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Nos. 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 W. SPARTMAN
Plaintiffs – Appellees

v.

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

ROWAN COUNTY, KENTUCKY
Defendant – Appellee

v.

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

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

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

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Statement in Support of Oral Argument

Appellees, Matthew G. Bevin, in His Official Capacity as Governor of Kentucky, and Terry Manuel, in His Official Capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives, respectfully request oral argument because it will aid the Court in understanding the issues of law presented by this appeal (and the related one brought by appellees, Case No. 6385) and to clarify the Record. Among other things, oral argument may aid the Court's understanding of the unique position held by county clerks under Kentucky law insofar as it impacts the determination of whether attorneys' fees are owed and, if so, by whom.

Introduction

Eight plaintiffs brought this action to challenge the refusal of Rowan County Clerk Kim Davis (“Davis”) to issue marriage licenses. For themselves, the plaintiffs—two same-sex and two opposite-sex couples—sought preliminary and permanent injunctive relief compelling Davis to end her policy of refusing to issue marriage licenses. The plaintiffs also sought compensatory and punitive damages. Additionally, on behalf of a putative class, the plaintiffs sought a declaration that Davis’s policy violated the Constitution of the United States.

The District Court issued a preliminary injunction on August 12, 2015, that enjoined *Davis* from her policy of refusing to issue marriage licenses. Some, but not all, plaintiffs received marriage licenses as the preliminary injunction was appealed. While the preliminary injunction was challenged, the plaintiffs’ claims, asserted against Davis in her individual and official capacities, became moot upon the voluntary decision of the Commonwealth of Kentucky to create a new form for marriage licenses. At that point, the District Court vacated its preliminary injunction and dismissed the plaintiffs’ claims. Despite this conclusion to the action—in which the plaintiffs did not receive a lasting change in the *legal* relationship of the parties—the District Court overruled a recommendation of the United States Magistrate Judge and awarded attorneys’ fees and costs to the plaintiffs.

Like Davis, the Governor and the State Librarian and Commissioner of Kentucky Department for Libraries (“Third-Party Defendants”) separately sought a reversal of this fee award, because the plaintiffs are not “prevailing parties” entitled to recover attorneys’ fees. The plaintiffs obtained only a preliminary injunction that ultimately was vacated when the claims they had asserted were dismissed as moot. Because the plaintiffs did not receive a *judicially sanctioned* change in the legal relationship between the plaintiffs and the Rowan County Clerk’s Office, they do not qualify as “prevailing parties” and thus cannot recover attorneys’ fees.

Even if the plaintiffs could be considered to have prevailed in their litigation, any fees awarded to them cannot be imposed against the “Commonwealth of Kentucky.” If the plaintiffs prevailed, they did so against Davis individually or in her official capacity as Rowan County Clerk. Davis unilaterally defied existing law when she created a “no marriage licenses” policy for Rowan County. This policy controlled her office and her county, not the Commonwealth. During this time, the Commonwealth never mandated—and could not have mandated—any particular marriage policy for Davis or another county clerks; instead, the Commonwealth only reminded county clerks of their duty to follow the law established in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Only Davis’s policy

was targeted by the plaintiffs, and so the Rowan County Clerk's office must be liable for any award of fees arising from her policy.

Statement of Jurisdiction

The Third-Party Defendants agree with Davis's statement of jurisdiction: this Court has jurisdiction under 28 U.S.C. § 1291, and Davis's notice of appeal was timely filed.

Statement of the Issues

Like the appeal brought by Third-Party Defendants (Case No. 17-6385), this appeal involves the award of attorneys' fees and costs following the dismissal of the dispute over Davis's unilateral decision not to issue marriage licenses to any couples in Rowan County, Kentucky. While the Third-Party Defendants largely confirm the issues as stated by Davis, they believe the issues are properly stated as:

1. Whether the District Court erred, as a matter of law, in concluding that the plaintiffs were "prevailing parties" for purposes of 42 U.S.C. § 1988, where the plaintiffs obtained neither a judgment on the merits nor a consent-ordered decree in this litigation.

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

3. Whether, even if the plaintiffs were "prevailing parties" for purposes of 42 U.S.C. § 1988, the District Court erred, as a matter of law, in awarding fees and costs against the Commonwealth of Kentucky, rather than the Office of the Rowan County Clerk, where the District Court's conclusion was based on its erroneous determination that Kim Davis, in her role as Rowan County Clerk, represented only the Commonwealth of Kentucky.

4. Whether, even if the plaintiffs were “prevailing parties” for purposes of 42 U.S.C. § 1988, the District Court erred, as a matter of law, in granting an award of fees and costs given the circumstances of the case, which would render an award against the Commonwealth of Kentucky unjust.

Counterstatement of the Case

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

This case concerns only one official policy: the “no marriage licenses” policy solely created and implemented by Davis as Rowan County Clerk in response to the Supreme Court’s ruling in *Obergefell*. (Complaint, R. 1, Page ID # 1). On June 26, 2015, the United States Supreme Court held that, because “same-sex couples may exercise the fundamental right to marry,” Kentucky’s definition of marriage as union between one man and one woman violated the Fourteenth Amendment of the United States Constitution. *Obergefell*, 135 S. Ct. at 2604-05.¹ As a result, Kentucky could not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at 2605.

Following the decision in *Obergefell*, then-Governor of Kentucky, Steven L. Beshear, sent a letter to county clerks to acknowledge the decision, to explain the Commonwealth’s action to assist county clerks with their statutory duties, and to remind the county clerks of their obligations as constitutional officers. (Letter to County Clerks, R. 1-3, Page ID # 26). This letter did not instruct Davis or any other county clerk to do anything. (*Id.*). In fact, it noted that county clerks “should consult with your county attorney on any particular aspects related to the

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

implementation of the Supreme Court’s decision.” (*Id.*). This letter did not change or limit the authority granted to any county clerk. Under Kentucky law, county clerks—like Davis—have exclusive authority for issuing marriage licenses. These statutes place the sole responsibility for issuing marriage licenses with the county clerks, who are separately elected constitutional officers, or their deputy clerks. Ky. Rev. Stat. § 402.080 (“[t]he license shall be issued by the clerk of the county”); *see also* Ky. Rev. Stat. §§ 402.100, 402.110, 402.210, 402.230.

By June 27, 2015, a day after the *Obergefell* decision, Kim Davis (“Davis”), as Rowan County Clerk, had unilaterally announced that her office would no longer issue any marriage licenses at all. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 250). She had contemplated how she might react to that ruling, “[s]o it wasn’t just a spur-of-the-moment decision.” (*Id.*). Given her statutory authority, Davis did not seek approval for her new policy from any state official. Indeed, Davis later wrote to then-Governor Beshear to request a “legislative” solution to “modify Kentucky’s marriage laws.” (Letter to Governor Beshear, R. 34-5, Page ID # 788). Her letter recognized that express Kentucky statutory law—not any correspondence or comments from the Governor’s office—controlled the matter. (*Id.*)²

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

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

B. Plaintiffs File Suit Against Kim Davis.

Having been denied marriage licenses in Rowan County, the plaintiffs, April Miller, Karen Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, Aaron Skaggs, and Barry Spartman ("Plaintiffs"), initiated this action on July 2, 2015 against Rowan County and Davis, individually and in her official capacity as Rowan County Clerk. (Complaint, RE 1, Page ID ## 1-2). Plaintiffs alleged that Davis and her office had violated their civil rights through the "no marriage licenses" policy. (*Id.* at Page ID # 4). Plaintiffs sought (1) class certification under Federal Rule of Civil Procedure 23, (2) a preliminary injunction, (3) a permanent injunction, (4) a declaratory judgment, (5) damages, (6) attorneys' fees and costs, and (7) a trial by jury. (*Id.* at Page ID ## 10-14).

On August 4, 2015, Davis, in turn, filed a verified third-party complaint against Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives.³ (Third-Party Complaint, R. 34, Page ID # 745). Davis alleged that “Kentucky’s marriage policies, as effected by Governor Beshear and Commissioner Onkst” violated her rights of free exercise of religion, free speech, and to be free from religious tests for public office. (*Id.* at Page ID # 759-68). Among other things, Davis sought to impose or transfer liability to the Third-Party Defendants for any relief obtained against her. Third-Party Defendants sought dismissal of Davis’s claims against them, because they had not engaged in any actions that would subject them to liability to her. (Memorandum in Support of Motion to Dismiss, R. 92-1, Page ID ## 1848-70). Third-Party Defendants noted that they have no authority over the issuance of marriage licenses and that they could not compel an elected county clerk to act in any particular manner with respect to marriage licenses. (*Id.* at Page ID # 1854). However, as discussed below, their pending motions were denied as moot before being considered on their merits.

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

C. Preliminary Injunction, Appeals, and Contempt.

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

Nevertheless, Davis persisted. Davis maintained her policy and continued to defy the District Court and was jailed following a hearing on September 3, 2015—to be held until she would comply. (Minute Entry Order, R. 75, Page ID ## 1558-

89).⁴ Under the direction of the District Court, the Rowan County Clerk's Office began issuing marriage licenses again while Davis was incarcerated, and by September 8, 2015, some, but not all, Plaintiffs had received licenses. (Status Report, R. 84, Page ID # 1798; R. 193-1, Kim Davis Declaration, Page ID # 2860). Based upon an agreement by Davis not to interfere with the issuance of marriage licenses by staff members of the Rowan County Clerk's Office, the District Court lifted the contempt. (Order Lifting Contempt, R. 89, Page ID ## 1827-28). Davis returned to work on September 14, 2015. (Motion to Enforce, R. 120, Page ID # 2316). As Davis's appeals (Case Nos. 15-5880, 5961, and 5978, the "Consolidated Appeals"), were pending, marriage licenses continued to be issued by deputy clerks. (*See, e.g.*, Status Report, R. 176, Page ID # 2692).

Meanwhile, before any decision on the merits of Plaintiffs' action or Davis's appeals of the preliminary injunctions issued against her, the Commonwealth of Kentucky voluntarily addressed the form of marriage licenses. First, Governor Matthew G. Bevin addressed the issue soon after taking office in December 2015. On December 22, 2015, Governor Bevin issued Executive Order 2015-048 (the "Executive Order") that prescribed a revised marriage form that did not contain the name of the county clerk under whose authority the license is issued. (Executive

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

Order, R. 157-2, Page ID ## 2616-18). The Executive Order directed the Kentucky Department for Libraries and Archives to publish the revised marriage license form to all county clerks immediately. (*Id.*). In a press release issued the same day as the Executive Order, Davis's counsel praised the action and stated that the revised form will allow county clerks "to do their jobs without compromising religious values and beliefs." (Press Release, R. 157-3, Page ID # 2621). The litigation, however, continued.

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

According to the remaining parties, this voluntary legislative action rendered the Consolidated Appeals moot. On June 21, 2016, Davis filed a motion to dismiss the Consolidated Appeals. (*See* Case No. 15-5880, Doc. 95, Motion to

Dismiss). On July 1, 2016, Plaintiffs responded to the motion and noted that they did not oppose the motion, because “subsequent to the briefing in these consolidated appeals, the Kentucky General Assembly enacted, and Kentucky’s Governor signed into law, Kentucky Senate Bill (S.B.) 216 which modifies Kentucky law governing marriage licensing.” (See Case No. 15-5880, Doc. 98, Response to Motion to Dismiss). Thus, on July 13, 2016, this Court dismissed the appeals and remanded them to the District Court “with instructions to vacate” the District Court’s preliminary injunction orders. (Order Dismissing and Remanding, R. 179, Page ID ## 2698-99). On August 18, 2016, the District Court vacated its preliminary injunction orders, denied all pending motions as moot, and dismissed the action. (Dismissal Order, R. 182, Page ID ## 2709-10). Among the motions denied as moot were two motions to dismiss filed by Third-Party Defendants, which sought dismissal of Davis’s claims because Third-Party Defendants could not be liable to Davis. (Motion to Dismiss filed September 8, 2015, R. 92, Page ID ## 1845-47; Motion to Dismiss filed on January 11, 2016, R. 157, Page ID # 2605-07). Following dismissal, Plaintiffs moved for an award of attorneys’ fees and costs pursuant to 42 U.S.C. §1988. (Motion for Fees, R. 183, Page ID # 2711-13).

D. Statutory Framework.

As a limited exception to the American Rule requiring each party to bear its own costs, 42 U.S.C. § 1988 (“§ 1988”) allows for the award of a reasonable

attorney's to the prevailing party in certain civil rights actions. *See Binta B. v. Gordon*, 710 F.3d 608, 639 (6th Cir. 2013). Section 1988 provides, in relevant part:

the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

As the statutory framework plainly states, a threshold requirement for a fee award is that the party seeking the award must be a "prevailing party." "Prevailing party" is "a legal term of art." *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 603 (2001). "A prevailing party is 'one who has been awarded some relief by the court'—say, by entry of a consent decree or judgment in the party's favor." *United States v. Tennessee*, 780 F.3d 332, 336 (6th Cir. 2015) (quoting *Buckhannon*, 532 U.S. at 603). These categories of relief "create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989)). The party seeking fees carries the burden of establishing it was a prevailing party. *Tennessee*, 780 F.3d at 336. Even if a party meets that burden and qualifies as a prevailing party, it may

not be entitled to a fee award if “special circumstances would render such an award unjust.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). This Court has “opted for a case-by-case approach” when considering whether such circumstances exist. *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty.*, 421 F.3d 417, 422 (6th Cir. 2005). Finally, this Court has explained that “the purpose of § 1988 is not to generate ‘satellite’ disputes over fees.” *Binta B.*, 710 F.3d at 625 (citing *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

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

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

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

First, the District Court held that Plaintiffs qualified as “prevailing parties.”

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

Second, the District Court determined that, because Plaintiffs were entitled to attorneys’ fees, the Commonwealth of Kentucky must pay them. (*Id.* at Page ID ## 2979-80). The District Court reached this conclusion by applying an analysis reserved for sovereign immunity issues. The District Court acknowledged that “courts undertake this analysis at the beginning stages of litigation, when attempting to determine whether the government entity is shielded by sovereign immunity.” (*Id.* at Page ID # 2968, citing *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015)). Applying this sovereign immunity analysis, the District Court concluded that, when defying the law by refusing to issue marriage licenses, Davis acted solely as a state official. (*Id.* at Page ID # 2970). Thus, the District Court held the “Commonwealth of Kentucky,” without any further specificity, liable for Plaintiffs’ fees. The District Court did, however, recognize “that the result in this case runs counter to the conclusion that usually follows a determination that a State has potential liability.” (*Id.* at n. 27).

Third, the District Court awarded Plaintiffs the full amount of the costs they

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

On August 18, 2017, Third-Party Defendants filed a motion asking the District Court to amend its award of fees and costs such that the fees and costs were to be assessed against Davis in her official capacity as Rowan County Clerk. (Motion to Amend, R. 208, Page ID ## 3004-05). Applying the standards found in Federal Rule of Civil Procedure 60, the district court denied the motion. (Second Fee Order, R. 222, Page ID # 3085). Like Third-Party Defendants, Davis appealed. (Davis's Notice of Appeal, R. 226, Page ID ## 3095-98).

Summary of the Arguments

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

Like Davis, Third-Party Defendants agree that Plaintiffs cannot qualify as “prevailing parties,” because they did not achieve success on the merits of their claims. Plaintiffs neither received an enforceable judgment on the merits nor a court-ordered consent decree. Plaintiffs’ lawsuit ultimately was resolved by the voluntary conduct of Governor Bevin and the Kentucky General Assembly, not a *judicially sanctioned* change in the legal relationship between the plaintiffs and the Rowan County Clerk’s Office.

II. The Office of the Rowan County Clerk is responsible for the payment of any fees award.

Davis does not challenge this ruling, but to the extent Plaintiffs are entitled to an award of attorneys’ fees and costs, that award must run against the Office of the Rowan County Clerk. That office is the party against which Plaintiffs prevailed, if at all, because that office’s unilateral policy—only applicable to Rowan County—is the one at the heart of this case. Davis must be considered a “county officer,” especially when she was setting policies solely for the Rowan County Clerk’s Office that defied federal law. It would be particularly unjust to impose a fee award against the “Commonwealth of Kentucky” when the Third-Party Defendants are not responsible for setting or enforcing Kentucky’s marriage policies and neither could compel Davis to act.

Standard of Review

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

Arguments

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

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

A prevailing party is limited to “a party who obtains either a judgment on the merits or a court-ordered consent decree.” *Hermansen v. Thompson*, 678 F. App'x 321, 328 (6th Cir. 2017) (citing *Buckhannon*, 532 U.S. at 605). Failing to apply this standard can be deemed an abuse of discretion. *Id.* Importantly, “[a] defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.” *Buckhannon*, 532 U.S. at 605.⁵ Thus, this Court has affirmed denials of attorneys’ fees when litigants obtain only a voluntary change in conduct and not a judgment on the merits. *Hermansen*, 678 F. App'x at 328. Here, voluntary changes in conduct resolved the litigation, not a final judgment.

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

Plaintiffs obtained no judicially enforceable judgment that modified Davis’s (or the Third-Party Defendants’) behavior, and thus they cannot be considered “prevailing parties.” The District Court’s now-vacated preliminary injunction

⁵ Third-Party Defendants refer the Court to their principal brief in Case No. 17-6385 for full discussion of the prevailing party test enunciated in *Buckhannon* and further explained in *Sole v. Wyner*, 551 U.S. 74, 83 (2007).

order is not a judicially enforceable order that could compel a change in the parties' relationship. "To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). This Court has recognized that the applicable test "will generally counsel against fees in the context of preliminary injunctions." *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010). Thus, "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." *Id.* at 604. There are only "occasional exceptions" to this rule. *Id.* An exception may exist when "the plaintiffs obtained all of the relief they requested once the preliminary injunction served its purpose," but courts must still consider the unique facts of each case. *Id.* at 599; *see also Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2002) (denying an award of fees in a case, because although the litigant won a preliminary injunction to obtain a temporary certificate of occupancy, the injunction did not provide the litigant with its ultimate goal).

The vacated preliminary injunctions cannot be said to have given Plaintiffs all they requested. Critically, it was the voluntary conduct of the Commonwealth of Kentucky—in the form of Governor Bevin's Executive Order and the General Assembly's SB 216—that brought the litigation to a close. That voluntary change

in the parties' relationship cannot support an award of fees, because a "defendant's voluntary change, even one precipitated by litigation, does not amount to 'a court-ordered change in the legal relationship' between the plaintiff and defendant, as required to establish prevailing-party status." *McQueary*, 614 F.3d at 597 (quoting *Buckhannon*, 532 U.S. at 604).

Courts routinely reject requests for fees in cases in which a party's voluntary actions resolve the controversy. *See, e.g., Doe v. Nixon*, 716 F.3d 1041, 1050 (8th Cir. 2013) ("the Does are not entitled to prevailing party status simply because the voluntary change in conduct is recognized in an order of dismissal"); *Singer Mgmt. Consultants v. Milgram*, 650 F.3d 223, 232 (3d Cir. 2011) ("Because no enforceable judgment on the merits issued in this case and the State's actions that mooted the case were voluntary, *Buckhannon* tells us that Live Gold was not a prevailing party."); *Walker v. Calumet City*, 565 F.3d 1031, 1037 (7th Cir. 2009) (reversing fee award because "dismissal of the case for mootness did not impose a judicial imprimatur that would permit awarding attorney fees under *Buckhannon*"). At most, Plaintiffs can claim to have "catalyzed" this voluntary action. That theory has been expressly rejected, and so it must be rejected here as well. *Buckhannon*, 532 U.S. at 605.

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

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

Under Kentucky law, county clerks—like Davis—are considered “county officials.”⁶ To mischaracterize Davis as a state official, the District Court misapplied a test used to determine the scope of sovereign immunity from *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015). While this analysis was unnecessary, Davis still should have been considered a county official—the conclusion reached by this Court in similar cases. *See, e.g., Brotherton v. Cleveland*, 173 F.3d 552, 565-66 (6th Cir. 1999) (finding that Hamilton County Coroner “acted as a county, not state, official” when he voluntarily enacted a policy). Any award against her, therefore, “must run against the County” office she holds. *Crane v. Texas*, 759 F.2d 412, 432 (5th Cir. 1985). Notably, in a similar case involving county officials and issues of religious expression, this Court approved of *fees assessed only against a Kentucky county*. *Granzeier v. Middleton*, 173 F.3d 568, 572 (6th Cir. 1999). There, because state officials were not responsible for the actions of county

⁶ Third-Party Defendants refer the Court to their principal brief in Case No. 17-6385 for a complete discussion of the facts supporting Davis’s proper characterization as a county official. For example, the offices of county clerks are funded by the fees they generate, not from funds allocated by the Commonwealth of Kentucky. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 241).

officials, fees could be assessed only against the county. *Id.* The same result is required here, because “it is not unfair to assess attorney’s fees against [the county officials], rather than against the state.” *Clay v. Edward J. Fisher, Jr., M.D., Inc.*, 588 F. Supp. 1363, 1366 (S.D. Ohio 1984).

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

Third-Party Defendants recognize that it is “extremely rare” for courts to find “special circumstances” that justify a denial of attorneys’ fees. *McQueary*, 614 F.3d at 604. However, this Court has instructed that a “case-by-case approach” be used when considering whether special circumstances exist. *Hescott v. City of Saginaw*, 757 F.3d 518, 523 (6th Cir. 2014). When considering the unique facts of this case, there are special circumstances which render an award against the Commonwealth of Kentucky unjust.

First, a fee award will not advance the purposes of § 1988. Among the purposes of § 1988(b) is deterring conduct that violates civil rights. *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (“As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”). That purpose is not vindicated if the offending office—the Rowan County Clerk’s Office—suffers no liability. If fees are assessed only against the Commonwealth, the Rowan County Clerk’s Office will be able to retain the significant budget

surplus it built, at least in part, on fees collected from marriage license.⁷ If the Rowan County Clerk's Office suffers no cost for its unilateral policy, there is little to deter it from instituting other unlawful policies.

Second, the relationship between Davis and the Third-Party Defendants also renders an award unjust here. Davis was adverse to the Third-Party Defendants before and throughout this litigation. The official position of the Commonwealth of Kentucky—that county clerks were obligated to follow the law—was both clear and clearly communicated to Davis. It was Davis alone who chose not to follow the law as established in *Obergefell*, and thus Plaintiffs obtained their preliminary and limited relief only against Davis in her role in as Rowan County Clerk. (Order Granting Preliminary Injunction, R. 43, Page ID # 1173). The Third-Party Defendants could not force Davis to take any particular action, and Davis herself recognized that a “legislative” solution was required to resolve her dispute with the *Obergefell* decision. Given the reality of the parties' relationship, it is unjust for fees to be imposed against the Third-Party Defendants for actions take solely under Davis's authority.

⁷ That surplus was \$733,000 at the time Plaintiffs' claims arose, which is more than enough to cover the award granted by the District Court. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 242-43).

Conclusion

The District Court erred, as a matter of law, in finding that Plaintiffs were entitled to any award, because Plaintiffs cannot qualify as “prevailing parties.” For purposes of a fee award, “prevailing parties” are limited to litigants who achieve a material and judicially sanctioned change in the legal relationship of the parties to that litigation. While Plaintiffs obtained preliminary injunctions against Davis, these were vacated, and so Plaintiffs have no enforceable rulings on the merits of their claims. Under the standard applicable here, Plaintiffs have not prevailed. Any lasting relief gained by Plaintiffs came through the voluntary actions of the Commonwealth of Kentucky—actions taken while the preliminary injunctions still were being challenged in this Court. Such voluntary conduct does not bear the judicial *imprimatur* necessary to support prevailing party status. This is because unlike a litigant who holds a final judgment, Plaintiffs possess no means of making their success permanent.

Even if Plaintiffs qualified as “prevailing parties,” the District Court erred, as a matter of law, by finding the “Commonwealth of Kentucky” was responsible for the fees awarded to Plaintiffs. Such a finding was in error because it rested on the incorrect conclusion that Davis, as Rowan County Clerk, represented the state when she unilaterally opposed the law of the land as established by *Obergefell*. Given the direct conflict between her actions and the stated position of the

Commonwealth of Kentucky, she cannot be considered to be acting as a state official in this context. Indeed, her policy was not to act all.

The District Court reached its erroneous conclusion by incorrectly using a test inapplicable to a determination regarding fees. Even under the balance of that test's factors, Davis must be considered a county official—the way Kentucky law characterizes county clerks. In any event, her actions represented only her office, the Rowan County Clerk's Office. If any county or state agency must bear the consequences of her actions, it must be the Rowan County Clerk's Office, rather than the Commonwealth of Kentucky. It would be particularly unjust to award fees against the Commonwealth of Kentucky, as a whole, when it was adverse to Davis at all relevant times. For these and all foregoing reasons stated above, this Court should reverse the District Court's award of attorneys' fees and costs.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief complies with the type-face and type-volume limitations because it was produced using the Times New Roman 14-point typeface and contains 5,961 words as calculated through Microsoft Word.

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Certificate of Service

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Addendum

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

Document Entry	Document Description	Page ID # Range
R. 1	Complaint	1-15
R. 1-3	Letter to County Clerks	26
R. 34	Third-Party Complaint	745-76
R. 21	Transcript of Preliminary Injunction Hearing on July 13, 2015	100-211
R. 26	Transcript of Preliminary Injunction Hearing on July 20, 2015	217-99
R. 43	Order Granting Preliminary Injunction	1146-73
R. 44	Notice of Appeal	1174
R. 75	Minute Entry Order	1558-89
R. 84	Status Report	1798-1800
R. 89	Order Lifting Contempt	1827-28
R. 92	Motion to Dismiss Filed September 8, 2015	1845-47
R. 92-1	Memorandum in Support of Motion to Dismiss Filed September 8, 2015	1848-70
R. 120	Motion to Enforce	2316
R. 155	Notice of Substitution	2591
R. 157	Motion to Dismiss filed on January 11, 2016	2605-07
R. 157-1	Memorandum in Support of Motion to Dismiss filed on January 11, 2016	2608-14
R. 157-2	Executive Order	2615-19
R. 157-3	Press Release	2621
R. 170	Notice of Substitution	2677
R. 171	Order Granting Third-Party Defendants' Motion to Dismiss Appeal	2680-82
R. 176	Status Report	2692
R. 179	Order Dismissing and Remanding	2698-99
R. 181	Vacating Order	2706-07
R. 182	Dismissal Order	2708-10
R. 183	Motion for Fees	2711-13
R. 184	Referral Order	2801

Document Entry	Document Description	Page ID # Range
R. 193	Davis's Response in Opposition to Motion for Fees	2832-58
R. 193-1	Kim Davis Declaration	2860-61
R. 199	Report and Recommendation	2896-2902
R. 201	Objections to Report and Recommendation	2911-17
R. 204	Davis's Response to Objections to Report and Recommendation	2926-33
R. 206	First Fee Order	2943-92
R. 208	Motion to Amend	3004-05
R. 208-1	Memorandum in Support of Motion to Amend	3007-15
R. 220	Reply in Support of Motion to Amend	3061-69
R. 222	Second Fee Order	3072-85
R. 224	Third-Party Defendants' Notice of Appeal	3088-89
R. 226	Davis's Notice of Appeal	3095-98

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