

ORAL ARGUMENT REQUESTED

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

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

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

**REPLY BRIEF OF CROSS-APPELLANTS
NORTHEAST OHIO COALITION FOR THE HOMELESS,
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 119,
AND KYLE WANGLER**

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I. INTRODUCTION

On cross-appeal, Plaintiffs established that the District Court abused its discretion by strictly applying the so-called “3% Rule” from *Coulter v. Tennessee*, 805 F.2d 146 (6th Cir. 1986), to drastically limit the attorneys’ fees that it awarded to the prevailing Plaintiffs in this case for the three categories of work at issue in the Plaintiffs’ Third Motion for Attorneys’ Fees and Costs. Plaintiffs advanced four primary arguments in support of their cross-appeal, none of which have been addressed by the State’s Response.

First, Plaintiffs urged this Court to reexamine the merits and conceptual underpinnings of *Coulter*’s 3% Rule. *Coulter*’s apparently arbitrary 3% cap on “fees for fees” awards was established in the space of three brief paragraphs of the *Coulter* opinion, without any analysis of (much less any attempt to distinguish) then-existing precedent from this Court (*Weisenberger v. Huecker*) or other Circuit Courts (*In re Nucorp Energy, Inc.*, citing *Weisenberger*) declining to adopt any such harsh limit on “fees for fees” awards—a limit that surely discourages the pursuit of meritorious civil-rights litigation by diluting the reasonable fees awarded to counsel for prevailing parties under the Fees Act.

Alternatively, Plaintiffs established that, even if this Court was reluctant to abandon *Coulter*’s 3% Rule, given the passage of time and its evolution into a judicially created “rule of thumb” in this Circuit, the District Court nevertheless

abused its discretion in misapplying *Coulter* to the specific facts of this case.

Plaintiffs have shown three ways in which the District Court went astray:

- First, the procedural history of this case embodies the “unusual circumstances” expressly contemplated in *Coulter* to justify a departure from its 3% Rule.
- Second, courts in this Circuit and elsewhere properly depart from *Coulter*’s 3% Rule when its application would undercut the intent of the Fees Act.
- And third, at the very least, the District Court improperly classified the Plaintiffs’ *entire* fee request as one made for work “done in pursuit of obtaining fees,” when significant portions, if not the vast majority, of the work for which compensation was sought in the Plaintiffs’ Third Motion was performed not in pursuit of fees, but rather on tasks wholly unrelated to fees, such as the parties’ negotiation and implementation of the lengthy and detailed April 2010 Consent Decree under the auspices of the Sixth Circuit Mediator. That Decree contained numerous carefully negotiated provisions completely unrelated to fees.

In its Response, the State leaves many of the Plaintiffs’ arguments unchallenged. The State incorrectly analyzes the impact of the 3% Rule on the

present case and on civil-rights litigation in general. The State also fails to *relevantly* distinguish the case law cited by Plaintiffs illustrating how this case embodies the “unusual circumstances” that justify departure from the *Coulter* 3% Rule. In fact, the State’s treatment of each fact pattern only works against them, underscoring those cases’ similarities with this one. Moreover, Plaintiffs’ Third Motion, even if granted in full, sought fees equating to less than 18% of the prior fee award in the main case. The State fails to explain why that modest request is out of proportion to the award in the main case, given the lengthy procedural history of this matter. Finally, the State simply refuses to acknowledge that Plaintiffs’ time spent negotiating and drafting the April 2010 Decree and defending their prior fee award from a groundless appeal that the State *itself brought* cannot fairly be classified as time that Plaintiffs spent “pursuing” fees. Were that the case, governmental defendants could simply run up fee bills and then deny fee requests, thwarting the purpose of fee-shifting.

For the reasons set forth in Plaintiffs’ opening brief and below, Plaintiffs respectfully ask this Court to remand this matter to the District Court for a recalculation of the fees and costs to be awarded to Plaintiffs under Plaintiffs’ Third Motion. If the Court decides that *Coulter*’s 3% Cap applies here at all, then at the very least the Court should instruct the District Court *not* to apply that harsh cap to the fees for counsel’s work associated with: (1) litigating the State’s appeal of

the District Court's prior fee award; and (2) negotiating the April 2010 Consent Decree under the auspices of the Sixth Circuit Mediator.

II. ARGUMENT

A. *Coulter's* 3% Rule Should Be Clarified.

The panel that decided *Coulter* did not cite, much less distinguish, this Court's earlier decision in *Weisenberger* awarding prevailing counsel fees for 90% of the time that they incurred pursuing their attorney's fees. *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979). In fact, the only case cited in the portion of *Coulter* regarding prevailing counsel's "fees for fees" request was the Ninth Circuit's opinion in *Nucorp Energy*, which surveyed caselaw from around the country (including this Court's opinion in *Weisenberger*)—and then directed the lower court to award reasonable compensation for "all" (*not just 3%*) of the actual, necessary services rendered in connection with counsel's fee application. Second Br. at 40, citing *Nucorp Energy*, 764 F.2d at 660.

With *Weisenberger* as the applicable (but ignored) precedent from this Court, and with *Nucorp Energy* the only case cited on the issue, it is frankly difficult to discern the proper scope or analytical underpinnings of *Coulter's* 3% Rule. It may be that this Court in *Coulter* deemed a 3% cap on "fees for fees" appropriate for the Vanderbilt University law professor who merely assisted lead counsel in that "simple" case, which was "tried in less than half a day," but that

the *Coulter* panel never intended that harsh cap to morph into the default, judicially manufactured “rule of thumb” that it has since become, without any foundation in 42 U.S.C. § 1988, the fee-shifting statute. In its Third Brief, though, the State fails to justify or explain the 3% Rule, beyond merely restating the holding of *Coulter*. Third Br. at 32-34. Ultimately, the State does not provide any compelling reasons why this Court should not clarify the questionable origins and application of *Coulter*’s 3% Rule.

1. The State obscures the impact of the 3% Rule on this case.

The State contends that the 3% Rule is responsible for preventing protracted litigation and encouraging settlement. Third Br. at 33-34 (“For example, without the three percent rule here, there is no doubt that the parties would still be litigating about whether Plaintiffs were prevailing parties in any of the consent orders ...whether \$400 an hour is a reasonable hourly rate ...or whether Plaintiffs may bill for such noncompensable tasks such as hiring a private investigator to ‘track down’ their clients.”) Putting aside the irony of this argument—because it actually *discourages* settlement to use the Rule to avoid paying fees incurred in settlement negotiations simply because they occur in the context of the State’s own appeal to this Court—this is not so. The District Court’s application of the 3% Rule to drastically reduce Plaintiffs’ supplemental fee award is unrelated to whether the parties continued litigating these issues. After all, regardless of

whether or not the District Court chose to apply the 3% cap to the specific categories of fees requested in Plaintiffs' Third Motion, the State could have appealed from the District Court's fee award by continuing to raise these issues; the State simply chose not to and thereby waived them. Moreover, the salient fact is that the parties are continuing to litigate this dispute—whether particular arguments are or are not still being advanced is of little or no relevance. Accordingly, the District Court's unreasonable application of the 3% Rule did not have the effect of discouraging litigation and the State's argument does not provide a reasoned or logical rationale for upholding its decision.

On the contrary, this case illustrates the tendency of the 3% Rule to *encourage* protracted “fees for fees” litigation. In that sense, the “second major litigation” that concerned the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) is actually encouraged by *Coulter*'s rule. Compensating attorneys reasonably for their work done pursuing and defending their fee awards serves the dual purpose of avoiding disproportionate “fees for fees” awards and discouraging protracted litigation.

2. The State confuses the impact of the 3 % Rule on incentives to settle civil-rights cases.

The State argues that, without the 3% Rule, state defendants will be discouraged from settling civil-rights cases. Third Br. at 34. But a district court's application of *Coulter*'s harsh cap on “fees for fees” requests has, at best, a

minimal impact on incentives to settle the underlying civil-rights dispute. A state defendant in a civil-rights case must weigh many factors in deciding to settle the main case—including the strength of a plaintiff’s claims on the merits, the likelihood of a successful defense, and the threat of paying attorney’s fees for counsel’s work on the main case if the plaintiff should prevail. The potential for paying prevailing plaintiffs a significant “fees for fees” award at some later date (which typically only arises where, as here, the state defendant persists in challenging the underlying fee award at every possible turn) can hardly be considered a primary consideration for settling the main case. If the 3% Rule has any effect on settlement, it is to *discourage* settlement, as state defendants know that they have an enormous tactical advantage in opposing legitimate fee requests by prevailing plaintiffs.

Correcting the State’s misconceptions highlights the injustice of *Coulter’s* default Rule. In theory, attorneys are reasonably compensated for time spent litigating the underlying claims (on which they prevailed), but as a matter of practice they are not reasonably compensated for the time spent seeking that reasonable compensation or defending it against spurious challenges from the state adversary they defeated on the merits. This Court in *Weisenberger* recognized, though, that fee awards related to (1) prevailing counsel’s work on the underlying case and (2) prevailing counsel’s work defending those awards are

conceptually inseparable when it comes to vindicating Congressional intent behind the Fees Act:

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.

Weisenberger v. Huecker, 593 F.2d 49, 53-54 (6th Cir. 1979) (emphasis added). As Plaintiffs argued in their Second Brief (and a point which the State leaves unchallenged), *Coulter* did not cite or distinguish *Weisenberger*, despite establishing a “rule of thumb” that is in direct conflict with that then-existing precedent. *Coulter* at 151. The minimal discussion of “fees for fees” in *Coulter* cites only the Ninth Circuit's *Nucorp Energy* case, in which the court awarded prevailing counsel fees for “*all*” the actual, necessary services that were rendered in connection with the fee application. *Coulter* at 151, citing *In re Nucorp Energy, Inc.*, 764 F.2d 655, 663 (9th Cir. 1985) (emphasis added). Plaintiffs thus respectfully urge this Court to clarify and mitigate the effects of the harsh and unjust (and judicially created) 3% Rule that has evolved from *Coulter*.

3. **The State’s citation of the U.S. Supreme Court’s *Hensley* decision does not support the State’s position because in that case the Supreme Court expressly rejected the kind of rigid mathematical approach to calculating fees that the *Coulter* rule embodies.**

Although a request for attorney’s fees should not result in a “second major litigation,” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the District Court’s application of the 3% Rule to the prevailing Plaintiffs here rewards the party who is responsible for the “second major litigation” that has resulted from Plaintiffs’ legitimate fee requests, and then also penalizes Plaintiffs for undertaking the time and burden of negotiating and settling the underlying complex merits of the dispute in the context of an appeal regarding fees. (Surely the courts would want to *encourage* Plaintiffs to avail themselves fully of the mediation process.) Moreover, the Supreme Court in *Hensley* expressly rejected—twice—the very kind of rigid mathematical rule that this Court adopted in *Coulter*. First, the Supreme Court in *Hensley* agreed with the district court’s *rejection* of a “mathematical approach” or “ratio” to determine what is a reasonable fee in light of all the relevant factors. *Id.* at 435. Next, the Supreme Court noted that there is “no precise rule or formula” for determining the extent to which civil-rights plaintiffs prevail in complex civil-rights litigation such as this, “involving numerous challenges to institutional practices or conditions.” *Id.* at 436-37. It is difficult to describe *Coulter*’s 3% Rule as anything but the kind of “mathematical

approach,” “ratio,” or “precise rule or formula” that the Supreme Court expressly deemed inappropriate in *Hensley*. For this reason, too, this Court should clarify the 3% Rule and make clear that it should not be applied rigidly, as the lower court did here.

B. This Case Embodies The “Unusual Circumstances” Contemplated In *Coulter* Compelling Departure From The 3% Cap.

Even if this Court declines to clarify *Coulter*’s 3% Rule, it should hold that the State’s actions in this case clearly embody the “unusual circumstances” that compel departure from the Rule, as *Coulter* itself recognizes. *Coulter*, 805 F.2d at 151. As Plaintiffs showed in their opening Brief, the facts of this case are analogous to other cases decided by District Courts in this Circuit properly invoking the “unusual circumstances” exception to *Coulter*’s rule, including *American Canoe Ass’n, Inc. et al. v. City of Louisa*, 683 F.Supp.2d 480 (E.D.Ky. 2010) and *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 3% Rule to render a “fees for fees” award nearly identical to that requested by Plaintiffs here in their Third Motion. *American Canoe*, 683 F.Supp.2d at 497-98. In *Communities for Equity*, Senior District Judge Enslin from the Western District of Michigan cited this Court’s decision in *Weisenberger* to justify departing from *Coulter* when faced with an

“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.” *Communities for Equity*, 2008 WL 906031 at *1.

1. The State fails to relevantly distinguish Plaintiffs’ case law. In fact, the State’s recitation of the particular facts of each case only highlights those cases’ similarities to this one.

The State misreads *American Canoe*. As the State recognizes, the district court in *American Canoe* found that the dispute over fees constituted “unusual circumstances” precisely because of the “complicated legal issues on both sides, such as determining the prevailing party and degree of success.” *Id.* at 498 and Third Br. at 36. That is also true here. Due to the State’s resistance to the Plaintiffs’ First and Second Motion for Attorney’s Fees, Plaintiffs were also forced to litigate “complicated legal issues” in the present case. R.99 at 9-16. The State claims to have caught Plaintiffs in a contradiction, but this assertion further underlines the State’s misreading of *American Canoe*.¹ The “exceptional circumstances” of *American Canoe* arose from the mere presence of “complicated legal issues” that required an unusually complex legal dispute over an award of

¹ The State argues in its Brief that Plaintiffs contradict themselves by calling the issues “complex” but also, in arguing against the State, labeling the State’s position as “meritless” and “groundless.” Third Br. at 36. But this is not a contradiction. It is not only consistent, but also commonplace, for courts to conclude both that certain factual and legal issues are complex and also that a party’s position regarding those issues is wholly without merit. Complexity does not, *ipso facto*, make all positions reasonable or meritorious.

fees. *See also 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.”)

Also, the State cannot minimize the fact that Plaintiffs secured multiple affidavits in support of their fee requests, analogous to the “exceptional” efforts expended in *American Canoe*. In addition, the State forced Plaintiffs to take other unusual steps to defend their fee award, including responding to the State’s decision to hire a supposed “expert” to question the reasonableness of Plaintiffs’ hourly rates. R. 99 17-18; R. 99-2. *American Canoe* suggests that the “unusual circumstances” exception should apply when the losing party in a fee-award dispute takes comprehensive and exceptional steps to avoid paying what they owe, as the State has done throughout the lengthy procedural history of this case.

Similarly, the State’s attempt to distinguish *Communities for Equity* only calls attention to the parallels between its actions here and those taken by the losing party in that case. Specifically, as in *Communities for Equity*, the State here has vigorously opposed each fee award on multiple grounds and forced Plaintiffs to respond to an “expert” witness. *Id.* at *19. Plaintiffs had to respond to each of these actions taken and arguments raised by the State or risk forfeiting their entire fee award.

The State claims two reasons why their actions do not match those taken in *Communities for Equity*: (1) the District Court’s praise for the State’s general work ethic during settlement negotiations; and (2) the 20% reduction of Plaintiffs’ fee award ordered by the District Court, purportedly showing the merits of the State’s persistent opposition. Third Br. at 38. But neither of these things are relevant. First, the State’s professionalism during settlement negotiations is not in question. The District Court’s kind verbiage about the conduct of State’s counsel during settlement negotiations with the Sixth Circuit Mediator—which negotiations focused on the merits of the case, not the fee dispute, and to which the District Court was not even privy—does not change the fact that the State has routinely opposed Plaintiffs’ fee award at every opportunity, as in the “unusual circumstances” present in *Communities for Equity*, thus running Plaintiffs’ fee bill up further. Second, it is not relevant whether the Court decided to reduce the fee request to reflect its judgment of the degree of success. This conclusion by the lower court does not change the fact that the State here assumed the same posture of stubborn resistance as the defendants in *Communities for Equity*, which justified departure from *Coulter*’s Rule.

2. The State introduces two cases that did not apply the Fees Act and have no application to this dispute.

The State cites *Auto Alliance, Inc. v. United States Custom Serv.*, 155 Fed. Appx. 226, 229 (6th Cir. 2006) and a Magistrate’s Report and Recommendation in

Lay v. Burley Stabilization Corp., 2010 WL 5139263 (E.D. Tenn. Nov. 2, 2010) to support the notion that merely opposing a fee petition is not an “unusual circumstance.” Third Br. 37. But these cases bear no resemblance whatsoever to the facts of this dispute. *Auto Alliance* was a Freedom of Information Act case decided on summary judgment, and the prevailing party’s request for fees was made under the fee-shifting provisions of FOIA, 5 U.S.C. § 552(a)(4)(E), not the Fees Act. *Lay* was not a civil-rights case like this one, either – it was a derivative suit (a disgorgement/contract/tort case) brought against a tobacco cooperative under Tennessee law. And unlike this case, *Lay* was over (on a motion to dismiss) only a year after it was filed, and the defendant’s motion for fees was made not under the Fees Act, but under the Tennessee Code provision allowing fees for frivolous derivative suits, TCA § 48-56-401(e). It is telling that the State resorts to such inapposite cases – in no way implicating the Fees Act – to justify its position here.

In both *Auto Alliance* and *Lay*, litigation over attorney’s fees continued due to the actions of the prevailing party (the party seeking fees) not, as here, because of the staunch refusal of the losing party to pay the fees it owed to the prevailing party. In *Auto Alliance*, the defendant U.S. Customs Service voluntarily dismissed its appeal of the fee award; the case was only about the plaintiff’s cross-appeal. *Id.* at **1. In *Lay*, the prevailing defendant continuously failed to comply with court

rules, needlessly extending the petition for its own fees.² *Id.* at *5 (“Because the additional work supplementing the request was necessitated by the Defendant’s failure to comply with the rules of fee petition preparation in this Circuit, the Court finds that the fees requested for work performed in supplementing the original fee petition should not be compensated.”) *Lay*, in other words, involved a court declining to award “fees for fees” that were incurred due to the prevailing party’s own procedural missteps and delays. The procedural histories of *Auto Alliance* and *Lay* stand in stark contrast to the State’s persistent opposition on multiple grounds to three separate motions for attorneys’ fees filed by Plaintiffs, the State’s appeal (later dismissed for lack of prosecution) of the District Court’s prior fee award, and the State’s retention of an “expert” witness solely for the purpose of undercutting Plaintiffs’ calculation of fees to which they are entitled.

The reality is that the State’s actions in this dispute mirror the obstinate and persistent opposition to fee petitions found in *American Canoe* and *Communities for Equity* to justify departure from *Coulter*’s 3% Rule, and bear no resemblance to what occurred in *Lay* or *Auto Alliance*. An ongoing policy of resisting fee

² The State’s summary of *Lay v. Burley* is incorrect. The State cites *Lay* for the proposition that “simply because a fee petition was “hotly contested” is not an “unusual circumstance” that would support disregarding three percent rule.” Third Br. at 37. The court in *Lay* notes that the fee petition in that case was not “hotly contested” and that supplemental briefing was only necessary due to the prevailing party’s mistakes. The defendant in *Lay* – not the court – described the proceedings as “hotly contested.” *Id.* at *5.

petitions at every opportunity, and running up Plaintiffs' fee bills further through a war of attrition, as the State has done here, embodies the "unusual circumstances" contemplated in *Coulter*. See *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.'"). Accordingly, the District Court abused its discretion by failing to depart from *Coulter's* 3% Rule under these circumstances.

C. Courts In This Circuit Depart From The 3% Rule When Not Doing So Would Undercut The Intent Of The Fees Act.

As Plaintiffs noted in their opening brief, multiple courts, including this one, have expressly declined to impose strict caps on "fees for fees" awards when doing so would be inconsistent with Congress's intent in enacting the Fees Act to reasonably compensate counsel for prevailing plaintiffs. The First Circuit, for example, opined that "[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 (1st Cir. 1978). The State's response fails to address the logic of *Lund*.

The State contends that a Sixth Circuit case cited by Plaintiffs on this point, *Lamar Advertising Co. v. Charter Township of Van Buren*, 178 Fed.Appx. 498 (6th

Cir. 2006), should not apply here because the State obtained a degree of victory in this case when the District Court declined to give Plaintiffs all of their requested relief. Thus, argues the State, their claims were not “spurious” and *Lamar* has no weight. Third Br. at 40.

But the State misreads *Lamar*. This Court in *Lamar* was motivated to depart from the 3% cap by the Township’s combative decision to lodge an appeal in the first place, not just because the appeal was ultimately unsuccessful. The Township in *Lamar* “needlessly” challenged whether a consent decree between the parties rendered the plaintiffs the “prevailing party,” an issue that the court dismissed as “undisputed.” *Id.* at *501. That same type of challenge is just one of the many meritless grounds on which the State has repeatedly and unsuccessfully opposed Plaintiffs’ fee petitions here. R. 99 at 9-16.

Moreover, the concerns expressed by this Court in *Lamar* are reflected in this case. This Court wrote in *Lamar* that granting “fees for fees” requests in situations where, as here, the “losing party in fee litigation***engage[es] in protracted and needless appellate litigation” is necessary to uphold the intent of the Fees Act.³ *Lamar* thus stands with *Lund*, *American Canoe*, and *Communities for Equity* by suggesting that *Coulter* did not fully contemplate the likelihood of a

³ The State notes that *Lamar* does not expressly discuss the intent of the Fees Act. Third Br. at 39. But *Coulter* does address that intent. *Coulter* at 151. That *Lamar* addresses the intent of the Fees Act by way of citing *Coulter* is an irrelevant distinction.

losing party prolonging fee litigation while the victorious party risks either forfeiting the award or using uncompensated time to defend it. Plaintiffs urge this Court to recognize, as it did in *Lamar*, that departing from the 3% Rule and compensating Plaintiffs in full for time spent defending their award will discourage needless litigation and fulfill the intent of the Fees Act.

D. Plaintiffs' Fee Request Includes Separate Categories Of Work, Two Of Which Were Clearly Not Subject to *Coulter's* 3% Cap.

As Plaintiffs demonstrated in their opening brief, even if this Court declines to clarify *Coulter's* Rule and further decides that some application of the 3% cap here is appropriate and consistent with the Fees Act, the District Court here clearly abused its discretion by applying that strict cap *across the board*, to all three categories of work for which counsel sought to be compensated in Plaintiffs' Third Motion. Although Plaintiffs encouraged the District Court to treat these categories of work separately for purposes of its fee calculation, the District Court erroneously concluded that "all steps" Plaintiffs took during *all* the time at issue in the Plaintiffs' Third Motion "were done in pursuit of obtaining fees." R. 234 at 14. That simply is not correct, given that most of the fees at issue were incurred in negotiating a Consent Decree, the vast bulk of which addressed the merits of Plaintiffs' claims and had nothing to do with fees. The District Court abused its discretion by applying *Coulter's* 3% cap to entire categories of work unrelated to Plaintiff's pursuit of fees, including the time Plaintiffs incurred defending the

State's appeal and the time incurred negotiating the April 2010 Decree under the auspices of the Sixth Circuit's own mediator.

- 1. Plaintiffs properly rely on *Weisenberger*, *Lamar*, and *Americans United* for the proposition that the hours billed to defend against the State's appeal should be exempt from *Coulter*'s 3% cap.**

In response to Plaintiffs' request that the second category of fees requested in their Third Motion (for the hours billed defending the State's prior appeal) be excluded from *Coulter*'s 3% cap, the State again fails to relevantly distinguish any of Plaintiffs' supporting case law. First, despite the State's suggestions to the contrary, Plaintiffs' reliance on *Weisenberger* is entirely justified, as *Coulter* did not distinguish its holding from *Weisenberger* or even cite to the case. *Weisenberger* has not been overruled and remains good law in this Circuit. As such, this Court should continue to heed *Weisenberger*'s warning that when prevailing parties "cannot secure attorney's fees for legal services needed to defend [a fee] award on appeal, the underlying Congressional purpose for the [Fees] Act would be frustrated." *Weisenberger*, 593 F.2d at 54.

Second, in *Lamar*, this Court said that "fees for fees" awards to prevailing plaintiffs "*may*" include the costs associated with appellate litigation, and went on to hold that an appeal similar to the State's in this case was "needless" and awarded "fees for fees" for prevailing counsel's work done defending against such an appeal. *Id.* at *4.

Finally, the State contends that the “bifurcated” issues in *Ams. United for Separation of Church & State*, 717 F.Supp. 488 (W.D.Mich. 1989) impair the applicability of that case here. Third Br. at 42. To the extent that bifurcation has any import here, similar issues in this case were bifurcated as well, in the District Court’s September 2008 Order separating the issues of “prevailing party” and “degree of success” into different hearings. R. 108 at 10. More fundamentally, it is simply irrelevant whether issues were bifurcated. *Americans United* stands for the principle that work done during appellate litigation on attorney’s fees need not be capped at 3% under *Coulter. Id.* at 494-95. Apart from attempting to distinguish the Plaintiffs’ cases on minor procedural points, the State never directly addresses Plaintiffs’ point that, as *Weisenberger*, *Lamar*, and *Americans United* all demonstrate, the fees Plaintiffs incurred for counsel’s work defending against the State’s appeal of the District Court’s fee award should *not* be capped at 3%.

2. Plaintiffs’ work negotiating and drafting the Consent Decree cannot be described as work done “in pursuit of fees.”

As to Plaintiffs’ third category of fees requested in the Third Motion (for the time spent negotiating the lengthy and detailed April 2010 Consent Decree), it defies reason to classify this work, as the District Court did, as strictly fee-related. R. 234 at p.14. The Decree contains a single brief paragraph pertaining to the fees “previously awarded.” It contains more than twenty other far more detailed

paragraphs on the merits of the underlying election dispute that took substantial time and effort to draft and negotiate under the auspices of the Sixth Circuit Mediator.

The State's unwillingness to acknowledge, much less actually address, these simple facts about the April 2010 Decree illustrates the State's intention to oppose the Plaintiffs' fee award at every conceivable turn. The State provides no substantive argument in support of its contention that all of this work should be subject to *Coulter's* 3% cap. Third Br. at 43. The mere fact that the parties mediated the merits of the case in the context of the State's own appeal of a fee award does not mean that the 3% Rule should apply. It is obvious from even a cursory reading of the Consent Decree that the vast majority of the document (and thus the work done drafting and negotiating it by Plaintiffs' counsel) concerns the substance of the underlying civil-rights dispute, and not the issue of fees. R. 210. Plaintiffs' counsel should be compensated for that substantive work on the merits of the dispute *without being subject to the 3% cap that Coulter applies to "fees for fees" work*. A decision by this Court otherwise would force all Plaintiffs' counsel to avoid any discussion of fees as part of any global resolution of a dispute, for fear that all the time spent negotiating a resolution to the substance of a dispute will go uncompensated.

Thus, the District Court abused its discretion by lumping all of Plaintiffs' separate fee requests together into a single "fees for fees" category entirely subject to *Coulter's* 3% cap. At the very least, then, even if it decides not to clarify *Coulter* or find that this case constitutes the "unusual circumstances" that take it out of *Coulter's* harsh and rigid 3% Rule, this Court should remand this case with instructions to the District Court to exclude the second and third categories of fee requests in the Plaintiffs' Third Motion from the drastic effects of that Rule.

III. CONCLUSION

The State has left many of the Plaintiffs' arguments unchallenged, and has failed to relevantly distinguish any of the Plaintiffs' supporting case law. For the reasons described above and in Plaintiffs' opening brief, this Court should thus clarify *Coulter's* 3% Rule and ensure that counsel for prevailing plaintiffs in civil-rights cases are reasonably compensated for the work done in defense of their fee awards. Alternatively, this Court should find that this case embodies the "unusual circumstances" contemplated in *Coulter* to justify departing from the 3% cap, and that the District Court abused its discretion in failing to make that departure. At the very least, this Court should recognize that Plaintiffs' Third Motion requested fees associated with substantial work that was not performed in "pursuit of obtaining fees," and should remand the case to the District Court for a recalculation of the fees and costs to be awarded to Plaintiffs, particularly for the

work associated with the State's appeal of the prior fee award and the negotiation of the April 2010 Decree.

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)(C) because it contains less than 7,000 words, as counted by the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 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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Dated: June 17, 2011

ADDENDUM OF RECORD DESIGNATIONS

<u>Docket Entry No.</u>	<u>Date</u>	<u>Description</u>
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. 203	07/28/09	Opinion and Order Granting Plaintiffs' Second Motion for Attorneys' Fees
R. 210	04/19/10	Consent Decree
R. 234	11/30/10	Opinion and Order Granting in Part and Denying in Part Plaintiffs' Third Motion for Attorneys' Fees and Costs