No. 17-6404

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

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

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

REPLY BRIEF OF APPELLANT KIM DAVIS

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

Davis established in her principal brief (Doc.39, "Davis Brief") that the district court's Fee Order should be reversed for the alternative reasons that Plaintiffs are not prevailing parties, special circumstances render the fee award to Plaintiffs unjust, and the fee award should be reduced to reflect Plaintiffs' limited success.[1] (Davis Br., Doc.39, pp.31–54.) Davis replies herein to Plaintiffs' unconvincing arguments that they prevailed.[2] (Doc.45, "Plaintiffs' Brief," pp.17–30.) Davis also replies herein to the likewise unconvincing arguments of Plaintiffs and Third Parties/Defendants–Appellees Governor Bevin and Commissioner Manuel (collectively, "Governor Defendants") that liability for any fee award that stands should be imposed on Davis' office. (Pls.' Br., Doc.45, pp.39–45; Gov. Defs.' Br., Doc.46, pp.25–29.) To the extent any fee award stands, the liability of the Commonwealth should be affirmed because Davis at all times pursued and upheld Commonwealth policy.

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[1] Capitalized terms used herein have the same meanings as ascribed to them in Davis' principal brief unless otherwise indicated.

[2] Davis stands on her arguments in her principal brief regarding special circumstances and reduction of the fee award. (Davis Br., Doc.39, pp.48–54.)

ARGUMENT

I. SINCE *BUCKHANNON* THE STANDARD OF REVIEW FOR PREVAILING PARTY DETERMINATIONS IS *DE NOVO*.

A. This Court Reviews a District Court's Factual Findings for Clear Error and Its Legal Conclusions *De Novo*.

Plaintiffs seek as much cover as possible for the district court's erroneous prevailing party determination, so they advocate for the deferential "clear error" standard of review. (Pls.' Br., Doc.45, pp.15–16.) Though the most recent Sixth Circuit cases correctly apply *de novo* review, *see Woods v. Willis*, 631 Fed. App'x 359, 363 n.4 (6th Cir. 2015), Plaintiffs disagree, and claim this Court is bound by the clear error standard applied in the 2006 decision of *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006). (Pls.' Br., Doc.45, p.16 n.5.)

At the outset, the district court's prevailing party determination cannot survive either *de novo* or clear error review because the undisputable facts reveal Plaintiffs received no case-mooting or case-ending relief through the vacated preliminary

injunction.[3] In any event, the Supreme Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001), dictates that *de novo* review applies.

Before discussing *Buckhannon*, consideration of federal courts' usual applications of the *de novo* and clear error standards is instructive. "Traditionally, decisions on questions of law are reviewable *de novo*, decisions on questions of fact are reviewable for clear error, and decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (internal quotation marks omitted). This Circuit agrees. *See, e.g., Planned Parenthood of Greater Ohio v. Himes*, 888 F.3d 224 (6th Cir. 2018) ("The district court's factual findings are reviewed for clear error, its legal conclusions are reviewed de novo . . . .").

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[3] The *McQueary II* panel cited *DiLaura* in applying clear error review to the district court's determination that the plaintiff did not prevail following the remand of *McQueary I*. 508 Fed. App'x at 523–24. But the operative *McQueary* holding for purposes of this case is from *McQueary I*, requiring essentially final, case-ending or case-mooting relief to establish prevailing party status. (Davis Br., Doc.39, pp.31–37). As shown herein, *McQueary II's* application of the clearly erroneous standard of review to the district court's prevailing party determination on remand was improper in light of *Buckhannon*. But given the inability of the *McQueary* plaintiff to show the kind of essentially final relief specified in *McQueary I*, the same result undoubtedly would have obtained under the *de novo* standard. In any event, *McQueary II* did not alter *McQueary I's* prevailing party test, which Plaintiffs herein fail.

B. Under New and Binding Supreme Court Precedent, Mixed Questions of Law and Fact Which Entail Primarily Legal Analysis Are Reviewed *De Novo*.

For mixed questions of law and fact, the default standard in this Circuit is *de novo*. *See, e.g., Sheffield v. Burt*, No. 16-2468, 2018 WL 1887618, at *2 (6th Cir. Apr. 20, 2018) ("We review de novo a district court's legal conclusions and mixed questions of law and fact . . . ."). Just two months ago, the Supreme Court explained how to decide whether *de novo* or clear error review applies to a mixed question, in *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960 (2018). Put simply, a district court's choice of the legal test applicable to an issue in dispute is a legal question reviewed *de novo*, and the court's findings of "'basic' or 'historical' fact—addressing questions of who did what, when or where, how or why," are reviewed for clear error. 138 S. Ct. at 965–66. The mixed question—"whether the historical facts found satisfy the legal test chosen"—is reviewed *de novo* if primarily answered by legal analysis, and for clear error if primarily answered by fact finding:

> Mixed questions are not all alike. [S]ome require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so—when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*. But . . . other mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called

> "multifarious, fleeting, special, narrow facts that utterly resist generalization." And when that is so, appellate courts should usually review a decision with deference. **In short, the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.**

Id. at 967 (emphasis added) (citations and footnote omitted).

C. This Court Correctly Recognized that *Buckhannon* Dictates *De Novo* Review of Prevailing Party Determinations Under § 1988.

In *Buckhannon*, the Supreme Court jettisoned the so-called "catalyst theory," which at the time was recognized by most federal appellate courts (including this Court), and under which prevailing party status could be conferred on a litigant "that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 600–601.

Thus, *Buckhannon* eliminated the excessive deference and "**highly factbound inquiry**" of the catalyst theory in favor of a straightforward prevailing party test of "ready administrability" to determine whether a sufficient "**change in the legal relationship of the parties**" has occurred. *See id.* at 605, 609–10 (emphasis added). Discarding the "highly factbound inquiry" of the catalyst theory also removed the justification for any "factbound" standard of review for prevailing party determinations.

In *Bridgeport Music, Inc. v. London Music, U.K.*, 226 Fed. App'x 491 (6th Cir. 2007), this Court reviewed a "district court's threshold prevailing-party determination" which "relied exclusively on the Supreme Court's decision in *Buckhannon*." 226 Fed. App'x at 493. Confronted directly with *Buckhannon's* holding, the *Bridgeport* Court held that the prevailing party determination is a legal question subject to *de novo* review, observing, "'Post-*Buckhannon*, every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes . . . is a legal question subject to *de novo* review.'" *Id.* (modification in original) (quoting *Bailey v. Miss.*, 407 F.3d 684, 687 (5th Cir. 2005)). Though *Bridgeport Music* was unpublished, it was quickly followed in the reported case *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007) ("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 we review de novo." (citing *Bridgeport Music*)). In further support of *de novo* review, the *Radvanksy* Court made the additional observation that the Supreme Court reviewed *de novo* a prevailing party determination without explicitly saying so in *Sole v. Wyner*, 551 U.S. 74 (2007), and that the Sixth Circuit did the same in *Toms v. Taft*, 338 F.3d 519 (6th Cir. 2003).

Conversely *DiLaura*, cited by Plaintiffs in support of clear error review, is indissolubly tethered to the dead catalyst theory. The *DiLaura* Court addressed it

with a mere sentence: "We review a district court's determination of prevailing party status for clear error," 471 F.3d at 670, citing *Knology, Inc. v. Insight Commc'ns Co.*, 460 F.3d 722 (6th Cir.2006). The *Knology* Court cited *Gregory v. Shelby Cnty., Tenn.*, 220 F.3d 433 (6th Cir. 2000). 460 F.3d at 726. Thus, *Gregory* is the root of *DiLaura's* clear error authority, but *Gregory* **does not say** that the clear error standard applies to the prevailing party **determination**. Rather, the *Gregory* Court explained, "a clear error standard is applied when reviewing **the factual findings underlying the trial court's determination** of 'prevailing party' status…." 220 F.3d at 446. This statement from *Gregory* is entirely consistent with this Court's usual application of clear error to factual determinations, and does not compel the application of clear error to the ultimate, mixed question of prevailing party status.

The *Gregory* Court, however, also appeared to apply clear error to its "conclusion" on the ultimate, mixed question, that prevailing party status was not obtained. *Id.* ("We find no clear error in the magistrate judge's factual analysis **and his ultimate conclusion that this suit was not the catalyst** for [the] termination." (emphasis added)). But that "ultimate conclusion" was based on application of the "highly factbound" catalyst theory, which the *Buckhannon* Court would soon discard as unfit for § 1988 prevailing party determinations. 532 U.S. 609–610. Whereas, under the discarded catalyst theory, the mixed question of prevailing party status "entail[ed] primarily…factual work," *U.S. Bank*, 138 S. Ct. at 967, *Buckhannon's*

retirement of the theory reformed the prevailing party determination into a primarily legal question, asking whether there was sufficient change in the **legal relationship** of the parties. *Buckhannon*, 532 U.S. at 605. Thus, *Gregory's* application of clear error to the ultimate prevailing party conclusion, explicitly based on the "factbound" catalyst theory, was drained of any precedential authority by *Buckhannon*.

In light of the foregoing, this Court should not consider itself constrained to follow other panels that followed the *Gregory* line of cases instead of *Buckhannon*, including *DiLaura* which did so without analysis or apparent intent to test the clear error standard against the Supreme Court's *Buckhannon* decision. *Gregory* and its progeny were displaced by the "inconsistent decision of the United States Supreme Court." *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (internal quotation marks omitted). Thus, the *Radvanksky* Court correctly followed *Buckhannon*, as well as *Toms* and *Sole* which implicitly adopted *de novo* review in

obedience to *Buckhannon*.[4] *Radvanksky*, 496 F.3d at 620. This Court should do likewise.[5]

The *McQueary* "contextual and case-specific inquiry" to determine prevailing party status, 614 F.3d at 604, is not the "highly factbound inquiry" required by the discarded catalyst theory, *Buckhannon*, 532 U.S. at 609. Rather, the *McQueary* test is designed to determine whether the "'court-ordered **change in the legal relationship**' between a plaintiff and a defendant [is] enduring and irrevocable." 614 F.3d at 597 (emphasis added). Thus, the *McQueary* inquiry is answered primarily by legal analysis, and should therefore be reviewed *de novo*.

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[4] This Court denied *en banc* review of the *Radvanksky* decision. 496 F.3d at 609.

[5] To the extent the Court considers *Radvansky's* (or *Tom's* implicit and pre-*DiLaura*) interpretation of *Buckhannon* as insufficient authority for applying *de novo* review as recent panels have done, solely because of *DiLaura's* catalyst-theory-bound homage to clear error, the Supreme Court's recent decision in *U.S. Bank* determining when a mixed question should be reviewed *de novo*, 138 S. Ct. at 967, provides sufficient authority for this Court to decide—now—what *Buckhannon* requires **in light of *U.S. Bank***, and to conclude that *de novo* is indeed the proper standard to apply in the wake of *Buckhannon's* rejection of the "factbound inquiry" of the catalyst theory.

II. PLAINTIFFS' VACATED PRELIMINARY INJUNCTION CANNOT CONFER PREVAILING PARTY STATUS UNDER *McQUEARY* BECAUSE PLAINTIFFS DID NOT RECEIVE ESSENTIALLY FINAL, CASE-ENDING OR CASE-MOOTING RELIEF.

A. Plaintiffs Cite Inapposite Authority from Other Circuits in a Failed Attempt to Lower the *McQueary* Bar.

Just as it is not surprising that Plaintiffs' urge a deferential (and wrong) standard of review to avoid this Court's rightful scrutiny of the district court's order, it is also not surprising that Plaintiffs attempt to avoid the clear standards of *McQueary* by relying on cases from other circuits applying different standards. But the rigor and recency of this Court's *McQueary* decisions obviate the need to search for or borrow standards from other circuits, and this Court must reject Plaintiffs' attempt to lower the *McQueary* bar.

Plaintiffs' principal contention is that their vacated preliminary injunction should confer prevailing party status because it was "merits-based." (Pls.' Br., Doc.45, pp.17–22.) Among the inapposite authorities from other circuits Plaintiffs rely on for their "merits-based" standard, they discuss in detail only the Tenth Circuit case *Kansas Judicial Watch v. Stout*, 653 F.3d 1230 (10th Cir. 2011). (Pls.' Br., Doc.45, pp.26–30.) To be sure, *Kansas Judicial Watch* departs entirely from the *McQueary* standard, and applies something quite different.

In the Tenth Circuit, according to *Kansas Judicial Watch*,

> in order for a preliminary injunction to serve as the basis for prevailing-party status, the injunction must provide at least some relief on the merits of the plaintiff's claim(s). A preliminary injunction provides relief on the merits when it (a) affords relief sought in the plaintiff's complaint and (b) represents an unambiguous indication of probable success on the merits.

653 F.3d at 1238. Applying this standard, the Tenth Circuit concluded that the plaintiffs before it were prevailing parties because they enjoyed relief from likely unconstitutional canons of judicial conduct pursuant to a preliminary injunction that was later mooted by a change in the law. *Id.* at 1239. It was enough for the Tenth Circuit that the preliminary injunction provided relief "as long as it was in effect." *Id.*

Regardless of whether Plaintiffs could satisfy the *Kansas Judicial Watch* standard, this Court requires significantly more under *McQueary*. Importantly, the *McQueary I* court expressly recognized that the preliminary relief obtained by the *McQueary* plaintiff both "materially changed the relationship between the parties" and "**turned at least in part on the district court's assessment of the merits**." 614 F.3d at 598–99 (emphasis added). Nonetheless, these facts were not sufficient to overcome the general rule that "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." *Id.* at 604. This was a clear rejection of the "merits-based" approach Plaintiffs urge the Court to import here.

Moreover, on remand, the *McQueary* district court—a year after *Kansas Judicial Watch*—further rejected that a repeal of challenged policies, even coupled with preliminary relief **on the merits**, was sufficient to confer prevailing party status. *McQueary Remand*, 2012 WL 3149344 at *2. In affirming the district court's denial of fees, *McQueary II*, 508 Fed. App'x at 523–24, this Court was apparently unpersuaded by any principle espoused in *Kansas Judicial Watch*. Plaintiffs' primary authority simply does not involve an application of this Court's *McQueary* standard, rendering the case inapposite here.

B. Plaintiffs Exaggerate the Preliminary, Temporary Relief They Received in a Failed Attempt to Pass the *McQueary* Test.

Plaintiffs claim to have received sufficiently lasting relief from the preliminary injunction to make them prevailing parties because they received "issuance of marriage licenses and thus the ability to wed." (Pls.' Br., Doc.45, pp.22–29.) As shown in Davis' principal brief, however, no Plaintiff sought a marriage license in order to be able to wed **on or before a particular date**. (Davis Br., Doc.45, p.8.) Rather, Plaintiffs sought and received preliminary injunctive relief ordering Davis to approve "future marriage license requests submitted by Plaintiffs." (R.43, Prelim. Inj., PgID.1173; Davis Br., Doc.39, pp.7–12.) But the right conferred by a Kentucky marriage license—the ability to wed—is conditional and finite, expiring after thirty days if not used to marry. (Davis Br., Doc.39, p.4.) Four

Plaintiffs obtained licenses and wed; two Plaintiffs obtained a license and allowed it to expire without marrying; and two Plaintiffs never bothered to get a license. (*Id.*, p.27.) The four Plaintiffs who never wed, despite having obtained the preliminary injunction against Davis, prove that the relief obtained by Plaintiffs was neither irrevocable nor enduring. Any Plaintiff who desires to wed now cannot obtain a marriage license under the authority of the vacated preliminary injunction.

The four Plaintiffs (two couples) who did legally wed on the licenses they received do not prove the opposite. Each of these couples used their preliminary relief to enter into relationships **with each other** that they presumably intend to be enduring, but the only legal relationship between these Plaintiffs and **Davis** which was affected by the preliminary injunction was the relationship between licensor and licensee, and the change in that relationship lasted only as long as the preliminary injunction. This is not a "'court-ordered change in the legal relationship' **between a plaintiff and defendant** [which is] 'enduring' and irrevocable" as required by *McQueary*. 614 F.3d at 597 (quoting *Sole*, 551 U.S. at 86).

The Court should also reject Plaintiff's hyperbolic protest that, if they are not prevailing parties under *McQueary*, then prevailing party status is "beyond the reach of **any** preliminary injunction winners . . . ." (Pls.' Br., Doc.45, pp.32–33 (emphasis added).) The *McQueary* Court itself gave concrete examples of cases where plaintiffs obtained case-mooting or case-ending relief through preliminary

injunctions, providing them prevailing party status. *See* 614 F.3d at 599. Even the plaintiff in *McQueary* likely would have prevailed had he sought and obtained a preliminary injunction to protest a **particular** funeral **on a particular date**, instead of a preliminary injunction putatively applying to "all future protests." *See McQueary II*, 508 Fed. App'x at 524. The more a plaintiff seeks by preliminary relief, the more that plaintiff must receive to prevail short of a favorable final judgment; the *McQueary* test is inherently fair, and Plaintiffs failed.

Not only is the relief Plaintiffs received insufficient to confer prevailing party status, but even Plaintiffs' description of the relief—"issuance of marriage licenses and thus the ability to wed"—vastly overstates what they actually received. As shown in Davis' Brief, Plaintiffs never were without the ability to obtain a marriage license and wed in Kentucky, even to wed in Rowan County, because marriage licenses were freely available to them in all surrounding counties, and there were no barriers to Plaintiffs' obtaining them. (Davis Br., Doc.39, p.9.) Thus, the preliminary injunction did not give any Plaintiff the ability to wed, which is something all Plaintiffs always had.

III. 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 Servs.*, 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 a quintessentially and 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 Servs., 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, at *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. (Fee Order, Doc.206, PgID.2980.) *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

402.100. Governor Beshear's SSM Mandate was a directive from the state **to all county clerks in the state**. (Davis Br., Doc.39, pp.4–5.)

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[6] 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.

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6 While "person" is not defined in 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 elected officials.

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 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 Br., Doc.39, pp.23–25.) 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 . . . ."[7] 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 capacity, Davis was at all times enforcing state law or policy as a state official.[8] *See Pusey*, 11 F.3d at 657 ("[A] city official pursues her duties as a state agent when enforcing state law or policy.") 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

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[7] 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.

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

laws and Kentucky RFRA, she was unlike the government officials who created local policies independent of any state mandate in *Crabbs, Brotherton v. Cleveland,* 173 F.3d 552 (6th Cir. 1999), and *Crane v. Texas,* 759 F.2d 412 (5th Cir. 1985) (collectively, the "Discretion Cases"), cited variously by Plaintiffs (Pls.' Br., Doc 45, p.42), and Governor Defendants. (Gov. Defs.' Br., Doc.46, p.25.)

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 recognized in *Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994), 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 Br., Doc.39, pp.2–6.) *See* Ky. Rev. Stat. § 402.100 (2015) (directing county clerks to issue Kentucky marriage licenses **on "the form prescribed by the Department for Libraries and Archives**" (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 Br., Doc.39, pp.5–6.) Davis' policy was also the only policy that could (i) treat all couples the same, and (ii) rightfully accommodate religious conscience under 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 Br., Doc.39, pp.10–21.)

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.[9] (Davis Br., Doc.39, pp.23–25.) 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

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[9] 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.

licensing. (*Id.*) Governor Defendants and Plaintiffs should not be permitted to sidestep that crucial admission.

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 it were 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 that 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 issue is of **potential** legal liability, not actual liability or whether state actually will be forced to pay judgment); *Perry v. Se. Boll Weevil Eradication Found.*, 154 F. App'x 467, 472 (6th Cir. 2005) ("[W]e look at 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." (Fee Order, Doc.206, PgID.2973.) 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 (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.) 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.)

This Court may easily reject Governor Defendants' argument that the Commonwealth has no control over county clerks. (Gov. Defs.' Br., Doc.46, p.27.) 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 Br., Doc.39, pp.4–5.) Second, Governor Bevin exercised authority over county clerks (properly) with the Executive Order. (*Id.*, pp.24–25.) Governor Defendants

cannot logically now argue that they merely "communicated" the "official position" of the Commonwealth to Davis. (Gov. Defs.' Br., Doc.46, p.27.)

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 were adverse to Davis "before and throughout this litigation" is disingenuous. (Gov. Defs.' Br., Doc.46, p.33.) 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 Br., Doc.39, pp.18–21.) 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 Br., Doc.39, pp.23–25.) Thus, by their words and actions, Governor Defendants have admitted that Davis upheld state policy.

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

Plaintiffs and Governor Defendants argue the district court applied the wrong analysis to determine "who pays" because this is not an Eleventh Amendment immunity case. (Pls.' Br., Doc.45, p.43; Gov. Defs.' Br., Doc.46, p.25.) This

argument 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 the official represents. *Graham*, 473 U.S. at 167. Before determining whether sovereign immunity applies, the entity represented by the official must be determined. Which entity Davis represents is precisely the question posed in this case, and the district court correctly concluded it is the Commonwealth. Neither Plaintiffs nor Governor Defendants provide any viable alternative analysis or conclusion.

Governor Defendants also make the nonsensical argument that Davis' office should pay because her office had a mid-year surplus of $733,000 **in 2015**. (Gov. Defs. Br., Doc.46, pp.26–27.) Governor Defendants cite no authority for the proposition that liability may be imposed on a government office simply because it could afford to pay. Moreover, there is no record evidence that Davis' office's surplus funds **in 2015** still existed at the time of the fee award, or even at the end of fiscal 2015. There is no basis for the Court to conclude that Davis' office could pay any fee award even if such inquiry were appropriate. The district court correctly ruled that surplus funds generated by Davis' office are not relevant. (Fee Order, R.206, PgID.2928 n.24.)

CONCLUSION

For all of the foregoing reasons, the district court's prevailing party determination should be reversed. But to the extent any fee award stands, the Commonwealth's liability for the award should be affirmed.

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DATED: May 14, 2018

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I hereby certify that on this May 14, 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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