

**ORAL ARGUMENT REQUESTED**

**Nos. 11-3035, 11-3036 & 11-3037**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Northeast Ohio Coalition for the Homeless, et al.  
*Plaintiff-Appellees/Cross-Appellants,*

v.

State of Ohio,  
*Intervenor-Appellant/Cross-Appellee*

and

Ohio Secretary of State,  
*Defendant-Appellee*

**BRIEF OF APPELLEES/CROSS-APPELLANTS  
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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 119,  
AND KYLE WANGLER**

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Dated: April 27, 2011

**DISCLOSURES PURSUANT TO RULE 26.1 OF THE FEDERAL RULES  
OF APPELLATE PROCEDURE AND SIXTH CIRCUIT RULE 26.1**

Pursuant to Fed. R. App. P. 26.1 and 6 Cir. R. 26.1, Plaintiff-Appellees/  
Cross-Appellants Northeastern Ohio Coalition for the Homeless (“NEOCH”) and  
Service Employees International Union, Local 1199 (“SEIU”) make the following  
disclosures:

1. Is either NEOCH or SEIU a subsidiary or affiliate of a publicly owned  
company?

No.

2. Is there a publicly owned corporation, not a party to this appeal, that  
has a financial interest in the outcome?

No.

Date: April 27, 2011

*/s/ Caroline Gentry*

\_\_\_\_\_  
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## **REQUEST FOR ORAL ARGUMENT**

Appellees/Cross-Appellants Northeast Ohio Coalition for the Homeless (“NEOCH”), Service Employees International Union, Local 1199 (“SEIU”), and Kyle Wangler (hereinafter referred to collectively as the “Plaintiffs”), pursuant to Sixth Circuit Rule 34(a), respectfully join the State of Ohio and Secretary of State (collectively, the “State”)’s request that the Court allow oral argument in this appeal. The underlying litigation is procedurally complex and oral argument may assist the Court in untangling it.

Moreover, the appeal and cross-appeal raise significant questions about the availability and amount of attorneys’ fees awarded to prevailing parties under the Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988. Congress intended in that Act to provide an economic incentive for members of the legal profession to take on meritorious civil rights cases at reasonable rates of compensation. The appeal and cross-appeal here, as they are resolved by this Court, could impact significantly the compensation awarded to counsel for prevailing parties in other cases. The Plaintiffs thus join the State’s request for oral argument because oral advocacy from the parties may assist the Court in reviewing the issues presented by the State’s appeal and the distinct issues presented by the Plaintiffs’ cross-appeal.

## **JURISDICTIONAL STATEMENT**

The United States District Court for the Southern District of Ohio exercised subject-matter jurisdiction over the civil complaint brought by the Plaintiffs pursuant to 28 U.S.C. §1331 because their suit was an action arising under 42 U.S.C. § 1983.

On December 29, 2010, the State of Ohio filed a notice of appeal from the District Court's November 30, 2010 Opinion & Order granting in part and denying in part the Plaintiffs' Third Motion for Attorneys' Fees and Costs pursuant to the Civil Rights Attorney's Fees Award Act of 1976 ("Fees Act"), 42 U.S.C. § 1988. On January 11, 2011, the Plaintiffs and the Ohio Secretary of State filed separate cross-appeals from the District Court's Order.

This Court has jurisdiction over the appeal and cross-appeals pursuant to 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over appeals from all final decisions of the district courts of the United States.

## COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. The issue presented by the State's appeal is whether the District Court erred when it decided that the Plaintiffs – who had twice before sought and been awarded their reasonable attorneys' fees and costs under the Fees Act for certain work performed through 2008 – had not waived their claim to a third award of fees and costs for sixteen months' worth of other, later work in the same case.

2. The issue presented by the Plaintiffs' cross-appeal is whether the District Court abused its discretion when it applied the so-called "Three Percent Rule" from *Coulter v. Tennessee*, 805 F.2d 146 (6<sup>th</sup> Cir. 1986) to drastically limit the fees and costs awarded to the Plaintiffs for work their counsel performed: (1) briefing and arguing their first two successful motions for fees; (2) defending against the State's appeal of the District Court's decision to grant those motions; and (3) negotiating the parties' April 2010 Consent Decree.

## **COUNTER-STATEMENT OF THE CASE AND FACTS<sup>1</sup>**

This appeal concerns an award of fees and costs to the Plaintiffs under the Fees Act. This is not the first appeal of a fee award from the underlying case. The State's appeal of a prior fee award was dismissed by this Court for lack of prosecution after the parties agreed, in an April 2010 Consent Decree, that the Plaintiffs should receive full payment of the fees "previously awarded" by the District Court. The fee award now being appealed by the State relates to sixteen months' worth of other work performed by counsel for the Plaintiffs that was not compensated by that prior award or that April 2010 Decree.

The State appeals from the District Court's latest fee award because it contends that the Plaintiffs waived their right to make any additional claim for fees and costs beyond those addressed by the April 2010 Decree. The Plaintiffs cross-appeal because they contend that the District Court misapplied this Circuit's so-called "Three Percent Rule" to drastically limit the amount of fees and costs that it awarded.

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<sup>1</sup> Fed. R. App. P. 28(a)(6) and (7) appear to anticipate that the parties' briefs should include a "statement of the case" that is separate from a "statement of facts". Because the State's brief combines these two sections, however, and because the Plaintiffs believe that doing so may be more efficient given the procedural history of this case, the Plaintiffs follow the briefing format selected by the State.

## **I. BACKGROUND**

### **A. The Prior Fee Awards in the Underlying Section 1983 Case.**

This case began in October 2006, before that year's general election, when the Plaintiffs sued the Ohio Secretary of State challenging the constitutionality of Ohio's voter-identification and provisional- ballot statutes. R. 2. Shortly thereafter, on November 1, the District Court entered a Consent Order negotiated by the parties, establishing uniform voter-identification procedures for Ohio's Boards of Elections to follow in the upcoming election. R. 51. Two weeks later, the District Court entered an Agreed Enforcement Order that addressed poll-worker errors made during the election with respect to voter-identification rules. R. 57.

Neither the first Consent Order nor the Agreed Enforcement Order addressed the issue of attorneys' fees to be awarded to the Plaintiffs. R. 51; R. 57. So, in January 2008, the Plaintiffs filed a first motion for attorneys' fees and costs related to those Orders. R. 96. That motion was granted. R. 108. At no time during the briefing on that request did the State argue, as it does now, that the Plaintiffs somehow waived their right to seek fees and costs by entering into the first Consent Order or the Agreed Enforcement Order. R. 99.

On October 24, 2008, the parties negotiated and the District Court entered another agreed Order that adopted and annexed Secretary of State Directive 2008-101. R. 142. That Directive, which was "issued as a means to settle ongoing litigation" in the underlying case, established uniform provisional-ballot procedures for Boards of Elections to follow in the November 2008 election.

R. 142. Three days later, the parties negotiated and the District Court entered an agreed Order prohibiting Boards of Elections from rejecting provisional ballots because of poll-worker error, or because the voter did not have a permanent address. R. 143.

Again, neither of these 2008 Orders (R. 142 or R. 143) addressed the attorneys' fees and costs incurred by the Plaintiffs. So, the Plaintiffs filed a second motion for fees and costs related to those Orders. R. 179. Again, the District Court granted that motion. R. 203; *see also* R. 205 (increasing award on reconsideration). And again, at no time during the briefing on the Plaintiffs' second motion for fees and costs did the State argue, as it does now, that the Plaintiffs waived their right to seek them. R. 192.

After the District Court awarded the Plaintiffs their fees for the work performed up through the time of the two Fall 2008 Orders, the State filed with this Court an interlocutory appeal of that fee order – not the underlying relief obtained. R. 207. In the meantime, as the State surely knew, the Plaintiffs continued to incur attorneys' fees and costs related to the State's appeal – fees not yet compensated by any of the District Court's prior fee awards (which related to earlier work).

**B. The April 2010 Consent Decree Addresses Only Those Fees “Previously Awarded.”**

When the State filed its appeal, the parties entered into settlement discussions under the auspices of the Sixth Circuit Mediator. Those discussions, which required the participation of counsel, and which caused the Plaintiffs to incur more legal fees and costs, ultimately led to the District Court's entry of the

April 19, 2010 Consent Decree. R. 210. Pursuant to that Decree, in its last paragraph under “Miscellaneous Provisions,” the State agreed to pay to the Plaintiffs, within sixty days, “the attorneys’ fees that were previously awarded by this Court” R. 210 at ¶12 (emphasis added).

The dollar amount of fees and costs addressed by the April 2010 Decree – \$504,414.11 – is exactly the same as the (revised) dollar amount of fees and costs “previously awarded” by the District Court on the Plaintiffs’ second motion for fees. *Compare* R. 210 at ¶ 12 with R. 205 at p. 5. Those fees and costs addressed by the April 2010 Decree were, therefore, the same fees and costs at issue in the State’s prior appeal to this Court. After entry of the April 2010 Decree, the Sixth Circuit dismissed the State’s appeal for want of prosecution. R. 211.

As noted, the April 2010 Decree expressly addressed only those fees and costs “previously awarded” by the District Court and totaling \$504,414.11. R. 210 at ¶ 12. But the State now points to the April 2010 Decree as the source of an alleged waiver of any additional fees and costs incurred by the Plaintiffs in the underlying litigation, beyond those “previously awarded” by the District Court.<sup>2</sup> And the State characterizes that alleged waiver as a “material term” of the April 2010 Decree.<sup>3</sup>

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<sup>2</sup> *See, e.g.*, Appellants’ Brief at 18 (“The Consent Decree was dispositive of all claims relating to this lawsuit. Accordingly, Plaintiffs waived the opportunity to request additional attorneys’ fees for any work performed prior to entry of the Consent Decree.”)

<sup>3</sup> *Id.* at 27 (“inclusion of a ‘final and certain’ amount of attorneys’ fees was a material term of the ‘complete settlement.’”) \*\*\* Most important, neither of the

Footnote continued on next page

But nowhere in the plain language of the April 2010 Decree do the Plaintiffs waive their right to seek fees and costs unrelated to those that were “previously awarded” by the District Court. R. 210. Although the April 2010 Decree lists six separate “Purposes of this Decree,” none mentions any waiver of attorneys’ fees or costs. R. 210 at ¶ 1. And while the April 2010 Decree contains more than twenty-five detailed paragraphs under the heading “General Injunctive Relief” (relating to the counting of provisional ballots), the Decree enjoins no one from seeking additional fees or costs from the District Court. R. 210 at ¶¶ 4-5. And on April 19, 2010, when the District Court asked counsel for the State to “summarize the terms of the agreement for the record,” counsel for the State made no mention of the alleged “waiver” of fees and costs that the State now describes as a “material term” of the Decree. R. 217.

Indeed, at no time during the parties’ negotiations of the April 2010 Decree was there any discussion about the Plaintiffs’ entitlement to seek fees and costs for work performed between January 21, 2009 and the date that the Decree was entered. R. 223 at ¶ 12; R. 224 at ¶ 12; R. 225 at ¶ 12. The State never informed the Plaintiffs during the negotiations that they intended to include, as a “material term” of the settlement, any provision that would bar the Plaintiffs from seeking fees and costs for work performed in that period. R. 223 at ¶ 17; R. 224 at ¶ 17; R. 225 at ¶ 16. The Plaintiffs did not intend to agree to any such waiver, R. 223 at

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Footnote continued from previous page

State Defendants would have agreed to settle if the parties had intended to leave the issue of attorneys’ fees ‘open or unsettled.’”)

¶ 19; R. 224 at ¶ 19; R. 225 at ¶ 18, nor did they actually agree to any such waiver. R. 223 at ¶¶ 12-19; R. 224 at ¶¶ 12-19; R. 225 at ¶¶ 12-18.

## **II. THE PLAINTIFFS' THIRD MOTION FOR FEES**

Soon after entry of the April 2010 Decree, in June 2010, the Plaintiffs filed their Third Motion for Attorneys' Fees and Costs. R. 212. The District Court's November 30, 2010 Order now on appeal was issued after full briefing on the Plaintiffs' Third Motion, summarized below.

In their Third Motion, the Plaintiffs sought an award of fees and costs related to their counsel's work in the following areas that had not yet been the subject of any fee award in the underlying Section 1983 case (and were thus not addressed by the April 2010 Decree, either), namely:

- (1) fees and costs incurred by the Plaintiffs while briefing and arguing the prior motions for attorneys fees (R. 96 and R. 179);
- (2) fees and costs incurred by the Plaintiffs while defending the State's appeal from the District Court's decision awarding the Plaintiffs those fees (which appeal was eventually dismissed for lack of prosecution, after entry of the April 2010 Decree) (R. 207 and R. 211); and
- (3) fees and costs incurred by the Plaintiffs while negotiating the April 2010 Decree (R. 210).

R. 212, at p. 3. The fees and costs sought in the Plaintiffs' Third Motion were all incurred from January 2009 forward – after the fees and costs that were “previously awarded” in the case and addressed in the April 2010 Decree. R. 213, ¶ 6; R. 214, ¶ 4; R. ¶ 8.

As they had done twice before, the Plaintiffs filed their Third Motion pursuant to the Fees Act, 42 U.S.C. § 1988. In support, the Plaintiffs contended that they were “prevailing parties” who were entitled to fees; that post-decree efforts to monitor and enforce consent decrees are fully compensable under the Fees Act; that no “special circumstances” rendered an award unjust; that the fees they sought were reasonable based on the “lodestar” method of calculation; and that the requested fees were supported by contemporaneous time records. R. 212 at pp. 4-11. The Plaintiffs sought a total of \$89,734.13 in fees and costs related to the categories of additional work listed above, and supported their Third Motion with detailed Declarations from counsel specifying the calculation of those fees and costs. R. 213 - 215. The following table sets forth the fees and costs requested in the Third Motion by each of the attorneys representing the Plaintiffs:

<b>Counsel</b>	<b>Firm</b>	<b>Fees/Costs Requested</b>
Caroline Gentry	Porter Wright Morris & Arthur LLP	\$28,840.74
H. Ritchey Hollenbaugh	Carlile, Patchen & Murphy LLP	\$28,441.00
Subodh Chandra	The Chandra Law Firm, LLC	\$32,452.39

Collectively, the fees sought by the three attorneys in the Plaintiffs’ Third Motion represent less than 18% of the fees and costs previously awarded by the District Court. ( $\$28,840.74 + \$28,441.00 + \$32,452.39 \div \$504,414.11$ ).

Opposing the Plaintiffs' Third Motion, the State contended that the Plaintiffs waived any additional claim to fees and costs in the parties' April 2010 Decree, and that the Plaintiffs were harboring a "secret intent" to request additional fees and costs after entry of that Decree. R. 219 at pp. 5-9. The State's Declarants expressed "shock" by the Plaintiffs' Third Motion. R. 219 at p. 3. The State reserved the right to move to vacate the Decree if additional attorneys' fees were awarded (R. 219 at p. 10), but the State has not yet done so in spite of the District Court's award. The State further argued that an award of additional fees to Plaintiffs would be "unjust" because "Plaintiffs and their counsel clearly concealed their intent to request additional fees throughout the sixth month negotiation period" relating to the April 2010 Decree. R. 219 at p. 11.

In the alternative to rejecting the Plaintiffs' fee request outright on waiver grounds, the State asked the District Court to either reduce or eliminate any award to the Plaintiffs on other grounds. First, the State asked the District Court to reduce the award based on the Sixth Circuit's so-called "Three Percent Rule" applied to "fees for fees" requests. R. 219 at pp. 12-15. The State argued that, under that rule, the Plaintiffs' "maximum allowable amount is \$14,232.56 (3% of the Court's previous lodestar award of \$474,418.50.)" Second, the State contended that the Plaintiffs "submitted bills that [were] completely unreasonable for the work required." R. 219 at p. 15. On that basis, the State sought an unspecified reduction or denial of fees and costs to be awarded. R. 219 at pp. 15-19.

In their Reply, the Plaintiffs urged the District Court to reject the State's claim to be "shocked" by the Third Motion, noting:

Twice before in this case, Plaintiffs have sought and been awarded attorneys' fees after they had obtained interim consent decrees. And although none of those consent decrees addressed the issue of attorneys' fees, Defendants never before argued (as they now do) that the issue was impliedly waived.

R. 222 at p. 1. The Plaintiffs also noted that at no time during the parties' negotiations of the April 2010 Decree was there any discussion about the Plaintiffs' entitlement to seek fees and costs for work performed between January 21, 2009 and the date that Decree was entered. R. 222 at p. 4. The Plaintiffs further noted that, in the Sixth Circuit, the parties' silence on the issue of fees does not create a waiver, and that by its terms, the April 2010 Decree remains in effect until June 2013, thus allowing for future claims for fees (such as those sought in the Plaintiffs' Third Motion), if necessary. R. 222 at p. 6. While the Plaintiffs conceded that the Decree required the State to pay the attorneys' fees that had been "previously awarded" and set a deadline for that payment,

That is exactly what this paragraph accomplishes, no more and no less. Nowhere in this paragraph is there any waiver of Plaintiffs' future fees, or any statement relating to such fees.

R. 222 at p. 9.

To challenge the State's assertion that it always intended for a waiver of future fees to be a material provision of the April 2010 Decree, the Plaintiffs then referred the District Court to the transcript of proceedings taken when the parties

were explaining the key terms of the Decree to the District Court, noting that “when asked \*\*\* to summarize the terms of the Decree, [the State’s] trial counsel, Richard Coglianese, failed to mention their intention or the alleged waiver.” R. 222 at 10, citing R. 217.

### III. THE DISTRICT COURT’S ORDER AWARDING FEES AND COSTS

On November 30, 2010, the District Court granted in part and denied in part the Plaintiffs’ Third Motion for Fees and Costs. R. 234. First, the District Court rejected the State’s waiver argument after applying this Court’s decisions in *Jennings v. Metro. Gov’t of Nashville*, 715 F.2d 1111 (6<sup>th</sup> Cir. 1983) and *McCuiston v. Hoffa*, 202 Fed.Appx. 858 (6<sup>th</sup> Cir. 2006). R. 234 at pp. 6-8.

Specifically, the District Court held:

The Decree \*\*\* is silent as to the issue of attorneys fees requested in the Plaintiffs’ Third Motion. Pursuant to *Jennings*, this silence is not controlling; rather, the question becomes whether the parties intended the Decree to be a final disposition of all claims, thus waiving the Plaintiffs’ right to collect further fees.  
\*\*\*

The Decree in this case, unlike the consent judgment in *McCuiston* that resolved “all remaining claims in this action,” expressly restricts its scope to the issues raised in the Plaintiffs’ Complaint and Supplemental Complaint.  
\*\*\* The Decree’s language is not as expansive as that in the *McCuiston* consent judgment, an indication that the parties to the present action did not intend the Decree to be final. Additionally, in the Decree herein the parties agreed to allow for modification and extension of the agreement for good cause \*\*\*. By contrast, the consent judgment in *McCuiston* did not allow the parties to seek

to modify or to extend the terms of the agreement and contained no qualifiers as to the scope of the consent judgment's terms. Thus, *McCuiston* is distinguishable from the case sub judice and the record here leads to the single inference that the parties did *not* intend the Decree to be a final settlement of all claims. The Plaintiffs, therefore, did not waive their right to further attorneys' fees and are entitled to collect an additional fee award.

R. 234 at 8 (emphasis in original).

After rejecting the State's waiver argument, the District Court went on to assess the reasonableness of the fees requested by the Plaintiffs. R. 234 at pp. 8-13. Pursuant to the lodestar analysis, the District Court determined that all three law firms' total requested hours were reasonable and that all three firms' billing rates were reasonable. *Id.* at pp. 12-13. The District Court also agreed with the Plaintiffs' request for costs and expenses. *Id.* at p. 16.

Instead of granting the Plaintiffs the entire amount of fees they requested, however, the District Court opined that "a practical rule of thumb has developed that the supplemental award should be limited to three percent of the award for the main case when it is decided on the papers without a trial, and five percent of the award for the main case when trial is necessary." *Id.* at p.13, citing *Coulter v. Tennessee*, 805 F.2d 146 (6<sup>th</sup> Cir. 1986), *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610 (6<sup>th</sup> Cir. 2007), and *Bank One, N.A. v. Echo Acceptance Corp.*, 595 F.Supp.2d 798 (S.D. Ohio 2009).

The District Court applied this “Three Percent Rule” to all three categories of fees requested by the Plaintiffs in their Third Motion. R. 234 at pp. 14-15. The District Court did so even though the Plaintiffs argued that the hours their counsel spent defending the State’s appeal and negotiating the Decree were separate and apart from the time spent preparing and litigating the attorneys’ fees case. *Id.* at p. 14. The District Court concluded that:

[e]ven though the appeals and Decree negotiation were unique proceedings after the Plaintiffs’ filing of the original fees motion, all steps taken in both of those stages were done in pursuit of obtaining fees in the absence of ‘unusual circumstances’ that would justify a departure from the Three Percent Rule.

*Id.* at pp. 14-15. The District Court also rejected the Plaintiffs’ argument that their hours should be exempt from the Three Percent Rule because the State, not the Plaintiffs, initiated the appeals process that caused the Plaintiffs to incur fees defending the appeal and negotiating the Consent Decree:

This Court finds this argument to be a misinterpretation of the Sixth Circuit’s intent. In *Coulter*, the Sixth Circuit reasoned that the Three Percent Rule was “necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case.” \*\*\* Nothing in this statement suggests that the *Coulter* court’s proportionality concerns turned on which party’s actions served to extend the litigation; rather, the Sixth Circuit was concerned with the *overall* fees outcome in supplemental fees cases.

*Id.* at p. 15. Accordingly, the District Court applied the “Three Percent Rule” to cap *all* of the fees requested in the Plaintiffs’ Third Motion. The following table illustrates how the District Court’s application of that Rule affected each lawyer’s actual fee award for the sixteen months’ worth of work at issue:

<b>Counsel</b>	<b>Fees/Costs Requested</b>	<b>Fees Awarded</b>	<b>Costs Awarded</b>
Gentry	\$28,840.74	\$9,658.30	\$1,108.24
Hollenbaugh	\$28,441.00	\$2,991.70	[N/A]
Chandra	\$32,452.39	\$2,482.50	\$2,702.39

To put into perspective the practical effects of the District Court’s application of the Three Percent Rule, this Court can examine the court-approved hours and billing rates submitted by counsel for the Plaintiffs. For example, the District Court approved a \$325 per hour billing rate for Mr. Hollenbaugh. R. 234 at p. 13. But by awarding him just \$2,991.70 after application of the Three Percent Rule, the District Court compensated Mr. Hollenbaugh at his court-approved rate (a rate the State does not challenge in this appeal) for just over nine hours’ worth of work on this case since January 2009, even though his timesheets reflect over one hundred hours of billable time devoted to the various matters for which he sought to be compensated in the Plaintiffs’ Third Motion. Mr. Chandra fared even worse. The District Court approved his hourly rate of \$400 per hour. R. 234 at p. 13. Yet by awarding him just \$2,482.50 in fees after application of the Three

Percent Rule, the District Court compensated Mr. Chandra at his court-approved billing rate for only just over six hours' worth of time devoted to the three categories of substantial work at issue in the Plaintiffs' Third Motion.

#### **IV. THE LIMITS OF THE STATE'S APPEAL**

In this appeal, the State has abandoned some of the arguments that it made to the District Court. No longer does the State contend, as it did below, that the Plaintiffs did not really "prevail" in the litigation, and thus are not entitled to fees. Nor does the State contend, as it did before, that the hours or billing rates submitted by Plaintiffs' counsel are unreasonable. And no longer does the State contend, as it did below, that the Plaintiffs "overlawyered" the case or "failed to exercise any billing judgment." R. 219 at p. 15. Abandoning these prior challenges, all of which were rejected, the State now tells this Court, "the issue on appeal relates only to the district court's interpretation of the Consent Decree." State's Brief at 6 (emphasis added). Accordingly, to the extent that the State has other reasons why it believes that the District Court's Order awarding fees should be vacated, the State has waived them. The "only" issue that this Court needs to determine on the State's appeal is whether the District Court erred when it concluded that the Plaintiffs, by entering into the April 2010 Decree, did not waive their right to seek attorneys' fees related to the matters set forth in the Third Motion. If this Court affirms the District Court's conclusion on that issue, as it

should, then this Court should proceed to the merits of the Plaintiffs' cross-appeal, which challenges the District Court's application of *Coulter's* "Three Percent Rule" to the fees it awarded.

### **ARGUMENT SUMMARY**

This Court should not disturb the District Court's finding that the Plaintiffs never waived their opportunity to pursue additional fees and costs. As a threshold matter, the State misstates the applicable standard of review by saying that a pure *de novo* standard applies, without acknowledging that the District Court's underlying factual findings are reviewed only for clear error. On the merits, as the District Court found, the parties never intended the April 2010 Decree to be a final disposition of all claims. The Decree does not say so on its face; instead, its plain language leaves open the possibility of future modification or extension of its terms. And while it contains a single brief paragraph addressing the fees "previously awarded" by the District Court, that paragraph says nothing about other fees incurred by the Plaintiffs for later work, such as the sixteen months' worth of effort for which the Plaintiffs sought compensation in their Third Motion. Moreover, the State's application of the interpretive maxim "expressio unius est exclusio alterius" actually works against them. The underlying facts and procedural history of the case (including the prior decrees and the prior requests for fees) show that the Plaintiffs never intended to waive the opportunity to obtain additional fees, so it is hardly surprising that no such waiver was described to the District Court as a term of the Decree that it entered.

With respect to the Plaintiffs' cross-appeal, although the District Court correctly granted the Plaintiffs' Third Motion, the District Court went astray when it strictly applied the "Three Percent Rule" from *Coulter v. Tennessee* to drastically reduce the fees that it awarded. The Plaintiffs' cross-appeal thus challenges the District Court's application of *Coulter* on four grounds. First, the Plaintiffs urge this Court to reexamine *Coulter*'s Three Percent Rule given the short shrift paid by *Coulter* to the merits of the issue, its arbitrary selection of a 3% cap, and its citation of a single case from the Ninth Circuit going the other way. Next, the Plaintiffs note that, even if this Court chooses not to depart from *Coulter*, that Three Percent Rule by its own terms does not apply where, as here, "unusual circumstances" suggest an upward departure to better compensate counsel for prevailing plaintiffs. Third, the Plaintiffs note that both this Court and other courts decline to apply *Coulter* where doing so would undermine the intent of the Fees Act by undercompensating the very counsel that the Act is meant to encourage to take on meritorious civil rights litigation. Finally, given that multiple categories of fees at issue in the Plaintiffs' Third Motion were not incurred in seeking prior fees, but for other purposes (such as defending against the State's appeal and negotiating the April 2010 Decree), the Plaintiffs respectfully request a remand to the District Court with instructions not to apply the Three Percent Rule to those non-fee categories of work.

## ARGUMENT IN RESPONSE TO PRINCIPAL BRIEF

### I. THE PARTIES NEVER INTENDED THE CONSENT DECREE TO DISPOSE OF ALL FUTURE CLAIMS FOR ATTORNEYS' FEES

#### A. Standard Of Review

In arguing that this Court should apply a pure *de novo* standard of review to the District Court's interpretation of the April 2010 Decree (Brief at 17), the State mischaracterizes the applicable standard. Although a "district court's interpretation of a consent decree or judgment is a matter of law subject to *de novo* review, ... the underlying facts are reviewed for clear error." *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007) (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 372 (6th Cir. 1998)) (emphasis added). The District Court did not award attorneys' fees based solely upon a legal interpretation of the April 2010 Decree. After finding it undisputed that the Decree "is silent as to the issue of attorneys fees requested in the Plaintiffs' Third Motion," the District Court recognized that "the question becomes whether the parties intended the Decree to be a final disposition of all claims." R. 234 at p. 7 (emphasis added). After reviewing that relevant facts, the District Court then determined that the parties "did not intend the Decree to be final." *Id.* at p. 8 (emphasis added). Discerning intent is generally "an issue of fact," although in some cases only one inference may be drawn from those facts. *Jennings v. Metro. Gov't of Nashville*, 715 F.2d 1111, 1114 (6th Cir. 1983). Here, the District Court determined that "the record here leads to the single inference that the parties did *not* intend the Decree to be a final settlement of all claims." R. 234 at p. 8

(emphasis added). That single inference was based on factual findings that are reviewed only for clear error.

**B. The Plain Language Of The April 2010 Decree Does Not Preclude Plaintiffs From Seeking Additional Attorneys' Fees.**

**1. The Decree is silent about future claims for fees.**

As the District Court noted, “the Decree does not expressly mention an award of attorneys’ fees covering the time period” at issue in the Plaintiffs’ Third Motion. R. 234 at p. 7. Silence on the issue of fees does not mean that a party waives the right to seek them, though. As this Court has held, silence is not controlling on the issue. *See Jennings*, 715 F.2d at 1114. The defendant is not required to obtain an express waiver of fees, and the plaintiff is not required to expressly reserve the right to seek them. *See McCuiston v. Hoffa*, 202 Fed. Appx. 858 (6th Cir. 2006). Instead, the relevant inquiry becomes whether the parties intended the settlement agreement to be a final disposition of all claims. *Id.* at 863.

Nonetheless, the fact that the Decree is silent about the fees at issue provides some evidence that the parties did not intend to fully dispose of all claims in the Decree. The Decree is painstakingly specific regarding what claims are being resolved; namely voting rights, standards for counting provisional ballots, and the payment of the fees “previously awarded” by the District Court. The parties went

to great lengths to ensure that the Decree was specific regarding which issues were being resolved.

First, the Decree specifies the six specific purposes of the Decree, all of which are related to voter identification and counting provisional ballots. R. 210 at p. 2. None are related to attorneys' fees. Then the Decree specifies each aspect of the injunctive relief to be implemented, all of which relates to voting rights. *Id.* at pp. 3-5. Next, the Decree explicitly identifies the method by which the injunctive relief should be implemented and enforced. It is clear that the parties were focused on resolving the issues related to voter identification and provisional ballots. The parties even considered and addressed the implications of a change to the law regarding voter identification or provisional ballots and specified a time limit for which the Decree would remain in effect. And in a single miscellaneous provision, the Decree specified when the "previously awarded" attorneys' fees should be paid. These were the issues to be fully resolved by the April 2010 Decree. That the Decree contains no provision regarding the other attorneys' fees at issue here suggests that the parties did not intend for the Decree to be a final disposition of all claims.

**2. The language of the Decree shows that it was not intended to be a final disposition of all claims.**

The language used in the Decree also shows that it was not intended to be a final disposition of all claims. First, the Decree could not have been a full and

final resolution of all claims between the parties because it remains in effect until June 30, 2013. R. 210 at ¶ 9. During this period of “continuing validity,” any party may move to “modify, extend or terminate this Decree for good cause shown.” *Id.* at ¶ 11. Moreover, the parties’ agreement that the Decree is “final and binding” is “subject to the continuing validity of this Decree if it or its terms are challenged in any other Court.” *Id.* at Preamble.<sup>4</sup> Such language does not constitute the finality suggested by the State.

The State argues that the “final and binding” language in the Preamble somehow constitutes a full release of all claims between the parties. In doing so, the State relies heavily on this Court’s decision in *McCuiston*, 202 Fed. Appx. 858. The District Court did not misinterpret or misapply *McCuiston*, though, because that case is distinguishable.

In *McCuiston*, both the district court and the Sixth Circuit held that the following one-paragraph consent decree fully and finally resolved all claims between the parties:

Upon stipulation of all parties, the Plaintiffs in this case  
\*\*\* shall have the right to observe the counting of ballots  
on any future referenda approving a contract in which

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<sup>4</sup> In a footnote (Brief at 25 n.1), the State cites two cases to support its proposition that the language of the Decree precludes the Plaintiffs from seeking the attorneys’ fees at issue. Both cases, though, are clearly inapplicable to the present case. First, both cases are employment discrimination cases. Second, neither case involved a consent decree.

Plaintiffs are eligible to vote. This is a final order of the court, disposing of all remaining claims in this action.

*McCuiston v. Conder*, 385 F.Supp. 2d 617, 617 (E.D. Mich. 2005), *aff'd* by *McCuiston*, 202 Fed.Appx. 858. Unlike the Consent Decree here, the one-paragraph *McCuiston* consent order did not remain in effect until a future date, did not allow the parties to seek to modify or extend its terms, and did not allow the plaintiffs to seek fees for monitoring and enforcing the order. In addition, the Sixth Circuit relied on the fact that the district court in charge of construing the decree also “participated in the settlement discussions and drafted the consent judgment” – a circumstance not present here. *McCuiston*, 202 Fed. Appx. 858. Finally, there were no other circumstances “to suggest that anything less than a comprehensive settlement was reached.” *Id.* Here, by contrast, the above-cited provisions of the Consent Decree and the Plaintiffs’ prior fee requests following other consent orders both strongly suggest that the Decree did not fully and finally resolve all claims between the parties.

The State also argues that the statement that the Decree is “final and binding \*\*\* as to the issues raised in the Plaintiffs’ Complaint and Supplemental Complaint” shows an intention to fully resolve the Plaintiffs’ claim for attorneys’ fees because the Plaintiffs requested attorneys’ fees in their Complaints. This argument is inconsistent with the State’s admission that the Plaintiffs can still seek fees for future violations of the Decree. R. 219 at n.2. If accepted, this argument

“would effectively reinstate the ‘waiver by silence’ rule” that this Circuit has declined to adopt. *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698-99 (9<sup>th</sup> Cir. 1989); *see Jennings*, 715 F.2d at 1114.

Finally, the State argues that miscellaneous paragraph (§12) of the Consent Decree was intended to be a full and complete settlement of the Plaintiffs’ claims for attorneys’ fees. But that paragraph was only intended to require the State to pay the attorneys’ fees that were “previously awarded” and to set a deadline for making such payment. It does not include any language relating to future fees, let alone a waiver of such fees. In short, there was no waiver.

The State also cites a recent Tennessee district court case to support its waiver argument, but that case is also clearly distinguishable. In *Montano-Perez v. Durrett Cheese Sales*, 2011 WL 128793 (M.D. Tenn. Jan. 14, 2011), the plaintiffs settled a claim against their former employer. In exchange for “full releases,” the employer agreed to pay the plaintiffs \$5,000. *Id.* at \*2. If the employer failed to meet any term of the agreement, the plaintiffs had the immediate right to “enter an agreed judgment in the amount of \$75,000.” *Id.* On that basis alone, the case is distinguishable. Here, the only exchange of money addressed in the April 2010 Decree was for amounts “previously awarded” to the Plaintiffs by the District Court. Further, the Decree provides no monetary damages cap in the event the State violates the Decree.

When the employer in *Durrett* failed to pay the \$5,000 settlement, the plaintiffs filed the agreed judgment. Then, in addition to seeking the \$75,000 provided in the agreement, the plaintiffs also sought the *attorneys' fees incurred in filing the agreed judgment and enforcing the parties' agreement*. The court denied the plaintiffs these fees because the agreement provided only one option upon violation of the agreement – \$75,000. *Id.* at \*7. This is completely different than the April 2010 Decree at issue – the Plaintiffs are not seeking enforcement fees and the Decree has no cap. In contrast, the State has *admitted* that the Plaintiffs would have a claim for attorneys' fees if the State violates the Decree. R. 219 at n.2.

Finally, the *Durrett* court did not rely only upon the language in the parties' agreement. Necessarily finding some uncertainty in the “full release” language of the agreement, the court also looked at the surrounding circumstances to determine the parties' intent. The court considered the circumstances surrounding the negotiations and the employer's dire financial conditions to determine whether the parties left the agreement open to permit additional fees. *Id.* at \*7. As addressed below, the history of this litigation and the circumstances surrounding the issuance of the Decree make it clear that the parties here did not intend for the April 2010 Decree to be a final disposition of all claims.

**3. The State's contract interpretation techniques are misplaced.**

The State also argues that various canons of contract interpretation support a waiver argument. Canons of construction, though, are not applicable “unless the terms of the contract are substantially and genuinely ambiguous.” *Jerik v. Columbia Nat'l, Inc.*, Case No. 97 C 6877, 1999 WL 1267702 at \*4 (N.D. Ill. Sept. 30, 1999) (citing *Pitcher v. Principal Mut. Life Ins. Co.*, 93 F.3d 407, 418 (7th Cir.1996); *Baker v. America's Mortg. Servicing, Inc.*, 58 F.3d 321, 327 (7th Cir.1995)). It is not enough that the parties disagree on the meaning of the contract terms; instead, “a contractual provision must be subject to more than one reasonable interpretation to be considered ambiguous.” *Id.* (citing *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir.1998)). As stated above, the Decree is completely silent on the issue of the attorneys' fees at issue. Thus, there is no ambiguity to support the use of the interpretive canons.

Furthermore, the cases and canons relied upon by the State do not support its position. First, the State relies upon *State ex rel. Paluf*, 630 N.E.2d 708 (Ohio App. 1994), for the proposition that the canon “*expressio unius est exclusio alterius*” shows that the parties intended to dispose all of the claims, including claims for attorneys' fees that were never discussed by the parties in negotiating the Decree. That case, though, is not applicable in this context. More importantly, it is equally supportive of the Plaintiffs' arguments.

The *Paluf* case involved a complaint for a writ of *quo warranto* to challenge a city council's refusal to confirm the mayor's appointment of a city law director under several provisions of the city's charter. The court had to interpret the city's charter and resolve issues relating to separation of powers under the charter. Applying the canon *expressio unius est exclusio alterius*, the court of appeals determined that the charter intended there to be only one prerequisite to be city law director, and the city council was prohibited from rejecting a nomination for city law director if that requirement was met.

The Ohio Supreme Court reversed in part after considering how the canon was applied in the specific context of *quo warranto* cases under municipal charters. *Id.* at 712 (citations omitted). Although the court permitted application of the canon in one provision of the charter, the canon could not be used in another provision of the same charter to prohibit the city council from rejecting a candidate if he met the sole qualification. *Id.* The Ohio Supreme Court reached that conclusion because the charter “did not specifically limit council’s confirmation power,” and the confirmation power could not be “specifically limited by reference to other qualifications.” *Id.* The case is not only inapplicable on its face, but it also does not support the State’s argument – the Ohio Supreme Court refused to find a waiver or limitation of the council’s confirmation power where the charter did not specifically provide for such limitation.

Furthermore, the “*expressio unius est exclusio alterius*” canon supports the Plaintiffs’ position. The maxim means that if “certain things are specified in a law, contract, or will, other things are impliedly excluded.” *Id.* As courts have recognized, and as is the case here, the “doctrine works as a ‘double edged sword.’” *Jerik v. Columbia Nat’l, Inc.*, No. 97 C 6877, 1999 WL 1267702 at \*4 (N.D. Ill. Sept. 30, 1999) (citation omitted) (finding that the canon could be used to support both sides’ arguments – that certain mortgage fees were authorized and unauthorized – because they were not included in either the list of authorized fees or unauthorized fees).

While expressly mentioning the fees “previously awarded,” the Decree makes no mention of the other fees at issue. The State argues that the exclusion of the future fees from the miscellaneous provision addressing the fees “previously awarded” to the Plaintiffs reflects the parties’ intent to exclude recovery of such future fees. Because the relevant inquiry is whether the parties intended the Decree to be a final disposition of all claims, though, the exclusion of the future fees issue altogether from the explicit purpose section of the Decree suggests that the parties did not intend to resolve the future fees issue in the Decree and did not intend that the Decree fully resolve all issues related to the voting rights claims outlined in the Complaint and Supplemental Complaint.

The State also invokes the principle that a contract should be construed against the party who drafted it, citing *Savedoff v. Access Group, Inc.*, 524 F.3d 754 (6th Cir. 2008) to support this argument. But the State misrepresents *Savedoff*. There, the issue was whether a standard (*i.e.* adhesion) loan agreement provided for capitalization of accrued interest. Contrary to the State's representation, this Court did not say that "a contract must be construed against the party who drafted it" (State's Brief at 26) as the State argues. Instead, this Court stated:

If the language in the contract is ambiguous, the court should generally construe it against the drafter. [citations omitted]. In particular, "where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the non-drafting party."

*Id.* at 764 (quoting *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1261-62 (Ohio 2003)) (emphasis added). The April 2010 Decree here is not a standardized adhesion contract between parties of unequal bargaining power. The parties negotiated the terms of the Decree together under the auspices of the 6<sup>th</sup> Circuit mediator. Further, such a principle requiring strict interpretation "against the drafter" only applies where there is an ambiguity to be interpreted. It does not apply to insert new language into the agreement that the parties never negotiated.

**C. The Facts And Circumstances Demonstrate That The Parties Did Not Intend For The April 2010 Decree To Waive Fees**

As stated, the role of the courts in analyzing agreements is to determine the parties' intent. The April 2010 Decree is silent regarding the attorneys' fees at issue. A consideration of all the circumstances, though, makes it clear that the parties did not intend a settlement in full that would preclude the Plaintiffs from seeking the fees requested in their Third Motion.

**1. The Plaintiffs sought fees after negotiating two previous agreements without any assertion of "waiver" by the State.**

It is disingenuous for the State to claim that it was "shocked" when the Plaintiffs' sought attorneys' fees following the issuance of the April 2010 Decree. The State never before lodged a "waiver" argument to oppose the Plaintiffs' pursuit of attorneys' fees following the previous agreements negotiated by the parties. The fact that the Plaintiffs sought their fees after negotiating those prior agreements evidences the parties' understanding that the Plaintiffs would do so again following the April 2010 Decree. The Decree, therefore, was not a full resolution of all such claims.

Before entering the Decree, the parties negotiated two other agreements in 2006. In the first agreement, the parties negotiated standardized voter identifications procedures. R. 51. Then, the parties negotiated an agreement to address poll-worker errors made during elections. R. 57. Neither agreement

addressed attorneys' fees. Nonetheless, in both cases, the Plaintiffs subsequently sought the fees they incurred related to the agreements. The Plaintiffs were awarded their fees, and the State never argued that the Plaintiffs had "waived" their right to the fees due to the agreements' silence on the issue. These facts suggests that the parties intended to exclude the future fees issue from the April 2010 Decree, just as they had done before. Although the State now claims that it had a different intent, no representative of the State ever expressed to the Plaintiffs that the State's intent had changed from the previous negotiated agreements.

**2. At the status conference summarizing and finalizing the April 2010 Decree, the parties' expressed intent was not to preclude the Plaintiffs from seeking additional attorneys' fees.**

At the status conference in which the parties presented the April 2010 Decree to the District Court for approval, the parties stated on the record their purpose and intent in negotiating the Decree. The State's representative "summarized the terms of the agreement." R. 217 at 2:20 – 4:11. He said nothing about the attorneys' fees at issue and also did not say that the State intended the Decree to be a final disposition of all claims. Instead, he summarized that the purpose of the Decree was to resolve the issues related to voter identification requirements and provisional ballot procedures. The Plaintiffs' representative confirmed the parties' intent during those proceedings, stating "I would just add that the intent of the decree is to ensure that voters who do not have identification,

such as homeless voters, are put on the same footing as voters with identification. So that if they have a Social Security number and they use the Social Security number on their ballot, their vote will be counted. That is the intent.” *Id.* at 4:21 – 5:3.

**3. The Plaintiffs’ intent was that the Decree would not resolve all issues fully but would allow the Plaintiffs to seek their attorneys’ fees.**

In the Declarations submitted with the Plaintiffs’ Reply in support of their Third Motion, the Plaintiffs, through their counsel, state unequivocally that they did not intend for the Decree to broadly settle all issues related to the action such that they would waive the ability to seek the fees requested in their Third Motion. R. 223, 224, 225. Plaintiffs’ counsel believed the parties were operating under the same understanding that applied in the previous negotiated agreements, after which the Plaintiffs sought attorneys’ fees without any “waiver” objection from the State. The State never indicated to the Plaintiffs that it now had a different understanding and intent in negotiating the April 2010 Decree. The Plaintiffs had no knowledge of the intent that the State expressed for the first time in opposition to the the Plaintiffs’ Third Motion. In negotiating the miscellaneous provision of the Decree, Plaintiffs’ counsel intended only to ensure that the State would pay the attorneys’ fees “previously awarded” by a set deadline. Plaintiffs’ counsel believed that the State’s appeal was completely meritless and jurisdictionally defective and would

not have agreed to forfeit the ability to seek the fees at issue just to settle the pending appeal. *See generally id.*

The State raises a red herring regarding the Declarations submitted by Plaintiffs' counsel. It suggests that the Plaintiffs' supporting affidavits are defective because they were prepared by Plaintiffs' counsel. This argument is meritless. First, the State's supporting case, *Venegas v. Mitchell*, 495 U.S. 82 (1990) does not support the State's argument. In *Venegas*, the issue was whether an attorney was permitted to collect a contingent fee in excess of the statutory fee award in a civil rights case. The Court affirmed a decision allowing the plaintiff's attorney to intervene in the appeal on the merits and obtain a lien on the judgment for the higher contingency fee amount. In other words, the Court found that the plaintiff's attorney had a right to intervene and pursue his fees. In the language cited by the State, the Court was merely analyzing the basis for its determination that a party can agree to pay an attorney a contingent fee in excess of the amount that may be awarded by statute. *Venegas* did not involve any representations about anyone's intent to fully resolve all claims (or not) in a consent decree.

The State also draws an arbitrary distinction that would allow its lawyers to provide their opinions on the parties' intent in negotiating the Decree (*see* the Shinn, Ashbrook, and Coglianese declarations, R. 219-1, 219-2, and 219-3) but then deny the Plaintiffs' counsel the right to do the same. Such a distinction is

neither appropriate nor fair. The reality is that the Declarations submitted by the parties were prepared by the key players to the negotiations of the Decree, and the District Court was entitled to review those Declarations and make the inference it ultimately (and correctly) made about the parties' intent.

**D. Adopting The State's Waiver Argument Would Lead To An Absurd Result.**

The State suggests that the District Court's decision leads to an absurd result but wholly fails to appreciate the absurdity of the result for which it advocates. If the State is to be believed, then the April 2010 Decree does nothing more than restate the State's existing obligations regarding voter rights and provisional ballot counting procedures. According to the State, the driving force behind its desire to enter the Decree was to eliminate the risk of an unknown future fee award (an argument that the State expects this Court to believe, even though it never raised the issue or ensured that an explicit provision was included in the Decree to prevent any future fee awards). Thus, under the State's analysis, the Decree, as to the Plaintiffs, is worthless – the Plaintiffs elicited no obligations from the State other than what the State was already planning to undertake. Yet, in exchange for those empty promises, the Plaintiffs received only the fees “previously awarded” by the District Court and agreed to forgo the substantial amount of statutorily-provided fees they incurred defending against the State's frivolous appeal and negotiating the lengthy Decree. Under the State's theory, the Plaintiffs apparently

gave up nearly \$90,000 of compensation for sixteen months' worth of legal work in exchange for nothing. To suggest that the Plaintiffs would agree to such an arrangement is absurd.

The less absurd interpretation is that the State intended to reduce its exposure risk for further attorneys' fees by agreeing to dismiss its groundless appeal and end the then-pending proceedings that were continually increasing the Plaintiffs' legal expenses. As was the history between these parties, they did not intend for the Decree to fully settle all potential claims, including the attorneys' fees that the Plaintiffs always sought after negotiating other interim agreements. The State concedes that the attorneys' fees now at issue were never discussed during the negotiations; thus, if the State had the intent it now claims to have had, it hid it from the Plaintiffs. The Plaintiffs, on the other hand, were simply operating under the same understanding that they had on all prior occasions – that this Decree was not intended to foreclose their ability to seek the fees to which they are entitled by statute.

It bears repeating that the purpose behind the Fees Act is to encourage claimants to pursue civil rights claims, even though (as here) vindication of such claims often does not include monetary compensation, and to encourage competent attorneys to prosecute civil rights claims on behalf of clients who typically cannot afford legal representation. *See Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186,

1202 (10th Cir. 1998); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1189-91 (11th Cir. 1983) (reviewing the policies behind §1988); *Gates v. Collier*, 616 F.2d 1268, 1274-75 (5th Cir. 1980) (extensive review of the legislative history behind §1988). The State turns this policy upside down, suggesting that the Court should consider the government's current financial status over the civil rights litigant's financial means and find that the Plaintiffs should bear the burden of the State's hidden, unexpressed intent. This Court should find, as others have done before it, that the government should bear the loss of its unexpressed intent. *See Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1201 (10<sup>th</sup> Cir. 1998) (determining that were a settlement agreement is silent on attorneys' fees and the parties claim conflicting intentions, the "losing" party should bear the burden and courts should follow the presumption in favor of awarding attorneys' fees). To allow the State to profit from its later expressed hidden intent would lead to an absurd result.

## **ARGUMENT IN SUPPORT OF CROSS-APPEAL**

### **II. THE DISTRICT COURT MISAPPLIED THIS COURT'S "THREE PERCENT RULE" – A RULE RIPE FOR REEXAMINATION**

The District Court properly rejected the State's waiver argument and awarded additional fees and costs to counsel for the Plaintiffs. Those counsel labored for nearly sixteen months to recover their fees previously incurred in the case, to defend the State's groundless appeal of that fee award, and to negotiate the

lengthy and detailed April 2010 Decree. But the District Court went astray when it applied the so-called “Three Percent Rule” from this Court’s 1986 decision in *Coulter v. Tennessee* to drastically cap that award. The practical effect of the District Court’s misapplication of the Rule is severe; limiting some of the Plaintiffs’ counsel to less than a single days’ worth of compensation for substantial, substantive work that took months to complete. This Court should reverse the District Court’s Order in part and remand the matter back to the District Court for a recalculation of the fees to be awarded. Doing so will further the intent of Congress, which enacted the Fees Act to provide an economic incentive for members of the bar to take on meritorious civil rights cases at reasonable rates of compensation. The District Court’s rigid misapplication of the Three Percent Rule, if left uncorrected, will substantially impair that incentive.

**A. Standard of Review**

This Court reviews a district court’s award of attorneys’ fees and expenses for an abuse of discretion. *Geier v. Sundquist*, 372 F.3d 784, 789 (6<sup>th</sup> Cir. 2004) (citing *Perotti v. Seiter*, 935 F.2d 761 763 (6<sup>th</sup> Cir.1991)). “An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 647 (6<sup>th</sup> Cir.1993).

**B. This Case Illustrates Why The Court Should Reexamine The Origins And Application Of *Coulter*'s "Three Percent Rule."**

More than three decades ago, the lawyers for prevailing plaintiffs in two §1983 cases came before this Court on a consolidated cross-appeal, contending that the district court abused its discretion by failing to award them the fees and costs they incurred in pursuit of their own attorneys' fees in those cases.

*Weisenberger v. Huecker*, 593 F.2d 49 (6<sup>th</sup> Cir. 1979). This Court unanimously agreed, awarded those prevailing lawyers 90% of their "fees for fees" request,<sup>5</sup> and in doing so established important principles about the intent of Congress in enacting the Fees Act:

When Congress passed the Act its basic purpose was to encourage the private prosecution of civil rights suits through the transfer of the costs of litigation to those who infringe upon basic civil rights. If a successful party in a civil rights suit is awarded attorney's fees under the Act and he cannot secure attorney's fees for legal services needed to defend the award on appeal, the underlying Congressional purpose for the Act would be frustrated. We conclude that implementation of Congressional policy requires the awarding of attorney's fees for time spent pursuing attorney's fees in the cases presently under review.

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<sup>5</sup> *Weisenberger*, 593 F.2d at n.12 ("Counsel for plaintiffs submitted affidavits before the district court and this court relating to the number of hours expended before the district court since the original fee awards and in our court prosecuting the present appeals. We have taken the number of hours submitted by plaintiffs' counsel, 113.25 hours, and reduced it by 10% to account for duplication of efforts among the respective attorneys.")

*Id.* at 53-54 (emphasis added). This Court in *Weisenberger* was so certain of this principle, and of counsel's entitlement to 90% of their "fees for fees" request, that it expressly chose to take the procedurally unusual step of determining the fee amount itself instead of leaving that calculation to the district court to perform on remand. *Id.* at 54.<sup>6</sup>

Somehow, for reasons this Court has never fully explained, the 90% "fees for fees" award unanimously approved by this Court in *Weisenberger* shrank to just 3% in the space of only seven years. See *Coulter v. Tennessee*, 805 F.2d 146 (6<sup>th</sup> Cir. 1986). In *Coulter*, as in *Weisenberger*, two lawyers who had prevailed in litigation against the state sought to recover attorneys' fees, as well as "fees for fees." The district judge who characterized their case as "simple," "tried in less than half a day," and "decided from the bench" limited their "fees for fees" award to "approximately 3% of the hours allowed in the main case." *Id.* at 151. This Court affirmed that 3% "fees for fees" award, but remanded the case to the district court for an increase in the fees awarded for counsel's work on a summary-judgment motion. *Id.* at 152.

This Court's opinion in *Coulter* affirming the district court's 3% "fees for fees" award did not even cite, much less distinguish, the Court's earlier decision in

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<sup>6</sup> The United States Supreme Court later denied a writ of certiorari in *Weisenberger*. 444 U.S. 880.

*Weisenberger* awarding counsel fees for 90% of the time incurred pursuing fees. The Court in *Coulter* devoted only three brief paragraphs to its discussion of the proper “fees for fees” award. It cited no other case from anywhere in the country adopting a 3% cap on “fees for fees” requests.

In fact, the only case cited in the portion of the *Coulter* opinion relating to “fees for fees” was a decision from the Ninth Circuit, *In re Nucorp Energy, Inc.*, in which that court – after a careful survey of caselaw from around the country on point – directed the lower court on remand to award reasonable compensation for “**all**” actual, necessary services that were rendered in connection with counsel’s fee application. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 663 (9<sup>th</sup> Cir. 1985) (emphasis added). Notably, one of the many cases that the Ninth Circuit reviewed for the proposition that “statutory fee award provisions should be read as authorizing compensation for time spent litigating fee awards” was *Weisenberger*, in which this Court had awarded 90% of the hours claimed for “fees for fees.” *In re Nucorp Energy*, 764 F.2d at 660 (citing *Weisenberger*, 593 F.2d at 49).

The Ninth Circuit in *Nucorp Energy* adopted no percentage cap of any kind on “fees for fees” awards, much less a cap as severe as the one approved by this Court in *Coulter*. On the contrary, the Ninth Circuit emphasized precisely why it is important to fully and reasonably compensate attorneys for time spent in fee litigation “to effectuate the objectives underlying most attorneys’ fee statutes:”

If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized.

*In re Nucorp Energy*, 764 F.2d at 660, quoting *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3<sup>rd</sup> Cir. 1978). Such a result, the Ninth Circuit agreed, ““would not comport with the purpose behind most statutory fee authorizations, *viz.*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.”” *Id.* (quoting *Prandini*).

This Court's decision in *Coulter* to impose an arbitrary 3% cap on fees-for-fees awards – in spite of its sheer brevity, in spite of its failure to cite or distinguish the *Weisenberger* precedent from this very Circuit, and in spite of its citation only to a single case going the other way – has evolved to become this Circuit's leading case on the issue. The Westlaw “KeyCite” service reveals over 470 citing references to *Coulter*. As recently as 2007, this Court has declared that “[t]he language from our *Coulter* decision controls the issue on appeal.” *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 621 (6<sup>th</sup> Cir. 2007). The district judge below, citing both *Coulter* and *Gonter*, described *Coulter*'s Three Percent Rule as a “rule of thumb.” R. 234 at p. 13. While characterizing it as such, the court applied that rule *strictly* – even to categories of work that the Plaintiffs contended were separate

and apart from their work preparing and litigating the attorneys' fees case, and even to categories of work that were caused not by the Plaintiffs themselves, but rather by the State's affirmative decision to lodge a groundless appeal that was later dismissed for lack of prosecution. R. 234 at p.14.

The facts of this case illustrate why this Court should reexamine *Coulter* and return to the principles espoused by the Sixth Circuit in *Weisenberger* and the Ninth Circuit in *Nucorp Energy*. The Plaintiffs' "fees for fees" request in their Third Motion, even if granted in full, would have given them less than 18% of the fees previously awarded by the District Court.<sup>7</sup> That is hardly out of proportion to the fees previously awarded. Yet the District Court's strict application of the 3% cap from *Coulter* results in an absurd reduction of even that low percentage of compensation representing substantial work performed over the course of sixteen months. It strains credulity to believe that attorneys will continue to "act as private attorneys general in vindicating congressional policies," as Congress intended, if they will be compensated for only a tiny fraction of every 100 hours that they reasonably<sup>8</sup> spend briefing legitimate fee requests, defending appeals of fee awards, and negotiating lengthy and detailed consent decrees.

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<sup>7</sup> The fees requested in the Plaintiffs' Third Motion totaled \$89,734.13, which is approximately 17.8% of the District Court's \$504,414.11 prior award.

<sup>8</sup> As noted above, the State has waived any appeal from the District Court's determination that counsel's hours billed and billing rates are reasonable.

**C. Even If This Court Adheres To The Three Percent Rule From *Coulter*, By Its Own Terms That Rule Does Not Apply Where, As Here, “Unusual Circumstances” Are Present.**

This Court may well decide that the Three Percent Rule from *Coulter* should continue to guide district courts awarding “fees for fees” under the Fees Act. As a practical matter, *Coulter* was decided nearly a quarter century ago. And the Three Percent Rule does have the positive attribute of ensuring that “the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation.” *Coulter*, 805 F.2d at 151. Even if this Court chooses not to reexamine (or abandon) *Coulter*, though, there are compelling reasons why it should not control here. Chief among them is *Coulter*’s express reminder that “unusual circumstances” can render the 3% cap inapplicable. *Id.* Put simply, this case involves circumstances far more unusual than *Coulter*.

As the district court noted in *Coulter*, that case was ““simple”” and ““tried in less than half a day.”” *Coulter*, 805 F.2d at 148 (quoting District Judge Morton). In that sex discrimination, the district court ruled in favor of the sole plaintiff on the issue of liability after that very quick trial. *Id.* The parties then submitted a consent order which disposed of all the remedial issues, as well as the fees to be paid to one of the two lawyers who had represented the plaintiff. *Id.* The only matter left unresolved were the fees to be paid to a law professor who had assisted

the plaintiff. *Id.* The law professor submitted a petition fees, and the district court ruled on that petition. *Id.*

The procedure in this now nearly five-year-old case, which the District Court described as having a “long and eventful history,” R. 203 at p. 2, has been markedly different and more complex. *Coulter* involved a “simple” case of sex discrimination that was resolved with a single consent order. This case, in contrast, has spanned multiple elections and involved multiple consent decrees; the most recent of which has spawned entirely separate (and still pending) litigation regarding the counting of provisional ballots. As of this writing, that litigation has involved an original action at the Ohio Supreme Court, preliminary injunctive relief granted by another U.S. District Court, an expedited appeal at the Sixth Circuit, and a request for emergency relief at the U.S. Supreme Court.<sup>9</sup>

At every turn, when the Plaintiffs have made legitimate requests for their fees under the Fees Act, the State has fought tooth and nail to oppose them, needlessly increasing the amount of litigation and effort expended on the issue of attorneys’ fees. When the Plaintiffs filed their first motion for fees, the State filed a twenty-seven page response, accompanied by sixteen pages of exhibits, asserting

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<sup>9</sup> See *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011); *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219 (6<sup>th</sup> Cir. 2011) (application to recall and stay mandate pending *certiorari* filed April 9, 2011 before the Hon. Elena Kagan, Circuit Justice for the Sixth Circuit).

that the Plaintiffs “lack standing to pursue their claims” and that the district court therefore lacked jurisdiction to award attorneys’ fees. R. 99 at pp. 7-8. The State then devoted three subsections of argument claiming that the Plaintiffs were not “prevailing parties” entitled to their fees – an argument the State has since abandoned. R. 99 at pp. 9-16. The State then devoted the rest of its brief, as well as a lengthy Affidavit of a retained expert, to challenge the reasonableness of the fees requested and to seek a hearing on reasonableness – another argument the State has now abandoned. R. 99 at pp. 17-18; R. 99-2. This expert rendered his “professional opinion that portions of the fees and costs sought by Plaintiffs are unreasonable and should not be reimbursable.” R. 99-2 at ¶ 4.

The State’s opposition to the Plaintiffs’ first motion for fees caused litigation over that motion to span more than eight months, from January 4, 2008 through the Court’s September 30, 2008 Order granting the Plaintiffs’ motion. R. 108. Even then, the issue was not resolved; the district court set a hearing on the reasonableness of the requested fees and ordered supplemental briefing on that issue, which the Plaintiffs submitted on the same date as their Second Motion for Fees. R. 176, 179. The briefing and hearing associated with Plaintiffs’ Second Motion for Fees was not complete until late July 2009. R. 202. And although the District Court granted the Plaintiffs’ Second Motion for Fees, it revised its award upward upon the filing of a motion for reconsideration. R. 203, 205. The State,

though, lodged a groundless appeal of that award, leading to the substantial work that the Plaintiffs undertook under the auspices of the Sixth Circuit mediator negotiating the parties' April 2010 Decree. R. 207, 210, 211.

When faced with "unusual circumstances" like these, courts within this Circuit correctly depart from *Coulter's* Three Percent Rule so that prevailing plaintiffs may be compensated for the substantial work they must do in order to pursue and defend legitimate fee requests in the face of staunch opposition. *See, e.g., American Canoe Ass'n, Inc. et al. v. City of Louisa*, 683 F.Supp.2d 480 (E.D.Ky. 2010); *Communities for Equity, et al. v. Michigan High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2008 WL 906031 (W.D. Mich. March 31, 2008).

In *American Canoe*, decided just a year ago, the U.S. District Court for the Eastern District of Kentucky deviated from *Coulter's* Three Percent Rule to render a "fees for fees" award of \$38,065.46 – nearly identical to that requested here by the Plaintiffs in their Third Motion. *American Canoe*, 683 F.Supp.2d at 497-98. American Canoe had requested a "fees for fees" award representing 34% of its fee award for the main case. Although the district court found that request excessive, it awarded American Canoe a 10% "fees for fees" award due to "some exceptional circumstances present," including "complicated legal issues on both sides, such as determining the prevailing party and degree of success. \* \* \* There are

complicated legal issues involved in this fee petition, justifying an exceptional award over the 3% amount.” *Id.* at 498.

In the *Communities for Equity* case, Senior District Judge Enslen took account of the principle that resolution of fee petitions should not become a “second major litigation.” *Communities for Equity*, 2008 WL 906031 at \*1, quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). But after “laborious review,” Judge Enslen discovered “a classic case of the obdurate defendant who digs in its heels while litigating the merits of an action, loses, and then cries ‘foul’ when asked to pay the resulting attorneys’ fees and costs.” *Id.* Accordingly, even though the hours billed to fee litigation were roughly three times the 3% “guideline recommended by the *Coulter* Court,” Judge Enslen cited this Court’s decision in *Weisenberger, supra*, as well as precedent from the Western District of Michigan, in support of her decision to depart from the Three Percent Rule, saying:

If the defendant vigorously objects to a fee petition with lengthy and specific objections, it is necessary for fee counsel to respond in kind. [The defendant]’s vigorous objections, employment of an expert, and obstructionist tactics compel finding that the efforts of Plaintiffs’ counsel was reasonably expended and absolutely necessary to secure their fee award.

*Id.* at \*19, citing *Weisenberger, supra*, and *Ams. United for Separation of Church & State v. Sch. Dist. of City of Grand Rapids*, 717 F.Supp. 488, 494-95 (W.D.Mich.1989) (awarding fees for hours that constituted 15% of the total hours in the underlying case based on atypical circumstances).

In this case, too, the defendant vigorously objected to the Plaintiffs' requests for fees, requiring the Plaintiffs to respond to each of those objections as they arose or risk losing their fee award entirely. And just as in the *Communities for Equity* case, the State here hired an "expert" to opine on the reasonableness of the Plaintiffs' fees – an expert who raised objections that the State has now abandoned, after already (and unsuccessfully) appealing the district court's prior fee award to this Court once before.

Accordingly, the District Court should have declined to apply *Coulter's* Three Percent Rule due to the unique circumstances present here. *Accord Klein v. Cent. States Southeast and Southwest Areas Health and Welfare Plan*, 621 F.Supp.2d 537,544-45 (N.D. Ohio 2009) (declining to apply *Coulter's* Three Percent Rule to "unusual circumstances" of ERISA litigation, where most of a plaintiff's attorney's work occurs in administrative proceedings, before the case reaches the district court); *Gross v. Perrysburg Exempted Village Sch. Dist.*, 306 F.Supp.2d 726, 743 (N.D. Ohio 2004) (awarding \$16,891 for fees and costs associated with litigating motion for fees, where the defendant "forced plaintiff to

expend a great deal of time parsing through [defendant's] numerous arguments" relating to the fee application); *Jaguar Cars v. Cottrell*, No. Civ.A.94-78, 1999 WL 1711083 (E.D. Ky. 1999) (awarding \$12,530.75 in fees relating to the fee application because "[i]n light of the complexity of this matter, \*\*\* an exception to the 3% guideline is proper."); *Moore v. Crestwood Loc. Sch. Dist.*, 804 F.Supp. 960, 971 (N.D. Ohio 1992) (justifying "a complete departure from the *Coulter* guidelines" where "the action of defendant and its counsel," including an unsuccessful appeal to the Sixth Circuit, turned "a simple fee petition \*\*\* into 'a second major litigation.'")

**D. Courts, Including The Sixth Circuit, Properly Decline To Follow *Coulter*'s "Three Percent Rule" Where Doing So Would Undercut The Intent Of The Fees Act.**

As the First Circuit has noted, "[i]t would be inconsistent with the purpose of the Fees Act to dilute a fees award by refusing to compensate the attorney for the time reasonably spent in establishing and negotiating his rightful claim to the fee." *Lund v. Affleck*, 587 F.2d 75, 77 (1<sup>st</sup> Cir. 1978). Judges from within this Circuit, too, have agreed that too strict a cap on "fees for fees" awards is inconsistent with Congress' intent. As Judge Enslin noted recently in *Communities for Equity*, "[t]he congressional purpose behind the Fees Act would be thwarted if losing defendants were able to dilute a fee award by forcing

prevailing plaintiffs to devote uncompensated time to defend their legitimate fees.”  
*Communities for Equity*, 2008 WL 906031 at \*19.

The Sixth Circuit itself has departed from *Coulter*'s Three Percent Rule in circumstances where, as here, the parties entered into a consent decree and where, as here, blind adherence to *Coulter*'s Three Percent Rule would thwart Congressional intent. In *Lamar Advertising Co. v. Charter Township of Van Buren*, 178 Fed.Appx. 498 (6<sup>th</sup> Cir. 2006), billboard owners brought a §1983 action against a township, alleging that it had violated the First Amendment by conditioning its approval of site plans on an agreement to remove certain billboards. The district court agreed, and the parties entered into a consent decree in which the Township agreed not to take any action to require the removal of the billboards, in exchange for a dismissal. The billboard owners requested their attorneys' fees, and the district court awarded them over \$80,000 in fees. On a cross-appeal, the billboard owners also sought their “fees for fees” incurred while defending the township's appeal. This Court agreed, and found that “this is the type of situation where the 3% cap on ‘fees for fees’ is not appropriate.” *Id.* at 502. As this Court explained in *Lamar Advertising*, although the Three Percent Rule from *Coulter* is aimed at discouraging protected “fees for fees” litigation, there are circumstances in which departing from *Coulter*'s Three Percent Rule is the only way to achieve that purpose:

The Township \*\*\* needlessly protracted “fees for fees” litigation by making spurious arguments in this court. \*\*\* *Coulter* sought to limit “fees for fees” litigation. Granting fees for this appeal does just that. Granting fees in this case discourages the losing party in fee litigation from engaging in protracted and needless appellate litigation and compensates the prevailing party for defending its fee award on appeal. Consistent with *Coulter*, \*\*\* this is the type of situation where the 3% cap on “fees for fees” is not appropriate.

*Id.* This case presents the same type of situation where application of the Three Percent Rule is “not appropriate” and results in an unconscionable dilution of compensation to counsel for the Plaintiffs. As this Court and many others have noted, Congress intended the Fees Act to incent members of the bar toward work as private attorneys general. Congress would be disheartened to learn that this incentive is being undercut by the actions of defendants like the State who, having lost on the merits, persist with unnecessary and groundless objections to (and appeals from) the fee awards for prevailing plaintiffs, who are then unable to compensate their lawyers for more than three percent of the significant time and hours billed to address those objections or the appeals stemming therefrom. As the Third Circuit noted long ago, “the policies behind statutory fee awards apply equally to time spent preparing the fee petition and time devoted to litigating the amount of the award at the fee hearing.” *Bagby v. Beal*, 606 F.2d 411, 416 (3<sup>rd</sup> Cir. 1979). The Ninth Circuit cited *Bagby* approvingly in *NuCorp Energy* – the only

case cited by this Court in the relevant portion of *Coulter*.<sup>10</sup> This case represents an opportunity for this Court to return to those first principles, correct the District Court's abuse of discretion, and award the Plaintiffs "fees for fees" that are more commensurate with what Congress intended and still not out of proportion to the fees awarded to them in the main case. Reversing the District Court's erroneous application of the Three Percent Rule and remanding this case with instructions to enter the "fees for fees" award requested by the Plaintiffs in their Third Motion, which amounts to less than 18% of the fees and costs previously awarded by the District Court, would be consistent with what Congress intended.

**E. At The Very Least, The District Court Abused Its Discretion In Applying *Coulter*'s Three Percent Rule To The Hours Billed Defending The State's Appeal And Negotiating The April 2010 Consent Decree.**

Even assuming that *Coulter*'s Three Percent Rule should cap the Plaintiffs' fee award for certain work that was the subject of the Plaintiffs' Third Motion, the District Court abused its discretion by applying the 3% cap across the board, to all three categories of work for which counsel sought to be compensated in that Motion. As described above, the Plaintiffs' Third Motion sought an award of

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<sup>10</sup> *In re NuCorp Energy, supra*, 764 F.2d at 661 (describing *Bagby*'s reasoning as "persuasive"); *see, also, Coulter, supra*, 805 F.2d at 151 (citing *In re NuCorp Energy*).

previously uncompensated fees and costs incurred in three different areas between January 2009 and entry of the April 2010 Decree:

- (1) fees and costs incurred by the Plaintiffs while briefing and arguing the two prior motions for attorneys fees (R. 96 and R. 179);
- (2) fees and costs incurred by the Plaintiffs while defending the State's appeal from the District Court's decision awarding the Plaintiffs those fees (which appeal was eventually dismissed for lack of prosecution, after entry of the April 2010 Decree) (R. 207 and R. 211); and
- (3) fees and costs incurred by the Plaintiffs while negotiating the April 2010 Decree (R. 210).

R. 212, at p.3.

Although the Plaintiffs encouraged the District Court to treat these categories separately for purposes of its fee calculation, the District Court improperly lumped them all together, as follows:

The Plaintiffs argue that the hours spent on the appeal and in negotiating the Decree were separate from the time spent preparing and litigating the attorneys' fee case and, therefore, fees incurred during the latter two phases of these proceedings should not be subject to the Three Percent Rule. This Court disagrees and finds that the hours spent at all three stages of this attorneys' fees case constituted preparation for and litigation of the attorneys' fees case and are subject to [the] Three Percent Rule.

R. 234 at p. 14 (emphasis added). Although the District Court characterized the appeal and Decree negotiation as "unique proceedings" that occurred after the Plaintiffs submitted their fee application, the District Court nevertheless concluded

that “all steps taken in both of those stages were done in pursuit of obtaining fees \*\*\* [.]” *Id.* (emphasis added). For the following reasons, the Plaintiffs believe that the District Court abused its discretion in reaching that conclusion.

- 1. The Plaintiffs did not lodge the earlier appeal “in pursuit of obtaining fees” as described by the District Court. Instead, they responded – as they must – to the groundless appeal lodged by the State, which is an action exempt from the Three Percent Rule.**

As this Court noted more than three decades ago in *Weisenberger*:

If a successful party in a civil rights suit is awarded attorney’s fees under the Act and he cannot secure attorney’s fees for legal services needed to defend the award on appeal, the underlying Congressional purpose for the Act would be frustrated. We conclude that the implementation of Congressional policy requires the awarding of attorney’s fees for time spent pursuing attorney’s fees in the cases presently under review. This award should also include amounts for legal time spent defending and prosecuting the instant appeals.

*Weisenberger*, 593 F.2d at 54 (emphasis added). Put simply, as this Court’s opinion in *Weisenberger* holds, prevailing plaintiffs should be able to recover the fees necessary to defend their fee awards on appeal. Accordingly, the District Court abused its discretion in applying *Coulter*’s Three Percent Rule to that category of fees sought in the Plaintiffs’ Third Motion. *Accord Lamar Advertising*, 178 Fed.Appx. at 502 (this Court finding the application of *Coulter*’s 3% cap “not appropriate” with respect to fees incurred by the prevailing party for defending its fee award on appeal); *Ams. United for Separation of Church & State*, 717 F.Supp.

at 494-95 (holding that a higher than ordinary limitation on the number of chargeable hours spent in pursuing fees [15%] was justified when there was an appeal on the fee issue). Accordingly, this Court should remand the case to the District Court with instructions not to apply *Coulter*'s "rule of thumb" to the hours billed by Plaintiffs' counsel defending the State's appeal.

**2. Many hours spent under the auspices of the Sixth Circuit Mediator negotiating the lengthy and detailed April 2010 Decree did not constitute "preparation for and litigation of the attorneys' fees case."**

Because *Coulter* by its terms caps only the "hours allowed for preparing and litigating the attorney fee case," the District Court also abused its discretion by applying the 3% cap across the board, to all of the many hours Plaintiffs' counsel billed during the relevant period on matters unrelated to their fee petition (such as negotiating the substantive and non-fee-related terms of the lengthy and detailed April 2010 Decree).

The Decree contains a single brief paragraph pertaining to the fees "previously awarded." It contains more than twenty other far more detailed paragraphs that took substantial time and effort to draft and negotiate under the auspices of the Sixth Circuit mediator. If this Court approves the District Court's application of the Three Percent Cap to all of the time that the Plaintiffs' counsel spent negotiating the substantive terms of the April 2010 Decree under the auspices of the Sixth Circuit mediator, that will only discourage future civil rights

litigants from pursuing mediation in this Court, because their counsel will not be meaningfully compensated for those efforts to resolve the underlying merits.

Accordingly, this Court should remand the case to the District Court with instructions not to apply *Coulter*'s cap to the hours billed by Plaintiffs' counsel unrelated to the Plaintiffs' fee application.

### CONCLUSION

The District Court correctly rejected the State's unsupportable contention that the Plaintiffs waived their right to collect reasonable attorneys' fees and costs for the work performed by their counsel from January 2009 until April 2010, with respect to: (1) the briefing and argument of the Plaintiffs' prior motions for fees and costs; (2) the settlement of the State of Ohio's appeal of the District Court's fee award; and (3) the negotiation of the April 2010 Decree. This Court has no sound basis in law to reverse that determination. The District Court abused its discretion, however, when it applied the Three Percent Rule from *Coulter* to drastically limit the fees and costs that it awarded to the Plaintiffs. As this Court noted in *Lamar Advertising*, "this is the type of situation where the 3% cap on 'fees for fees' is not appropriate." This Court should, therefore, reverse the District Court's determination on that issue and remand the case to the District Court for a re-calculation of the fees and costs to be awarded to the Plaintiffs, particularly for work associated with categories (2) and (3) above.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 28.1 OF THE FEDERAL  
RULES OF APPELLATE PROCEDURE**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) because it contains less than 16,500 words, as counted by the word-processing system used to prepare this brief.

*/s/ Caroline H. Gentry*

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Caroline H. Gentry

Attorney for Appellees/Cross-Appellants

Dated: April 27, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on April 27, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

*/s/ Caroline H. Gentry*

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Caroline H. Gentry

Attorney for Appellees/Cross-Appellants

Dated: April 27, 2011

**ADDENDUM OF RECORD DESIGNATIONS**

<u>Docket Entry No.</u>	<u>Date</u>	<u>Description</u>
R. 2	10/24/06	Complaint
R. 51	11/01/06	Consent Order
R. 57	11/15/06	Agreed Enforcement Order
R. 96	01/04/08	Plaintiffs' First Motion for Attorneys' Fees
R. 97	01/25/08	State of Ohio's Unopposed Motion for Extension of Time to Respond to Plaintiffs' First Motion for Attorneys' Fees
R. 99	02/27/08	State of Ohio's Motion to Dismiss and Memorandum in Opposition to Plaintiffs' First Motion for Attorneys' Fees
R. 108	09/30/08	Order Granting Plaintiffs' First Motion for Attorneys' Fees
R. 142	10/24/08	Order Adopting and Annexing Ohio Secretary of State Directive 2008-101
R. 143	10/27/08	Order Granting in Part by Agreement Plaintiffs' Motion for Preliminary Injunction
R. 179	01/20/09	Plaintiffs' Second Motion for Attorneys' Fees
R. 180	01/20/09	Affidavit of Caroline H. Gentry In Support of Second Motion for Attorneys' Fees
R. 181	01/20/09	Affidavit of Subodh Chandra In Support of Second Motion for Attorneys' Fees
R. 182	01/20/09	Affidavit of H. Ritchey Hollenbaugh In Support of Second Motion for Attorneys' Fees

<u>Docket Entry No.</u>	<u>Date</u>	<u>Description</u>
R. 192	02/27/09	Response in Opposition to Plaintiffs' Second Motion for Attorneys' Fees
R. 198	03/10/09	Plaintiffs' Reply in Support of Second Motion for Attorneys' Fees
R. 202	04/29/09	Order Setting Hearing on Plaintiffs' First and Second Motions for Attorneys' Fees
R. 203	07/28/09	Opinion and Order Granting Plaintiffs' Second Motion for Attorneys' Fees
R. 205	07/30/09	Order Granting Motion for Reconsideration and Revising 07/28/09 Award of Attorneys' Fees
R. 207	08/28/09	Notice of Appeal by Intervenor State of Ohio as to R. 205
R. 210	04/19/10	Consent Decree
R. 211	05/25/10	Order of USCA as to R. 207 Notice of Appeal: The Sixth Circuit Dismissed This Cause For Lack Of Prosecution
R. 212	06/03/10	Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 213	06/03/10	Affidavit of Caroline H. Gentry in Support of Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 214	06/03/10	Affidavit of H. Ritchey Hollenbaugh in Support of Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 215	06/03/10	Affidavit of Subodh Chandra in Support of Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 217	06/24/10	Transcript of Status Conference Proceedings held on April 19, 2010 before the Hon. Algenon L. Marbley

<u>Docket Entry No.</u>	<u>Date</u>	<u>Description</u>
R. 219	08/09/10	Response in Opposition to Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 222	09/09/10	Plaintiffs' Reply in Support of Third Motion for Attorneys' Fees and Costs
R. 223	09/09/10	Supplemental Declaration of Caroline H. Gentry in Support of Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 224	09/09/10	Supplemental Declaration of Subodh Chandra in Support of Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 225	09/09/10	Supplemental Declaration of H. Ritchey Hollenbaugh in Support of Plaintiffs' Third Motion for Attorneys' Fees and Costs
R. 234	11/30/10	Opinion and Order Granting in Part and Denying in Part Plaintiffs' Third Motion for Attorneys' Fees and Costs

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