

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION AT ASHLAND

APRIL MILLER, *et al.*,

Plaintiffs,

v.

KIM DAVIS, *et al.*,

Defendants.

Case No. 0:15-cv-00044-DLB

*Electronically filed*

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR OBJECTIONS TO MAGISTRATE'S  
RECOMMENDED DISPOSITION AND ORDER**

Pursuant to this Court's Order [RE #202], Plaintiffs submit this reply in support of their objections to the Magistrate Judge's recommended disposition and order (R&R). [RE #199.] As set forth in their objections to the R&R, Plaintiffs obtained a direct and irrevocable benefit as a result of the merits-based preliminary injunction. Defendants' arguments to the contrary, if accepted, would prevent any plaintiff from attaining prevailing party status based on a merits-based preliminary injunction that becomes moot before final judgment. Plaintiffs respectfully submit that the Court should therefore reject the R&R and grant Plaintiffs' motion for attorneys' fees and costs.

**ARGUMENT**

**I. PLAINTIFFS OBTAINED AN IRREVOCABLE BENEFIT — THEIR MARRIAGE LICENSES — BECAUSE OF THE PRELIMINARY INJUNCTION.**

In their respective response briefs, Defendants make various assertions in support of the R&R. [RE #203; RE #204.] However, because Defendants fail to illuminate the relevant analysis or otherwise refute Plaintiffs' arguments, Plaintiffs confine this reply to only one of their

contentions — that Plaintiffs did not attain a lasting and irrevocable benefit by virtue of the merits-based preliminary injunction. [RE #203, at 2-3; RE #204, at 4-6.] But by attempting to defend that portion of the R&R, the Defendants further highlight why the R&R erred in reaching that conclusion.

**A. Rowan County erroneously argues that because changed circumstances rendered the preliminary injunction moot the Plaintiffs did not achieve a direct and irrevocable benefit.**

In its response, Rowan County focuses on the fact that changed circumstances rendered the preliminary injunction at issue here moot and, as a result, Plaintiffs failed to attain the permanent injunctive or declaratory relief requested in their complaint. But the County errs in failing to credit Plaintiffs with the direct and irrevocable benefit they attained because of the preliminary injunction that entitles them to prevailing party status. [RE #199: R&R, at 6; RE #203: County Resp., at 2-3.] *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) (“touchstone” inquiry for prevailing party status is whether there is a material alteration in the parties’ legal relationship in a way that directly benefits the plaintiff); *see also Sole v. Wyner*, 551 U.S. 74, 86 (2007) (court-ordered change in legal relationship must be enduring and irrevocable). That changed circumstances rendered the preliminary injunction moot does not alter this conclusion.

Under this rationale, *every* merits-based preliminary injunction rendered moot before final judgment would be insufficient to confer prevailing party status because its benefit will be “temporary” in that mootness will prevent entry of a final judgment or of permanent injunctive or declaratory relief. Thus, the County’s approach to examining whether the material alteration in the parties’ legal relationship resulted in a direct and irrevocable benefit to the plaintiffs would, if accepted, prevent *any* plaintiff from attaining prevailing party status on the basis of a

merits-based preliminary injunction that is rendered moot before final judgment. Of course, such a construction is contrary to the holding in *McQueary v. Conway*, 614 F.3d 91 (6th Cir. 2010) in which the Court of Appeals held that preliminary injunction winners may, in some instances, be prevailing parties. “While the very definition of a *preliminary* injunction suggests that it does not cause an irrevocable change in a legal relationship, ‘the *preliminary* nature of the relief does not by itself provide a ground for *never* granting fees.’” *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722, 2013 U.S. Dist. LEXIS 129777, at \*4-5 (S.D. Ohio Sep. 11, 2013) (quoting *McQueary*, 614 F.3d at 600 (emphasis in original)).

And in this instance, not only did the preliminary injunction materially alter the parties’ legal relationship, but it did so in a way that conferred a direct and irrevocable benefit to Plaintiffs. Before issuance of the preliminary injunction, Plaintiffs were unable to secure marriage licenses from the county clerk’s office in their county of residence (as they were lawfully entitled to do) because of the “no marriage licenses” policy. Only after Plaintiffs secured a merits-based preliminary injunction barring further enforcement of that policy (and even then only after successfully defeating Davis’ repeated attempts to stay the ruling *and* after successfully moving to hold her in contempt for refusing to comply once she failed to secure a stay) were two Plaintiff couples able to obtain the marriage licenses to which they were legally entitled and then lawfully wed.<sup>1</sup> Plaintiffs, therefore, obtained a court-ordered material change in the parties’ legal relationship (the merits-based preliminary injunction barring enforcement of the “no marriage licenses” policy) that resulted in a direct and irrevocable benefit to them (marriage licenses that had been previously withheld pursuant to the challenged policy and that, once

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<sup>1</sup> Plaintiffs Miller and Roberts obtained their marriage license on September 4, 2015 and were married on September 10, 2015. [RE #183-2.] And Plaintiffs Skaggs and Spartman obtained their marriage license on September 4, 2015 and were married on September 9, 2015. [RE #183-3.]

obtained, enabled two of the Plaintiff couples to lawfully marry). Irrespective of the fact that changed circumstances later rendered the preliminary injunction moot, the mootness had no effect on the benefit Plaintiffs achieved as a result of that ruling. Thus, when properly viewed, it is evident that the material alteration in the parties' legal relationship conferred a sufficiently direct, irrevocable, and enduring benefit to support prevailing party status. *See, e.g. Occupy Nashville v. Haslam*, No. 3:11-cv-01037, 2015 U.S. Dist. LEXIS 104550, at \*21-22 (M.D. Tenn. Aug. 10, 2015) (TRO and preliminary injunction sufficient to confer prevailing party status where plaintiffs benefitted by being able to engage in protest activity free from arrest for violating challenged policy); *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 911 (8th Cir. 2012) (finding prevailing party status where merits-based preliminary injunction blocked enforcement of challenged city ordinance); *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002).<sup>2</sup> The contrary assertion by the County in defending the R&R's recommendation is thus in error and should be rejected.

**B. Davis errs in suggesting that *McQueary* requires a preliminary injunction to confer all of the relief sought in the lawsuit to confer prevailing party status.**

Similarly, Davis, too, contends that the Plaintiffs failed to achieve a direct and irrevocable benefit. [RE #204, at 4-6.] In doing so, Davis stitches together portions of *McQueary* that are separated by five pages to seemingly imply a holding that does not exist.

Where only preliminary relief is obtained, the 'enduring and irrevocable' standard generally will not be met, **with only 'occasional exceptions' for 'fact patterns in which the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time.**

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<sup>2</sup> As noted in their fees motion and objections to the R&R, Plaintiffs not only successfully sought injunctive relief to bar enforcement of the "no marriage licenses" policy as to them, but also as to *any* other couples who were otherwise eligible to obtain a marriage license. [RE #194, at 3 n.2; RE #201, at 3.]

[*Id.* at 4 (quoting *McQueary*, 614 F.3d at 599, 604).]

Of course, *McQueary* does not hold that only those merits-based preliminary injunctions that award the claimant “everything it asked for in the lawsuit” will suffice to confer prevailing party status.<sup>3</sup> If that were *McQueary*’s holding, then no preliminary injunction would suffice because no plaintiff seeks only preliminary injunctive relief in her complaint. Instead, *McQueary* clarified that “when a claimant wins a preliminary injunction *and nothing more*, that *usually* will not suffice to obtain fees under § 1988.” 614 F.3d at 604 (emphasis added). From this general observation, one important conclusion may be drawn: Claimants seeking prevailing party status based on a merits-based preliminary injunction will normally have to show a direct and irrevocable benefit *beyond* the mere existence of the preliminary injunction itself.

Here, it cannot be reasonably disputed that Plaintiffs did, in fact, receive an irrevocable benefit *beyond* the preliminary injunction ruling itself — the marriage licenses that they obtained as a result of the preliminary injunction which they then used to legally wed. Without having obtained the preliminary injunction ruling (and Davis’ incarceration for civil contempt for failing to comply with it), Plaintiffs would not have received the marriage licenses to which they were entitled. Thus, the benefit Plaintiffs obtained is analogous to the protest event at issue in *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000), in that Plaintiffs achieved their benefit by virtue of the preliminary injunction, and it was not (nor could it have been) undone by the changed circumstances that resulted in mootness.

By contrast, the preliminary injunction at issue in *McQueary* did not satisfy the contextual and case specific inquiry because the plaintiff failed to benefit from the ruling beyond

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<sup>3</sup> Davis’ attempt to read into *McQueary* requirements not found in the decision is similar to her earlier argument (incorporated by reference into her response, here) that nothing short of a permanent injunction can support prevailing party status in this case. [RE #193: Davis Resp. Opp. Fees Motion, at 18 (emphasis added).]

the fact of the injunction itself. Specifically, the plaintiff did not show any additional benefit he received (such as engaging in specific protest activity) as a result of the preliminary injunction. *McQueary v. Conway*, 508 Fed. App'x 522, (6th Cir. 2012) (per curiam) (unpublished); *see also McQueary v. Conway*, No. 06-CV-24-KKC, 2012 U.S. Dist. LEXIS 107501, at \*6-7 (E.D. Ky. Aug. 1, 2012) (“where a plaintiff is granted preliminary injunctive relief that enjoins the government from acting at a particular time and place, *the preliminary relief becomes, in effect, permanent relief after the event occurs. After the passage of the event, the preliminary injunction can no longer be meaningfully revoked.* In contrast, preliminary injunctive relief like that granted by the Court in this case that enjoins the defendant only while the case is pending is truly temporary and revocable. Such relief cannot confer prevailing-party status because it is not enduring and irrevocable.” (internal quotation marks and citation omitted)).

In an attempt to avoid the conclusion that Plaintiffs received a benefit *beyond* the mere issuance of the preliminary injunction, Davis resorts to attempting to analogize the preliminary injunction here with the one at issue in *McQueary* by arguing that Plaintiffs did not receive an enduring and irrevocable benefit because they did not seek injunctive relief to obtain a “marriage license on or before” a specific date. [RE #204, at 5-6.] But they did not need to do so, nor does the prevailing party inquiry require it in order to obtain an irrevocable benefit. Unlike situations in which discrete protest activities are tied to specific dates, Plaintiffs’ desire to secure a valid marriage license here did not depend on their doing so by a date certain. And for two Plaintiff couples, they were able to obtain their marriage licenses (and wed) *because* as a result of the preliminary injunction ruling. Thus, any suggestion that Plaintiffs did not receive an enduring benefit because they did not secure permanent injunctive relief barring enforcement of the

challenged policy misses the mark both as to the “contextual and case specific” inquiry as well as the general “prevailing party” analysis.<sup>4</sup>

### CONCLUSION

Here, Plaintiffs sought (and obtained) a court-ordered change in the parties’ legal relationship. They secured a merits-based preliminary injunction that barred Davis, in her official capacity, from enforcing the challenged “no marriage licenses” policy both as to the named Plaintiffs and others. Before the preliminary injunction ruling, the challenged policy prevented Plaintiffs from obtaining marriage licenses to which they were legally entitled, and after the preliminary injunction two Plaintiff couples directly and irrevocably benefitted from that ruling by applying for (and receiving) their marriage licenses and then marrying. Under the contextual and case specific inquiry, Plaintiffs have thus prevailed because they secured a merits-based preliminary injunction that conferred a direct and irrevocable benefit before rendered moot by changed circumstances. Thus, the R&R’s recommendations to the contrary should be rejected and Plaintiffs’ motion for reasonable attorneys’ fees and costs should be granted in full.

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<sup>4</sup> Nor is it necessary for Plaintiffs to have achieved all of the relief they sought in their complaint because “[a] plaintiff crosses the threshold to prevailing party status by succeeding on a single claim, even if he loses on several others and even if that limited success does not grant him the primary relief he sought. *McQueary*, 614 F.3d 591 at 603.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on May 1, 2017, I filed this motion and accompanying proposed order with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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