No. 17-6385

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL MILLER, *et al.*
Plaintiffs-Appellees

v.

ROWAN COUNTY, KENTUCKY, *et al.*
Defendant-Appellee

On appeal from the United States District Court
for the Eastern District of Kentucky at Covington
Case No. 2:15-CV-00044

BRIEF OF APPELEE, ROWAN COUNTY, KENTUCKY

Respectfully submitted,

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26, Appellee, Rowan County, Kentucky, makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

   If answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

2. Is there a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome? **No.**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest.

/s/ Jeffrey C. Mando **April 30, 2018**
Jeffrey C. Mando, Esq. Date

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STATEMENT REGARDING ORAL ARGUMENT

Appellee, Rowan County, requests oral argument because it believes oral argument will be beneficial to the Court in understanding and deciding the issues on appeal.

SUMMARY OF THE ARGUMENT

Appellee, Rowan County, joins in the arguments of Appellees that the District Court erred in its determination that Plaintiffs are "prevailing parties" under 42 U.S.C. § 1988 and entitled to an award of attorney fees. On that basis alone, Rowan County joins in the request of Appellees seeking reversal of the District Court's decision.

In all other respects, however, Rowan County, requests that the District Court's decision as to attorney fees be affirmed. The District Court's determination that Davis acted as a state official with respect to the issuance or non-issuance of marriage licenses was correct. The District Court's decision was rooted in Supreme Court and Sixth Circuit authority. In particular, the District Court thoroughly and correctly followed the multi-factorial test from *Crabbs v. Scott,* 786 F.3d 426 (6th Cir. 2015). Though Governor Bevin challenges this decision, he cites to no authority which required a contrary result or the application of a different test. To the contrary, the various authorities that Governor Bevin cites in an effort to undermine the District Court's decision are either inapplicable or factually distinguishable.

Contrary to Governor Bevin's assertions, the District Court did not err in declining to impose attorney fee liability against the Rowan County Clerk's Office. No legal authority, including *Hutto v. Finney*, 437 U.S. 678 (1978), requires such

an action. In addition, the District Court did not abuse its discretion in determining that no circumstances existed which made an award of attorney fees against Governor Bevin unjust. The unjust circumstances exemption is rarely employed in the Sixth Circuit and is not satisfied merely where, as here, a party seeks to avoid attorney fee liability on the grounds of good faith. Moreover, Governor Bevin's request to impose fees against the Rowan County Clerk's Office is in reality a request to impose fees against Rowan County. Yet, this suggestion is no more just than the imposition of fees against Governor Bevin, since the state exerted significant control over Davis with respect to marriage licenses. As a result, the District Court did not err when it imposed attorney fees against Davis in her official capacity. Its decision in this respect should be affirmed.

COUNTERSTATEMENT OF THE ISSUES

Rowan County does not dispute the framing of the issues on appeal as stated by Governor Matt Bevin and Commissioner Terry Manual, in their official capacities (hereinafter collectively referred to as "Governor Bevin") in issue number 1. (Governor Bevin Brief, p. 7) However, Appellant Bevin misstates the issues in questions 2, 3, and 4. (*Id.* at p. 7 – 8) The issues presented in this appeal are as follows:

(1) Whether the District Court appropriately found that Appellee Davis acted as an agent of the Commonwealth of Kentucky with respect to the issuance or non-issuance of marriage licenses, when marriage is regulated by the state and county clerks are subject to state control in issuing marriage licenses?

(2) Whether the District Court appropriately refused to enter an order imposing attorney fee liability against the Rowan County Clerk's Office when no authority supports such a mandate and Davis was correctly found to act for the Commonwealth in issuing or failing to issue marriage licenses?

(3) Whether the District Court abused its discretion in finding that no special circumstances existed to make an award of attorney fees against the Commonwealth unjust?

I. BACKGROUND OF MARRIAGE LICENSES IN KENTUCKY

Governor Bevin challenges the District Court's finding that Appellant Davis acted for the state, rather than for Rowan County, with respect to marriage licenses. Nevertheless, Governor Bevin fails in his Statement of the Case to even mention the facts developed in the record relating to the operations of county clerk offices in Kentucky with respect to marriage licenses. An overview of those facts is as follows:

Under Kentucky law, county clerks are not county employees, but instead are the holders of elective offices pursuant to § 99 of the Kentucky Constitution. For this reason, the Rowan County Fiscal Court never hired Davis to perform functions for it and it does not set her salary. In general, Fiscal Courts in Kentucky are charged with the obligation of setting the salaries for its employees. *See* KRS 64.530(1). Yet, because Davis is considered under Kentucky law to have duties and jurisdiction "coextensive with that of the Commonwealth" her salary is established pursuant to schedules set by the Kentucky Department of Local Government. *See* KRS 64.5275(1) and (2); *see also* Ky. Cons. § 246.

Additionally, the Rowan County Fiscal Court does not fund or control the internal operations of the County Clerk's office. Rowan County Judge Executive, Walter Blevins, Jr., testified that the Rowan County Clerk's Office operates from the fees it generates itself and that the Office does not receive ***any*** direct funding

from the County's general fund. (R.26, 07.20.15 Hearing Tran. at PageID 234) Though fiscal courts are permitted to set the reasonable maximum amount expended for the county clerk deputies, they do not have the authority to set their salaries outright. KRS 64.530(3). Likewise, Davis testified that she is free to hire and fire her own deputies and to set their individual salaries. (R.26, 07.20.15 Hearing Tran. at PageID 240 – 241, 275) Similarly, Davis testified that she alone, and not the Fiscal Court, sets the internal rules for her office. (*Id.* at 277)

A county clerk's obligations with respect to marriage licenses are subject to state, and not county, control. In Kentucky, the state has "absolute jurisdiction over the regulation of the institution of marriage." *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. App. 2011) (quoting *Rowley v. Lampe*, 331 S.W.2d 887, 890 (Ky. 1960)). Along these lines, Davis testified that her role is to serve as a "pass through" for state agencies, meaning that she collects fees and information for the state and passes it along to various state agencies. (R.26, 07.20.15 Hearing Tran. at PageID 240 – 241, 275) In particular, Davis testified that she collects a $35.00 fee for marriage licenses and that $14.33 of this amount is forwarded to the state. (*Id.* at 241 – 242) According to Davis, her office operates from the fees it collects, and it is not funded separately by the Fiscal Court. (*Id.* at 241)

While the Rowan County Clerk's Office ultimately must return any excess fees collected to the Rowan County Fiscal Court, the amounts that Davis collects

from marriage licenses represent only a small part of this accounting. Davis testified that her office had greater than a $700,000.00 surplus for fiscal year 2015. (R.26, 07.20.15 Hearing Tran. at PageID 243) Yet, she also testified that the amount collected from marriage licenses for that year was only $4,500.00. (*Id.*) This means that marriage licenses represented about 0.1 percent of her total budget for the year. (*Id.*) Thus, the surplus enjoyed by the Rowan County Clerk's Office did not result from issuing marriage licenses, but other functions.

Likewise, all procedures relating to marriage licenses are governed solely by the state. (*Id.* at 273) In fact, all matters relating to marriage in Kentucky, including its definition and the procedures for licensing, solemnizing, and dissolving marriages are governed by Kentucky Revised Statues Chapter 402. In particular, the duty of county clerks to issue marriage licenses is governed by KRS 402.080. The form that county clerks must use for marriage licenses, as required by KRS 420.100, is a form developed by the Kentucky Department of Libraries and Archives. (*Id.* at 252 – 256; *see also* Exh. 2 & Exh. 3) This is why, following the Supreme Court's decision in *Obergefell, et al. v. Hodges, et al.*, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015), Davis received instructions from former Governor Steve Beshear to issue marriage licenses. (R.26, 07.20.15 Hearing Tran. PageID 259 – 260; Exh. 4) In stark contrast, there is no evidence at all that Judge

Executive Blevins or the Fiscal Court ever issued directives to Davis or the Rowan County Clerk's Office with respect to the issuance of marriage licenses.

Indeed, when Davis made the decision to discontinue the issuance of marriage licenses post *Obergefell*, she did not confer with Judge Executive Blevins or consult the Rowan County Fiscal Court. (*Id.* at 278) Instead, Davis merely sat down with her deputies and advised them of the decision that she had made. (*Id.*)

Further indicating the state's control over marriage licenses, Governor Bevin entered Executive Order 2015-048 on December 15, 2015. (R.157-2 at PageID 2616 – 2619) In that Order, Governor Bevin directed the Kentucky Department of Libraries and Archives to begin using a marriage license form that no longer included the name and signature of county clerks. (*Id.*) Subsequently, the Kentucky General Assembly passed Senate Bill 216 which amended KRS 402.100 and removed the language requiring the signature of the county clerk on marriage licenses. (R.181, Order; see also S.B. 216, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016)). Because these actions on the part of the state rendered the issues in this action moot, the Court at the direction of the Sixth Circuit dismissed the action. (*Id.*)

II. PROCEDURAL HISTORY RELATING TO DISTRICT COURT'S DETERMINATION OF DAVIS' STATUS AS A STATE ACTOR

Though Governor Bevin challenges the District Court's determination as to the Commonwealth's liability for attorney fees, he fails to thoroughly trace the

procedural history underlying that decision. This is most likely because Governor Bevin opted not to participate in briefing on this issue until very late in the proceedings. An overview of this history is as follows:

At the outset of this litigation, April Miller, Karen Ann Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, L. Aaron Skaggs, and Barry Spartman (hereinafter "Appellees"), contended that Kim Davis, acted as an agent for Rowan County in enacting her no-marriage licenses policy. (R.1, Complaint at PageID 12, ¶ 53). Rowan County, however, has always contested this allegation. In its Answer, it denied Appellees' assertion that Rowan County had granted final policymaking authority to Davis with respect to marriage licenses (R.27, Answer at PageID 304, ¶ 53) In addition, it asserted as an affirmative defense that Davis acted for the state, and not the County, with respect to issuing or denying marriage licenses. (*Id.* at PageID 305, ¶ 2)

The issue arose again with the filing of Appellees' Motion for a Preliminary Injunction. (R.2, Motion for Pre. Inj.) While Appellees did not explicitly address who Davis served in her "official capacity," Appellant, Rowan County argued in opposing the Motion that no injunctive relief should be ordered against the County. (R.28, Def. Rowan County's Resp. in Opp. to Pl. Mot. for Pre. Inj.) It was only after the District Court ordered Appellees to provide supplemental briefing on this issue that they argued that Davis was a state actor. (R.30, Order) Even then,

however, Appellees insisted it was not necessary for the Court to decide if Davis acted for the state or the County. (R.36, Pl. Rep. in Supp. of Mot. for Pre. Inj. at PageID 798 – 800).

Prior to the filing of these briefs, however, Davis had filed her Third-Party Complaint against the Commonwealth of Kentucky and its officials. (R.34, Third Party Complaint) Thus, by the time that the District Court entered its Order granting Appellees' request for a preliminary injunction, the Commonwealth and its officials were parties to the action. (R.43, Mem. Opin. & Ord. Granting Inj.) Of course, in that decision, the District Court preliminarily found that Davis acted for the state and not the county in enacting her no marriage license policy. (*Id.* at PageID 1152 – 1154) Governor Bevin and the Commonwealth *never* filed any motion seeking modification of this decision.

Davis' status as a state or County official did not arise again until Appellees filed their Motion for Attorney Fees. (R.183, Pl. Mot. for Att. Fees) The County filed a brief opposing the Motion, among other things, on the grounds that Davis did not act as a County official. (R.192, Def. Rowan County's Resp. to Pl. Mot. for Att. Fees at PageID 2820 – 2826) Governor Bevin and the Commonwealth chose not to participate in briefing the Motion. Initially, the Magistrate Judge found that no attorney fees should be awarded. (R.199, Mag. Rec. Disp. & Ord.)

This prompted Appellees to file Objections, seeking reversal of the Magistrate's Decision. (R.201, Pl. Obj. to Magi. Rec. Disp. & Ord.) While Davis and Rowan County filed briefs in opposition, Governor Bevin and the Commonwealth did not participate in briefing the Objections. (R.203, Def. Rowan County's Resp. to Pl. Objections; R. 204, Def. Davis' Resp. to Pl. Objections)

In its thorough and well-reasoned decision, the District Court reversed the Magistrate's determination that attorney fees should be denied and found that attorney fee liability flowed to the Commonwealth because Davis acted for the state and not the county in enacting her marriage license policy. (R.206, Mem. Opin. and Ord. Rej. R&R, Grant. Pl. Mot. for Att. Fees) In so doing, the District Court noted that the Commonwealth had notice of the issue and the opportunity to file a brief opposing fee liability but had opted not to do so. (*Id.* at PageID 2966 n.22)

After the District Court entered this Order, Governor Bevin filed a Motion to Amend. (R.208, TP Def. Mot. to Amend) This was the first time that the Commonwealth or its officials had taken any position as to the entity that Davis served in issuing or refusing to issue marriage licenses. (*Id.*) Even then, however, the Commonwealth did not argue that Davis acted for the County, but instead only asserted that the Rowan County Clerk's Office should have been ordered to pay the attorney fees. (*Id.*) Rowan County filed a Response in opposition to the Motion,

asserting that the District Court's finding that Davis acted for the state was well-supported by the law and that the Commonwealth's proposed solution of directing fee liability to the County Clerk's Office was not. (R.214, Def. Rowan County's Resp. in Opp. to TP Def's Motion to Amend) The District Court denied the Motion and this appeal followed. (R.222, Mem. Opin. & Ord. Denying TP Def's Mot. to Amend; R. 224, TP Def. Notice of Appeal; R.226, Def. Davis' Notice of Appeal)

STANDARD OF REVIEW

Rowan County agrees with Governor Bevin that this Court's review of the District Court's determination of prevailing party status is a legal question that must be reviewed de novo. *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007). However, it disagrees with Governor Bevin's assertion that all other issues presented in this appeal are also subject to the same level of review. (Governor Bevin Brief p. 22) First, while Governor Bevin correctly notes that the District Court's decision as to which party is responsible for the attorney fee liability is subject to *de novo* review, he misperceives the reason for this. Governor Bevin suggests that this case is about "apportionment" of fee liability, but that assertion indicates Governor Bevin's misunderstanding of the issues presented here. In reality, the District Court's decision as to attorney fee liability is a determination about which entity Appellant Davis served with respect to the issuance of marriage licenses. (R.206, Mem. Opin. & Order at PageID 2965 – 2980) That legal issue does not relate to apportionment, though it is subject to *de novo* review. *Crabbs v. Scott,* 786 F.3d 426, 429 (6th Cir. 2015) (*McMillian v. Monroe Cnty.*, 520 U.S. 781, 785 (1997) (holding that identifying the entity that the defendant serves requires a review of state law).

Governor Bevin also claims that the award of attorney fees against him is "unjust" based on special circumstances. This determination can clearly only be

reviewed for an abuse of discretion. *Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 634 (6th Cir. 2009) (awards of fees under § 1988 are generally subject to abuse of discretion review); *Hensley v. Eckerhart*, 461 U.S. 424, 446 (1983) (noting that § 1988 left trial courts with discretion to determine when special circumstances render an award of fees unjust); *Morscott, Inc. v. Cleveland*, 936 F.2d 271, 272 (6th Cir. 1991) (reviewing denial of fees based on special circumstances for abuse of discretion). "A district court abuses its discretion when it relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard." *Wikol v. Birmingham Pub. Schs. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004).

I. ROWAN COUNTY JOINS IN THE ARGUMENTS OF GOVERNOR BEVIN AND DAVIS THAT PLAINTIFFS ARE NOT PREVAILING PARTIES AND THAT FEES SHOULD BE REDUCED IF AWARDED

Rowan County did not appeal the decision of the District Court because it was not aggrieved by it and it does not seek reversal here. With that said, it argued below in support of the initial decision of the Magistrate Judge that Plaintiffs did not obtain "prevailing party" status. (R.203, Def. Rowan County's Resp. to Pl. Obj. to Mag. Rec. Disp. & Ord.) As a result, Rowan County joins in the arguments made by Davis and Governor Bevin that the Plaintiffs are not prevailing parties. (Governor Bevin Brief, pp. 23 – 29; Davis Brief, pp. 31 – 48)

II. THE DISTRICT COURT CORRECTLY FOUND THAT DAVIS WAS ACTING AS A STATE OFFICIAL WITH RESPECT TO THE ISSUANCE OR NON-ISSUANCE OF MARRIAGE LICENSES

Governor Bevin argues that the District Court erred in finding that the Commonwealth, as opposed to Rowan County, was responsible for the attorney fees incurred by Plaintiffs on account of Kim Davis' actions with respect to marriage licenses. (Governor Bevin Brief, pp. 29 – 30) While Governor Bevin argues that the District Court applied the wrong test in making its determination, his arguments are insufficient to call the District Court's finding into question. (*See id.*)

A. THE DISTRICT COURT'S FINDING THAT DAVIS WAS A STATE ACTOR WITH RESPECT TO MARRIAGE LICENSES RESTED ON SOLID LEGAL AUTHORITY AND A THOROUGH REVIEW OF THE FACTS IN THE RECORD

Though Governor Bevin makes numerous arguments to challenge the District Court's decision, the arguments he does not make are telling. Governor Bevin does not argue that the District Court got any facts supporting its decision wrong or failed to comply with Sixth Circuit law. This is because the District's Court's decision was consistent with prevailing precedent in this Circuit and founded upon a thorough review of the facts in the record. (R.206, Mem. Opin. & Ord. at PageID 2965 – 2980)

Governor Bevin, however, contends that Davis should have been found to be a county official because some facts indicate that county clerks, in general, may

function as county officials. (Governor Bevin's Brief, p 37) Yet, the District Court acknowledged and accounted for each of these issues in its decision. (R.206 at PageID 2965 – 2980) It acknowledged that Davis was elected by voters in Rowan County. (*Id.* at PageID 2972) It agreed that county clerks were described in some Kentucky judicial decisions as county officials. (*Id.* at PageID 2971) It accepted that the Rowan County Fiscal Court conducted some supervision of the County Clerk's Office by annually setting its budget. (*Id.* at PageID 2972 – 2978) Thus, Governor Bevin does not point out any facts that the District Court overlooked or failed to consider.

The most significant way in which the District Court's and Governor Bevin's analyses differ, however, is that the District Court did not attempt, as Governor Bevin does here, to determine whether Davis acted as a state or county official *in a general sense*. Rather, as it was required to do, the District Court focused its analysis as to whether Davis acted as a state or county official with respect to the particular function at issue in this litigation: the issuance of marriage licenses. (R.206 at PageID 2966 – 2967) This is precisely what the Supreme Court instructed lower courts to do in *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997). In that case, the Court expressly rejected the approach Governor Bevin invites the Court to adopt here when it said, "the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, 'all or nothing'

manner.'" *Id.* Rather, it explained, the object was to determine who the sheriff represented in the particular function at issue in the case, in that instance law enforcement. *Id.*

The District Court followed this mandate with fidelity. It did not attempt to answer whether, for all purposes, Davis acted for the Rowan County or the Commonwealth. Instead, it only analyzed Davis' work as defined by state law with respect to the issuance of marriage licenses. (R.206, Mem. Opin. & Order at PageID 2967). Governor Bevin, however, pays almost no attention to Kentucky law's treatment of marriage and marriage licenses. That is because, as the District Court found, those facts overwhelmingly indicate that Davis acted for the state when she issued or refused to issue marriage licenses. (*Id.* at PageID 2973 – 2978)

In particular, Governor Bevin does not even mention the fact that marriage is clearly a state function under Kentucky law. He ignores the reality that all regulations and statutes that Davis had to follow with respect to marriage licenses were state statutes and regulations. *See* Ky. Rev. Stat. Ann. § 402.080 (state law vest clerk with authority to issue marriage licenses and mandates reporting to state); KRS 402.100 (requiring clerk to use KDLA developed form for marriage licenses); KRS 402.230 (mandating maintenance of register for marriage license recipients); KRS 64.012(19) (setting fees for marriage license).

He does not account for the fact that the Commonwealth was the sole party that could have taken action of *any* kind to discipline Davis for her refusal to issue marriage licenses. *See* Ky. Const. § 68; *Lowe v. Commonwealth*, 60 Ky. 237 (Ky. 1860); KRS 522.020-030; KRS 402.990.

And, he fails to acknowledge that the Commonwealth had arguably as much or more fiscal control over Davis' office, since it (a) set her salary; and (b) set the fees for marriage licenses that she collected and remitted to the state. KRS 64.535, KRS 64.5275; KRS 64.012(19)

Given the substantial amount of control that the Commonwealth exerted over county clerks with respect to marriage licenses and the lack of control exerted by counties in this area, the District Court appropriately found that Davis acted for the Commonwealth and not Rowan County when she issued or refused to issue marriage licenses. (R.206 at PageID 2979 – 2980)

B. THE AUTHORITY THAT GOVERNOR BEVIN OFFERS TO ATTACK THE DISTRICT COURT'S FINDING IS EITHER INAPPLICABLE OR UNPERSUASIVE

Governor Bevin makes several other arguments in an effort to undermine the District Court's decision but each is flawed. First, he contends that the District Court erred in relying on the test from *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015) because that case is about immunity and not attorney fees. (Governor Bevin Brief p. 31) Though, indeed, *Crabbs* relates to immunity, there is no principled reason

why that distinction should matter here. In reality, the same thing at issue in *Crabbs* is at issue here: whether a government official served the state or the county. In *Crabbs*, this Court was required to ascertain whether a county sheriff was entitled to 11th Amendment immunity. In order to do that, the Court had to consider whether the sheriff, in enacting his DNA collection policy, acted for the state or the county. *Crabbs*, 786 F.3d at 428.

While immunity is not in issue here, since Plaintiffs did not sue Davis in her official capacity for damages, the same issue decided in *Crabbs* is: whether Davis acted for the Commonwealth or Rowan County. Thus, it certainly was not improper for the Court to use the test from *Crabbs* here to determine liability for attorney fees. To the contrary, because the very same issue was pertinent in both cases, the Court appropriately followed this Court's binding precedent to make its determination as to attorney fee liability. (R.206 at PageID 2966)

Though he claims that the District Court should not have followed *Crabbs*, Governor Bevin contradicts himself by then suggesting that under *Crabbs* Davis was a County, and not a state actor. (Governor Bevin Brief p. 39) This analysis is fraught with problems. *Crabbs* does not stand for the proposition that county officials, or even county sheriffs, in all contexts, are not state actors for purposes of § 1983 or § 1988 liability. 786 F.3d at 429 (quoting *McMillian*, 520 U.S. at 785). While the District Court was correct to employ the test from that case, the facts

underlying each application of the test demonstrate the differing results between *Crabbs* and the present case.

First, in *Crabbs*, the parties agreed that the county and not the state would pay any judgment for the county sheriff. 786 F.3d at 429. There was no such agreement here and, in fact, Rowan County has always taken the position that Davis' actions with respect to marriage licenses do not represent the policy of Rowan County. (R.27, Answer of Def. Rowan County at PageID 305 at ¶ 2; R.28, Def. Rowan County Resp. to Pl. Mot. for Prel. Inj.; R.192, Def. Rowan County's Resp. in Opp. to Pl. Mot. for Att. Fees at PageID 2820 – 2826; R.196, Def. Rowan County's Sur-Reply to Pl. Mot. for Att. Fees; R.214, Def. Rowan County's Resp. to TP Def's Mot. to Amend) As a result, the District Court considered whether the state could potentially satisfy the judgment for attorney fees here and found that it could. (R.206 at PageID 2967 – 2971)

Second, in *Crabbs*, the sheriff was paid by the county and subjected to its fiscal control. 786 F.3d at 429. But here, the District Court found that Davis paid her own salary from the fees her office collected. (R.206 at PageID 2972 – 2978) In addition, fiscal supervision was mixed. (*Id.*) While the County could set the budget for the clerk's office, the state set Davis' salary and dictated the fees she could charge for marriage licenses. (*Id.*)

Third, in *Crabbs*, the Court found that Ohio law designated law enforcement by the sheriff as a clearly local function. 786 F.3d at 429. Yet here, the District Court found that marriage and the issuance of marriage licenses are clearly state functions under Kentucky law. (R.206 at PageID 2978)

Given the factual distinctions between *Crabbs* and this case, there is no inconsistency with the District Court's decision here and the result in *Crabbs*. While the District Court correctly relied on the test from *Crabbs*, it also correctly used the facts in the record here to independently consider whether Davis under Kentucky law and when implementing the functions of her office relating to marriage licenses, acted for the Commonwealth and not Rowan County.

Moreover, Governor Bevin's argument that *Crabbs* somehow stands for the proposition that officials elected in a county always represent the county would put that case at odds with several other decisions finding county officials to be state actors. For instance, in *McMillian*, the Supreme Court, after considering state law and the particular functions of the job at issue, found that a county sheriff was a state actor. 520 U.S. at 793. Likewise, in *Williams v. Leslie*, 28 Fed. Appx. 387 (6th Cir. 2002), this Court found that an Ohio county clerk of courts acted for the state with respect to motor vehicle transfers. And, in *Pusey v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993), a municipal prosecutor was held to be a state actor because prosecution is a state, and not local, function.

Because implementation of the test from *Crabbs* inexorably leads to the conclusion that Davis was a state and not a county official, Governor Bevin shifts gears and argues that Davis was a county actor because she had discretion in how she conducted her job. (Appellant Bevin Brief, pp. 32 – 34) Governor Bevin claims that Davis, like the officials in *Crabbs*, *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999), and *Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994), exercised discretion in implementing the policies at issue and, thus, was a county official. Yet, in each of these cases, the Courts otherwise concluded that the officials were county officials. *Crabbs*, 786 F.3d at 429; *Brotherton*, 173 F.3d at 563; *Ruehman*, 34 F.3d at 528. Each of the officials attempted to argue that they were state actors on the theory that their policy actions were mandated by state law. *See id*. The Courts, however, rejected these arguments and found that the official's policies were not the product of state regulation, but their own initiatives. *Id*.

These results do not imply that any official with discretion in the performance of his or her job duties is automatically a county or local official. Rather, they only suggest that an otherwise local official may be deemed a state actor when his or her actions are mandated by state law. *Id.* Here, the District Court did not find that Davis was a state actor because her actions were mandated by state law, but instead because she was subject to state fiscal control, supervision, and regulations with respect to marriage licenses. (R.206 at PageID

2065 – 2080) Thus, Governor Bevin's attempts to twist the results in *Crabbs, Brotherton,* and *Rhueman* to undermine the District Court's decision fail.

Relying on the non-binding decision in *Crane v. Texas*, 759 F.2d 412, 432 (5th Cir. 1985), Governor Bevin also argues that Davis' actions cannot be said to represent the Commonwealth because they violated Kentucky law. (Appellant Bevin's Brief, p. 33) In that case, the Fifth Circuit found that a county prosecutor was not entitled to 11th Amendment immunity for allegedly issuing capias without probable cause. *Crane*, 759 F.2d at 432. That case is not instructive here because the Court there did not employ a test at all similar to the one in *Crabbs* or thoroughly review state law as dictated by *McMillian*. *See id*. Rather, it summarily concluded that the prosecutor acted for the county because he was a county official and elected by the voters in the county. *Id.* at 429 – 430. Because the analysis in *Crane* differs from the Sixth Circuit's analysis in *Crabbs* and the Supreme Court's directive in *McMillian* to avoid "all or nothing" conclusions about an official's status, this Court should not follow it here. *See* 786 F.3d at 429 (quoting *McMillian*, 520 U.S. at 785).

Finally, Governor Bevin cites to the definition of "prevailing party" from *Farrer v. Hobby*, 506 U.S. 103, 110 (1992) as a last ditch effort to avoid attorney fee liability. (Governor Bevin Brief, p. 34) In essence, Governor Bevin suggests that the Plaintiffs did not force the Commonwealth to change any practice, but only

forced the Rowan County Clerk's Office to do so. Thus, he contends, fee liability should only be had against the Clerk's Office. Again, this is not the analysis in which the Court should be engaging to determine attorney fee liability. Instead, as demonstrated above, the District Court used the right test to determine whether Davis acted as a state or county official and that test does not require a consideration of which party was forced to change the most.

Moreover, the notion that Governor Bevin and the Commonwealth had no control over this matter is inaccurate. While Governor Bevin claims that the state had no control over Davis, it was the Governor who ordered her to comply with *Obergefell* and it was a change in state law that resulted in the conclusion of this litigation. As the District Court concluded, in matters relating to marriage and marriage licenses, the Commonwealth exercised a great deal of control over Davis, while the County enjoyed none. (R.206 at PageID 2973 – 2978) Thus, even if this Court considered which party "changed the most," the Commonwealth's behavior changed far more than the County's.

In short, the District Court's determination that Davis was a state actor with respect to the issuance of marriage license was thorough and well-supported by the law. Governor Bevin cites no legal authority which casts serious doubt on the District Court's decision. Because the finding of the District Court that Davis acted

for the state when issuing or failing to issue marriage licenses, liability for the attorney fee award imposed against the Commonwealth should be affirmed.

III. GOVERNOR BEVIN'S REQUEST TO IMPOSE FEES AGAINST THE ROWAN COUNTY CLERK'S OFFICE IS NOT SUPPORTED BY ANY LEGAL AUTHORITY

Governor Bevin next contends that the District Court erred when it refused to direct the attorney fee award against the Rowan County Clerk's Office. (Governor Bevin Brief, p. 35) The logic for this argument is that Davis was enjoined from her conduct in her official capacity and the office she served was the Rowan County Clerk's Office. (*Id.*) To the extent that this argument entirely ignores the fact that the District Court found that Davis acted as a state official with respect to marriage licenses, those issues have already been addressed above.

Regardless, Governor Bevin's proposed solution to the problem of attorney fee liability is no solution at all because there is no authority to support it. Governor Bevin does not cite a single case where another court took that action. (*See* Governor Bevin Brief, p. 35 – 38) Given the absence of legal authority, it is no wonder the District Court did not do what Governor Bevin asks here.

While Governor Bevin cites to the Supreme Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978) as an example, it does not demonstrate what he claims it does. Governor Bevin makes much of the fact that the Department of Corrections, rather than the state, was ordered to pay attorney fees in *Hutto*.

(Governor Bevin Brief, p. 35) Yet, in looking at the context of this decision, it is clear that the Court in *Hutto* understood the directive for the Department to pay attorney fees to be equivalent to a directive for the state to pay fees. In rejecting the challenge to the labels used in the fee order, the Court explained:

> Instead of assessing the award against the defendants in their official capacities, the District Court directed that the fees are "to be paid out of Department of Correction funds." Although the Attorney General objects to the form of the order, no useful purpose would be served by requiring that it be recast in different language. We have previously approved directives that were comparable in their actual impact on the State without pausing to attach significance to the language used by the District Court. Even if it might have been better form to omit the reference to the Department of Correction, the use of that language is surely not reversible error.

437 U.S. at 692 – 693. The Court construed the award against the Department of Correction to be the same thing as an award against the officials in their official capacities, or in other words, against the state directly. *Id*.

Indeed, this language actually undermines Governor Bevin's contention that the District Court's order should have specifically directed the fee award against the Rowan County Clerk's Office when it notes that a directive assessing fees against the Department of Corrections may not have been the best form. *Id*. at 693. The best form, according to the Court, was merely to direct that fees be paid by the relevant official in their official capacity. *Id*. at 692. This is the opposite of what Governor Bevin proposes here because it implies that once the entity served by the official in their official capacity is identified, no additional analysis is needed. That

is exactly what the District Court did here. (R.206 at PageID 2965 – 2980) Because it found that Davis, when acting in her official capacity with respect to marriage licenses, served the Commonwealth, ordering the Commonwealth to pay the fees was consistent with *Hutto*. (*Id.*)

Nevertheless, Governor Bevin persists in the misreading of *Hutto*, by lifting a quote from a later portion of that decision which states that the Department of Correction is the entity "intended by Congress to bear the burden of the counsel-fee award." (Governor Bevin Brief, p. 35 (quoting *Hutto*, 437 U.S. at 700)) He argues that this quote is further evidence that the District Court was required to designate the agency that the official served as the entity responsible for fee awards. This quote does not mean what Governor Bevin claims it means. The paragraph in which that quote is found reads as follows:

> Like the Attorney General, Congress recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained "either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, p. 5 (1976). Awards against the official in his individual capacity, in contrast, were not to be affected by the statute; in injunctive suits they would continue to be awarded only "under the traditional bad faith standard recognized by the Supreme Court in Alyeska." *Id.*, at 5 n. 7. There is no indication in this case that the named defendants litigated in bad faith before the Court of Appeals. Consequently, the Department of Correction is the entity intended by Congress to bear the burden of the counsel-fees award.

Hutto, 437 U.S. at 700.

In this paragraph, the Court is clearly distinguishing between personal liability for attorney fee awards and official liability for fee awards. *Id*. It was not, as Governor Bevin contends, defining the times in which differing state or county agencies must bear fee liability. *See id*. In fact, the issue raised here: the distinction between county agency or state liability for fees, is not mentioned or implicated at all. Thus, this passage just does not support Governor Bevin's contention that the District Court should have imposed fee liability against the Rowan County Clerk's Office.

Governor Bevin next incorrectly asserts that the District Court's decision is inconsistent with other Kentucky decisions. (Governor Bevin Brief, pp. 35 – 36) His efforts are in vain. He first cites to *Ewing*, *County Judge*, *v. Hays*, 77 S.W.2d 946 (Ky. 1934), a Kentucky case from 1934 which described a county clerk's acts as "of the county." Taking this language out of context, Governor Bevin argues that it lends further support to the idea that Davis' actions with respect to marriage licenses only served Rowan County. (Governor Bevin Brief, p. 35) The facts in *Ewing*, however, did not pertain to marriage licenses, but instead elections. *See* 77 S.W.2d 946. Additionally, the Court in *Ewing* was not discussing liability for the county clerk's actions, but instead the authority of the clerk in comparison to the

fiscal court. *Id*. Indeed, in a decision issued the following year, the Kentucky Court of Appeals made this clear when it wrote:

> In *Ewing, County Judge, v. Hays*, 257 Ky. 259, 77 S.W.2d 946, we construed section 1482, as it relates to, and governs, the correlative and separate duties of the county court clerk and the county election commission and those acting with them during the performance of their respective duties as they are defined by section 1482.

Taylor v. Chandler, 86 S.W.2d 1038 (Ky. App. 1935).

Thus, when the Kentucky Court of Appeals said in *Ewing* that he clerk's actions were "of the county" in relation to elections, it meant only that the fiscal court did not have authority to undo or supplant those actions. 77 S.W.2d at 948. In short, neither the language nor the result in *Ewing* has anything to do with the issues here. Even if, in some strained way, *Ewing* supports the idea that Davis in general may be considered a county official under Kentucky law, the District Court did not find that she was a state official in all contexts. (R.206 at PageID 2979 – 2980) Rather, consistent with Supreme Court and Sixth Circuit precedent, it considered only which entity she served when issuing or refusing to issue marriage licenses. (*Id.*) Since *Ewing* has nothing to do with marriage licenses, it does not contradict the District Court's attorney fee decision in the slightest.

The same is true of this Court's decision in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999). Governor Bevin asserts that this case "approves" of an attorney fee award against the Rowan County Clerk's Office. (Governor Bevin

Brief, p. 36) Again, this reading takes substantial liberties with the holding. In *Granzeier*, the Sixth Circuit never considered, let alone issued any holding, relating to whether the county clerk in that case acted for the state or the county. Rather, the Court in that case only considered the First Amendment issues relating to posting a sign about closing the courthouse for Good Friday and, as to attorney fees, whether a partial fee award was reasonable based on the degree of the plaintiff's success. *Granzeier*, 173 F.3d at 572 – 576, 576 – 578.

The fact that fees were imposed against the County for the clerk's and other county official's actions in *Granzeier* is proof of nothing more than the fact that, in some instances, the county clerk acts for the county. Rowan County has never taken the position in this litigation that Davis, in discharging some of her duties as the County Clerk, acts for the County. But, with respect to the issuance of marriage licenses, the District Court correctly found that Davis was acting pursuant to the directives of the Commonwealth, was subject to the Commonwealth's control, and was acting on an issue that has historically always been a state issue. (R.206 at PageID 2965 – 2980) Because *Granzeier* does not pertain to the issuance of marriage licenses, it also does not support Governor Bevin's position.

In sum, Governor Bevin has failed to offer any legal authority mandating that the award of attorney fees in this action should have been directed against the Rowan County Clerk's Office. As a result, the decision of the District Court

finding that the Commonwealth responsible for attorney fee liability should be affirmed.

IV. AN AWARD OF ATTORNEY FEES AGAINST THE COMMONWEALTH IS NOT UNJUST OR AT LEAST NO MORE UNJUST THAN IMPOSING FEES AGAINST ROWAN COUNTY

Finally, Governor Bevin asserts that imposing fees against the Commonwealth, the entity which Davis was found to represent in enacting her unconstitutional policy, would be "unjust." (Governor Bevin's Brief, p. 38) Governor Bevin does not, however, define the circumstances in which this exception has been employed by courts. This is likely because the exception is only very rarely invoked by federal courts. *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010) (noting that no Sixth Circuit case has ever found special circumstances justify a denial of fees and the exemption is "extremely rare" in other circuits); see also *De Jesus Nazario v. Rodriguez*, 554 F.3d 196, 200 (4th Cir. 2009) (findings of special circumstances are "few and far between").

Without acknowledging the high burden triggered by asserting that the exception applies here, Governor Bevin asserts that an award of fees against the Commonwealth is inherently unjust because the "guilty" party – the Rowan County Clerk's Office – would avoid punishment. (Governor Bevin Brief, pp. 38 – 39) On the other hand, Governor Bevin frames himself and the Commonwealth as

an innocent party which had no ability to control or restrain Davis' unconstitutional actions. (*Id.*)

This argument is problematic for several reasons. First, the Commonwealth's argument is similar to saying that it should avoid fee liability because it acted in good faith and did not do anything to contribute to the violation of law. A party's good faith, however, does not justify avoiding fee liability under § 1988. *McQueary*, 614 F.3d at 604 (citing *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 273 (6th Cir. 1991)); *Bills v. Hodges,* 628 F.2d 844, 845 (4th Cir. 1980); *Wilson v. Stocker,* 819 F.2d 943 (10th Cir. 1987).

Moreover, even if good faith or innocence were pertinent, what Governor Bevin proposes is to shift attorney fee responsibility from one allegedly innocent party to another: Rowan County. While Governor Bevin's explicit request is to impose fee liability only against the Rowan County Clerk's Office, this is equivalent to a demand to direct the fee liability to the County itself. The record is clear that any excess funds from the Rowan County Clerk's Office at the end of the fiscal year are returned to the County general fund. (R.26, 07.20.15 Hearing Trans. at p. 27; *see also* KRS 64.152; KRS 64.530(3)) Critically, as the Court found, the County Clerk's funds from marriage licenses would cover less than a fraction of the attorney fee judgment entered in this case, and thus, would in effect adversely impact the County itself. (R.208 at PageID 2975 n.36 (citing *id.*))

But this result is no more just than the result that Governor Bevin decries as "unjust." As the District Court found, Rowan County had even less ability to control Davis' actions than the Commonwealth. (R.206 at PageID 2976 – 2978) Governor Bevin asserts on appeal that the Governor directed Davis to comply with the law after the *Obergefell* decision to demonstrate his own innocence. (Governor Bevin Brief, p. 39) Yet, the County did not even have the ability to direct Davis to act in compliance with the law because marriage is a quintessentially state function. Likewise, the Commonwealth had the option to initiate proceedings against Davis for failing to comply with the law, but the County had no such option available. *See* KRS 522.020-030; KRS 62.070.

In short, Governor Bevin has not shown that the District Court abused its discretion in failing to find that the fee award against the Commonwealth was unjust. And, most critically, he has not demonstrated that this allegedly unjust circumstance would be avoided if the award was instead imposed against the Rowan County Clerk's Office and, thus, passed on to Rowan County. Instead, Governor Bevin's solution merely requests that the Court trade one variety of alleged injustice for another. Because no law or facts support this request, the District Court's decision rejecting this argument should be affirmed. (R.222, Mem. Opin. & Ord.)

V. CONCLUSION

For the foregoing reasons, Rowan County respectfully requests that the District Court's Order be reversed in part as to the finding that Plaintiffs are prevailing parties. In the alternative, if the Court finds that the District Court's prevailing party determination was correct, Rowan County requests that the District Court's Order holding Kim Davis to be a state actor be affirmed. In addition, if the Court concludes that the District Court's prevailing party determination was correct, Rowan County requests that the District Court's denial of Governor Bevin's Motion to Amend be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P.32(a)(7)(B). The foregoing brief contains 7,766 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Word 2010 for Microsoft Office.

/s/ Jeffrey C. Mando
Jeffrey C. Mando, Esq.

CERTIFICATE OF SERVICE

This is to certify that on the **30th** day of April, 2018, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will generate service to the following ECF participants: All counsel of record.

/s/ Jeffrey C. Mando
Jeffrey C. Mando, Esq.

DESIGNATION OF RECORD

Cross-Appellee, ROWAN COUNTY, KENTUCKY, pursuant to Sixth Circuit Rule 28(d), hereby designates the following filings in the district court's record as items to be included in the joint appendix:

Description of Document	Date Filed in District Court	Record Entry No.
07.20.15 Hearing Transcript p. 27	07.23.15	26
Answer of Defendant, Rowan County PageID 305 at ¶ 2	07.29.15	27
Defendant Rowan County's Response to Plaintiffs' Motion for Preliminary Injunction	07.30.15	28
Defendant Rowan County's Response to Plaintiffs' Motion for Attorney Fees	10.27.16	192
Defendant Rowan County's Sur-Reply to Plaintiffs' Motion for Attorney Fees	12.30.16	196
Defendant Rowan County's Response to Plaintiffs' Objections to Magistrate's Recommended Disposition & Order	04.07.17	203
Memorandum Opinion & Order PageID 2965 – 2980	07.21.17	206
Third-Party Defendants' Motion to Amend PageID 2975 n.36	08.18.17	208
Defendant Rowan County's Response to Third-Party Defendants' Motion to Amend	09.08.17	214
Memorandum Opinion & Order	10.23.17	222