No. 17-6385

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL MILLER, PH.D.; KAREN ANN ROBERTS; SHANTEL BURKE; STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON SKAGGS; BARRY W. SPARTMAN
Plaintiffs - Appellees
v.
KIM DAVIS, in her official capacity as Rowan County Clerk
Defendant/ Third Party/Plaintiff - Appellee
v.
ROWAN COUNTY, KENTUCKY
Defendant - Appellee

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

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

PRINCIPAL BRIEF OF APPELLEE KIM DAVIS

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CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

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

STATEMENT OF JURISDICTION

Davis agrees that, pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over the appeal of the district court's final order awarding prevailing party attorney's fees to Plaintiffs (Mem. Op. and Order, R.206, PgID.2944 (the "Fee Order")), filed by Third Parties/ Defendants–Appellants Governor Bevin and Commissioner Manuel (collectively, "Governor Defendants"). (Joint Not. Appeal, R.224, PgID.3088.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

2. Whether Governor Defendants waived their right to appeal the district court's Fee Order by failing to participate in briefing on Plaintiffs' Motion for Award of Attorneys' Fees and Costs (R.183, PgID.2711 ("Fee Motion")) in the district court.

3. Whether, if any award of attorney's fees and costs to Plaintiff stands, the district court correctly concluded that the Commonwealth of Kentucky is liable for such award.

INTRODUCTION

Davis agrees with Governor Defendants that Plaintiffs are not prevailing parties, and that the Fee Order should be reversed on that basis. Having already argued that point in her Principal Brief in the companion appeal, No. 17-6404 (Doc. 39), Davis will not repeat her argument here.

Davis disagrees with Governor Defendants, however, regarding the Commonwealth's liability for any fee award that survives. Governor Bevin took office in December 2015, after Davis had already been sued by Plaintiffs. Thus, it is not Governor Bevin's fault that his predecessor in office, Governor Beshear, knowingly chose an implementation of *Obergefell* that violated Kentucky law and Davis' rights, and set Davis up to be sued in her official capacity. To be sure, upon taking office, Governor Bevin took immediate action to correct Governor Beshear's dereliction, issuing the Executive Order which acknowledged that Governor Beshear's implementation of *Obergefell* was wrong, and that Davis correctly applied and upheld Kentucky law. The Commonwealth, nonetheless, must answer for the consequences of Governor Beshear's mistake. Now, if any attorney's fee award stands, the Commonwealth, not Davis or her office, must pay the award.

STATEMENT OF THE CASE

This appeal, No. 17-6385 (the "Bevin Fee Appeal"), and appeal No. 17-6404 (the "Davis Fee Appeal"), are from the same district court order awarding attorney's

fees to Plaintiffs–Appellants ("Plaintifs"). (R.206, Mem. Op. and Order (July 21, 2017) (hereinafter, the "Fee Order"), PgID.2943-2992.) The two appeals are on parallel briefing schedules, and they will be consolidated for submission to the Court. (Order, Doc. 30-1, Jan. 2, 2017.)

Davis included a comprehensive Statement of the Case in her principal brief in the Davis Fee Appeal (Davis Br., No. 17-6404, Doc. 39, at 2-30 (hereinafter, "Davis SOC").) Since this case will be consolidated with the Davis Fee Appeal for submission to the Court, Davis will rely on and refer to herein her Statement of the Case in that appeal.

SUMMARY OF THE ARGUMENT

First, Governor Defendants waived their right to appeal the Fee Order because they chose not to participate below in the briefing on Plaintiffs' Fee Motion. Because Governor Defendants' cannot raise on appeal any matter not raised below, they are precluded from challenging the Fee Order here.

Second, to the extent any award of attorney's fees and costs imposed against Davis in her official capacity survives, the Commonwealth is liable because Davis acted as a state official for purposes of marriage licensing. Davis complied with the express requirements of Kentucky marriage licensing statutes and Kentucky RFRA, and therefore at all times upheld and enforced state policy as a state official. Governor Defendants have admitted that Davis upheld state policy by their words

and actions, first by Governor Beshear's ratification of Davis' alterations of the marriage license form to accommodate her religious objections, and then by Governor Bevin's Executive Order which acknowledged that Kentucky RFRA must be applied to Kentucky marriage licensing policies, and tacitly acknowledged that Davis upheld state policy by doing so.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's erroneous determination that the Miller Plaintiffs are prevailing parties. *Woods v. Willis*, 631 Fed. App'x 359, 363 (6th Cir. 2015). To the extent the district court's correct designation of the Commonwealth as responsible for payment of the fees and costs awarded in the Fee Order was an "apportionment" between multiple parties—*i.e.*, as between the Commonwealth and Rowan County—then Governor Defendants' appeal of that apportionment "arguably raises a legal issue to be reviewed de novo." *Garner v. Cuyahoga Cty. Juvenile Court*, 554 F.3d 624, 641 (6th Cir. 2009) ("We need not settle the question in this case, however, because we would reach the same conclusion regarding apportionment under either the abuse-of-discretion or de novo standard of review."); *cf. Paschal v. Flagstar Bank*, 297 F.3d 431, 436-37 (6th Cir. 2002) (reviewing for abuse of discretion district court's refusal to apportion award of expert witness fees among defendant and unsuccessful plaintiffs). Application of

either *de novo* or abuse of discretion to the question of the Commonwealth's liability compels the same result.

This Court reviews for abuse of discretion the district court's denial of Governor Defendants' motion for relief from judgment under Rule 60(b), Fed. R. Civ. P. *See Perris v. Cuyahoga Cnty. Bd. of Developmental Disabilities*, 620 Fed. Appx. 386, 389 (6th Cir. 2015).

ARGUMENT

I. IF ANY AWARD OF ATTORNEY'S FEES TO PLAINTIFFS STANDS, THE COMMONWEALTH'S LIABILITY FOR SUCH FEES SHOULD BE AFFIRMED BECAUSE GOVERNOR DEFENDANTS WAIVED THEIR RIGHTS TO APPEAL THE FEE ORDER BY FAILING TO PARTICIPATE IN BRIEFING BELOW.

The Fee Order granted Plaintiffs' Fee Motion (Davis SOC, § O), which was contested by Davis and Appellee Rowan County. (Davis' Resp. Opp'n Pls.' Mot. Award Att'ys' Fees and Costs, R.193, PgID.2832; Rowan Cty.'s Resp. Opp'n Pls.' Mot. Award Att'ys' Fees and Costs R.192, PgID.2820.) Governor Defendants, however, took no position and filed no paper in connection with the Fee Motion. Accordingly, when Governor Defendants challenged the district court's determination that the Commonwealth is liable for the fee award in their motion to amend the Fee Order (Gov. Defs.' Mot. Amend Finds. and Concls. and Amend J., R.208, PgID.3004), the district court rightly rejected their challenge as having been waived. (Mem. Op. and Order, R.222, PgID.3074-76 ("The [Governor] Defendants

not only failed to raise these specific arguments in response to Plaintiffs' Motion for Attorneys' Fees and Costs, but elected not to participate in the briefing of Plaintiffs' Motion for Attorneys' Fees and Costs at all.") Although Governor Defendants included the district court's denial of their motion to amend in their Notice of Appeal (Joint Not. Appeal, R.224, PgID.3088–89), they excluded the issue from their Civil Appeal Statement (Doc. 15), and confirmed their abandonment of the issue by not briefing it. Accordingly, the district court's conclusion that they waived their right to challenge the Fee Order stands. Governor Defendants' waiver applies to this appeal as well.

"It is the usual rule that we will not give consideration to issues not raised below." *Doll v. Glenn*, 231 F.2d 186, 190 (6th Cir. 1956). Governor Defendants did not timely or effectively raise below their arguments on the matters decided in the Fee Order. Accordingly, they cannot now raise these issues on appeal.

Thus, the Order Denying Governor Defendants' Motion to Amend should be affirmed, and so should the portion of the Fee Order designating the Commonwealth as liable, because Governor Defendants waived their right to appeal when they chose not to participate in the briefing on Plaintiff's Fee Motion in the district court.

II. IF ANY AWARD OF ATTORNEY'S FEES TO PLAINTIFFS STANDS, THE COMMONWEALTH'S LIABILITY FOR SUCH FEES SHOULD BE AFFIRMED BECAUSE DAVIS ACTED FOR THE COMMONWEALTH IN UPHOLDING AND ENFORCING STATE POLICY.

A. The District Court Properly Inquired Whether Davis Acted as a State Official for Purposes of § 1988, and Properly Concluded She Did.

1. In Official Capacity Suits the Proper Inquiry Is Which Entity Did the Official Represent.

In the Fee Order, having erroneously concluded that Plaintiffs prevailed against Davis in her official capacity, the district court nonetheless asked the right next question: "Who pays?" (Fee Order, R.206, PgID.2965.) Answering the question was necessary because "[o]fficial-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978)). "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* at 166. Thus, determining the entity of which Davis was an agent was critical.

The district court correctly understood that local officials like Davis can act for both the state and the county in performing her official duties, and correctly concluded that Davis acted for the Commonwealth in the issuance of marriage licenses. (Fee Order, R.206, PgID.2966-2980.)

2. Davis' Marriage Licensing Duties Clearly Flow from State Policy.

Marriage licensing is an exclusively state-level function in Kentucky. **Where a county officer's relevant duties "clearly flow from the State," the officer is a state official.** *Gottfried v. Med. Planning Svcs., Inc.*, 280 F.3d 684, 693 (6th Cir. 2002) (holding county sheriff state official when enforcing state court injunction); *cf. D'Ambrosio v. Marino*, 747 F.3d 378, 387 (6th Cir. 2014) (holding county prosecutor state official when prosecuting state crimes); *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009) (same); *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) ("**[A] city official pursues her duties as a state agent when enforcing state law or policy**." (emphasis added)); *Graves v. Mahoning Cnty.*, No. 4:10CV2821, 2015 WL 403156, *6 (N.D. Ohio Jan. 28, 2015) (holding township clerks acted as state officials when issuing arrest warrants pursuant to state statute), *aff'd*, 821 F.3d 772 (6th Cir. 2016); *Leslie v. Lacy*, 91 F. Supp. 2d 1182, 1194 (S.D. Ohio 2000) (holding county clerk acted as agent of state, not county, where relevant job duties specified by state law and subject to control of state).

Officials such as Davis "sometimes wear multiple hats, acting on behalf of the county *and* the State." *Crabbs v. Scott*, 786 F.3d 426, 429 (6th Cir. 2015). Thus, "**the question is not whether [Davis] acts for [Kentucky] or [Rowan] County in some categorical, 'all or nothing' manner.**" *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997) (emphasis added). The inquiry does not seek "to make a

characterization of [Davis] that will hold true for every type of official action they engage in. We simply ask whether [Davis] represents the state or the county" in marriage license issues. *McMillian*, 520 U.S. at 785-86. It is beyond cavil that Davis represents the Commonwealth when dealing with marriage licenses. (Doc. 206, Fee Order, PgID.2980; 267 F. Supp. 3d at 993). *See also, Jones v. Perry*, 215 F. Supp. 3d 563, 568 n.3 (E.D. Ky. 2016) (treating Kentucky county clerk as state official in applying *Ex parte Young* exception to sovereign immunity).

Kentucky law leaves no doubt that, in issuing and declining to issue marriage licenses, Davis is a state official. County clerks, such as Davis, have statutorily conferred duties and jurisdiction "coextensive with that of the Commonwealth." *See* Ky. Rev. Stat. § 64.5275(1); *see also* Ky. Const. § 246. In Kentucky, the Commonwealth has "**absolute jurisdiction over the regulation of the institution of marriage**." *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. Ct.App. 2011) (emphasis added). All matters relating to marriage in Kentucky, including its definition and the procedures for licensing, solemnizing, and dissolving marriages are governed by Chapter 402 of the Kentucky Revised Statutes. In particular, the duty of county clerks to issue marriage licenses is governed by section 402.080, and the license form that county clerks must use for marriage licenses by section 420.100. Governor Beshear's SSM Mandate was a directive from the state **to all county clerks in the state**. (Davis SOC, § B.)

In light of this absolute state control over marriage in Kentucky, the district court correctly concluded,

> The State not only enacts marriage laws, it prescribes procedures for county clerks to follow when carrying out those laws, right down to the form they must use in issuing marriage licenses. Thus, **Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses**.

(R.43, Prelim. Inj., PgID.1153; 123 F. Supp. 3d at 933 (citations omitted) (emphasis added).)

3. Davis Upheld and Enforced State Policy by Enforcing Kentucky RFRA.

Davis' marriage licensing duties and obligations "clearly flow from the state." *See Gottfried*, 280 F.3d at 693. And Davis' decision *not* to issue marriage licenses was no less the act of a state official because that decision was likewise sanctioned by Kentucky state law. As ultimately acknowledged by Governor Bevin's Executive Order, Davis' right to relief from carrying out Gov. Beshear's SSM Mandate against her conscience is protected by and entrenched in Kentucky RFRA which provides, in pertinent part:

> Government shall not substantially burden a person's[1] freedom of religion. The right to act **or refuse to act** in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.

Ky. Rev. Stat. § 446.350 (emphasis added). Thus, Kentucky RFRA prohibits the Commonwealth from substantially burdening a person's freedom of religion, including a refusal to act, unless the Commonwealth has a compelling interest and uses the least restrictive means to further that interest. *Id.*

Kentucky RFRA applies to all Kentucky statutes. Kentucky RFRA is housed under Chapter 446, which is entitled "Construction of Statutes," and includes such other generally applicable provisions as "Definitions for Statutes Generally," "Computation of Time," "Severability," and "Titles, Headings, and Notes." Ky. Rev. Stat. §§ 446.010, 446.030, 446.090, 446.140. Even more specifically, Kentucky RFRA is included under a section of Chapter 446 reserved for "Rules of Codification." As such, Kentucky's marriage statutes—much like any other body of

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[1] While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "bodies-politic and corporate, societies, communities, the public generally, **individuals**, partnerships, joint stock companies, and limited liability companies." *See* KY. REV. STAT. § 446.010(33) (emphasis added). There is no exception from the definition for individuals who are publicly elected officials.

Kentucky law—cannot be interpreted without also considering and applying Kentucky RFRA.

In light of the foregoing, applying Kentucky RFRA to Kentucky marriage licensing laws is enforcing state policy. Governor Bevin, in the Executive Order, unequivocally agreed that Kentucky RFRA prohibited Kentucky from requiring Davis to issue SSM Mandate licenses against her conscience because much less restrictive means were available, such as the new form adopted by the Executive Order. (Davis SOC, § J.) Put differently, Kentucky (*i.e.*, Davis in her official capacity) was prohibited by Kentucky RFRA from substantially burdening "the right of any person" (*i.e.*, Davis in her individual capacity, her employees, etc.) "to act **or refuse to act** in a manner motivated by a sincerely held religious belief . . . ."[2] Ky. Rev. Stat. § 446.350 (emphasis added). Accordingly, both in issuing marriage licenses, and in not issuing licenses pursuant to Kentucky RFRA, in her official

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[2] The "official capacity" concept is an imperfect legal fiction, as recognized by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), wherein it acknowledged the problem that railway companies may be able to pay fines for violating state law, but **agents** of those companies would personally suffer imprisonment. 209 U.S. at 164. Federal courts on numerous occasions since have recognized that official capacity suits are founded on this imperfect legal fiction. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (collecting cases). Plaintiffs' official capacity suit against Davis obviously has affected Davis in both her official capacity and her individual capacity; it would make little sense to say Davis went to jail only in her official capacity.

capacity, Davis was at all times enforcing state law or policy as a state official.[3] *See Pusey*, 11 F.3d at 657 ("[A] city official pursues her duties as a state agent when enforcing state law or policy.")

The district court correctly held, concerning Davis, "county clerks, when issuing—or refusing to issue—marriage licenses, represent the Commonwealth of Kentucky, not their counties." (R.43, Prelim. Inj., PgID.1153; 123 F. Supp. 3d at 933 (citations omitted) (emphasis added).) Davis' marriage licensing duties clearly flow from the Commonwealth, which should end the inquiry.

4. Davis Exercised Discretion on State Authority to Uphold State Policy.

As discussed above, as a Kentucky official Davis was obligated to enforce Kentucky RFRA, even as she enforced Kentucky marriage licensing laws. Thus, to the extent Davis exercised some degree of discretion in upholding both the licensing laws and Kentucky RFRA, she was unlike the government officials who created local policies independent of any state mandate in *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015), *Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994), *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999), and *Crane v. Texas*, 759 F.2d 412 (5th Cir.

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[3] Even if the Court concludes Davis, in her official capacity, applied the Kentucky RFRA incorrectly, the Kentucky RFRA is still a state law and not a county policy.

1985) (collectively, the "Discretion Cases"), all cited by Governor Defendants. (Doc.36, Gov. Defs.' Br., at 30-34.)

While the extent to which a local official exercises discretion is relevant to determining whether the official's policy is of the state or the locality, it is not dispositive. As this Court advised in *Crabbs*, "'the essential question is **the degree of discretion** possessed by the official . . . implementing the contested policy.'" 786 F.3d at 430 (alteration in original) (emphasis added) (quoting *Cady*, 574 F.3d at 343). Likewise, the Seventh Circuit in *Ruehman* recognized that that an official's exercising discretion "is surely **part** of the question . . . ." 34 F.3d at 529. But the *Ruehman* court clarified:

> **It does not follow, however, that *only* persons whose every step is guided by positive law are acting for the state.** Consider a member of the Governor's Cabinet. Such officials typically exercise a great deal of discretion, but that does not mean that they are acting for themselves. They exercise discretion in the name of the state. The effects of their choices are "state policy," and to interfere with their discretion is to change state policy.

Id. (bold emphasis added).

Compared to the officials in the Discretion Cases, Davis exercised very little discretion. Rather, Davis "no marriage licenses" policy complied with the express directives of the marriage licensing statutes requiring a uniform license form throughout the Commonwealth, such that she could not change the form unilaterally. (Davis SOC §§ A, C.) *See* Ky. Rev. Stat. § 402.100 (2015) (directing county clerks

to issue Kentucky marriage licenses **on "the form proscribed by the Department for Libraries and Archives** [KDLA]" (emphasis added)); Ky. Rev. Stat. § 402.110 (2015) (requiring that "[t]he form of marriage license prescribed in KRS 402.100 **shall be uniform throughout this state**" (emphasis added)). Davis (in her official capacity) also complied with the express prohibition in Kentucky RFRA against substantially burdening any person's freedom of religion, including a refusal to act against conscience, when less restrictive alternatives were available. Davis' issuing no licenses, while they were readily available in all surrounding counties, complied with the express requirements of both the Kentucky licensing statutes and Kentucky RFRA. (Davis SOC, § C.) Davis' policy was also the only policy that could (i) treat all couples the same, and (ii) rightfully accommodate religious conscience under the Kentucky RFRA and the United States and Kentucky Constitutions, while (iii) leaving marriage licenses readily available to every couple throughout every region of the state and not preventing Plaintiffs from marrying whom they wanted to marry.

Davis did not take the additional step of effecting her own alterations to the Kentucky marriage license form until after the district court (1) refused to consider her preliminary injunction motion against Governor Beshear to obtain an accommodation, (2) entered a preliminary injunction ordering her to issue marriage licenses, (3) jailed her for not issuing marriage licenses, and then (4) released her

after approving the license alterations already effected by her deputy clerks. (Davis SOC, §§ E-H.)

Thus, unlike the officials in the Discretion Cases, Davis did not act with complete discretion, creating new policy out of whole cloth; rather, Davis complied with the explicit requirements of Kentucky's marriage licensing statutes and Kentucky RFRA. Also unlike the officials in the Discretion Cases, Davis received an admission from the Commonwealth, in the form of Governor Bevin's Executive Order, that she upheld Kentucky policy, while Governor Beshear got it wrong.[4] (Davis SOC, § J.) By the Executive Order, Kentucky admitted Davis was due an accommodation under Kentucky RFRA, and conformed Commonwealth policy to Davis' implementation of Kentucky RFRA in the context of marriage licensing. (*Id.*)

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[4] Governor Bevin, upon taking office, stepped into the shoes of former Governor Beshear.

> In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. *See* Fed. Rule Civ. Proc. 25(d)(1); Fed. Rule App. Proc. 43(c)(1); this Court's Rule 40.3.

Graham, 473 U.S. at 166 n.11. Thus, Governor Bevin's admission on behalf of the Commonwealth relates back to Governor Beshear's actions on behalf of the Commonwealth.

B. The *Crabbs* Factors Confirm Davis is a State Official for Purposes of Marriage Licensing.

1. Marriage Licensing Is Clearly Within the Purview of the Commonwealth.

Even if necessary to probe further, the district court correctly applied the *Crabbs* factors to confirm Davis represented the Commonwealth, not the County, in the function of marriage licensing. In cases where it is not clear that an official's duties "flow from the state" (unlike this case), this Court may consider several "[r]elevant factors," including, *inter alia*, the Commonwealth's potential liability, how state law treats the county officer for purposes of the requisite activity, the degree of control exercised over the defendant's duties in the particular activity, and whether such functions fall within the purview of state government. *See Crabbs*, 786 F.3d at 429. There is no dispute that marriage licensing falls within the purview of the Commonwealth. The remaining factors likewise demonstrate the Davis acted for the Commonwealth in this case.

2. Kentucky Statutes Indicate the Commonwealth Is Potentially Liable for Davis' Official Acts.

The "foremost factor" in the optional *Crabbs* analysis is whether the state has potential legal liability for the judgment. *Lowe v. Hamilton Cnty. Dep't of Jobs & Family Serv.*, 610 F.3d 321, 325 (6th Cir. 2010). "In analyzing this factor, we focus our inquiry on the state treasury's *potential* legal liability for the judgment, not whether the state treasury will pay for the judgment in *that* case." *Lowe*, 610 F.3d at

325; *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 778 (6th Cir. 2015) (noting that the issue is one of **potential** legal liability, not actual liability or even whether the state will actually be forced to pay the judgment); *Perry v. Se. Boll Weevil Eradication Found.*, 154 F. App'x 467, 472 (6th Cir. 2005) ("we look to the state's potential for legal liability for a judgment against the entity, **not whether the state would actually pay the judgment in our particular case.**" (emphasis added)).

Although there is no Kentucky statute definitively establishing what entity—the Commonwealth, the county, or another—is liable for judgments against county clerks, there is a statute clearly indicating that the Commonwealth is **potentially** liable. Kentucky Rev. Stat. § 62.055 requires that "[e]very county clerk, before entering on the duties of his office, **shall execute bond to the Commonwealth**, with corporate surety authorized and qualified to become surety on bonds in this state." Ky. Rev. Stat. § 62.055(1). Thus, by statute, the Commonwealth requires every county clerk to protect the Commonwealth with a bond. This statutory requirement plainly contemplates potential liability of the Commonwealth for obligations of the county clerks.

3. The Commonwealth's Level of Control over State Marriage Policy Dictates That Davis Is a State Actor.

The district court correctly held that the state control factor "weighs heavily in favor of finding Davis represented the Commonwealth." (Doc. 206, Fee Order,

PgID.2973; 267 F. Supp. 3d at 990.) This holding was necessitated because, [w]ith respect to the issuance of marriage licenses, the Commonwealth **exercises a substantial degree of control over county clerks**." (*Id.* at PgID.2974; 267 F. Supp. 3d at 990 (emphasis added).) The district court found a number of things relevant for purposes of the Commonwealth's control over Davis, including that the Commonwealth controls marriage as an institution, exercises fiscal control over Davis, is the only entity with legal recourse against Davis, and can criminally penalize Davis. (*Id.* at PgID.2973-78; *id.* at 990-92.) Those same factors necessitate a finding that "the Commonwealth exercises a great deal of control over country clerks in this particular area." (*Id.* at PgID.2973; *id.* at 990).

The Court may easily reject Governor Defendants' attempt to argue that the Commonwealth has no control over county clerks. (Gov. Defs.' Br., Doc. 36, at 10 n.2, 30 n.5, 34 n.7.) First, Governor Beshear exercised authority over county clerks (albeit wrongfully) with his SSM Mandate, going so far as to instruct clerks to comply or resign. (Davis SOC, § B.) Second, Governor Bevin exercised authority over county clerks (properly) with the Executive Order. (*Id.*, § J.) Governor Defendants cannot logically now argue that they merely "communicated" the "official position" of the Commonwealth to Davis. (Gov. Defs.' Br., Doc. 36, at 33.)

Third, the article cited by Governor Defendants, Shawn Chapman, *Removing Recalcitrant County Clerks in Kentucky*, 105 Ky. L.J. 261 (2016), further reveals

their error, for it discusses, *inter alia*, these important points: (i) only a **state entity** (the General Assembly) may impeach County Clerks, *id*. at 266; (ii) County Clerks were made privy to "the rarified air of the statewide executive branch," *id*. at 277; and (iii) "**[a]ny person** may, by written petition to the House of Representatives . . . pray the impeachment of any officer," so long as the process begins in the House. *Id*. at 283 (first alteration in original) (emphasis added) (internal quotation marks and citations omitted). Governor Defendants' protest that impeachment is "an exceedingly rare remedy" (Gov. Defs.' Br., Doc. 36, at 30 n.5) is purely academic. The relevant question is Kentucky's authority over county clerks, not the frequency with which that authority is exercised.

C. Governor Defendants Words and Actions Admit Davis Upheld and Enforced State Policy.

While Governor Defendants attempt to insulate the Commonwealth from liability, their claim that they "stood directly adverse to Davis and her Rowan County Clerk's office" (Gov. Defs.' Br., Doc. 36, at 40), is disingenuous. Governor Defendants cannot become adverse to Davis when it suits them.

To be sure, Governor Defendants stopped standing adversely to Davis when Governor Beshear admitted Davis' post-jail alterations of the marriage license form upheld state policy, by publicly stating that the marriage licenses were valid in Kentucky. (Davis SOC, § H.) Governor Defendants' next endorsement of Davis came in the form of Governor Bevin's Executive Order, containing the tacit

admission that by applying Kentucky RFRA to the SSM Mandate license forms, Davis upheld Kentucky policy. (Davis SOC, § J.) Thus, by their words and actions, Governor Defendants have admitted that Davis upheld state policy.

D. Governor Defendants Fail to Support Any Alternative Analysis or Conclusion.

Governor Defendants argue that the district court applied the wrong analysis because the district court relied on cases determining the availability of Eleventh Amendment immunity in official capacity suits. (Gov. Defs.' Br., Doc. 36, at 29-38.) Their argument, however, has no merit. The question of whether Eleventh Amendment immunity is available in an official capacity suit is derivative of the preliminary question of which entity does the official represent. *Graham*, 473 U.S. at 167. In order to determine whether sovereign immunity applies, it must be determined whether the official acted for the state. Thus, Eleventh Amendment immunity cases are answering the same question as posed by this case—who pays? Governor Defendants fail to provide any viable alternative analysis or conclusion.

Governor Defendants mistakenly rely on *Hutto v. Finney*, 437 U.S. 678 (1978), to argue that the Rowan County Clerk's Office should pay as the "legally responsible party." (Gov. Defs.' Br., Doc. 36, at 35-36.) Again, however, Governor Defendants are wrong. In *Hutto*, the Arkansas Attorney General objected to a fee award naming the Department of Corrections, arguing that "neither the State nor the Department is expressly named as a defendant." 437 U.S. at 699. Fees were assessed

against the Department of Corrections as a **state entity**, responsible for payment of the fees for the conduct of the named defendants, in their official capacities. As the Court explained,

> Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, **brought against the State**. . . .
>
> 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)." 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*." 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.

Id. at6 99–700 (emphasis added) (citations omitted). Contrary to Governor Defendants' argument, the Court did not say that a specific department of a wrongdoer must be the party that pays an award of fees. Instead, the Court rebuffed the Attorney General's argument as to whether the **state** could be assessed fees (via

the state's Department of Corrections) instead of the named defendants in their **individual capacities**. The *Hutto* Court further explained its rationale, noting,

> [a]lthough 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 the District Court [sic]. **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**.

Id. at 692–93 (emphasis added). Thus, the **state** was held the responsible party to pay the fees because the named defendants **represented the state** in their official capacities. The Department of Corrections was named nominally as a stand-in for the state.

Thus, *Hutto* does not stand for the proposition that a particular government office should be liable for awards against its officials in their official capacities. Rather, as applied to the instant case, *Hutto* requires the Court to determine on what entity's behalf Davis acted, which the district court did correctly.

Governor Defendants none-too-subtle suggestion that Davis' Office should pay because it can afford it is likewise improper. (Gov. Defs. Br., Doc.36, at 39.) Tellingly, Governor Defendants cite no authority for this proposition. Furthermore, there is no record evidence that Rowan County Clerk's surplus funds of $733,000 **in 2015** still existed at the time of the fee award, or even at the end of fiscal 2015.

Without more evidence of the Clerk's Office's annual expenses and liabilities, there is no basis for the Court to conclude that Davis' Office could pay the fee award even if appropriate. The district court correctly ruled that surplus funds generated by Davis' office are not relevant. (R.206, Fee Order, PgID.2928 n. 24.)

CONCLUSION

For all of the foregoing reasons, the Fee Order should be reversed because Plaintiffs are not prevailing parties. If any award of attorney's fees and costs to Plaintiffs should stand, however, then the Commonwealth's liability for such award should be affirmed.

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CERTIFICATE OF COMPLIANCE
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,426 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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DATED: April 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this April 30, 2018, I caused the foregoing document to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon all counsel and parties of record.

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

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

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

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

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

Record Entry No.	Document Description
R.183-1 PgID.2714, 2722	Memorandum in Support of Plaintiffs' Motion for Award of Attorneys' Fees and Costs
R.184 PgID.2801	Order (Sept. 21, 2016)
R.192 PgID.2820	Rowan County's Response in Opposition to Plaintiffs' Motion for Award of Attorney Fees and Costs
R.193 PgID.2832	Davis' Response in Opposition to Plaintiffs' Motion for Award of Attorneys' Fees and Costs
R.193-1 PgID.2860-61	Declaration of Kim Davis
R.199 PgID.2896-2902	Recommended Disposition and Order
R.206 PgID.2943-2992	Memorandum Opinion and Order (July 21, 2017, "Fee Order")
R.208 PgID.3004	Governor Defendants' Motion to Amend Findings and Conclusions and Amend Judgment
R.222 PgID.3072	Memorandum Opinion and Order (Oct. 23, 2017)
R.224 PgID.3088	Joint Notice of Appeal