple accommodation of her religious conscience rights, requiring them to provide for the issuance of marriage licenses to Plaintiffs through any of numerous available alternatives which would not coerce Davis to violate her conscience. (*Id.* at PgID.760-774.) Davis additionally sought to impose or transfer to the Beshear Defendants any relief obtained against her by Plaintiffs. (*Id.*)

Davis also filed a motion for preliminary injunction to enjoin enforcement of the SSM Mandate **as to her**, and obtain an exemption "from having to authorize the issuance of Kentucky marriage licenses." (R.39-7, Proposed Prelim. Inj. Order, PgID.1129-1130.) The grounds on which Davis sought preliminary injunctive relief

against the Beshear Defendants were necessarily intertwined with the grounds on which she opposed Plaintiffs' motion for preliminary injunction against her. (R.29, Resp. Pls.' Mot. Prelim. Inj., PgID.318-366; R.39-1, Mem. Supp. Mot. Prelim. Inj., PgID.828-876.)

F. The district court granted Plaintiffs' motion for preliminary injunction against Davis without considering Davis' necessarily intertwined motion for preliminary injunction against Governor Beshear.

Rather than considering Davis' and Plaintiffs' respective motions for preliminary injunctive relief together, and allowing Davis to develop a further evidentiary record on her own request for individual religious accommodation from the SSM Mandate, the district court granted Plaintiffs' motion for preliminary injunctive relief against Davis on August 12, 2015. (R.43, Mem. Op. and Order ("Preliminary Injunction"), PgID.1146-1173.) The Preliminary Injunction enjoined Davis in her official capacity "from applying her 'no marriage licenses' policy **to future marriage license requests submitted by Plaintiffs**." (R.43, Prelim. Inj., PgID.1173 (emphasis added).) The district court recognized that "this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence," thereby conceding that Davis' individual religious rights were being "threaten[ed]" and "infringe[d]" by Plaintiffs' demands for her approval of their proposed unions, and by the SSM Mandate to provide exactly that or resign. (*Id.* at PgID.1147.) Notwithstanding, the district court granted the Preliminary Injunction

without fully considering Davis' "further develop[ed]" request for injunctive relief against the Beshear Defendants. (*Id.* at PgID.1164.)

According to the district court, even though Plaintiffs indisputably could have obtained a Kentucky marriage license from more than 130 locations, including all nearby and surrounding counties, Plaintiffs were likely to succeed on the merits of their purported right to marry claims under the Fourteenth Amendment of the United States Constitution and were being irreparably harmed by the effective closure of the Rowan County clerk's office for the issuance of marriage licenses. (*Id.* at PgID.1154-1161.) The district court acknowledged that "Plaintiffs can obtain marriage licenses from one of the surrounding counties," that "Plaintiffs have the means to travel to any one of these counties," and that Plaintiffs "are not totally precluded from marrying in Kentucky." (*Id.* at PgID.1148, 1156.) The court nonetheless concluded that Plaintiffs were substantially harmed by the "no marriage licenses" policy because Plaintiffs "strongly prefer to have their licenses issued in Rowan County because they have significant ties to that community."[3] (*Id.* at PgID.1149, 1157.) The district court further concluded that Plaintiffs' right to marry was directly and substantially burdened because "[t]he state has long entrusted

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[3] **Without any evidentiary record**, the district court **speculated** that for other individuals "it may be more than a preference," and that the "no marriage licenses" policy "significantly discourages" "other Rowan County residents" not before the court from exercising their right to marry. (R.43, Prelim. Inj., PgID.1157, 1159.)

county clerks with the task of issuing marriage licenses," and "[i]t does not seem unreasonable for Plaintiffs, as Rowan County voters, to expect their elected official to perform her statutorily assigned duties." (*Id.* at PgID.1159.)

The district court rejected Davis' claims and defenses under the Kentucky Religious Freedom Restoration Act ("Kentucky RFRA"), KY. REV. STAT. § 446.350, and the First Amendment of the United States Constitution, and similar Kentucky Constitution provisions. (*Id.* at PgID.1161-1173.) In rejecting Davis' religious liberty claims in favor of Plaintiffs' preferences and convenience, the district court incorrectly concluded that the Kentucky marriage license form "does not require the county clerk to condone or endorse same-sex marriage" and instead merely "asks the county clerk to certify that the information provided is accurate and that the couple is qualified to marry under Kentucky law." (*Id.* at PgID.1167, 1170, 1172.)

Despite acknowledging that the sincerity of Davis' religious beliefs was not disputed, the district court found that the burden on Davis' religious freedom is "more slight," because she "remains free to practice her Apostolic Christian beliefs" since she "may continue to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County Jail," and "believe that marriage is a union between one man and one woman." (*Id.* at PgID.1172.) According to the district court, "her religious convictions cannot excuse her" from authorizing marriages that violate her conscience and issuing the SSM Mandate licenses. (*Id.* at

PgID.1172-1173.) The district court also speculated about religious accommodation requests that might be made at unspecified times in the future by other county clerks not before the court, and pointed to these hypotheticals as grounds for denial of Davis' particular claims based upon her undisputed, sincerely-held religious beliefs.[4] (*Id.* at PgID.1157.) Davis immediately appealed the Preliminary Injunction to this Court. (R.44, Not. Appeal, PgID.1174 (6th Cir. Case No. 15-5880).)

Davis also moved to stay the Preliminary Injunction pending appeal. (R.45, Mot. Stay Pending Appeal, PgID.1207-1233.) In denying this stay request for the same reasons it granted the Preliminary Injunction, the district court nonetheless recognized (again) that "constitutional issues" are involved in this dispute and reiterated that a constitutional "debate" is present in this case, and therefore granted a temporary stay instead. (R.52, Order (Aug. 17, 2015), PgID.1264-1265.)

The district court also entered an order staying any consideration of Davis' motion to dismiss Plaintiffs' Complaint and motion for preliminary injunction against the Beshear Defendants, "pending review" of the Preliminary Injunction on the merits by this Court. (R.58, Order (Aug. 25, 2015), PgID.1289.) This order

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[4] During Davis's entire tenure in the Rowan County Clerk's office prior to *Obergefell*, spanning nearly thirty years, neither Davis, any deputy clerk, nor Davis's predecessor in office ever asserted a religious objection to performing any function of the clerk's office. (R.26, Prelim. Inj. Hr'g (July 20, 2015), Davis Testimony, PgID.267-268, 279-280; R.34, VTC, PgID.755.)

effectively denied Davis' request for injunctive relief against the Beshear Defendants, and Davis appealed the order to this Court. (R.66, Not. Appeal, PgID.1471 (6th Cir. Case No. 15-5961).)

G. The district court imposed a class-wide expansion of the Preliminary Injunction while it was on appeal and without granting or even hearing Plaintiffs' motion for class certification.

On September 1, 2015—three weeks after entry of the Preliminary Injunction, and while it was **already on appeal to this Court**—Plaintiffs filed a motion to "clarify" the Preliminary Injunction by expanding it to a class of persons not already covered. (R.68, Pls.' Mot. "Clarify" Prelim. Inj., PgID.1488-1495.) The scope of the Preliminary Injunction already matched the scope Plaintiffs requested (*i.e.*, coercion of Davis to issue "**any future marriage license applications submitted by the Named Plaintiffs**." (R.2-2, Proposed Prelim. Inj. Order, PgID.48 (emphasis added); R.2, Pls.' Mot. Prelim. Inj., PgID.34; R.43, Prelim. Inj., PgID.1173.) But Plaintiffs' new motion was seeking an order holding that the Preliminary Injunction "**applies not only to future marriage license requests submitted by the four named Plaintiff couples in this action, but also to requests submitted by other individuals who are legally eligible to marry in Kentucky**." (*Id.* at PgID.1488 (emphasis added).) Thus, through "clarification," Plaintiffs actually sought to convert the Preliminary Injunction from being limited and personal to them (by their own request), into a class-wide preliminary injunction, even though: (1) they did not

previously request a class-wide injunction (R.2-2, Proposed Prelim. Inj. Order, PgID.48); (2) they presented no actual evidence regarding the purported "other members of the putative class" (R.68, Pls.' Mot. "Clarify" Prelim. Inj., PgID.1489); and (3) briefing on their actual motion for class certification filed on August 2, 2015 was stayed on August 25, 2015, after **Plaintiffs did not oppose** Davis' request for the stay. (R.57, Virtual Order (Aug. 25, 2015) (no PgID)).

On September 3, 2015, the district court commenced a hearing it had noticed exclusively for Plaintiffs' motion to hold Davis in contempt for not issuing a marriage license to one Plaintiff couple. (R.67, Pls.' Mot. Hold Davis in Contempt, PgID.1477, 1481-82; R.69, Order (Sept. 1, 2015), PgID.1496.) Before taking up the contempt motion, however, and without any advance notice to Davis, the district court called up Plaintiffs' motion to "clarify" the Preliminary Injunction that had been filed just two days before. (R.78, Contempt Hr'g (Sept. 3, 2015), PgID.1570-1573.) Davis objected to proceeding on the motion to "clarify" due to lack of fair notice, and due to the district court's lack of jurisdiction to expand the Preliminary Injunction because it was already on appeal to this Court. (*Id.* at PgID.1573-1580.)

The district court acknowledged that the motion to "clarify" was not noticed for hearing, and that that the so-called "clarification" sought by Plaintiffs was, in fact, to add relief to the Preliminary Injunction which was not sought by Plaintiffs in their motion for preliminary injunction. (*Id.* at PgID.1571, 1578 ("**I recognize**

they did not request it in the original motion." (emphasis added)).) Nonetheless, over Davis' objection to proceeding without notice, and without taking any evidence to support class-wide relief, the district court granted the expansion of the Preliminary Injunction.[5] (*Id.* at PgID.1580-1581; R.74, Order (Sept. 3, 2015), PgID.1557.) As expanded, the Preliminary Injunction applied "to future marriage license requests submitted by Plaintiffs or by other individuals who are legally eligible to marry in Kentucky." (R.74, Order (Sept. 3, 2015), PgID.1557.) Davis appealed the order expanding the Preliminary Injunction to this Court. (R.82, Not. Appeal, PgID.1785 (6th Cir. Case No. 15-5880).)

On September 18, 2015, Plaintiffs attempted to bolster the class-expanded Preliminary Injunction by filing a motion to reopen briefing and expedite consideration of their class certification motion. (R.115, Pls.' Mot. Reopen Class Cert. Br'g, PgID.2296.) The district court denied the motion, acknowledging that its "clarification"—*i.e.*, expanding the Preliminary Injunction to apply to the class of "*any couples* who are legally eligible to marry in Kentucky"—"already" meant there was "no need to reopen briefing on this issue ...." (R.139, Order (Oct. 26, 2015), PgID.2530.)

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[5] Remarkably, the district court admits in the Fee Order that it granted a "class-wide" injunction without ever granting class certification. (R.206, Fee Order (July 21, 2017), PgID.2957 n.12.)

H. The district court ordered Davis jailed for not issuing a marriage license to one Plaintiff couple in violation of her conscience, but then accepted Davis' self-effected accommodation which was also ratified by the Governor and the Attorney General.

At the September 3, 2015 hearing on Plaintiffs' contempt motion, the district court held Davis in contempt for violating the Preliminary Injunction and committed her to federal custody. (R.78, Contempt Hr'g (Sept. 3, 2015), PgID.1651-1662; R.75, Min. Entry Order (Sept. 3, 2015, "Contempt Order"), PgID.1558-59.) The condition for Davis' release was her compliance with the Preliminary Injunction. (R.78, Contempt Hr'g (Sept. 3, 2015), PgID.1661-1662; R.75, Contempt Order, PgID.1559.)

The district court then questioned Davis' deputy clerks as to whether each of them would issue marriage licenses without Davis' authorization. (R.78, Contempt Hr'g (Sept. 3, 2015), PgID.1667-1736.) The deputy clerks who testified stated that they would issue the licenses rather than face jail time, notwithstanding the religious objections stated by some of them. (*Id.*) The district court did not determine whether the marriage licenses the deputies agreed to issue without Davis' authorization were valid under Kentucky law. (*Id.* at PgID.1724 (explaining licenses "may not be valid under Kentucky law"), 1728 ("I'm not saying it is or it isn't. I haven't looked into the point. I'm trying to get compliance with my order."), 1731-32.) Davis appealed

the Contempt Order to this Court. (R.83, Not. Appeal, PgID.1791 (6th Cir. Case No. 15-5978).)

On September 8, 2015, the sixth day of Davis' incarceration, Plaintiffs filed a status report showing the Court that six of eight Plaintiffs had received marriage licenses from the deputy clerks.[6] (R.84, Status Report, PgID.1798-1800.) With Davis in jail, not having given her authorization to issue licenses, the deputy clerks altered the marriage licenses to replace the name "KIM DAVIS" with "ROWAN COUNTY." (R.84-1, Plaintiffs' Marriage Licenses, PgID.1801-1804.)

Following the status report, the district court lifted its prior contempt sanction and ordered Davis released, stating that the Court was "satisfied that the Rowan County Clerk's Office is fulfilling its obligation to issue marriage licenses" under the Preliminary Injunction, and that the deputy clerks "have complied with the Court's Order," despite the "alterations" to the marriage licenses. (R.89, Order (Sept. 8, 2015), PgID.1827-1828.) The release order further commanded that "Davis shall not interfere in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses" to "all legally eligible couples" on pain of new sanctions.

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[6] The status report showed that three of the four Plaintiff couples had received marriage licenses. (*Id.*) But only two of those couples would use their licenses to obtain legal marriages. (*Infra*, Stmt. of the Case, § M.) The fourth (alleged) couple, Plaintiffs Burke and Napier, never sought a marriage license, and did not even testify at the preliminary injunction hearings. (*Id.*)

(*Id.* at PgID.1828.) The order also required the deputy clerks to file status reports with the district court every fourteen days. (*Id.* at PgID.1828; *see also* R.130, Order (Oct. 6, 2015), PgID.2446 (extending deputy clerk status reports to every thirty days).)

On September 14, 2015, Davis returned to work at the Rowan County clerk's office. (R.133, Resp. Opp'n to Pls.' Mot. Enforce Orders, PgID.2478, 2487.) On that day, she provided a public statement regarding the issuance of marriage licenses in Rowan County. (*Id.* at PgID.2490 n.4 (citing news webpage with linked video of public statement), 2491 n.5 (same).) Davis explained that she would not interfere with her deputy clerks' issuance of marriage licenses, but that the licenses would be further modified to accommodate her sincerely-held religious beliefs by clarifying the omission of her name and authority. (*Id.*) Immediately that same day, the Kentucky Governor and Kentucky Attorney General both inspected the new licenses and publicly stated that they were valid and will be recognized as valid by Kentucky. (R.132, Resp. Pls.' Mot. Reopen Class Cert. Br'g, PgID.2456, 2458-2465; R.133, Resp. Pls.' Mot. Enforce, PgID.2484, 2487-2495.)

From Davis' return to work until the incoming Governor Matt Bevin issued his Executive Order 2015-048 Relating to the Commonwealth's Marriage License (*see infra*, Stmt. of the Case, § J), these licenses deemed valid by the highest elected officials in Kentucky, and which accommodated Davis' sincerely-held religious

beliefs, were issued in Rowan County by deputy clerks to lawfully eligible couples without any interference or interruption. (Deputy Clerk Status Reports, R.114, 116-19, 122, 125-29, 131; R.132, Resp. Pls.' Mot. Reopen Class Cert. Br'g, PgID.2456, 2458, 2460, 2464-2465; R.133, Resp. Pls.' Mot. Enforce, PgID.2487, 2490, 2494-2495.)

I. Plaintiffs demanded that the district court "enforce" the Preliminary Injunction by revoking Davis' accommodation which was allowing marriage licenses to be issued and which the court and Kentucky's Governor and Attorney General had approved.

Plaintiffs filed a motion to "enforce" the Preliminary Injunction on September 21, 2015. (R.120, Pls.' Mot. Enforce, PgID.2312-2328.) In their motion, Plaintiffs insisted the Rowan County Clerk's Office was not in compliance with the Preliminary Injunction. (*Id.* at PgID.2313.) Plaintiffs alleged that Davis had "obstruct[ed]" and "significantly interfere[d]" with the process for issuing marriage licenses in Rowan County upon her return to the office on September 14, 2015. (*Id.* at PgID.2316-2317, 2319.) Plaintiffs still further alleged that Davis has "so materially altered" marriage licenses that "they create a two-tier system of marriage licenses throughout the state," and these so-called "adulterated marriage licenses received by Rowan County couples will effectively feature a stamp of animus against the LGBT community," absent intervention by the Court. (Id. at PgID.2319.)

Plaintiffs asked the Court to "expressly direct Defendant Davis to refrain from interfering with the Deputy Clerk's issuance of marriage licenses in the same form or manner as those that were issued on or before September 8, 2015" and to provide notice to Davis that "any violation of this Order will result in civil sanctions, including but not limited to (a) the placement of the Rowan County Clerk's Office into a receivership for the limited purposes of issuing marriage licenses, and (b) the imposition of civil monetary fines as appropriate and necessary to coerce Davis' compliance with this Court's Order." (*Id.* at PgID.2313, 2321.)

With respect to the deputy clerks, Plaintiffs asked this Court to direct them to "issue marriage licenses in the same form and manner as those that were issued on or before September 8, 2015," to "disregard any instruction or order from Defendant Kim Davis that would require them to issue any marriage license in a form or manner other than the form and manner of licenses that were issued on or before September 8, 2015," to continue to file status reports, and to "re-issue, *nunc pro tunc*, any marriage licenses that have been issued since September 14, 2015, in the same form or manner as those that were issued on or before September 8, 2015." (*Id.* at PgID.2312-2313; *see also id.* at PgID.2320.)

The Court denied Plaintiffs' motion to "enforce" the Preliminary Injunction in an Order dated February 9, 2016, without ordering Davis to reissue licenses in the form demanded by Plaintiffs, leaving in place the self-effected accommodation for

Davis' religious beliefs which had been ratified by the Governor and Attorney General. (R.161, Order (Feb. 9, 2016), PgID.2657-59.)

J. Incoming Governor Matt Bevin issued an Executive Order to change Governor Beshear's SSM Mandate form statewide, removing a county clerk's name and authorization from the marriage licensing process and standardizing the accommodation effected by Davis.

On December 22, 2015, incoming Governor Matt Bevin issued Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form (the "Executive Order"). (R.156-1, Executive Order, PgID.2601.) The Executive Order officially acknowledged the Commonwealth's position regarding the application of the Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350 ("Kentucky RFRA"), to the post-*Obergefell* issuance of Kentucky marriage licenses by county clerks like Davis:

> **WHEREAS**, the issuance of marriage licenses on the form currently prescribed by [the SSM Mandate] creates a substantial burden on the freedom of religion of some County Clerks and employees of their offices because the current form bears the name of the issuing County Clerk, and some County Clerks and their employees sincerely believe that the presence of their name on the form implies their personal endorsement of, and participation in, same-sex marriage, which conflicts with their sincerely held religious beliefs; and
>
> **WHEREAS**, [Kentucky RFRA] requires use of the least restrictive means available to carry out compelling governmental interests, and there are less restrictive means available to further the governmental interest of issuing

> marriage licenses to all applicants who qualify than the form that is currently being used; and
>
> **WHEREAS**, there is no compelling governmental interest, particularly under the heightened "clear and convincing evidence" standard required by [Kentucky RFRA], necessitating that the name and signature of County Clerks be present on the marriage license form used in the Commonwealth; and
>
> **WHEREAS**, [the Commonwealth] can readily prescribe a different form that reasonably accommodates the interests protected by [Kentucky RFRA], while at the same time complying with the United States Constitution . . . without substantially burdening the free exercise of religion by those County Clerks and their employees who hold sincerely-held religious beliefs that conflict with same-sex marriage.

(R.156-1, Executive Order, PgID.2602.)

Governor Bevin, pursuant to the authority vested in him by Section 69 of the Kentucky Constitution and the Kentucky RFRA, then ordered and directed that the Commonwealth "shall forthwith create, prescribe and publish to all County Clerks in the Commonwealth a marriage license form substantially identical to the form attached hereto, henceforth to be used by the offices of all County Clerks in the

Commonwealth."[7] (R.156-1, Executive Order, PgID.2601-04.) The Executive Order license form removed the requirements of the SSM Mandate and prior form for inclusion of the county clerk's name and authorization. (*Id.* at PgID.2604.) The Executive Order standardized across the state the accommodation effected by Davis.

K. The Kentucky General Assembly unanimously passed SB 216 to codify and make permanent the marriage license accommodation Davis sought from the beginning of this litigation.

On July 14, 2016, after unanimous passage by the Kentucky General Assembly, Senate Bill 216 ("SB 216") took effect, permanently modifying Kentucky law regarding the issuance and authorization of marriage licenses beyond the Executive Order. SB 216 expressly modified the Kentucky statutory marriage licensing scheme to remove entirely a County Clerk's name, personal identifiers, and authorization from any license.[8] Thus, SB 216 provided through a permanent

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[7] At the September 3, 2015 contempt hearing, even though the district court had refused to consider Davis' motion for preliminary injunction, the court nonetheless expressed hope for a legislative or executive accommodation of the kind granted by Governor Bevin in the Executive Order: "I recognize, and I mentioned this when we first came out earlier this morning, that the legislative and executive branches do have the ability to make changes. And those changes may be beneficial to everyone. Hopefully, changes are made." (R.78, Contempt Hr'g (Sept. 3, 2015), PgID.1658:5-9.) "If legislative **or executive remedies** . . . come to fruition, as I stated, better for everyone." (*Id.* at PgID.1659:3-5 (emphasis added).)

[8] SB 216 was signed into law on April 13, 2016 and amends Ky. Rev. Stat. §§ 402.100, 110. *See* 2016 Kentucky Laws Ch. 132 (SB 216), General Assembly Reg. Sess. (Ky. 2016).

change in the law **the very religious accommodation Davis sought from the beginning of this litigation**, and obtained temporarily—first by the ratification of Davis' post-incarceration alterations to the marriage license form by the Kentucky Governor and Attorney General, and second by the Executive Order.

L. This Court vacated the Preliminary Injunction, and the district court dismissed the litigation, because Kentucky's voluntary passage of SB 216 finally mooted Plaintiffs' injunctive relief claims.

The enactment and implementation of SB 216 rendered moot Davis' appeal from the Preliminary Injunction. Accordingly, this Court dismissed the related appeals and directed the district court to **vacate the Preliminary Injunction** on remand. (R.179, Order (6th Cir. July 13, 2016), PgID.2698-99; R.180, Mandate (6th Cir. Aug. 4, 2016), PgID.2703.) The district court subsequently vacated the Preliminary Injunction (R.181, Order (Aug. 18, 2016)), and **additionally dismissed Plaintiffs' remaining claims**, comprising Plaintiffs' individual claims for permanent injunctive relief and compensatory and punitive damages, and putative class claims for declaratory and permanent injunctive relief. (R.182, Order (*In Re: Ashland Civil Actions*, Aug. 18, 2016), PgID.2708-2710.) **Plaintiffs did not appeal the dismissal of their damages and class claims**.

M. Only half of the Plaintiffs actually married on marriage licenses obtained while the Preliminary Injunction was in effect.

Despite representing to the district court their need for preliminary injunctive relief to coerce Davis' issuance of Kentucky marriage licenses to them, leading to Davis' incarceration for refusing to violate her conscience, only **half** of the Plaintiffs sought legal marriage in Rowan County after entry of the Preliminary Injunction. Four of the eight Plaintiffs legally married on licenses issued in Rowan County. (R.183-1, Mem. Supp. Pls.' Mot. Award Att'ys' Fees and Costs, PgID.2714, 2722 n.4.) The other four, however, have never legally married on a marriage license issued in Rowan County. Plaintiffs Burke and Napier—who never testified at the preliminary injunction hearings—did not attempt to join the other Plaintiffs in even seeking a license in Rowan County while Davis was incarcerated, and did not subsequently seek a license in Rowan County. (R.46, Pls.' Resp. Mot. Stay Prelim. Inj., PgID.1235 n.1; R.84, Status Report, PgID.1798; R.193-1, Decl. Kim Davis (Oct. 27, 2016), PgID.2860.) Plaintiffs Fernandez and Holloway went through the motions of obtaining a marriage license in Rowan County while Davis was incarcerated (R.84, Status Report, PgID.1798), but they did not seek marriage on that license before its thirty-day expiration, and have not sought a license since. (R.193-1, Decl. Kim Davis (Oct. 27, 2016), PgID.2860.)

N. The related and sometimes consolidated litigation against Davis in the *Ermold* and *Yates* cases continues in the district court and in this Court.

In addition to Plaintiffs herein, two other couples sued Davis in the same district court, in separate suits, asserting essentially the same claims as Plaintiffs except for injunctive relief. Both of the other cases were assigned to the same district court judge as the instant case, Judge David L. Bunning. The cases are *Ermold v. Davis*, E.D. Ky. Case No. 15-cv-00046, and *Yates v. Davis*, E.D. Ky. Case No. 15-cv-00062. Although the district court did not formally consolidate the instant case with *Ermold* and *Yates*, the district court treated the cases as consolidated for some purposes, including dismissal. (R.182, Order (*In Re: Ashland Civil Actions*, Aug. 18, 2016), PgID.2708-2710.) Furthermore, the district court expressly considered the *Ermold* and *Yates* plaintiffs "companion cases" when it expanded the Preliminary Injunction to cover not only Plaintiffs herein, but all persons who may seek a marriage license in Rowan County: "There are a couple of companion cases, [*Ermold*, 15-]46 and [*Yates*, 15-]49? 51? I can't remember the numbers, but there are three cases now pending with various plaintiffs." (R.78, Contempt Hr'g (Sept. 3, 2015), PgID.1573.) Also, "in granting that relief that's requested at Docket 68, the Court finds that given the fact that it does have two companion cases that involve, in essence, the very same allegations with the same lawyers, it just makes judicial

sense to have the Circuit review the decision for all three of them." (*Id.* at PgID.1581.)

The district court's dismissal of the three cases was reversed by this Court as to *Ermold*, and vacated by the district court as to *Yates*. Both cases remain pending in the district court, and both are currently on appeal to this Court from the district court's denial of Davis' respective motions to dismiss the cases. (*Ermold*, 6th Cir. Case No. 6120/6226; *Yates*, 6th Cir. Case No. 6119/6233.)

O. The Fee Order on appeal erroneously concludes that Plaintiffs' vacated and merely preliminary relief is sufficient to make Plaintiffs prevailing parties.

Despite this Court's vacatur of the Preliminary Injunction, and the dismissal of all Plaintiffs' claims for mootness, Plaintiffs moved the district court for prevailing party attorney's fees. (R.183, Pls.' Mot. Award Att'ys' Fees and Costs ("Fee Motion"), PgID.2711; R.183-1, Mem. Supp. Pls.' Mot. Award Att'ys' Fees and Costs, PgID.2714.) Davis opposed the Fee Motion, including Plaintiffs' prevailing party status and the amount of fees claimed. (R.193, Davis' Resp. in Opp'n to Fee Motion, PgID.2832.)

The district court referred the Fee Motion to the magistrate judge for report and recommendation. (R.184, Order (Sept. 21, 2016), PgID.2801.) The magistrate judge, on the authority of *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010), held Plaintiffs were not prevailing parties, and denied their motion. (R.199, Recomm'd

Disp'n and Order, PgID.2896-2902.) Plaintiffs objected to the magistrate judge's ruling, and the district court entered the order now on appeal, sustaining Plaintiffs' objections and granting their Fee Motion. (R.206, Mem. Op. and Order (July 21, 2017, the "Fee Order"), PgID.2943-2992.) Davis timely appealed. (R.226, Not. Appeal, PgID.3095.)

SUMMARY OF THE ARGUMENT

The Fee Order should be reversed because Plaintiffs are not prevailing parties under 42 U.S.C. § 1988. Having received only preliminary relief, which was vacated, Plaintiffs fall far short of satisfying the applicable prevailing party standard in the Sixth Circuit under *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010).

Even if Plaintiffs could satisfy the *McQueary* prevailing party standard, however, the special circumstances of this case render an award of fees unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Finally, if any award of fees to Plaintiffs is upheld, the amount awarded by the district court should be reduced to reflect Plaintiffs' limited results. Plaintiffs received only vacated preliminary relief in the litigation, and fully half of the Plaintiffs received no meaningful relief whatsoever.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's prevailing party determination. *Woods v. Willis*, 631 Fed. App'x 359, 363 (6th Cir. 2015). This Court reviews for abuse of discretion the amount of fees awarded by the district court. *Id.*

ARGUMENT

I. THE DISTRICT COURT ORDER SHOULD BE REVERSED BECAUSE PLAINTIFFS ARE NOT PREVAILING PARTIES.

A. The vacated Preliminary Injunction does not confer prevailing party status on Plaintiffs.

1. This Court's *McQueary v. Conway* standard requires a preliminary injunction to provide essentially final, case-mooting or case-ending relief to confer prevailing party status.

Under the "American Rule," "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Svc. Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). And Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. However, an exception to the American Rule is codified in The Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, which gives federal district courts the discretion to award attorney's fees to "the prevailing party" in civil rights litigation brought under 42 U.S.C. § 1983. *Sole v. Wyner*, 551 U.S. 74, 77 (2007). "Prevailing party" is a "legal term of art."

Buckhannon Bd. and Care Home v. W. Va. Dep't of Health and Human Resources, 532 U.S. 598, 603 (2001).

"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). Thus, Supreme Court precedent establishes that "enforceable judgments on the merits and court-ordered consent decrees 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*, 489 U.S. at 792-93). But, "[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 551 U.S. at 83.

The Sixth Circuit has provided guidance for cases, such as the instant case, where a plaintiff obtains preliminary injunctive relief against a defendant, but no final judgment, in *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010) (hereinafter, "*McQueary I*"). The *McQueary* plaintiff challenged new Kentucky laws criminalizing certain conduct by protesters at funerals, on First Amendment

grounds.[9] 614 F.3d at 595-96. The plaintiff was a Kentucky resident who had previously protested at military funerals, and wanted to engage in the criminalized conduct at future protests. *Id.* He asked the district court to declare the new laws unconstitutional on their face, and to enjoin their enforcement against his future protests. *Id.* at 596.

The district court preliminarily enjoined enforcement of the challenged laws. *Id.* But six months later, before any final disposition, the Kentucky General Assembly repealed the laws, and the district court dismissed the lawsuit as moot. *Id.* In the dismissal order, the district court also denied the plaintiff's request for prevailing party attorney's fees. *Id.* On appeal, the Sixth Circuit undertook to answer a question expressly left unanswered by the Supreme Court: "'whether, in the absence of a final decision on the merits . . . , success in gaining a preliminary injunction may sometimes warrant an award of counsel fees.'" *Id.* at 597 (quoting *Sole*, 551 U.S. at 86).

Recognizing that *Sole* "established that the 'court-ordered change in the legal relationship' between a plaintiff and a defendant must be 'enduring' and irrevocable," the *McQueary I* court held, "**when a claimant wins a preliminary**

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[9] The new laws were "designed to discourage protests by the Westboro Baptist Church, whose members have become known for staging anti-homosexual protests at military funerals . . . ." *McQueary I*, 614 F.3d at 595.

injunction and nothing more, that usually will not suffice to obtain fees under § 1988." 614 F.3d at 604 (emphasis added). Only "occasional exceptions" to the rule may be applied, after "a contextual and case-specific inquiry [for] the district court to undertake in the first instance." *Id.* Said this Court:

> In the aftermath of *Buckhannon* and *Sole*, however, we can say that the 'preliminary' nature of the relief—together with the requirement that 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—**will generally counsel against fees in the context of preliminary injunctions**."

Id. at 601 (emphasis added).

The *McQueary I* court provided only limited examples of preliminary relief that can confer prevailing party status, such as "fact patterns in which the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time." *Id.* at 599. The court illustrated these limited circumstances:

> When protesters seek an injunction to exercise their First Amendment rights **at a specific time and place**—say to demonstrate at a Saturday parade—a preliminary injunction will give them all the court-ordered relief they need and the end of the parade will moot the case. In what way are such claimants not prevailing parties? We think they are. *See Young v. City of Chicago*, 202 F.3d 1000, 1000 (7th Cir. 2000) (awarding fees to protestors who obtained a preliminary injunction to protest at the 1996 Democratic National Convention, which was the only relief sought). The same is true of a government employee who seeks to exclude an unconstitutionally obtained report

> from an administrative hearing and obtains a preliminary injunction that irrevocably excludes the report. *See Watson v. County of Riverside*, 300 F.3d 1092, 1095–96 (9th Cir. 2002). So also for a plaintiff who seeks to delay enforcement of a statute **until a certain event occurs**—say a scheduled public referendum—and the preliminary injunction brings about that result. *Cf. Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003).
>
> Not all preliminary injunctions, as these examples show, have merely a catalytic effect. The defendants in these cases did not voluntarily change their conduct. An immediately enforceable preliminary injunction compelled them to. **And in each instance, the plaintiffs obtained all of the relief they requested once the preliminary injunction served its purpose.** *See N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir.2006); *Watson*, 300 F.3d at 1096.

Id. (emphasis added).

Having announced the rule, and guidelines for applying the limited, "occasional" exceptions to it, the *McQueary I* court reversed the district court's denial of prevailing party fees and remanded the case to the district court for further proceedings in light of the rule announced. *Id.* at 604-05. On remand, the *McQueary* district court rehearsed the standards set forth by the Sixth Circuit:

> As discussed, in its opinion, the Sixth Circuit stated that, as a general rule, preliminary-injunction winners are not entitled to attorney's fees under § 1988. However, in rejecting a *per se* rule that would deny prevailing-party status to every preliminary-injunction winner, the court indicated that there should be an exception where the preliminary-injunction winner "receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time." *Id.* at 599.

> For example, "[w]hen protesters seek an injunction to exercise their First Amendment rights **at a specific time and place**—say to demonstrate at a Saturday parade—a preliminary injunction will get them all the court-ordered relief they need and the end of the parade will moot the case." *Id.*

McQueary v. Conway, No. 06-CV-24-KKC, 2012 WL 3149344, at *2 (E.D. Ky. Aug. 1, 2012) (emphasis added) (hereinafter, "*McQueary Remand*").

Applying the *McQueary I* standards, the district court held that the plaintiff was not the prevailing party. *Id.* at *3. He had not sought a preliminary injunction "to protest **at a specific funeral or at a specific time and place**." *Id.* at *2 (emphasis added). Rather, plaintiff sought a permanent injunction to enjoin enforcement of the challenged policies at **all** future funerals, and a preliminary injunction to enjoin enforcement of the challenged policies "only while his claim for permanent relief was pending." *Id.* Thus, the district court reasoned,

> the Plaintiff's claim for permanent relief did not become moot when a particular event occurred. Instead, the Plaintiff's claim for permanent injunctive relief became moot because the Defendant voluntarily repealed the challenged provisions. The Defendant's voluntary conduct, however, cannot serve as the basis for an award of attorney's fees.
>
> Nor did the Plaintiff's claim for relief become moot because the preliminary injunction granted him all the relief he sought and there was nothing more this Court could do for him. The **Plaintiff sought a permanent injunction** that would permanently enjoin the state from enforcing the challenged provisions. **The Court never granted him that relief**.

Id. (emphasis added) (citation omitted).

The *McQueary* district court's holding that plaintiff was not entitled to prevailing party attorney's fees was affirmed by this Court in *McQueary v. Conway*, 508 Fed. App'x 522, 523 (6th Circ. 2012) (hereinafter, "*McQueary II*") ("As we explained in *McQueary I*, Supreme Court precedent counsels that, 'when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988.'")[10]

2. Plaintiffs cannot attain prevailing party status under the *McQueary* standard because they did not obtain injunctive relief for any specific, date-certain event, or otherwise obtain essentially final, case-mooting or case-ending relief.

Plaintiffs in the instant case are not prevailing parties under the *McQueary* standard. First, although they sought much more, Plaintiffs only obtained a preliminary injunction, and no final relief, which places Plaintiffs squarely within the general rule that, "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." *McQueary I*¸ 614 F.3d at 604. Second, none of the limited, "occasional" exceptions contemplated in

[10] Although *McQueary II* applied the "clear error" standard of review to the district court's prevailing party determination, this Court has subsequently clarified that the *de novo* standard applies. *See Woods*, 631 Fed. App'x at 363 n.4. Like in *Woods*, however, "[e]ither standard produces the same result here." *Id.*

McQueary I apply because Plaintiffs obtained no essentially final, case-mooting or case-ending relief.

Like the plaintiff in *McQueary*, Plaintiffs here sued Davis to **permanently** enjoin enforcement of Davis' "no marriage licenses" policy. (R.1, Compl., PgID.1-2.) Also like in *McQueary*, Plaintiffs in this case sought a preliminary injunction against enforcement of the "no marriage licenses" policy as to "**any future** marriage license applications submitted by the Named Plaintiffs" (R.2-2, Proposed Prelim. Inj. Order, PgID.48), but **not** a preliminary injunction against enforcement for a **specific** event, occurring at a particular time and place. In other words, **no Plaintiff sought injunctive relief to obtain a license or get married on or before a particular date**.

Thus, Plaintiffs did not obtain any essentially final relief that could fit within any of the limited, "occasional" exceptions to the general rule that "a preliminary injunction and nothing more … usually will not suffice to obtain fees under § 1988." *McQueary I*, 614 F.3dat 604. Plaintiffs are not like protesters who seek an injunction "to demonstrate at a Saturday parade" where "a preliminary injunction will give them all the court-ordered relief they need and the end of the parade will moot the case." *Id.* at 599. Nor is any Plaintiff like "a government employee who seeks to exclude an unconstitutionally obtained report from an administrative hearing and obtains a preliminary injunction that irrevocably excludes the report." *Id.* Nor is any

Plaintiff like one "who seeks to delay enforcement of a statute until a certain event occurs—say a public referendum—and the preliminary injunction brings about that result." *Id.* Rather, the Preliminary Injunction actually sought and obtained by Plaintiffs is, for prevailing party purposes, no different from the preliminary injunction held insufficient in *McQueary I*, because it did not enjoin Davis's policy so as to preserve a particular wedding date, but rather enjoined Davis generally "from applying her 'no marriage licenses' policy to **[all] future marriage license requests** submitted by Plaintiffs [as well as] by other individuals who are legally eligible to marry in Kentucky." (R.74, Order (Sept. 3, 2015), PgID.1557 (emphasis added).) Thus, the Preliminary Injunction did not provide Plaintiffs the kind of case-mooting or case-ending relief common to **all** of the *McQueary* examples.

Plaintiffs' own conduct illustrates the fleeting nature of their relief. One Plaintiff couple never obtained a marriage license before their injunctive relief claim was mooted. They actually received **nothing** from the court, and any "future marriage license request" from them cannot be fulfilled on the authority of the mooted and vacated Preliminary Injunction. Another Plaintiff couple obtained a marriage license while Davis was incarcerated, but did not marry on that license before it expired. Any "future marriage license request" from them cannot be

fulfilled under the Preliminary Injunction.[11] Even the two Plaintiff couples who did get legally married on licenses obtained before their injunctive relief claims were mooted cannot be prevailing parties based on their preliminary relief alone because neither requested injunctive relief to be married on or by a specific date, and any "future marriage license request" from them cannot be fulfilled under the Preliminary Injunction. Finally, and critically, it cannot be seriously argued that all "individuals who are legally eligible to marry in Kentucky" as of the time of the Preliminary Injunction were actually licensed and married before Plaintiffs' injunctive relief claims were mooted; and any "future marriage license request" from them cannot possibly be fulfilled under the Preliminary Injunction.

3. Plaintiffs' failed post-injunction requests demonstrate beyond doubt that they did not obtain all the relief they wanted.

Tellingly, **all Plaintiffs** joined in subsequent court filings making it clear that the Preliminary Injunction was not everything they wanted. While Davis was

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[11] To be sure, the seeming indifference to this litigation of Plaintiffs Burke, Napier, Fernandez, and Holloway is remarkable. They represented to the Court their need for immediate injunctive relief to get married, and successfully had Davis held in contempt for not issuing the licenses they wanted. They likewise represented to the Court their competence to represent an entire class of Kentuckians allegedly wanting marriage licenses in Rowan County, though marrying on a Rowan County license appears to have been of little importance to them. Whether their allegations were a sham or otherwise will likely never be known because there was no discovery in the litigation.

incarcerated, the district court accepted the altered marriage license forms being issued by her deputies with Davis' name removed as sufficiently compliant with the Preliminary Injunction to order Davis' release. When Davis returned to work, she perfected the accommodation of her religious beliefs by making additional, clarifying alterations to fully remove her name and authority from the forms. Both the Kentucky Governor and Attorney General ratified Davis' self-effected accommodation.[12]

Although three of four Plaintiff couples had received marriage licenses while Davis was incarcerated, which the district court had determined to be compliant with the Preliminary Injunction, and Davis' post-incarceration changes to the licenses had been ratified by the highest executive officials in the Commonwealth, all Plaintiffs then moved the district court to "enforce" the Preliminary Injunction, demanding a different form of license, and reissuance *nunc pro tunc* of all licenses issued under Davis' clarified policy. (R.120, Pls.' Mot. to Enforce, PgID.2312-2328.) If Davis would not comply with the order demanded by Plaintiffs, then Plaintiffs further demanded drastic "civil sanctions, including but not limited to (a) the placement of

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[12] Davis had requested such an accommodation from Governor Beshear prior to Plaintiffs' lawsuit (Governor Beshear had already unilaterally changed the statutory marriage license form in response to *Obergefell*), with no response. The district court precluded Davis from pursuing the accommodation judicially by tabling her motion for preliminary injunctive relief against the Beshear Defendants.

the Rowan County Clerk's Office into a receivership for the limited purposes of issuing marriage licenses, and (b) the imposition of civil monetary fines as appropriate and necessary to coerce Davis' compliance with this Court's Order." (*Id.* at PgID.2313; *see also Id.* at PgID.2321.) However, the district court denied Plaintiffs' motion as moot. (R.161, Order (Feb. 9, 2016), PgID.2657-59.)

Plaintiffs' motion to "enforce" clearly demonstrates they wanted more than the district court provided them in the Preliminary Injunction. Davis' self-effected, then ratified accommodation to remove her name and authority from the licenses was offensive to Plaintiffs, and Plaintiffs wanted the Preliminary Injunction to coerce Davis to abandon her accommodation. That Plaintiffs wanted the Preliminary Injunction to go farther than the issuing court intended revealed that **the Preliminary Injunction did not give Plaintiffs all the relief they sought**, and there was still more they wanted the court to do for them.

4. Plaintiffs' dismissed individual claims for permanent injunctive relief and damages and putative class claims for declaratory and permanent injunctive relief demonstrate that Plaintiffs are not prevailing parties.

After this Court granted Davis' vacatur of the Preliminary Injunction due to the case-mooting passage of SB 216, the district court **dismissed as moot all of Plaintiffs' claims for permanent and final relief**, comprising Plaintiffs' individual claims for permanent injunctive relief and compensatory and punitive damages, and

putative class claims for declaratory and permanent injunctive relief. (R.182, Order (*In Re: Ashland Civil Actions*, Aug. 18, 2016), PgID.2708-2710.) **Plaintiffs did not appeal the dismissal of their damages and class claims**. Thus, in terms of final relief, it cannot be said that the district court "granted [them] all the relief [they] sought and there was nothing more [the district court] could do for [them]." *McQueary Remand*, 2012 WL 3149344, at *2.

5. Plaintiffs are not prevailing parties because their lawsuit was mooted and dismissed, not by the relief they obtained, but by the permanent legislative and judicial ratification of Davis' accommodation.

Fundamentally, and at the end of day, Plaintiffs cannot be prevailing parties under *McQueary*, because their lawsuit was indisputably mooted by the voluntary and permanent ratification (both legislative and judicial) of Davis' accommodation, and not by any relief that Plaintiffs obtained.

One of Davis' express defenses to Plaintiffs' injunctive relief claim was Plaintiffs' failure to join the Beshear Defendants as required parties under Fed. R. Civ. P. 12(b)(7), because Davis had requested a religious accommodation from Governor Beshear's SSM Mandate—the basis of Plaintiffs' suit—which accommodation Governor Beshear had the power and responsibility to grant. (R.32-1, MTD Mem., PgID.694-97.) Davis' ultimate attainment of the accommodation she sought, **with the Governor's and the district court's approval**, even as the

Preliminary Injunction was in effect, proved it was always possible for the district court to craft an order providing for valid marriage licenses to be issued in Rowan County without coercing Davis to violate her conscience, if only the district court had timely taken up Davis' defenses and her own claims for preliminary injunctive relief. The approval of the accommodation also vindicates the merit of Davis' defense to Plaintiffs' injunctive relief claim, further eroding any prevailing party consideration for Plaintiffs. Governor Bevin's Executive Order, and the legislative enactment of SB 216, eliminates such consideration entirely.

Critically, here as in *McQueary*, Plaintiffs' claims for permanent injunctive relief, class certification, and for damages (compensatory and punitive) did not become moot "when a particular event occurred" (*i.e.*, when half of them actually married) after entry of the Preliminary Injunction. *McQueary Remand*, 2012 WL 3149344, at *2. Nor did Plaintiffs' outstanding claims become moot because the Preliminary Injunction "granted [them] all the relief [they] sought and there was nothing more [the district court] could do for [them]." *Id.* To the contrary, Plaintiffs never received a permanent injunction against Davis' "no marriage license" policy, or the class certification they sought, or the damages they sought. As in *McQueary*, Plaintiffs claims were mooted **not** by the Preliminary Injunction they obtained, but by Kentucky's **voluntarily** changing its laws, effectively abrogating the challenged

"no marriage licenses" policy at a time when Plaintiffs had only obtained preliminary relief.

Thus, even for the half of the Plaintiffs who put it to use, the Preliminary Injunction did not award them relief that can be called "enduring and irrevocable," and certainly did not award them case-mooting or case-ending relief. Indeed, all of the Plaintiffs revealed they wanted more from the district court than the Preliminary Injunction gave them, and none of the Plaintiffs obtained the kind of essentially final, case-ending or case-mooting relief that could justify prevailing party status under *McQueary*.

B. The Fee Order disregards the requirement of *McQueary* that a preliminary injunction provide essentially final, case-mooting or case-ending relief to confer prevailing party status.

In its Fee Order the district court correctly acknowledged the general rule reiterated in *McQueary*, "'counsel[ling] against fees in the context of preliminary injunctions,'" and that there are only "rare instances where preliminary-injunction winners are entitled to attorneys' fees." (R.206, Fee Order, PgID.2953.) In counting Plaintiffs' vacated Preliminary Injunction among those "rare instances," however, the district court failed to acknowledge the temporary nature of Plaintiffs' relief, and entirely disregarded the common thread running through all of the *McQueary* court's limited, "occasional" exceptions: essentially final, case-mooting or case-ending

relief. (*Supra*, Argument, § I.A.2.) The district court's subsequent errors in the Fee Order are numerous; the several highlighted below are illustrative.

One example of the district court's misapprehension of the *McQueary* requirements is its citation to this Court's decision in *Green Party of Tennessee v. Hargett*, 767 F.3d 533 (6th Cir. 2014), for the proposition that "not every legislative change strips a plaintiff of their [sic] prevailing-party status." (R.206, Fee Order, PgID.2959.) In *Hargett*, this Court considered prevailing party status **after summary judgment had been granted**. 767 F.3d at 540. Thus, although the statutes challenged by the *Hargett* plaintiffs were amended while the defendants' appeal was pending, *id.* at 541, the relief obtained by the plaintiffs was **definitively final**, and plaintiffs could "*not* [be] stripped of their prevailing party status by the legislature's decision to amend the relevant statutes two months after the district court issued its order but before the defendants' appeal was heard." *Id.* at 553. Because no preliminary relief was involved in this Court's *Hargett* analysis, however, the case has no bearing whatsoever on Plaintiffs' status here.

Another error in the Fee Order with respect to *McQueary* is the district court's proposition that, "[t]o determine whether Plaintiffs' 'prevailed,' the Court must focus exclusively on Plaintiffs' claims" and disregard Davis' third-party claims against the Beshear Defendants. (R.206, Fee Order, PgID.2960.) This statement cannot be squared with the *McQueary* requirement for "a contextual and case-

specific inquiry." *McQueary I*, 614 F.3d at 604. Disregarding all of Davis' claims and defenses, especially the inextricably intertwined claims and defenses involving the Beshear Defendants (*see supra*, Stmt. of the Case, § E, Argument, § I.A.5), is the opposite of "a contextual and case-specific inquiry," and the district court cited no authority for doing so, in the prevailing party context or otherwise.

Still another error is the district court's attempt to avoid *McQueary* by asserting that "Plaintiffs did not challenge any law . . . ." (R.206, Fee Order, PgID.2961.) As the district court itself recited in the same order, Plaintiffs challenged Davis' "'no marriage licenses' policy." (*Id.* at PgID.2945; *see also supra*, Stmt. of the Case, §§ C, D.) Plaintiffs did not obtain any final, case-mooting, or case-ending relief with respect to the challenged policy, however, because of a series of mooting events **voluntarily** undertaken by Kentucky state officials which abrogated the policy and rendered Plaintiffs' injunctive relief claims moot. (*See supra*, Stmt. of the Case, §§ H-L.) In sum, Davis' self-effected accommodation from the SSM Mandate (which is the policy **Davis** challenged) signaled the end of her "no marriage licenses" policy as a practical matter, because marriage licenses flowed from Davis' accommodation without her name and authority. But Davis' accommodation revealed that Plaintiffs were not satisfied with the Preliminary Injunction alone, for they continued to pursue relief from the district court to undo Davis' accommodation. And while Plaintiffs were still pursuing that relief from the district

court, Governor Bevin entered the Executive Order standardizing Davis' accommodation statewide, and further relegating the Preliminary Injunction to mootness. Finally, the enactment of SB 216 made the statewide accommodation final, and mooted the Preliminary Injunction as well. Thus, Plaintiffs did, in fact, challenge a law—Davis' "no marriage licenses" policy—but Plaintiffs' relief from the policy was short-lived, and far from case-mooting or case-ending.

II. THE DISTRICT COURT ORDER SHOULD BE REVERSED BECAUSE SPECIAL CIRCUMSTANCES RENDER THE FEE AWARD UNJUST.

Even if Plaintiffs could be prevailing parties, which they cannot, an award of fees would be unjust given the special circumstances of this case. "Even a prevailing party may not be entitled to attorneys' fees if 'special circumstances would render an award unjust.'" *Déjà Vu v. Metropolitan Gov't of Nashville and Davidson Cty.*, 421 F.3d 417, 429 (6th Cir. 2005) (quoting *Hensley*, 461 U.S. at 429). The Supreme Court has provided little guidance on this issue, but this Court has "opted for a case-by-case approach rather than adopting a 'predetermined formula.'" *Id.* (citations omitted). Although the district court dismissed the question out of hand in the Fee Order (R.206, Fee Order, PgID.2964 n.20), and similarly dismissed Davis' arguments pertaining to this Court's vacatur of the Preliminary Injunction under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (*Id.* at PgID.2957-58), the district court erred in ruling that no special circumstances exist.

First, Davis' successful attainment of the very accommodation she sought from the outset of this litigation, despite the district court's refusal to take up the matter, renders unjust any fee award to Plaintiffs. (*See supra*, Stmt. of the Case, §§ H-K.) Following her incarceration, Davis initially self-effected the accommodation that had been denied her by both Governor Beshear and the district court prior to the Preliminary Injunction. But Governor Beshear (along with the Attorney General) ratified the accommodation, and then the district court accepted it as non-violative of Preliminary Injunction. Then, the Executive Order acknowledged that Kentucky owed Davis an accommodation under Kentucky RFRA, vindicating Davis' central claims against the Beshear Defendants, and her central defense to Plaintiffs' claims. Had the matter been timely taken up by the district court, most of the litigation in this case could have been avoided.

Second, litigation against Davis in the related *Ermold* and *Yates* cases continues in both this Court and the district court. (*See supra*, Stmt. of the Case, § N.) The claims of the plaintiffs in those cases, and Davis' defenses thereto, are **essentially identical** to the claims and defenses in the instant case. It would be unjust to award fees to Plaintiffs in this case, having only obtained vacated, preliminary relief, when the grounds for Plaintiffs' vacated Preliminary Injunction and Davis' defenses thereto are now being litigated **on the merits, for the first time**, in other cases.

Finally, the equitable remedy of vacatur, which Davis obtained from this Court with respect to the Preliminary Injunction, "ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.'" *Camreta v. Greene*, 563 U.S. 692, 712 (2011). Courts usually vacate lower court judgments, orders, and injunctions in these situations "because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez v. Smith*, 558 U.S. 87, 94 (2009) (citing *Munsingwear*, 340 U.S. at 40). To be sure, in defining the appropriate prevailing party standard, the *McQueary I* court observed that *Munsingwear* vacatur doctrine cases counsel against awarding fees for preliminary relief not accompanied by a final judgment: "The *Munsingwear* doctrine suggests a potentially straightforward approach to the fees question: *Sole* says that 'dissolved' or 'otherwise undone' preliminary injunctions do not warrant fees; mootness generally requires a court to vacate its earlier rulings, including any preliminary injunction granted in the case; fees for preliminary injunctions therefore are not permitted under *Sole*." *McQueary I*, 614 F.3d at 600. These principles are all the more compelling in this complex case, and highlight the special circumstances which would make an award of fees to Plaintiffs unjust.

III. THE FEE ORDER SHOULD BE REVERSED BECAUSE THE FEE AMOUNT SHOULD HAVE BEEN REDUCED TO REFLECT PLAINTIFFS' LIMITED SUCCESS.

A. Awarding Plaintiffs the lodestar fee would be excessive.

Even if Plaintiffs could attain prevailing party status, which they cannot, the fees claimed by Plaintiffs are excessive. The district court erred in failing to reduce the lodestar fee amount to reflect Plaintiffs' limited success. (R.206, Fee Order, PgID.2988-2991.)

Plaintiffs brought this action seeking, on behalf of themselves, preliminary and permanent injunctive relief compelling Davis to issue them marriage licenses, compensatory and punitive damages from Davis, and damages from Rowan County. (R.1, Compl., PgID.1-2.) Plaintiffs additionally sought, on behalf of "a putative class of individuals who are qualified to marry and who intend to seek a marriage license from the Rowan County Clerk," a declaration that Davis' discontinuance of marriage licenses violated their constitutional rights, and preliminary and permanent injunctive relief barring Davis' actions. (*Id.*) Plaintiffs received, however, almost none of the relief they sought.

Plaintiffs obtained the Preliminary Injunction, which was vacated; pursuant to that preliminary injunction, only half of the named Plaintiffs were married on a Rowan County marriage license. All of Plaintiffs' other individual claims, and all of Plaintiffs' class claims, were fully and finally dismissed, with no appeal taken.

Under the circumstances, awarding prevailing party fees based on a straight lodestar calculation would be excessive:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, **the most critical factor is the degree of success obtained**.
>
> Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. . . .
>
> **There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.** The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Hensley, 461 U.S. at 436–37 (emphasis added). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a

change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley,* not to the availability of a fee award *vel non.*" *Garland Indep. Sch. Dist.*, 489 U.S. at 792–93.

In light of *Hensley*, if Plaintiffs could attain prevailing party status, which they cannot, the Court should substantially reduce the fee amount requested by Plaintiffs to account for Plaintiffs' limited success. Given that "[t]here is no precise rule or formula for making these determinations," Davis suggests that the Court should reduce Plaintiffs' requested fee by at least half to account for the numerous claims on which Plaintiffs did not recover, and half again to account for the half of Plaintiffs who abstained from participating in the limited relief Plaintiffs did obtain.

B. The district court erred in failing to exclude specific time entries for Plaintiffs' failed attempts to obtain class certification.

The district court should have excluded time spent on Plaintiffs' wholly unsuccessful attempts to obtain class certification. (*See supra,* Stmt. of the Case, § G; R.206, Fee Order, PgID.2988-2991.) Davis incorporates herein by this reference her detailed challenge to Plaintiffs' class certification time entries, totaling 27.2 hours, in her Response in Opposition to Plaintiffs' Fee Motion (R.193, Davis' Resp. in Opp'n to Fee Motion, PgID.2857.)

CONCLUSION

For all of the foregoing reasons, the district court's Fee Order should be reversed.

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CERTIFICATE OF COMPLIANCE
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,181 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point, Times New Roman font.

/s/ Roger K. Gannam
Attorney for Appellant Kim Davis
DATED: March 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this March 20, 2018, I caused the foregoing document to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon all counsel and parties of record.

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ADDENDUM 1
Designation of Relevant District Court Documents
Pursuant to 6 Cir. R. 28(b)(1)(A)(i) and 6 Cir. R. 30(g)(1)(A)-(C)

Record Entry No.	Document Description
R.1 PgID.1-15	Complaint
R.2 PgID.34	Plaintiffs' Motion for Preliminary Injunction
R.2-1 PgID.42	Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction
R.2-2 PgID.48	Proposed Preliminary Injunction Order
R.10 PgID.77-78	Order (July 13, 2015)
R.21 PgID.105-06, 117-147	Preliminary Injunction Hearing Transcript (July 13, 2015)
R.26 PgID.239-297	Preliminary Injunction Hearing Transcript (July 20, 2015)
R.29 PgID.318-366	Response in Opposition to Plaintiffs' Motion for Preliminary Injunction
R.32-1 PgID.694-97	Davis' Memorandum of Law in Support of Her Motion to Dismiss Plaintiffs' Complaint
R.34 PgID.745-776	Verified Third-Party Complaint of Defendant Kim Davis
R.34-5 PgID.788	Letter to Governor Beshear
R.39-1 PgID.828-876	Davis' Memorandum of Law in Support of Her Motion for Preliminary Injunction
R.39-7 PgID.1129-1130	Proposed Preliminary Injunction Order

Record Entry No.	Document Description
R.43 PgID.1146-1173	Memorandum Opinion and Order (Aug.12, 2015, "Preliminary Injunction")
R.44 PgID.1174	Notice of Appeal
R.45 PgID.1207-1233	Motion to Stay Pending Appeal
R.46 PgID.1235	Plaintiffs' Response Opposing a Stay [sic] the Preliminary Injunction Ruling Pending Appeal
R.52 PgID.1264-65	Order (Aug. 17, 2015)
R.58 PgID.1289	Order (Aug. 25, 2015)
R.66 PgID.1471	Notice of Appeal
R.67 PgID.1477-1484	Plaintiffs' Motion to Hold Davis in Contempt
R.68 PgID.1488-1495	Plaintiffs' Motion to Clarify Preliminary Injunction
R.69 PgID.1496	Order (Sept. 1, 2015)
R.74 PgID.1557	Order (Sept. 3, 2015)
R.75 PgID.1558-59	Minute Entry Order (Sept. 3, 2015, "Contempt Order")
R.78 PgID.1570-1581, 1651-1662, 1667-1736	Contempt Hearing Transcript (Sept. 3, 2015)
R.82 PgID.1785	Notice of Appeal

Record Entry No.	Document Description
R.83 PgID.1791	Notice of Appeal
R.84 PgID.1798-1800	Status Report
R.84-1 PgID.1801-1804	Plaintiffs' Marriage Licenses
R.89 PgID.1827-1828	Order (Sept. 8, 2015)
R.114 PgID.2293-95	Deputy Clerk Status Report
R.115 PgID.2296	Plaintiffs' Motion to Reopen Class Certification Briefing
R.116 PgID.2304-05	Deputy Clerk Status Report
R.117 PgID.2306-07	Deputy Clerk Status Report
R.118 PgID.2308-09	Deputy Clerk Status Report
R.119 PgID.2310-11	Deputy Clerk Status Report
R.120 PgID.2312-2328	Plaintiffs' Motion to Enforce Orders
R.122 PgID.2334-35	Deputy Clerk Status Report
R.125 PgID.2439	Deputy Clerk Status Report
R.126 PgID.2440-41	Deputy Clerk Status Report
R.127 PgID.3442-43	Deputy Clerk Status Report

Record Entry No.	Document Description
R.128 PgID.2444	Deputy Clerk Status Report
R.129 PgID.2445	Deputy Clerk Status Report
R.130 PgID.2446	Order (Oct. 6, 2015)
R.131 PgID.2447-48	Deputy Clerk Status Report
R.132 PgID.2456, 2458-2465	Response in Opposition to Plaintiffs' Motion to Reopen Class Certification Briefing
R.133 PgID.2478, 2484, 2487-2495	Response in Opposition to Plaintiffs' Motion to Enforce Orders
R.139 PgID.2530	Order (Oct. 26, 2015)
R.156-1 PgID.2601-04	Executive Order
R.161 PgID.2657-59	Order (Feb. 9, 2016)
R.179 PgID.2698-99	Order (6th Cir. July 13, 2016)
R.180 PgID.2703	Mandate (6th Cir. Aug. 4, 2016)
R.181 PgID.2706-07	Order (Aug. 18, 2016)
R.182 PgID.2708-2710	Order (*In Re: Ashland Civil Actions*, Aug. 18, 2016)
R.183 PgID.2711	Plaintiffs' Motion for Award of Attorneys' Fees and Costs

Record Entry No.	Document Description
R.183-1 PgID.2714, 2722	Memorandum in Support of Plaintiffs' Motion for Award of Attorneys' Fees and Costs
R.184 PgID.2801	Order (Sept. 21, 2016)
R.193 PgID.2832	Davis' Response in Opposition to Plaintiffs' Motion for Award of Attorneys' Fees and Costs
R.193-1 PgID.2860-61	Declaration of Kim Davis
R.199 PgID.2896-2902	Recommended Disposition and Order
R.206 PgID.2943-2992	Memorandum Opinion and Order (July 21, 2017, "Fee Order")
R.226 PgID.3095-98	Notice of Appeal