No. 17-6385 and 17-6404

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 SPARTMAN,
Plaintiffs-Appellees,

v.

KIM DAVIS,
Defendant-Third Party Plaintiff-Appellee/Appellant,

and

MATTHEW G. BEVIN; TERRY MANUEL, in their official capacities,
Third-Party Defendants-Appellants/Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky, No. 0:15-cv-00044-DLB

BRIEF OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 17-6385 / 17-6404 Case Name: Miller, et al. v. Davis, et al.

Name of counsel: William Sharp, Amy Cubbage, James Esseks, Ria Mar, Daniel Mach, Heather Weaver, Laura Landenwich, Dan Cannon April Miller, Karen Roberts, Shantel Burke, Stephen Napier, Jody

Pursuant to 6th Cir. R. 26.1, Fernandez, Kevin Holloway, Aaron Skaggs, Barry Spartman
Name of Party

make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 30, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. *See* 6th Cir. R. 26.1 on page 2 of this form

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34 and 6 Cir. R. 34, Plaintiffs-Appellees April Miller, Ph.D.; Karen Ann Roberts; Shantel Burke; Stephen Napier; Jody Fernandez; Kevin Holloway; L. Aaron Skaggs, and Barry Spartman (hereinafter "Plaintiffs") agree that oral argument would likely aid the Court in deciding these appeals, particularly with respect to the proper application of the "contextual and case specific inquiry" for determining the sufficiency of a merits-based preliminary injunction to confer prevailing party status.

COUNTERSTATEMENT OF THE ISSUES[1]

1. Whether the District Court clearly erred in finding that attainment of a merits-based preliminary injunction that barred Davis, in her official capacity as Rowan County Clerk, from enforcing her "no marriage licenses" policy, coupled with the fact that two named Plaintiff couples (as well as other couples) secured a direct and irrevocable benefit from the ruling by obtaining marriage licenses that they then used to wed, rendered Plaintiffs prevailing parties under 42 U.S.C. § 1988 and this Court's "contextual and case specific inquiry."

2. Whether the District Court, after having determined that Plaintiffs were prevailing parties, abused its discretion in concluding that special circumstances and limited success did not warrant a denial of, or reduction in, the award of attorney's fees.

3. Whether Rowan County or the Commonwealth of Kentucky is liable for Davis's wrongdoing when she unilaterally adopted and enforced a policy that not only exceeded the authority granted her office by the state regarding marriage licensing, but also conflicted with her office's statutory obligation under Kentucky

[1] Pursuant to Fed. R. App. P. 28(b), Plaintiffs omit their Statement of Jurisdiction because, on that point, they agree with Davis and the State Defendants.

law to issue marriage licenses to couples who were otherwise legally eligible to wed.

COUNTERSTATEMENT OF THE CASE

On June 27, 2015—one day after the U.S. Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015)—Rowan County Clerk Kim Davis decided that her office would no longer issue marriage licenses because of her personal, religious opposition to marriage for same-sex couples. [Page ID #278: 7/20/15 Hr'g Tr. (RE #26).] Rather than issue licenses to same-sex couples, Davis adopted a "no marriage licenses" policy that barred *all* qualified applicants from obtaining licenses in Rowan County. After Davis adopted this policy, Plaintiffs—two same-sex and two different-sex couples who reside in Rowan County—were denied marriage licenses. [Page ID #123-25; #133-34; #140-42: 7/13/15 Hr'g Tr. (RE #21).]

Plaintiffs include, *inter alia*, Dr. April Miller and Karen Roberts, two women who have been in a committed relationship with one another for eleven years and who have lived in Rowan County since 2006. [Page ID #123-24: 7/13/15 Hr'g Tr. (RE #21).] Upon learning that the Supreme Court recognized marriage equality for same-sex couples in *Obergefell*, April and Karen were "elated" to be able to marry in Kentucky, and they sought a marriage license for that purpose on

June 30, 2015. [*Id*. at Page ID #125; Page ID #1637: 9/3/15 Hr'g Tr. (RE #78).] When they went to their county clerk's office to apply for the license, however, a deputy clerk consulted with Kim Davis before informing them that the office would not issue them a marriage license. [Page ID #127: 7/13/15 Hr'g Tr. (RE #21).]

Similarly, Plaintiffs Barry Spartman and Aaron Skaggs have been in a committed relationship for more than twenty years after having met in college. [*Id.* at Page ID #140-41.] Barry and Aaron both attended college in Rowan County, Kentucky, and the two of them have lived there ever since. [*Id.* at Page ID #141.] After learning of the *Obergefell* decision and what it meant for their ability to finally wed legally in Kentucky, Barry and Aaron contacted the Rowan County Clerk's office by telephone on June 30, 2015, to inquire about the requirements for obtaining a marriage license. [*Id.* at Page ID #142.] During that call, they were informed that the Rowan County Clerk's office would not be issuing marriage licenses and that they need not come to the office for that purpose. [*Id.* at Page ID #143.]

After being denied marriage licenses, Plaintiffs filed a putative class-action suit challenging the "no marriage licenses" policy under the First and Fourteenth Amendments, and they brought official-capacity claims against Davis seeking preliminary and permanent injunctive relief barring future enforcement of the

policy. [Page ID #1-2: Compl. (RE #1); Page ID #34: Mot. for Prelim. Inj. (RE #2).]

After an evidentiary hearing and full briefing by the parties, the District Court entered a preliminary injunction on August 12, 2015 ("Preliminary Injunction"), barring Davis, in her official capacity, from enforcing the "no marriage licenses" policy against Plaintiffs. [Page ID #1173: Mem. Op. & Order (RE #43).] Davis filed a notice of appeal from that ruling [Page ID #1174: Notice of Appeal (RE #44)], and she also filed a motion with the District Court requesting a stay of the Preliminary Injunction pending appeal. [Page ID #1207: Stay Mot. (RE #45).]

The District Court denied Davis's stay motion, but it stayed its denial of the stay motion pending review by this Court. [Page ID #1264-65: Order (RE #52).] Then, on August 19, 2015, the District Court amended its earlier ruling by clarifying that the "temporary stay" of the Preliminary Injunction would expire on August 31, 2015, absent further order from this Court. [Page ID #1283: Order (RE #55).] Following that clarification, Davis filed a motion to stay the Preliminary Injunction with this Court. That request, too, was denied. *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015). In its Order, this Court explained:

> The request for a stay pending appeal relates solely to an injunction against Davis in her official capacity. The injunction operates not

> against Davis personally, but against the holder of her office of Rowan County Clerk. In light of the binding holding of *Obergefell*, *it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court. There is thus little or no likelihood that the Clerk in her official capacity will prevail on appeal*.

Id. at *1 (emphasis added).

Davis then sought an emergency stay of the Preliminary Injunction from the U.S. Supreme Court. But, in a one-line order, the Supreme Court denied that request without asking for a response from Plaintiffs and without any published dissent. *Davis v. Miller*, 136 S. Ct. 23 (2015).

The morning after the Supreme Court denied her stay application, Davis nonetheless directed her employees to continue enforcing her "no marriage licenses" policy. [Page ID #1621, 1631: 9/3/15 Hr'g Tr. (RE #78).] That decision resulted in Plaintiffs April Miller and Karen Roberts again being denied a marriage license. [*Id.* at Page ID #1638-39.] Left with no other recourse, Plaintiffs filed a motion asking the District Court to hold Davis in contempt to compel her compliance with the Preliminary Injunction. [Page ID #1477: Pls.' Mot. to Hold Kim Davis in Contempt of Ct. (RE #67).] Plaintiffs also filed a Rule 62(c) motion to modify the Preliminary Injunction so that Davis would be barred from enforcing her "no marriage licenses" policy against any other eligible applicants, not just

Plaintiffs. [Page ID #1488: Pls.' Mot. Pursuant to Rule 62(c) to Clarify Prelim. Inj. Pending Appeal (RE #68).]

At the September 3, 2015, contempt hearing, the District Court afforded Davis's counsel an opportunity to respond to Plaintiffs' Rule 62(c) motion. [Page ID #1571-80: 9/3/15 Hr'g Tr. (RE #78).] After hearing argument, the District Court granted Plaintiffs' motion and entered an order ("September 3 Order") modifying the Preliminary Injunction. [Page ID #1557: Order (RE #74).] In doing so, the District Court explained that even though briefing on Plaintiffs' still-pending class certification motion had been stayed,[2] allowing the Preliminary Injunction "to apply to some, but not others, simply doesn't make practical sense." [Page ID #1581: 9/3/15 Hr'g Tr. (RE #78).] The District Court also noted that after Plaintiffs filed their suit, two related cases were filed by couples also seeking to marry. [*Id.* at Page ID #1573.] Those cases raised identical legal issues, and the reasoning behind the Preliminary Injunction applied with equal force to the plaintiff couples in those cases. [*Id.* at Page ID #1576-77.] Thus, the District Court's September 3 Order modified the Preliminary Injunction by barring Davis,

[2] In a Virtual Order, the District Court granted Davis's unopposed motion to extend the briefing on Plaintiffs' class certification motion until "30 days after the Sixth Circuit Court of Appeals renders its decision on the appeal of the Court's granting of Plaintiffs' motion for a preliminary injunction." [RE #57.]

in her official capacity, from enforcing her "no marriage licenses" policy against *any* applicants who were otherwise legally eligible to marry. [*Id.*]

The District Court also conducted an evidentiary hearing on Plaintiffs' contempt motion, and it found Davis in civil contempt for her continued refusal to comply (or to allow her subordinates to comply) with the Preliminary Injunction. [Page ID #1559: Mins. Order (RE #75).] As a result, the District Court remanded Davis to the custody of the U.S. Marshal. [*Id.*] Prior to the conclusion of the day's proceedings, however, and after Davis's deputy clerks informed the court that they would comply with the Preliminary Injunction [Page ID #1736: 9/3/15 Hr'g Tr. (RE #78)], the District Court afforded Davis an opportunity to immediately purge herself of contempt by agreeing not to interfere with the deputy clerks' compliance with the Preliminary Injunction. Davis's counsel met with her during a court recess to discuss the matter, and when they returned they informed the court that she would not agree to do so. [*Id.* at Page ID #1737-38.]

While Davis remained in custody on the civil contempt ruling, several of the Plaintiff couples sought and received marriage licenses [Page ID #1798: Status Report (RE #84)], as did the plaintiff couples in the two related cases. [Page ID #2217: Def./Third-Party Pl. Kim Davis's Mem. of Law in Supp. of Mot. for Immediate Consideration & Mot. to Stay Sept. 3, 2015 Inj. Order Pending Appeal (RE #113-1).] The District Court then lifted the contempt sanction and released

Davis from custody in light of her deputies' compliance with the Preliminary Injunction. The District Court further ordered 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." [Page ID # 1828: Order (RE #89) (emphasis in original).] Thereafter, Plaintiffs Miller and Roberts, as well as Plaintiffs Spartman and Skaggs, were finally able to wed using the marriage licenses they obtained as a result of the Preliminary Injunction. [Page ID #2742: Ex. 1 – Pls. Miller and Roberts' Marriage License (RE #183-2); Page ID #2743: Ex. 2 – Pls. Skaggs and Spartman's Marriage License (RE #183-3).][3]

Simultaneous with Plaintiffs' preliminary injunction litigation against Davis, Davis filed a third-party complaint asserting claims against then-Kentucky Governor Steven L. Beshear and the Commissioner for Kentucky's Department for Libraries and Archives, Wayne Onskt (the "State Defendants").[4] [Page ID #745: Verified Third-Party Compl. of Def. Kim Davis (RE #34).] In her complaint, Davis

[3] Plaintiffs Fernandez and Holloway obtained a marriage license on September 8, 2015 but, for personal reasons, decided to defer their marriage until after it expired. [Page ID #1803: Ex. to Status Report (RE #84-1).] There is no evidence in the record regarding Plaintiffs Burke and Napier having obtained a marriage license.

[4] By operation of Fed. R. App. P. 43(c)(2), Kentucky Governor Matthew G. Bevin and Commissioner Terry Manuel replaced the former officeholders in Davis's official capacity claims against those offices.

sought, *inter alia*, injunctive relief requiring the State Defendants to create an exemption that would relieve her—because of her personal religious opposition to marriage for same-sex couples—from performing her official duties pursuant to Kentucky's neutral and generally applicable law. [*Id.* at Page ID #774.]

Relevant to this appeal is the fact that, while she remained in custody on the District Court's civil contempt finding, Davis sought emergency injunctive relief from this Court in Appeal Number 15-5961 asserting that the District Court erred: in conducting a hearing on Plaintiffs' contempt motion, by finding her in civil contempt, and by remanding her to custody before ruling on her third-party request for an emergency preliminary injunction. [RE #26-1 (15-5961): Emergency Mot. for Immediate Consideration & Mot. for Inj. Pending Appeal.] At that time, Davis maintained that an emergency injunction against the State Defendants was necessary because she lacked authority to alter the marriage license form prescribed by the Kentucky Department for Libraries and Archives, and because absent the requested injunction she would be forced to violate her religious beliefs by issuing marriage licenses pursuant to Kentucky law. [*Id.* at 10; 13.] The Plaintiffs and State Defendants responded. [RE #28 (15-5961); RE #30-1 (15-5961).] By the time Davis filed her reply, however, she had been released from custody. [RE #32 (15-5961): Davis Reply in Supp. of Mot. for Emergency Prelim. Inj. (filed Sept. 10, 2015).] Four days later, upon her return to work, Davis

"confiscated all of the original [marriage license] forms, and provided a changed form which delete[d] all mentions of the County, fill[ed] in one of the blanks that would otherwise be the County with the [federal district] Court's styling, delete[d] her name, delete[d] all of the deputy clerk references, and in place of the deputy clerk type[d] in the name [of the deputy clerk tasked with issuing marriage licenses] and ha[d] him initial rather than sign" the forms herself. [Page ID #2293-94: Notice of Brian Mason (RE #114).]

After Plaintiffs secured their merits-based Preliminary Injunction and Davis's office finally issued valid marriage licenses following her incarceration for civil contempt, the Kentucky General Assembly enacted SB 216 amending Kentucky's marriage licensing requirements. 2016 Kentucky Laws Ch. 132 (SB 216), General Assembly Reg. Sess. (Ky. 2016). Among its provisions, SB 216 removed the requirement that certain information appear on Kentucky marriage licenses, including the information to which Davis objected: (1) the authorizing statement on the license in the name of the county clerk; (2) the signature of the county clerk or deputy clerk from the county in which the license was issued; (3) a statement on the marriage certificate signed by the county clerk or deputy clerk from the county in which the marriage license was issued; and (4) any reference on the marriage certificate that the license was issued under the authority of a county clerk. *Id*.

As a result of these changes, Davis requested, and this Court granted, her request to dismiss her then-pending appeals for lack of jurisdiction. *Miller v. Davis*, 667 F. App'x 537, 538 (6th Cir. 2016). The panel also ordered that the Preliminary Injunction and September 3 Order be vacated, but it declined to likewise order the finding of contempt vacated. *Id.* On remand, the District Court vacated the Preliminary Injunction ruling and, *sua sponte*, dismissed Plaintiffs' damages claims as well the related actions filed by other plaintiffs. [Page ID #2706-07: Order (RE #181).]

Plaintiffs in this action did not appeal the dismissal of their damages claims, which included individual capacity claims against Davis, but instead timely moved for an award of attorney's fees and costs as prevailing parties in connection with their success on their official capacity claims against Davis. [Page ID #2711-40: Pls.' Mot. and Mem. for Award of Att's' Fees and Costs (RE #183; #183-1).] The District Court referred the motion to the Magistrate Judge [Page ID #2801: Order (RE #184)], and the parties fully briefed the issue. [Page ID #2820-31: Rowan County Resp. (RE #192); Page ID #2832-59: Davis Resp. (RE #193); Page ID #2862: Pls.' Reply (RE #194); Page ID#2884-88: Rowan County Sur-reply (RE #196).] Then, after the Magistrate Judge issued his recommendation that Plaintiffs' fees motion be denied [Page ID #2896-902: R. & R. (RE #199)], Plaintiffs timely submitted their objections. [Page ID #2911: Pls.' Objs. To Magistrate's R. & R.

(RE #201).] The District Court ordered Davis and the State Defendants to respond to those objections [Page ID #2919], which they did. [Page ID #2920-25: Rowan County Resp. to Pls.' Objs. (RE #203); Page ID #2926-33: Davis Resp. to Pls.' Objs. (RE #204).]

After two rounds of briefing by the parties, the District Court issued its decision finding Plaintiffs prevailing parties in this litigation and awarding them reasonable attorney's fees and costs. [Page ID #2943-92: Mem. Op. & Order (RE #206).] The District Court also concluded that Davis's official capacity conduct in adopting and enforcing her "no marriage licenses" policy constituted state, not municipal, action. [*Id.* at Page ID #2965-80.] As a result, the District Court ordered the state, not the office of the Rowan County Clerk, to pay the fee award. [*Id.* at Page ID #2980, #2991.]

The State Defendants moved the District Court to amend its decision by imposing the fee liability on the office of the Rowan County Clerk. [Page ID #3004-15: Mot. and Mem. to Amend J. (RE #208; #208-1).] After a third round of briefing on fees, the District Court declined to do so. [Page ID #3072-85: Mem. Op. & Order (RE #222).] Davis and the State Defendants thereafter separately appealed from the District Court's fee decision. [Page ID #3088-91: State Defs.' Notice of Appeal (RE #224) (appealing from fee decision and denial of motion to amend judgment); Page ID #3095-98: Davis Notice of Appeal (RE #226).]

SUMMARY OF THE ARGUMENT

Plaintiffs secured a substantial victory in this case by blocking a recalcitrant government official from withholding marriage licenses from eligible applicants. They did so by securing court-ordered relief in the form of a preliminary injunction that barred Rowan County Clerk Kim Davis from continuing to enforce her "no marriage licenses" policy. Plaintiffs also succeeded by ensuring that the court-ordered relief did not apply just to them, but that it also protected the rights of any other eligible applicants wishing to obtain a marriage license in Rowan County. Then, when Davis refused to comply with the Preliminary Injunction even after having exhausted all attempts to stay the ruling, Plaintiffs enforced their court-ordered victory by pursuing (and obtaining) a civil contempt finding that resulted in her capitulation.

As a result of those court-ordered victories, several Plaintiffs (and others) were able to obtain their marriage licenses, and two of the Plaintiff couples in this appeal married using the very marriage licenses they obtained *because of* the Preliminary Injunction. Plaintiffs thus secured a merits-based, court-ordered victory that: (1) materially altered the parties' legal relationship; (2) conferred a direct and irrevocable benefit to them; and (3) was not later "reversed, dissolved, or otherwise undone" by a final decision on the merits. Under 42 U.S.C. § 1988 and this Court's "contextual and case specific inquiry," the Preliminary Injunction

here thus satisfies all of the requirements for conferring prevailing party status on Plaintiffs. Accordingly, the District Court did not clearly err in finding that Plaintiffs are prevailing parties or in determining a reasonable amount of Plaintiffs' attorney's fees and costs. Its opinion on those topics was not only not clearly erroneous, but it was also correct under any standard of review and should be affirmed.

However, Plaintiffs' attorney's fees and costs should be assessed against the office of the Rowan County Clerk, not the state. That is because, by unilaterally adopting and enforcing a policy that exceeded her authority under Kentucky law and conflicted with her state-mandated duties regarding the issuance of marriage licenses, Davis's official-capacity conduct represented a decision by a local, not state, official with final policymaking authority over the operations of her office. The portion of the District Court's opinion assigning liability for Plaintiffs' reasonable fees and costs to Kentucky should be vacated with directions to order the office of the Rowan County Clerk's office to pay the fee award in this matter.

STANDARD OF REVIEW

"[A] district court's determination of prevailing party status [is reviewed] for clear error." *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006), *as amended on denial of reh'g and reh'g en banc* (June 12, 2007); *see, e.g.*,

McQueary v. Conway (*McQueary II*), 508 F. App'x 522, 524 (6th Cir. 2012) (applying clear error standard to district court's determination of prevailing party status).[5] "[C]onsiderable deference" is due the District Court's determination of prevailing party status because "the district court granted the preliminary injunction in the first instance, had a ring-side view of the proceedings and knows firsthand how and why the case proceeded as it did." *McQueary II*, 508 F. App'x at 523-24.

As to the fee award itself (including whether the opponent has made the requisite "strong showing" that special circumstances would render such an award unjust), the District Court's rulings are reviewed for abuse of discretion. *Reed v.*

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[5] The State Defendants and Davis assert that a determination of prevailing-party status is reviewed *de novo*, and they cite a 2007 panel decision and an unreported 2015 decision, respectively, for that proposition. [RE #36 (17-6385): State Defs.' Br. at 22 (citing *Radvansky v. City of Olmstead Falls*, 496 F.3d 609, 619 (6th Cir. 2007)); RE #39 (17-6404): Davis's Br. at 31 (citing *Woods v. Willis*, 631 F. App'x 359, 363 (6th Cir. 2015)).] However, "a published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision.'" *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (quoting *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014)). Because *DiLaura* does not conflict with Supreme Court precedent and has not been overruled by this Court sitting *en banc*, clear error review applies to the District Court's determination that Plaintiffs were prevailing parties. Indeed, though not mentioned by Davis in her brief, the conflict between reported panel decisions regarding the proper standard of review was acknowledged in the unreported decision she cited. *See Woods*, 631 F. App'x at 363 n.4. [RE #39 (17-6404) at 31.] In any event, Plaintiffs meet the definition of prevailing parties under either standard.

Rhodes, 179 F.3d 453, 469 n.2 (6th Cir. 1999); *Hescott v. City of Saginaw*, 757 F.3d 518, 526 (6th Cir. 2014). "A district court abuses its discretion when it 'relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard.'" *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 618 (6th Cir. 2013) (quoting *Wikol ex rel. Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004)).

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ERR IN AWARDING PLAINTIFFS PREVAILING PARTY STATUS ON THE BASIS OF A MERITS-BASED PRELIMINARY INJUNCTION THAT MATERIALLY ALTERED THE PARTIES' LEGAL RELATIONSHIP AND CONFERRED A DIRECT AND IRREVOCABLE BENEFIT.

A plaintiff qualifies as a "prevailing party," and is thus entitled to recover attorney's fees under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, where she succeeds "on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) (internal quotation marks and citation omitted). "The touchstone of the prevailing party inquiry [is] the material alteration of the [parties'] legal relationship [] in a manner which Congress sought to promote in the fee statute." *Id.* at 792-93.

In order to secure a material alteration in the parties' legal relationship, the plaintiff must "'obtain an enforceable judgment against the defendant from whom

fees are sought, or comparable relief through a consent decree or settlement.'" *DiLaura*, 471 F.3d at 670 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). Thus, the change in the parties' legal relationship must be court-ordered, and it must directly benefit the plaintiff "at the time of the judgment or settlement." *Id.* (internal quotation marks omitted); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 604-05 (2001).

Moreover, preliminary injunctions that are not later undone by a final decision on the merits may, in some instances, materially alter the parties' legal relationship and thus be a basis for awarding prevailing party status. *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010); *Sole v. Wyner*, 551 U.S. 74, 86 (2007) (preliminary injunction that is "reversed, dissolved, or otherwise undone" by a final decision insufficient to confer prevailing party status). In determining whether the plaintiffs in a particular case have achieved prevailing party status by virtue of a preliminary injunction, district courts must engage in a "contextual and case-specific inquiry." *McQueary*, 614 F.3d at 601.

As explained below, the District Court did not commit clear error when it awarded Plaintiffs prevailing party status. Plaintiffs secured a court-ordered change in the parties' legal relationship on the merits of their claim that conferred a direct and irrevocable benefit that was not undone by a later decision in the case,

notwithstanding that the Preliminary Injunction became moot before a final judgment could be issued.

A. Plaintiffs Secured A Material Alteration In The Parties' Legal Relationship.

The preliminary injunction in this case satisfied all of the requisites for having materially altered the parties' legal relationship. Specifically, it: (1) represented a court-ordered, enforceable judgment on the merits against Davis in her official capacity; (2) awarded relief to Plaintiffs on a significant issue in the litigation; and (3) conferred a direct and irrevocable benefit to Plaintiffs.

1. Plaintiffs secured a court-ordered, merits-based preliminary injunction.

It cannot reasonably be disputed that the preliminary injunction at issue represented a merits-based, enforceable judgment against Davis in her official capacity. After the parties fully briefed the preliminary injunction issue and conducted an evidentiary hearing, the District Court applied heightened scrutiny to analyze the challenged "no marriage licenses" policy because it directly and significantly interfered with Plaintiffs' fundamental right to marry. [Page ID #1159: Mem. Op. & Order (RE #43).]

The District Court not only found that the "no marriage licenses" policy failed to serve a compelling governmental interest, the court also concluded that the challenged policy *undermined* the state's countervailing (and compelling)

interests in preventing Establishment Clause violations and in upholding the rule of law. [Page ID #1160: Mem. Op. & Order (RE #43).] The District Court thus held that Plaintiffs were likely to succeed on the merits of their claims and would suffer irreparable harm absent the injunction. [*Id.* at Page ID #1160-61.] The District Court also examined, and rejected, each of the purported harms Davis alleged would result if an injunction were granted. [*Id.* at Page ID #1161-73.]

Further reinforcing the merits-based nature of the ruling, a unanimous panel of this Court, in denying Davis's attempt to stay the preliminary injunction ruling, observed that "it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that 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 WL 10692640, at *1 (6th Cir. Aug. 26, 2015). This Court further concluded that "[t]here is thus little or no likelihood that [Davis] in her official capacity will prevail on appeal." *Id.*

And once issued, the court-ordered preliminary injunction compelled Davis, in her official capacity, to refrain from enforcing her "no marriage licenses" policy as to Plaintiffs. [Page ID #1173: Mem. Op. & Order (RE #43).] Then, following the subsequent modification, the preliminary injunction further barred Davis's

official capacity enforcement of the policy as to *all* eligible marriage license applicants. [Page ID #1557: Order (RE #74).]

And not only was the merits-based preliminary injunction enforceable, it was actually enforced when Davis, unsatisfied with the adverse ruling, persisted in refusing to comply (or to allow her subordinates to comply) with the preliminary injunction after having exhausted all attempts to stay its enforcement. [Page ID #1558-59: Order (RE #75) (holding Davis in contempt of court and ordering that she be remanded to the custody of the U.S. Marshal pending compliance with the preliminary injunction); *Davis v. Miller*, 136 S. Ct. 23 (2015).] As is evident from the record, therefore, Plaintiffs' victory in barring Davis from enforcing her "no marriage licenses" policy was not the result of Davis voluntarily abandoning the policy; nor did the preliminary injunction merely have a "catalytic effect" in bringing about a change regarding the challenged "no marriage licenses" policy. Rather, the preliminary injunction forced Davis to abandon enforcement of the policy when civil contempt sanctions compelled her compliance.

2. The preliminary injunction represented a merits-based victory on a significant issue in the litigation.

Similarly, that the preliminary injunction awarded victory to Plaintiffs on a significant issue in the litigation is evident from the fact that their claims primarily centered on challenging Davis's "no marriage licenses" policy as an infringement on the fundamental right to marry. [Page ID #10-14: Compl. (RE #1).] Thus,

securing a preliminary injunction barring the official-capacity enforcement of that policy, not only as to the named Plaintiffs but also to all other individuals who were otherwise eligible to marry, represented a substantial victory on a "significant issue . . . which achieve[d] some of the benefits the party sought in bringing the suit." *Tex. State Teachers Ass'n*, 489 U.S. at 791-92 (internal quotation marks and citation omitted); *see Hewitt v. Helms*, 482 U.S. 755, 755 (1987) (plaintiff must "receive at least some relief on the merits of his claim before he can be said to 'prevail'"); *accord McQueary*, 614 F.3d at 603 ("A plaintiff crosses the threshold to 'prevailing party' status by succeeding on a single claim, even if he loses on several others and even if that limited success does not grant him the 'primary relief' he sought.").

3. The court-ordered relief conferred a direct and irrevocable benefit on Plaintiffs.

In addition to being a court-ordered relief on the merits of their claim, the preliminary injunction in this case also provided a direct and lasting benefit to Plaintiffs in the form of enabling them to obtain the marriage licenses to which they were legally entitled. Specifically, Plaintiffs secured a merits-based preliminary injunction barring enforcement of a policy that blocked them from obtaining marriage licenses. Once the policy was enjoined (and enforced by means of the District Court's contempt power), Plaintiffs were free to obtain their marriage licenses, which several did. [Page ID #1798: Status Report (RE #84).]

And two of the Plaintiff couples then used those marriage licenses to wed, thus solidifying the irrevocable nature of the benefit they obtained by virtue of the preliminary injunction. [Page ID #2742: Ex. 1 – Pls. Miller and Roberts' Marriage License (RE #183-2); Page ID #2743: Ex. 2 – Pls. Skaggs and Spartman's Marriage License (RE #183-3).] This is relief that Plaintiffs requested in their Complaint [Page ID #14: Compl. (RE #1)], and that is the measure of whether one obtains a direct benefit from the ruling. *McQueary*, 614 F.3d at 602 ("In considering whether a claimant directly benefitted from litigation, we usually measure the plaintiff's gain based on the relief requested in his complaint . . . ."); *id.* at 601 (holding that merits-based preliminary injunction barring enforcement of various restrictions on funeral protest activities conferred direct benefit on plaintiff who sought to engage in those prohibited, and enjoined, activities).

As to the two Plaintiff couples who wed, they could have obtained no more injunctive relief on their official-capacity claim than they achieved by virtue of the preliminary injunction, nor could they have obtained any additional individualized benefit had it been converted to a permanent injunction. Thus, the preliminary injunction effectively granted them the individualized permanent injunctive relief they sought in their complaint and is no different than other merits-based preliminary injunctions found to have conferred prevailing party status. *See, e.g.*, *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903 (8th Cir. 2012) (preliminary

injunction barring regulation of quarry operators outside city limits, but later rendered moot by change in the law, sufficient to confer prevailing party status); *Select Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (preliminary injunction barring voter identification provision requiring voters to pay $20 to $35 to obtain IDs, but rendered moot before final judgment, sufficient to confer prevailing party status); *Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005) (preliminary injunction barring defendant from imposing separate price for certain butterfat, but later rendered moot, sufficient to confer prevailing party status).

Moreover, Plaintiffs also sought (and obtained) preliminary injunctive relief barring enforcement of the challenged policy as to *any other* individuals who were otherwise legally entitled to marry. [Page ID #1581: 9/3/15 Hr'g Tr. (Re #78).] This victory likewise conferred a benefit in the form of nonparties to this litigation likewise being able to obtain the marriage licenses to which they were legally entitled. Though not secured by means of a certified class claim, as contemplated by Plaintiffs' complaint [Page ID #14: Compl. (RE #1)], this victory nonetheless conferred a direct and irrevocable benefit sought by Plaintiffs in bringing their lawsuit because they achieved the functional equivalent of class-wide relief *via* the merits-based preliminary injunction. [*Id.*]

B. Awarding Plaintiffs Prevailing Party Status Is Consistent With This Court's Contextual And Case-Specific Inquiry.

Under *McQueary*'s "contextual and case specific inquiry," the "*preliminary* nature of the relief does not by itself provide a ground for *never* granting fees" to a preliminary injunction winner. 614 F.3d at 600. Here, the District Court correctly concluded that under the *McQueary*'s "contextual and case-specific" standard, Plaintiffs were prevailing parties despite the preliminary nature of the relief. [Page ID #2953-64: Mem. Op. & Order (RE #206).] That conclusion was not clearly erroneous.

For the reasons explained in Section I.A, above, there can be no clearer example of a court-ordered change in the parties' legal relationship that results in a direct and irrevocable benefit to the plaintiff than what Plaintiffs achieved in this case. Specifically, they sought to block enforcement of an unconstitutional policy of refusing to issue marriage licenses to qualified applicants, and they obtained a merits-based preliminary injunction for themselves (as well as all qualified non-parties to the litigation) that did so. Despite Davis's efforts to stay enforcement of the preliminary injunction ruling, she failed. Then, dissatisfied with the judiciary's refusal to grant her a stay of the preliminary injunction, Davis refused to comply with it which resulted in her being held in contempt on Plaintiffs' motion. Only then were two Plaintiff couples able to obtain the marriage licenses to which they were legally entitled and solemnize their marriages. To conclude that Plaintiffs are

not prevailing parties in this case would render *McQueary*'s contextual and case-specific inquiry beyond the reach of any preliminary injunction winners and thereby conflict with *McQueary* itself. 614 F.3d at 601 ("contextual and case-specific inquiry" . . . does not permit us to say that preliminary-injunction winners always are, or never are, "prevailing parties").

C. The District Court's Decision Is Consistent With The Weight Of Authority From Other Circuits.

Finally, awarding Plaintiffs prevailing party status here is consistent with the weight of authority from other circuits that have held, to varying degrees, that a merits-based preliminary injunction that confers a direct and irrevocable benefit may provide a basis for awarding prevailing party status even if it is rendered moot before final judgment. *See, e.g.*, *Rogers Grp., Inc.*, 683 F.3d 903 (post-*McQueary* decision upholding award of attorney's fees based on preliminary injunction success later rendered moot); *Kan. Judicial Watch v. Stout*, 653 F.3d 1230 (10th Cir. 2011) (same); *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008); *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233 (3d Cir. 2008) (holding that "relief obtained via a preliminary injunction can, under appropriate circumstances, render a party 'prevailing.'"); *Select Milk Producers, Inc.*, 400 F.3d at 946 ("[P]reliminary injunctions may be sufficient in some certain circumstances to render plaintiffs "prevailing parties" under federal fee-shifting statutes."); *Dupuy v. Samuels*, 423 F.3d 714, 723 n.4 (7th Cir. 2005) (rejecting "*per*

se rule that a preliminary injunction can never serve as a predicate" for a fee award); *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (holding that preliminary injunction "carries all the 'judicial imprimatur' necessary" to confer prevailing party status in certain circumstances). *But see Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002) ("A preliminary injunction such as that granted to Smyth and Montgomery below is closely analogous, for these purposes, to the examples of judicial relief deemed insufficient in *Buckhannon*.").

The Tenth Circuit's post-*McQueary* decision in *Kansas Judicial Watch*, 653 F.3d 1230, is particularly instructive. There, the plaintiffs challenged certain portions of Kansas Code of Judicial Conduct on free speech grounds, and they sought a declaratory judgment as well as preliminary and permanent injunctive relief to bar enforcement of those provisions. *Id.* at 1232-33. The district court awarded the plaintiffs a merits-based preliminary injunction, but the defendant appealed that adverse ruling. *Id.* at 1234. While the preliminary injunction ruling was on appeal, the Kansas Supreme Court amended the challenged Code provisions, causing the Tenth Circuit to vacate the preliminary injunction, dismiss the appeal as moot, and remand for entry of dismissal. *Id.* (citing *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1249 (10th Cir. 2009)).

On remand, the district court dismissed the case and denied the plaintiffs' request for attorney's fees because, in its view, the preliminary injunction did not

"materially alter" the parties' legal relationship due to the plaintiffs' failure to achieve their "primary relief," *i.e.*, final declaratory relief that the rules were invalid both on their face and as-applied. *Kan. Judicial Watch*, 653 F.3d at 1234. In the subsequent appeal of that prevailing party decision, the Tenth Circuit reversed. In doing so, the Court of Appeals Circuit considered whether the preliminary injunction provided "relief on the merits," *i.e.*, whether the preliminary injunction awarded "relief sought in the plaintiff's complaint and [which] represent[ed] an unambiguous indication of probable success on the merits," a necessary element for prevailing party status (as opposed to a mere status quo injunction). *Id.* at 1238. The Court of Appeals concluded that it did, stating:

> Appellants sought two basic types of relief in their complaint: (1) a declaration that the Pledges, Commits, and Solicitation clauses were unconstitutional; and (2) preliminary and permanent injunctions that would prohibit the Commission from enforcing the canons against judicial candidates who responded to KJR's questionnaire. *The preliminary injunction issued by the district court provided the second form of relief as long as it was in effect.* That is, the preliminary injunction prohibited enforcement of the challenged canons and allowed Appellants to engage in their speech activities without fear of a disciplinary action during the pendency of the case.

Id. at 1239 (emphasis added).

The plaintiffs in the case had sought to enjoin enforcement of the challenged speech restrictions alleging a chill on their protected expression because of the threatened enforcement. *Id.* at 1233 (indicating that one plaintiff "desired to go door-to-door to seek signatures on a nominating petition" and the other "wanted to

express his views to the public by answering" a campaign questionnaire). Because the preliminary injunction barred enforcement of the challenged speech restrictions "and allowed Appellants to engage in their speech activities without fear of a disciplinary action during the pendency of the case," and because the preliminary injunction also represented "an unambiguous indication of probable success on the merits" (that was not later undone by an adverse ruling on the merits), the Tenth Circuit held that it sufficed to confer prevailing party status notwithstanding that the preliminary injunction was later vacated due to mootness. *Id.* at 1239-40.

As in *Kansas Judicial Watch*, Plaintiffs here sought, *inter alia*, both declaratory and injunctive relief in their complaint, and they attained a merits-based preliminary injunction barring Davis, in her official capacity, from enforcing the "no marriage licenses" policy. [Page ID #14: Compl. (RE #1).] Despite Davis's willful refusal to comply with the ruling after exhausting all attempts to stay its enforcement, Plaintiffs nonetheless secured the direct and irrevocable benefit they sought—issuance of marriage licenses and thus the ability to wed—once Davis was found in contempt and unable to bar her subordinates from complying with the ruling. Thus, *Kansas Judicial Watch* makes clear that the preliminary injunction ruling was sufficiently "enduring" to support Plaintiffs' status as prevailing parties in this litigation.

Kansas Judicial Watch is also instructive in that it establishes that prevailing party status is not confined to situations in which mootness is caused by the mere passage of time. There, the preliminary injunction barred defendants' ability to enforce the challenged provisions during the pendency of the case. *Id.* at 1239. And, as here, the plaintiffs' claims were not rendered moot by the mere passage of time, but rather by the affirmative repeal of the challenged provisions after the entry of the merits-based preliminary injunction barring their enforcement. *Id.* at 1234. By holding that the preliminary injunction success supported prevailing party status despite the subsequent repeal, the Tenth Circuit implicitly rejected the contention that *only* preliminary injunction winners whose claims are rendered moot by the "passage of time" can attain prevailing party status.

D. The District Court Did Not Abuse Its Discretion In The Amount Of Fees Or In Finding That No Special Circumstances Exist To Justify Disallowing The Fee Award.

The amount of fees awarded was reasonable in light of the success that Plaintiffs achieved. Moreover, there are no special circumstances that would warrant the extraordinary step of disallowing fee recovery altogether for a prevailing party.

1. The District Court did not abuse its discretion in refusing to discount the fee award.

The District Court did not abuse its discretion in finding that the amount of attorney's fees Plaintiffs incurred was reasonable. To the extent that Davis objects to them as excessive, she first fails to appreciate that efforts by Plaintiffs' counsel were the direct result of her litigation strategy. *See, e.g.*, *Hixon v. City of Golden Valley*, Civ. No. 06-1548, 2007 WL 4373111, at *4 (D. Minn. Dec. 13, 2007) (unreported) (noting that "[t]he Defendants cannot be heard to complain" about the number of hours reasonably incurred by plaintiffs' counsel in having to respond to defendants' arguments). Moreover, Davis's suggestion that the lodestar amount should be reduced by one-half because Plaintiffs did not prevail on their individual capacity claims misses the point. Specifically, reduction for "limited success" depends on two issues:

> (1) [W]hether the claims on which the plaintiff failed to prevail were or were not related to the claims on which he or she succeeded, and (2) whether the plaintiff achieved a sufficient degree of success to render the hours reasonably expended a satisfactory basis for awarding attorney fees.

Imwalle v. Reliance Med. Prod., Inc., 515 F.3d 531, 552 (6th Cir. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

Here, the number of hours Plaintiffs' counsel expended on this litigation related almost exclusively on pursuing, and defending, Plaintiffs' official-capacity claims. Thus, there are no hours, much less half of the compensable hours, related

to unsuccessful claims that would justify reducing the lodestar amount. But, even if there were, the individual and official-capacity claims were so inextricably intertwined, both in terms of common facts and relevant legal theories, that the District Court would not have abused its discretion in refusing to reduce the lodestar amount given the significance of the "overall relief" Plaintiffs obtained. *Imwalle*, 515 F.3d at 552 ("[W]here the plaintiff's claims for relief involve common facts or related legal theories, such that much of counsel's time will have been devoted generally to the litigation as a whole, the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.") (internal quotation marks and citation omitted).

It is also of no consequence that only two of the Plaintiff couples married using marriage licenses they obtained as a result of the preliminary injunction. The attorney's fees reasonably incurred in attaining that preliminary injunctive relief (and in defending it before the District Court, this Court, and the U.S. Supreme Court) were the same regardless of whether two or two hundred couples ultimately wed. "When claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorneys [sic] fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced." *Id.* at 554 (internal quotation marks and citation omitted).

In any event, even if the number of licenses obtained pursuant to the Preliminary Injunction were relevant to the lodestar amount, that would weigh in favor of increasing, not decreasing, the lodestar because Plaintiffs successfully argued that the preliminary injunction should apply to *all* eligible marriage license applicants, not just themselves. Thus, they actually achieved a broader victory for a greater number of individuals—a fact that Davis herself has acknowledged. [*See* Page ID #2217: Davis's Mem. of Law in Supp. of Mot. for Immediate Consideration and Mot. to Stay Sept. 3, 2015 Inj. Order Pending Appeal (RE #113-1) (Davis noting that, following preliminary injunction and contempt hearing, nonparties to this litigation obtained marriage licenses).] The lodestar amount, as determined by the District Court, should therefore be afforded substantial deference and should not be reduced for limited success. *See Deja Vu v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 421 F.3d 417, 423 (6th Cir. 2005) (stating that "[p]revailing parties . . . are generally entitled to a fully compensatory fee" and noting that "we have repeatedly rejected mechanical reductions in fees based on the number of issues on which a plaintiff has prevailed" (internal quotation marks and citation omitted)).[6]

[6] Davis also takes issue with 27.2 hours Plaintiffs devoted to class certification. [RE #39 (17-6404): Davis Br. at 53.] But that time, as the District Court found, was reasonably incurred in furtherance of Plaintiffs' attempt (ultimately successful by other means) to block enforcement of the "no marriages

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2. Davis and the State Defendants failed to make the "strong showing" necessary to establish the existence of special circumstances.

Special circumstances "should not be easily found," *Hescott*, 757 F.3d at 523 (internal quotation marks and citation omitted), and indeed this Court has "never" reduced a fee award on that basis. *Id.* at 535. Neither Davis nor the State Defendants point to any circumstances that would warrant the unprecedented step of reducing the lodestar amount because of purported "special circumstances."[7]

First, Davis's purported special circumstance—that she "self-effected" the relief she sought in her third-party claims until the law changed in her favor—is legally inadequate to constitute a special circumstance. Specifically, the apparent

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licenses" policy for all eligible applicants. Time spent on (ultimately unsuccessful) class certification can nonetheless be reasonably incurred and thus fully compensable to prevailing parties. *See Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161, 1197-98 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004) (awarding fees in Title VII case attributable to preparing class action claims even though class claims were later dismissed voluntarily).

[7] Davis criticizes the District Court for having dismissed the "special circumstances" question "out of hand." [RE #39 (17-6404): Principal Br. of Appellant, at 48.] But she fails to note that she never raised the issue below. [Page ID #2832-58: Davis's Resp. to Pls.' Fees Mot. (RE #193); Page ID #2926-32: Davis's Resp. to Pls.' Obj. to Magistrate's R & R. (RE #204).] And of the purported "special circumstances" offered by Rowan County and the State Defendants below, none of them involved those Davis raises in her appeal. [Page ID #2827-28: Rowan County's Resp. to Pls.' Fees Mot. (RE #192); Page ID #3013: State Defs.' Mem. in Supp. of Mot. to Alter or Amend (RE #208-1).]

premise of Davis's argument is that Plaintiffs were unsuccessful in obtaining marriage licenses signed by her. But Plaintiffs sought the issuance of valid marriage licenses to which they, and others, were legally entitled. [Page ID #14: Compl. (RE #1).] That Davis, after having been jailed for contempt, changed the form in a way that anticipated a future change in the law does not alter the fact that Plaintiffs, and others, obtained valid marriage licenses because of the preliminary injunction they obtained and the contempt order enforcing it.[8] *See, e.g.*, *McQueary*, 614 F.3d at 604 (citing *Deja Vu*, 421 F.3d at 422 (later developments in the law, which would prevent a party from prevailing if case were re-litigated at time of fees determination, are not special circumstances)).

Similarly, that related actions remain pending in which other plaintiffs seek damages against Davis for the same conduct does not render unjust the fee award in this case where Plaintiffs prevailed *via* a merits-based preliminary injunction. Davis presupposes that she will prevail in those cases and will do so on-the-merits. But not only is Davis's success in those cases purely speculative, so, too, is

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[8] Notably, the "self-effected" relief Davis granted herself is contrary to the position she advanced throughout this litigation, including before this Court, in which she disclaimed any authority to alter the form of the marriage licenses issued by her office. [*See, e.g.*, Page ID #748: Davis's Verified Third-Party Compl. (RE #34), at ¶ 10 ("County clerks have no local discretion under Kentucky law to alter the composition or requirements of the KDLA-prescribed form."); RE #26-1 (15-5961): Davis's Emergency Mot. for Immediate Consideration and Mot. for Inj. Pending Appeal, Page ID #10; #13.]

whether it would even be on-the-merits as opposed to on the threshold question of qualified immunity. [*See, e.g.*, RE #30 (17-6120): Davis Br. at 29-44 (Davis, in appealing the denial of her motion to dismiss on qualified immunity grounds, argues that even if she violated plaintiffs' constitutional rights, the right was not "clearly established" at the time).] Thus, Davis's mere hope that she will prevail in those damages cases in which she is asserting qualified immunity is not a special circumstance that would render a fee award here unjust. *See Lefemine v. Wideman*, 758 F.3d 551, 557 (4th Cir. 2014) ("[N]either this Court nor the Supreme Court has ever held that qualified immunity constitutes a special circumstance supporting the denial of Section 1988 attorneys' fees. In fact, the case law suggests quite the opposite.").

Davis's assertion that vacatur of the Preliminary Injunction is a "special circumstance" is also without merit. The District Court correctly found that vacatur of the Preliminary Injunction did not defeat Plaintiffs' status as prevailing parties. Having lost the vacatur argument at the prevailing-party stage, Davis seeks a second bite at the apple by positing that vacatur constitutes a "special circumstance" that would destroy Plaintiffs' entitlement to fees. [Page ID #2852-54: Davis's Resp. Opposing Mot. for Attorney's Fees (RE #193).] As noted above, Plaintiffs prevailed by attaining a direct and irrevocable benefit that materially altered the parties' legal relationship. The fact that a change in the law rendered

Plaintiffs' official-capacity claims moot before final judgment did not render Plaintiffs less successful in having obtained that permanent benefit, nor did the procedural vacatur of the Preliminary Injunction that was unrelated to the merits of their claims. If vacatur, by itself, were sufficient to justify denying a fee award to otherwise prevailing plaintiffs, *McQueary* would have been decided differently. 614 F.3d at 600 (rejecting "potentially straightforward approach" of denying fees on basis of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), doctrine that generally requires vacatur of preliminary injunctions in cases rendered moot before final judgment).

As for the State Defendants' argument that the state should not bear financial responsibility for Davis's unlawful acts, that, too, is not a special circumstance.[9] The Supreme Court has explicitly recognized that federal courts have the authority to assign liability for attorney's fees to the state. *Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("[It] is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, *or from the State or*

[9] As explained in Section II, below, Plaintiffs agree that the office of the Rowan County Clerk should be liable for paying the fee award because Davis, in her official capacity, acted as a local, not state, official in adopting and enforcing her "no marriage licenses" policy. However, if that portion of the District Court's opinion is affirmed, Plaintiffs maintain that the State Defendants' proffered "special circumstance" is insufficient to warrant denying a fee award.

local government (whether or not the agency or government is a named party)." (quoting S. Rep. No. 94-1011, p. 5 (1976) (emphasis added)); *McMillian v. Monroe Cty.*, 520 U.S. 781, 793 (1997) (holding that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties."); *Brandon v. Holt*, 469 U.S. 464, 471 (1985) ("a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents"). Thus, assignment of liability to the state rather than the county cannot constitute a "special circumstance" that would undo government responsibility for paying the award altogether.

In this case, Plaintiffs filed this action so that they (and others) might be able to obtain the marriage licenses to which they were legally entitled and marry. Two of the Plaintiff couples did just that by virtue of the relief they obtained *via* the Preliminary Injunction. Short of obtaining a final judgment—which is not required for prevailing party status—Plaintiffs could attain no more success than they achieved here: (1) a merits-based ruling enjoining Davis from enforcing the challenged "no marriage licenses" policy; and (2) Davis's court-ordered (as opposed to voluntary) compliance with the Preliminary Injunction that resulted in Plaintiffs' attainment of a direct and irrevocable benefit in the form of marriage licenses that enabled two of the Plaintiff couples (as well as others) to marry.

Because Plaintiffs obtained a merits-based preliminary injunction that granted them a direct and lasting benefit that materially altered the parties' relationship, the District Court did not clearly err in finding that Plaintiffs are prevailing parties in this litigation. Moreover, the District Court's determination of a reasonable amount of fees and costs was not clearly erroneous and should be affirmed.

II. THE OFFICE OF THE ROWAN COUNTY CLERK IS LIABLE FOR DAVIS'S WRONGDOING BECAUSE DAVIS ACTED AS A LOCAL OFFICIAL IN ADOPTING AND ENFORCING A "NO MARRIAGE LICENSES" POLICY.

While the District Court correctly observed that local versus state liability is a close question, Davis's "no marriage licenses policy"—which flew in the face of explicit instruction from the state to comply with *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015)—is best described as a local one for which her office should be held responsible. Accordingly, Plaintiffs' attorney's fees and costs should be assessed against Rowan County, not the Commonwealth of Kentucky.

In determining whether a county official acts as a state or local official, the examination must be "guided" by two principles—"whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue" and whether, and to what extent, the official's functions are defined under relevant state law. *McMillian*, 520 U.S. at 785. Relevant to this inquiry are the following factors:

> (1) the State's potential liability for a judgment; (2) how state statutes and courts refer to the officer; (3) who appoints the officer; (4) who pays the officer; (5) the degree of state control over the officer; and (6) whether the functions involved fall within the traditional purview of state or local government.

Crabbs v. Scott, 786 F.3d 426, 429 (6th Cir. 2015) (citing *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (en banc)).

Here, the fifth factor—the degree of state control, or in this case, lack of control—weighs decisively in favor of local liability. Localities may be liable for attorney's fees when the culpability lies with local, not state, officials. That assigns fees to the official responsible and achieves a deterrent effect to prevent future wrongdoing. *Cf. City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). Davis's "no marriage licenses" policy was neither a state-imposed obligation that Davis was duty bound to enforce nor one that was adopted in furtherance of her state-delegated marriage licensing duties. *See, e.g.*, *Jones v. Hamilton Cty. Sheriff*, 838 F.3d 782, 784 (6th Cir. 2016) (holding that an Ohio sheriff was a state actor entitled to sovereign immunity because state law "required" him to take the challenged actions); *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) ("Thus, a city official pursues her duties as a state agent when enforcing state law or policy."); *see also McMillian*, 520 U.S. at 793 (locally elected sheriffs in Alabama are state actors "when executing their law enforcement duties").

Instead, Davis's "no marriage licenses" policy is more properly viewed as a locally-adopted, discretionary policy regarding the services her office would provide because she possessed no authority under state law to impose new or additional requirements on obtaining a marriage license, and the policy did not promote or otherwise enforce state law. [Page ID #277: July 20, 2015 Hr'g. Tr. (RE #26) (Davis testifying that she possesses authority to set the internal rules, policies and practices for the Rowan County Clerk's office); Page ID #748: Davis's Verified Third Party Compl. (RE #34), ¶10 ("County clerks have no local discretion under Kentucky law to alter the composition or requirements of the KDLA-prescribed form.").] Indeed, the policy actually *conflicted* with Davis's state-imposed obligations to issue marriage licenses to eligible applicants. K.R.S. § 402.100 ("Each county clerk *shall make available to the public* the form prescribed by the Department for Libraries and Archives for the issuance of a marriage license." (emphasis added)); K.R.S. § 402.110 ("In issuing the license *the clerk shall deliver it in its entirety to the licensee*." (emphasis added)); K.R.S. § 402.080 ("The license *shall be issued by the clerk of the county in which the female resides at the time*, unless the female is eighteen (18) years of age or over or a widow, and the license is issued on her application in person or by writing signed by her, in which case it may be issued by any county clerk." (emphasis added)).

Thus, the enjoined policy here is closely analogous to the challenged policy in *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999), in which this Court found that a county coroner acted as a local, not state, official for purposes of Eleventh Amendment immunity with respect to a policy he adopted governing the manner in which his office would harvest corneas. In doing so, the Court recognized a distinction between county officers who act in compliance with state mandates versus those who undertake discretionary acts. *Id.* at 566. The former are fairly said to be state actors when performing those state-mandated tasks whereas the latter are not. *Id.* at 567 ("Dr. Cleveland, acting without state compulsion, chose to harvest corneas, and he selected a policy for Hamilton County; he thus acted as an agent of Hamilton County, not of Ohio."); *see also Crabbs*, 786 F.3d at 430 ("If Sheriff Scott's policies mechanically adopt and enforce Ohio's DNA-collection law, he may invoke the State's sovereign immunity. . . [i]f not, the State's sovereign immunity offers him no refuge." (internal quotation marks and citation omitted)).

The second and third factors, while not dispositive, also weigh in favor of local, not state, liability: Kentucky law generally classifies county clerks as county, not state, officials; and Davis is elected by the voters of Rowan County. [Page ID #2971-72: Mem. Op. & Order (RE #206).]

The remaining factors do not alter the conclusion that the county, not the state, should be held responsible for Davis's wrongdoing. While the first factor—the State's potential liability—ordinarily is "the foremost factor" to consider in this analysis for purposes of Eleventh Amendment sovereign immunity, it is not particularly helpful here because this case does not involve sovereign immunity. Instead, Plaintiffs prevailed by virtue of having obtained prospective injunctive relief against Davis in her official capacity. *Ex parte Young*, 209 U.S. 123 (1908); *Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274, 279 (1989); *Cash v. Hamilton Cty. Dep't of Adult Prob.*, 388 F.3d 539, 545 (6th Cir. 2004) (stating "that the most important factor is 'will a State pay if the defendant loses?'" (quoting *Brotherton*, 173 F.3d at 560)). Thus, because the Eleventh Amendment does not shield states from fee liability in official-capacity suits seeking prospective injunctive relief, and because counties are liable for fee awards rendered against local officials who have final policymaking authority, this factor is circular because the fee liability is necessarily dependent upon whether Davis's official-capacity conduct is attributable to the county or the state. This factor, therefore, does not weigh in favor of state liability.[10] The fourth factor is similarly irrelevant, as Davis's salary

[10] The District Court noted that there are no Kentucky statutes that directly address whether an adverse judgment against a county clerk's office would be borne by the state or the county. [Page ID #2968 n.24: Mem. Op. & Order (RE #206).]

is not paid by the county or the state, but *via* a portion of the fees her office collects. [Page ID #2973: Mem. Op. & Order (RE #206).]

While the sixth factor—whether marriage license functions fall within the traditional purview of the county or the state—tips in favor of state liability, that alone is insufficient to overcome the fact that each of the other five factors either weighs in favor of local liability or is neutral.

Here, Davis's adoption and enforcement of a "no marriage licenses" policy was purely a discretionary policy that was inconsistent with her state law duties regarding marriage licensing. It is therefore properly considered a policy adopted by her as a county official with final policymaking authority over the operations of her office. It follows that Rowan County, not the Commonwealth of Kentucky, should be held responsible for that wrongdoing.

CONCLUSION

For the foregoing reasons, the July 21, 2017 Order should be affirmed regarding Plaintiffs' attainment of prevailing party status and the reasonable amount of attorney's fees and costs to be awarded as a result.

That portion of the July 21, 2017 Order finding that Davis acted as a state official should be vacated with directions to enter an Order finding that: (a) Davis, in her official capacity, acted as a local, not state official when she adopted (and

enforced) her "no marriage licenses" policy, and (b) the office of the Rowan County Clerk is responsible for satisfying the fee award.

Respectfully submitted,

s/ William E. Sharp

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 32(g), and this Court's Order granting leave for an enlargement of the word limit to 14,000 words [RE #38-1 (17-6385)], I certify that the **Brief of Plaintiffs-Appellees** was prepared using a proportional 14-point typeface and contains 10,387 words (excluding parts of the brief exempted by Rule 32(f) and 6 Cir. R. 32(b)(1)) as calculated by the word processing system used to prepare this brief.

s/ William E. Sharp
William E. Sharp

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I filed a true and accurate copy of the foregoing **Brief of Plaintiffs-Appellees** with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Document Description	Page ID #	Date
1	Complaint with Exhibits	1-26	7/2/15
2	Plaintiffs' Motion for Preliminary Injunction	34-36	7/2/15
2-1	Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction	37-47	7/2/15
10	Order on July 13, 2015 Proceedings	77-78	7/13/15
21	Transcript of July 13, 2015 Proceedings	100-211	7/16/15
24	Order on July 20, 2015 Proceedings	215	7/20/15
26	Transcript of July 20, 2015 Proceedings	217-99	7/23/15
29	Defendant Davis' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction	318-66	7/30/15
34	Verified Third-Party Complaint of Defendant Kim Davis	745-76	8/4/15
36	Plaintiffs' Reply Memorandum in Support of Preliminary Injunction	797-813	8/6/15
39	Defendant/Third-Party Plaintiff Davis's Motion for Preliminary Injunction	824-27	8/7/15
39-1	Defendant/Third-Party Plaintiff Davis's Memorandum in Support of Motion for Preliminary Injunction	828-76	8/7/15
43	Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction	1146-73	8/12/15
44	Notice of Appeal from RE #43	1174-76	8/12/15
58	Order Staying Further Briefing of Davis's Motion for Preliminary Injunction	1289	8/25/15
66	Notice of Appeal from RE #58	1471-73	8/31/15
67	Plaintiffs' Motion to Hold Davis in Contempt of Court	1477-84	9/1/15
67-1	Declaration of April Miller, PhD.	1485-86	9/1/15
68	Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction Pending Appeal	1488-92	9/1/15
72	Davis's Response in Opposition to Contempt Motion	1540-46	9/2/15

Record No.	Document Description	Page ID #	Date
74	Order Granting Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction	1557	9/3/15
75	Order Granting Plaintiffs' Motion to Hold Davis in Contempt	1558-59	9/3/15
78	Transcript of September 3, 2015 Hearing	1563-743	9/5/15
79	Amended Notice of Appeal Amending RE #44	1744-46	9/6/15
82	Notice of Appeal from RE #74	1785-88	9/8/15
83	Notice of Appeal from RE #75	1791-94	9/8/15
84	Status Update	1798-800	9/8/15
89	Order Releasing Defendant Davis from Custody	1827-28	9/8/15
181	Order Vacating Preliminary Injunction	2706-07	8/18/16
182	Order Dismissing Case	2708-10	8/18/16
183	Plaintiffs' Motion for Award of Attorney's Fees and Costs	2711-13	9/19/16
183-1	Memorandum in Support of Plaintiffs' Fees Motion	2714-41	9/19/16
183-2	Exhibit 1: Miller/Roberts Marriage License	2742	9/19/16
183-2	Exhibit 2: Skaggs/Spartman Marriage License	2743	9/19/16
192	Rowan County's Response Opposing Plaintiffs' Fees Motion	2820-31	10/27/16
193	Davis's Response Opposing Plaintiffs' Fees Motion	2832-59	10/31/16
194	Plaintiffs' Reply in Support of Fees Motion	2862-77	11/14/16
195	Rowan County's Motion to Strike or Leave to File a Surreply	2878-82	12/30/16
199	Recommended Disposition and Order	2896-2902	3/6/17
201	Plaintiffs' Objections to Recommended Disposition and Order	2911-18	3/20/17
203	Rowan County's Response to Plaintiffs' Objections to Recommended Disposition	2920-25	4/7/17
204	Davis's Response to Plaintiffs' Objections to Recommended Disposition	2926-33	4/10/17
205	Plaintiffs' Reply in Support of Objections to Recommended Disposition	2934-42	5/1/17
206	Memo. Op. & and Order Granting RE #183	2943-92	7/21/17

Record No.	Document Description	Page ID #	Date
208	State Defendants' Motion to Amend Judgment	3004-06	8/18/17
208-1	Memorandum in Support of State Defendants' Motion to Amend Judgment	3007-15	8/18/17
213	Plaintiffs' Response to Motion to Amend Judgment	3027-30	9/7/17
222	Memo. Op. & and Order Denying RE #208	3072-85	10/23/17
224	Notice of Appeal by State Defendants from RE #206 and RE #222	3088-91	11/21/17
226	Notice of Appeal by Davis from RE #206	3095-98	11/22/17