No. 13-30161

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CITY OF NEW ORLEANS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument in this case.

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STATEMENT OF JURISDICTION

This is an appeal from the district court's entry of a consent decree on January 11, 2013. USCA5 1283-1307; 2USCA5 110, 246.[1] The City of New Orleans timely filed a notice of appeal on February 8, 2013. 2USCA5 3777. This Court has jurisdiction under 28 U.S.C. 1291 to review entry of that decree. As

[1] The record on appeal is cited as "USCA5" or, for the second supplemental record on appeal, "2USCA5." Documents filed in the district court but not included in the record on appeal are cited, by docket number, as "R. _." "Br." refers to the appellant's opening brief.

explained in greater detail below (see Part II.A), however, the Court does not have jurisdiction to consider the lower court's later order of May 23, 2013 denying the City's motion under Federal Rule of Civil Procedure 60(b), because the City did not appeal that order. 2USCA5 4642.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in entering the consent decree that the United States and the City had negotiated, signed, and repeatedly urged the district court to adopt.

2. Whether this Court has jurisdiction to overturn the district court's denial of appellant's Rule 60(b) motion to vacate the decree.

STATEMENT OF THE CASE

In this appeal, the City of New Orleans urges this Court to overturn a consent decree that the City itself negotiated, agreed to, and then repeatedly urged the district court to adopt as a necessary remedy in a suit alleging widespread constitutional violations in the New Orleans Police Department (NOPD). In May 2010, at the invitation of New Orleans Mayor Mitchell Landrieu, the United States began a nearly year-long investigation of constitutional violations by NOPD. USCA5 31-188; 2USCA5 3874, 3891-3892, 4337. The investigation revealed a longstanding pattern or practice of unconstitutional conduct. USCA5 36-38. On July 24, 2012, the United States and the City of New Orleans jointly moved for

entry of a consent decree to remedy the violations. USCA5 190. That same day, the United States filed a complaint in federal district court alleging that NOPD engaged in a pattern or practice of constitutional violations. USCA5 19. The United States sought declaratory and injunctive relief under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141 (Section 14141); the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d (Safe Streets Act); and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-7 (Title VI), and its implementing regulations, 28 C.F.R. 42.101-42.112. USCA5 19.

After extensive review, the district court granted the United States' and the City's joint motion for entry of the consent decree on January 11, 2013. 2USCA5 102-110. On January 31, 2013, the City moved, under Federal Rule of Civil Procedure 60(b) to vacate the consent decree. 2USCA5 2051-2054. On February 8, 2013, the City appealed the district court's order entering the decree. 2USCA5 3777. The court denied the Rule 60(b) motion on May 23. 2USCA5 4595-4596. The City did not appeal that order.

STATEMENT OF THE FACTS

1. The Investigation

At the request and with the cooperation of Mayor Landrieu, the Department of Justice's (DOJ's) Civil Rights Division began an investigation of NOPD in May

2010 under Section 14141, the Safe Streets Act, and Title VI. USCA5 31, 90-91; 2USCA5 4337. As the Mayor explained in a letter inviting DOJ to investigate, he had "inherited a police force that has been described by many as one of the worst police departments in the country." 2USCA5 3874. The troubled force had endured "investigations, indictments, and resignations" because of "malfeasance by members of the police department." 2USCA5 3874. The Mayor told DOJ that the City was "desperate for positive change," and that he sought a "partnership" to "bring about significant change that will lead to a better police force." 2USCA5 3874.

Over the course of nearly a year, a team of seven attorneys and staff from DOJ's Civil Rights Division, based in Washington, DC, interviewed NOPD officers, supervisors, command staff, members of the public, City and State officials, and other interested community members and organizations. 2USCA5 3899; USCA5 56. The United States reviewed the department's policies and procedures, training materials, incident reports, use of force reports, crime investigation files, complaints of misconduct, misconduct investigations, and other data gathered by NOPD. USCA5 56. Investigators went on ride-alongs with officers, attended police briefings, observed police work, and met with representatives of police fraternal organizations. USCA5 56. The team also consulted with approximately 11 law enforcement experts and professionals.

2USCA5 3899. Attorneys from the United States Attorney's Office in New Orleans were also involved, including Sal Perricone, an Assistant United States Attorney (AUSA) who acted as a liaison with the United States Attorney's Office. 2USCA5 3899. Perricone, a criminal prosecutor, played a minimal role in this civil investigation. He was not a decision maker and did not write any part of the findings report. 2USCA5 3899-3900.

Altogether, the United States participated in more than 40 meetings with members of the New Orleans community. USCA5 56. Investigators spoke to local judges, the District Attorney's Office, the Public Defender's Office, the Civil Service Commission, the Office of the Independent Police Monitor, the City Council, Louisiana state legislators, and other organizations. USCA5 56.

2. Findings

Following its exhaustive investigation, the United States issued its findings on March 16, 2011. USCA5 31-188. The findings reveal a longstanding pattern of unconstitutional conduct by NOPD. USCA5 36. Among other problems, the United States found that NOPD engaged in a pattern or practice of unconstitutional force; unconstitutional stops, searches and arrests; and discriminatory policing on the basis of race and gender. USCA5 58-108.

Investigators found that NOPD "routinely use[d] unnecessary and unreasonable force in violation of the Constitution," and their investigation

uncovered "many instances in which NOPD officers used deadly force contrary to NOPD policy or law." USCA5 58-59. Officers used force that "appeared not only unnecessary but deliberately retaliatory." USCA5 59. In some cases, officers used significant force "against mentally ill persons where it appeared that no use of force was justified." USCA5 59. Use of force was hard to track given evidence that "officers likely report only a small fraction of the force they actually use." USCA5 59. The investigation found that NOPD has "allowed the systems and practices that were once in place to prevent and detect excessive force to languish," that NOPD does not provide adequate training, and that it "has tolerated and condoned widespread and routine violation of policy." USCA5 60. As the Mayor summed it up in explaining the results of the investigation, "New Orleans Police used too much force against civilians, too often didn't report it, and often failed to investigate the use of force thoroughly." 2USCA5 3892.

Officers also engaged in a pattern of stops, searches, and arrests that violated the Fourth Amendment. USCA5 87-88. Detentions without reasonable suspicion were routine, and led to unwarranted searches and arrests without probable cause.

The investigation revealed evidence of discrimination because of race, gender, and language ability. USCA5 24, 88. Often there was no one to assist victims or witnesses who cannot speak English. USCA5 98-100; see also 2USCA5 4260. This led officers to ignore potential crimes against non-English speakers,

mistake victims for suspects, and, in at least one case, arrest a non-English speaker for failing to follow an order she could not understand. USCA5 99. NOPD relied informally on a few bilingual officers to provide translation, even calling on these officers via their personal cell phones while they were off duty. USCA5 97-99. NOPD made little or no effort to recruit officers with foreign language skills. USCA5 110.

The investigation also found evidence of racial bias in policing. For example, in 2009 NOPD arrested young black residents at a rate of sixteen to one compared with white residents, adjusting for population. USCA5 96. In 2010, the ratio was eleven to one. USCA5 96. Nationally, the ratio was approximately three to one in 2009. USCA5 96. This is "strongly suggestive of differential enforcement" as the disparity is too great to be attributed entirely to differing crime rates between whites and blacks. USCA5 96.

NOPD systematically failed to investigate or even properly report sexual assault, misclassifying many cases under a "miscellaneous," non-criminal designation. USCA5 100-108. Officers discouraged rape victims from reporting assaults and routinely failed to interview witnesses or suspects. USCA5 103-105. Accusations of rape within a marriage or existing relationship were often ignored. 2USCA5 4274.

The investigation found that officers also discriminated against victims of domestic violence. A law professor who runs a domestic violence clinic in the City testified to a "real issue here in New Orleans with the victim of domestic violence being arrested instead of the perpetrator." 2USCA5 4273. This practice "makes a case essentially unprosecutable and often punishes the victim for calling the police." 2USCA5 4273. While jurisdictions nationally arrest women in ten percent of domestic violence calls, NOPD arrested women at three times that rate. 2USCA5 4273.

The United States found that these ongoing constitutional violations are caused by entrenched deficiencies within "a wide swath of City and NOPD systems and operations, including failures to: adopt and enforce appropriate policies; properly recruit, train, and supervise officers; adequately review and investigate officer uses of force; fully investigate allegations of misconduct; identify and respond to patterns of at-risk officer behavior; [and] oversee and control the system of paid details." USCA5 43-44.

NOPD's largely unregulated system of secondary employment, which allows officers to work for third parties, undermines constitutional policing in a number of ways. USCA5 126. It undermines the command structure, creates conflicts of interest, and facilitates dangerous problems with fatigue. The City's Police Superintendant Ronal Serpas said that the system was "in need of an

overhaul" to "restore public trust." 2USCA5 3906, 3908. Because of the "complexity of this issue," he explained, "collaboration with the Department of Justice" was necessary to accomplish needed reforms. 2USCA5 3906. Investigators noted that "few if any large police departments" had a system of details so "entrenched and unregulated." USCA5 127. They heard accounts of "ghosting," where officers check in to NOPD for a shift and then leave for a detail. USCA5 127. Officers negotiate directly with employers, leading to conflicts of interest and corruption. USCA5 46-47. The Mayor explained that the detail system has led to "officers with divided loyalty spending most of their time on details." 2USCA5 3893. In one instance, officers insisted a business hire certain detailees at a particular wage, threatening that otherwise the business would not get regular NOPD police protection. USCA5 129. The business owner was told: "You f*** with me and you will never see a police car again." USCA5 129. Another officer called his detail employer to warn him so he could escape impending arrest. USCA5 128. There was an "expectation that officers will 'look the other way' when faced with a conflict between enforcing the law and protecting the business's interest." USCA5 128.

As the Mayor pointed out, the detail system has also led to "the perversion of the command structure." 2USCA5 3893. Fellow officers negotiate details for others, even their supervisors, and take a cut. USCA5 128. It is difficult for a

supervisor to discipline a subordinate he or she depends on for potentially lucrative detail assignments. Where the secondary employment system undermines proper discipline and supervision, NOPD cannot correct problems such as use of excessive force, improper arrests, or deficient reports. USCA5 128.

The City joined the United States in announcing the findings report, and the Mayor said the findings were "sobering" and that the report "provides us with an honest assessment" and the "full weight of the federal government behind our reforms." 2USCA5 3923. He promised to "do what ever it takes to make this right." 2USCA5 3923.

3. The NOPD Consent Decree Negotiations

After release of the United States' findings, the parties began negotiating a consent decree in October 2011. 2USCA5 3900. The negotiations were led by attorneys from the Civil Rights Division. Attorneys from the United States Attorney's Office in New Orleans, including Perricone, were also involved in the negotiations. 2USCA5 3899. Perricone did not write any part of the draft consent decree, or the final consent decree. 2USCA5 3900.

In March 2012, it came to light that Perricone had posted remarks about current events, including NOPD and the consent decree, in the public comments section of a local newspaper's website. 2USCA5 3932, 3937. Perricone used an alias as a username. Perricone admitted to making the postings on March 13,

2012, resigned six days later, and was no longer involved with the work of the Civil Rights Division or the U.S. Attorney's Office. 2USCA5 3832, 3834-3937, 3899-3900, 3959-3961. The decree was not finalized until months later in July 2012. 2USCA5 3900.

During the negotiations, the City's attorneys told negotiators that they were upset by Perricone's behavior and told Civil Rights Division negotiators for the first time that he had applied to be superintendant of NOPD. 2USCA5 2086, 3900. The Mayor publicly worried that Perricone's comments had "poisoned" the negotiations, but also said the incident was "a hiccup in the process" and promised negotiators would "battle through it." 2USCA5 3936-3838.

4. The Consent Decree's Provisions

On July 24, 2012, the parties signed and jointly filed a consent decree with the district court. USCA5 190, 329. In announcing the decree, the Mayor said it would help "fundamentally change the culture of the NOPD once and for all" and combat "decades of corruption, racial profiling, and misconduct by some members of the New Orleans Police Department." 2USCA5 3890-3891. He said the City and the United States "had to tackle these challenges head on together," and that the "voluntary partnership" would "allow[] true change to take hold." 2USCA5 3891-3892. With the consent decree, the Mayor hoped "the transformation of the NOPD can be systemic and more importantly, lasting." 2USCA5 3894.

Among other things, the decree provides for reforms in searches, investigatory stops, arrests, use of force, and custodial interrogations, as well as improved complaint intake. 2USCA5 116, 3769. It creates rules and oversight for secondary employment. 2USCA5 116, 3769. The decree has a four-year term, and the parties may then request its termination, provided NOPD has been in compliance for two years. 2USCA5 236; USCA5 326. As the City's Police Superintendant has stated, "[t]his is a marathon, not a sprint." 2USCA5 3923.

As the parties told the court in urging adoption of the decree, the decree specifically addresses the fact that "the difficult job of a police officer has been made more difficult in New Orleans by policies that are obsolete or disregarded, training that is inadequate in amount and quality, and accountability that is lax and inconsistent." USCA5 195. With the decree in place, officers will have better policy guidance, more training, closer supervision, broader officer support systems, and fair investigatory and disciplinary procedures. USCA5 196. There will be a more equitable allocation of details, allowing officers to participate without going through informal networks.

5. The Fairness Hearing And The Court's Consideration Of The NOPD Decree

On September 14, 2012, the United States and the City again urged the court to adopt the decree, filing a joint supplemental motion for entry of an amended consent decree reflecting edits that were made to correct typographical errors and

to add clarity; to reflect changes requested by the Court; and, as appropriate, to incorporate edits suggested in comments submitted to the Court. On September 21, 2012, the court held a full-day hearing to consider the fairness, adequacy, and reasonableness of the proposed decree. USCA5 1672-1674.

The hearing was open to the public. 2USCA5 106. Police, experts, the City's Independent Police Monitor, and members of the public (including victims of police misconduct) testified at the hearing and were questioned by the court.[2] 2USCA5 106-107, 4161. In addition, the district court accepted 158 written public comments. USCA5 914-1281, 1309-1340, 1396-1418; 2USCA5 106-107. Community members said NOPD needed "systematic change" (2USCA5 4247) and many felt the decree did not go "far enough" (2USCA5 4270). See also 2USCA5 4234-4247.

In response to questions from the court about the secondary employment provisions, the City explained it had hired outside counsel to ensure compliance with the Fair Labor Standards Act (FLSA) and assured the court that "[t]he F[LS]A issue has been dealt with." 2USCA5 4348, 4355. Superintendant Serpas testified

[2] The Crescent City Lodge No. 2, Fraternal Order of Police, Inc., and the Community United for Change, a non-profit association of local citizens interested in police reform, participated in the hearing and moved to intervene. USCA5 341-343, 381-386, 585-594, 616-627, 730-740, 797-806. The City and the United States had opposed the motions and the district court denied them. USCA5 545-571, 897-901, 904-913, 1283-1307. The would-be intervenors have filed separate appeals. USCA5 1569-1570; R. 144.

that the decree's secondary employment provisions brought the City, which had not updated its system in 50 years, in line with other cities that had centralized secondary employment systems. 2USCA5 4355. The Superintendant testified that the City could implement its secondary employment system in compliance with the FLSA. 2USCA5 4355.

The court also asked the Superintendant about potential problems with funding the decree, including added training. The Superintendant replied that the City was prepared to pay for needed reform. "[W]e're just going to get it done. The mayor has to find the funds, I know he is committed to that; I've talked to many members of the [City] coun[ci]l, they're committed to it." 2USCA5 4357.

The hearing (conducted two years after the investigation had begun) showed that problems with NOPD continued. The Superintendant testified that the department's internal affairs unit had received over 3000 complaints about police conduct over the past two years. 2USCA5 4353-4354. The City's Independent Police Monitor called the decree "long overdue" and reported that her office, in the last year, had responded to over 200 complaint contacts, reviewed over 50 investigations, and looked into 15 officer-involved shootings. 2USCA5 4184-4185. Representatives of the African-American and Latino communities testified about persistent distrust and fear of police, demand for interpreters, and

"continu[ing]" and "ongoing" problems despite promises for change. 2USCA5 4244, 4259-4261, 4265-4266, 4268.

Throughout the fairness hearing, the City urged the court to adopt the decree. 2USCA5 4337-4357. Superintendant Serpas told the judge that "what this police department needs more than anything and what this community needs more than anything is the independence of your court and the independence of your monitor who says to the people of New Orleans this department has improved." 2USCA5 4356. The City lauded its "partnership with the Department of Justice in achieving sustained reforms." 2USCA5 4337-4338.

6. Developments In The Case Involving The Orleans Parish Prison

In September 2009, even before starting its NOPD investigation, the United States completed its investigation of – and publicly announced findings of – unconstitutional conditions at another institution in New Orleans, the Orleans Parish Prison (OPP). *Jones* v. *Gusman*, Nos. 12-859, 12-138, 2013 WL 2458817, at *2 (E.D. La. June 6, 2013); 2USCA5 297; 2009 OPP Findings Letter (September 11, 2009), available at http://www.justice.gov/crt/about/spl/documents/parish_findlet.pdf (OPP Letter). The Parish Sheriff administers the jail, but as provided for under State of Louisiana law, the jail receives most of its funding from the City. *Jones*, 2013 WL 2458817, at *3-4.

The United States investigated OPP under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, and found a pattern or practice of constitutional violations, such as "a disturbingly high" number of prisoner-on-prisoner assaults and failure to segregate predatory prisoners from vulnerable ones. OPP Letter 11. In addition to the public release, the United States sent its 2009 findings directly to the Sheriff's Office, the Mayor, and the City Attorney as soon as they were completed. OPP Letter 32.

After issuing its findings, the United States tried to work with the Sheriff to improve conditions. See Update to Letter of Findings (April 23, 2012) 1, available at www.justice.gov/crt/about/spl/findsettle.php#corrections (Update Letter). Negotiations were slow. See Update Letter 1-2; Doc. 73-1 at 1, *Jones*, *supra* (No. 12-859). The City, through its attorney, was involved in these negotiations from the beginning. In October 2011, the United States sent the City a draft of the proposed decree in the OPP case, which required the City to provide adequate funding to achieve constitutional conditions of confinement for its detainees. 2USCA5 3834, 3896, 3984. Indeed, when it ultimately approved the OPP consent decree, the court in that case categorically rejected the City's claim that it was "left out of the negotiations process" or was "unaware that is was facing additional, significant revenue requests in connection with the OPP litigation." *Jones*, 2013 WL 2458817, at *35. The *Jones* court quoted the court's findings in this case,

rejecting as "patently false" the City's claim it did not know about the impending OPP expenses. *Id*. at *35 n.496.

On April 2, 2012, private plaintiffs – prisoners and former prisoners – sued the Sheriff and other OPP officials, alleging that "[r]apes, sexual assaults, and beatings are common place throughout the facility." 2USCA5 4616 n.102; *Jones*, 2013 WL 2458817, at *13. That case, *Jones* v. *Gusman*, Nos. 12-859, 12-138 (E.D. La.), was assigned to District Court Judge Lance M. Africk, who is not involved in the NOPD case. During the next three days, attorneys from the United States re-inspected the OPP and found "alarming" and "worsened" conditions. Update Letter 2; *Jones*, 2013 WL 2458817, at *2 n.21. There were "shockingly high rates" of violence and "widespread sexual assaults, including gang rapes." Update Letter 2; *Jones*, 2013 WL 2458817, at *14. Guards routinely ignored fights, injuries, and calls for help. Update Letter 5-6. The OPP was understaffed, with an officer assigned to supervise as many as 120 prisoners. *Id*. at *6.

On April 23, 2012, the United States publicly issued an update to its findings letter, which was sent to the Mayor and the City Attorney, and urged the Sheriff to enter into "an aggressive schedule of negotiations" to resolve dangerous conditions. Update Letter 1, 21; *Jones*, 2013 WL 2458817, at *2. The City continued to participate in negotiations, discussing funding for the OPP decree on May 15, 2012. 2USCA5 3994. The City reviewed the draft OPP decree and

proposed changes to the United States on May 31, 2012 and again on July 11, 2012. 2USCA5 3989-3990; *Jones*, 2013 WL 2458817, at *34 n.491.

In July 2012, before the City consented to the NOPD decree and urged the district court to approve it, the Sheriff sent the City a $45 million cost estimate for fiscal year 2013 – a $22.5 million increase over OPP's existing budget. 2USCA5 3897. In August 2012, the United States sent an email to the Sheriff's and the City's attorneys and offered "[t]o start the conversation" with the Sheriff and the City "regarding a reasonable compromise" amount of $34.5 million, representing a $12 million budget increase, about halfway between the existing budget and the Sheriff's request. 2USCA5 3992. The figure was, as the email said, a conversation starter, meant to facilitate negotiations between the Sheriff and the City. Even after the August email, the City continued to urge the court in this case to adopt the NOPD consent decree. USCA5 1420. Negotiations over the proposed OPP decree continued after the United States intervened as a party in the *Jones* case in September 24, 2012. *Jones*, 2013 WL 2458817, at *2.

Despite its liability for jail expenses and involvement in settlement negotiations, the City had nevertheless not yet intervened in the OPP case. The Sheriff filed a third party complaint against the City on October 1, 2012. *Jones*, 2013 WL 2458817, at *34. Although the City later opposed entry of the OPP consent decree, the *Jones* court noted as of October 12, 2012, that "the parties,

including the City, had been successful in reaching agreement on all of the substantive provisions in the proposed [OPP] Settlement Agreement, with the exception of an interim funding amount to be in effect until completion of a staffing analysis." *Jones*, 2013 WL 2458817, at *34 (internal quotation marks omitted). At a status conference on October 15, 2012, the *Jones* court found that there was "no dispute" about unconstitutional conditions at OPP, the efforts needed to satisfy constitutional standards, and the City's "responsib[ility] for funding those efforts." *Ibid.*

The court approved the *Jones* decree, over the City's objections, on June 6, 2013. *Jones*, 2013 WL 2458817, at *34. The *Jones* court agreed with the United States that there are pervasive unlawful conditions at OPP. *Jones*, 2013 WL 2458817, at *1-2. The jail was "horrific," "plagued by suicides and other in-custody deaths, rapes and other sexual assaults, stabbings, and severe beatings." *Id.* at *9 (internal quotation marks omitted). Staff sometimes ordered "hits" or beatings among prisoners. *Id.* at *16-17. In 2012, OPP sent prisoners to the emergency room 600 times, mostly because of injuries from violence. *Id.* at *9. A comparably sized jail in Memphis had seven emergency room transports. *Ibid.* One expert told the court it was the worst jail he had ever seen in 35 years of reviewing prisons, and was likely the worst large city jail in the nation. *Ibid.*

OPP also had "an exceptionally low level of staffing," with some living areas left unsupervised. *Jones*, 2013 WL 2458817, at *10-11. Because of the "dramatically insufficient staffing," the jail improperly uses prisoners as "tier representatives" to keep order, allocate food and other resources, and help make housing assignments. *Id*. at *17, 25. The "tier representatives" have frequently assaulted and raped vulnerable inmates the prison puts under their control. *Id*. at *17-19. Without staff to perform regular searches, weapons are "widespread and readily available." *Id*. at *10. Cells are unsanitary, with feces smeared on walls, leaking sewage, and piles of moldering, uneaten food. *Id.* at *19, 27.

When the OPP decree was entered in June 2013, the City still disputed "an interim funding amount" which was "to be in effect until completion of a staffing analysis." *Jones*, 2013 WL 2458817, at *34-36 (internal quotation marks omitted). The *Jones* court assumed, "for the sake of argument," that the City would be liable for $22.5 million in additional funding, based on the Sheriff's estimate. *Id*. at *32. The court nevertheless approved the settlement, explaining that the remedial measures were necessary and narrowly drawn. According to the court's order, the City and the Sheriff will make all future funding decisions, with the monitor or the court intervening in case of a dispute. *Id*. at *31. The court said there might be other sources of funding for the prison, and "at this stage of the proceedings, the Court does not know whether any additional revenue is needed." *Id*. at *32.

7. Entry Of The NOPD Decree And The City's Motion To Vacate

On January 11, 2013, at a status conference to discuss possible changes to the NOPD decree, the City abruptly informed the court in the present case that it wished to "orally move[] to withdraw its consent to the joint motion and withdraw from the consent decree." 2USCA5 2265. That same day, the court granted the United States' and the City's previously filed joint motion to enter the amended decree. 2USCA5 110. It noted the City's change of position in its minute order of that date and explained that it would consider a motion to vacate the decree under Federal Rule of Civil Procedure 60(b). 2USCA5 110.

On January 31, 2013, the City moved to vacate the decree under Rule 60(b) and, on February 8, 2013, filed a notice of appeal of the court's entry of the decree. 2USCA5 288, 2051, 3777. In its motion to vacate, the City claimed that the OPP settlement, Perricone's anonymous blogging, the procedures used at the fairness hearing, and the City's potential liability under the FLSA justified relief from the consent decree. 2USCA5 2051-2055.

On May 23, 2013, the court denied the City's motion to vacate, finding that the City had not presented any basis for relief under Rule 60(b) or otherwise. 2USCA5 4642. The City's purported grounds for vacating the decree, the court pointed out, did not show any newly discovered evidence or changed circumstances since they were all known to the City before it signed the decree.

2USCA5 288, 4595-4642. The court also denied the City's motion to stay the decree pending appeal of its order entering the decree. 2USCA5 4714-4715. The City filed an emergency motion in this Court seeking a stay. This Court denied the stay because the City failed to make "the requisite strong showing of a likelihood of success on the merits of its appeal." 2USCA5 4889.

8. Recent Conditions

Problems with NOPD persist. In 2012, NOPD's Public Integrity Bureau received over a thousand complaints about NOPD. Independent Police Monitor Report 8 (March 31, 2013) (IPM Report), available at http://modiphy.dnsconnect.net/~nolaipm /main/uploads/File/Reports/ 2012%20 Annual%20Rpt%203-31-13.pdf; see also 2USCA5 4184-4185 (Independent monitor's testimony at the fairness hearing). There were 66 complaints of unauthorized force. IPM Report 14. NOPD reported that police used force against 335 individuals, 266 (or 79%) of whom were African American. IPM Report 28. The City's Independent Police Monitor reported three fatal shootings by NOPD officers. IPM Report 4. In one of these incidents, the officer was indicted by the State for manslaughter. IPM Report 4. Ten officers were dismissed for misconduct, including criminal behavior, falsifying reports, obstruction of justice, sleeping on the job, and excessive force. IPM Report 19-20. Two officers were dismissed for their involvement in domestic violence. IPM Report 20. There have

been continued reports of failure to provide policing for non-English speakers. R. 277-6.

9. Louisiana's Recent Statute Regulating Police Details

On June 4, 2013, after the court had denied the City's Rule 60(b) motion, the Louisiana legislature passed La. Rev. Stat. Ann. § 33:2339(A)(1) (2013), which sets restrictions on a new office the City has established, pursuant to the consent decree, to coordinate secondary employment. The statute, which was first introduced April 8, see Louisiana State Legislature, 2013 Regular Legislative Session: SB 159 by Senator J.P. Morrell, available at http://www.legis.la.gov/legis/BillInfo.aspx?s=13RS&b=ACT94&sbi=y (last visited July 11, 2013), by the son of a New Orleans Councilwoman, see Bruce Eggler, *New Orleans City Council committee advances measures creating new office to oversee police details*, The Times-Picayune, (June 27, 2013), available at http://www.nola.com/politics/index.ssf/2013/06/city_council_committee_advance.html, essentially requires that NOPD and the new office conduct some of their communications in writing. The statute says that the office "may only communicate with the New Orleans Police Department, its staff, officers, or superintendent regarding matters concerning paid detail or secondary employment assignments. All *other matters* shall be communicated *in writing*." La. Rev. Stat. Ann. § 33:2339(A)(1) (2013) (emphasis added). The City notified the court of the

statute on June 17, asking "the Court's guidance on how" the new office should proceed to coordinate secondary employment "under this newly imposed legal restriction." R. 279 at 2, 4. The United States argued that the new law did not impede compliance. R. 280. The district court has not yet addressed the matter.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in first entering and then declining to vacate a consent decree the City had, only months before, negotiated, signed, and urged the court to adopt.

A party may not unilaterally withdraw from a consent decree after it has presented the agreement to the court for approval, even if it attempts to withdraw before the decree is entered. There is no question here that the City did consent, as it actively negotiated the decree and its subsequent amendments, and repeatedly urged the court to adopt the decree. The City cannot now point to various events it knew about at the time it signed the decree, including a pending jail reform settlement and anonymous blogging by an AUSA, to suggest its consent was somehow invalid. As the Mayor explained when describing the United States' investigation and announcing the City's agreement to the consent decree, "We asked for it and we got it." 2USCA5 3892. The City's recalcitrance only underscores the need for a court-enforceable order to reform a longstanding pattern and practice of unconstitutional policing by NOPD.

The City did not appeal the court's denial of its Rule 60(b) motion to vacate the decree and, therefore, this Court is without jurisdiction to review that decision or to consider arguments the City presented only in its motion to vacate. For purposes of this appeal, those arguments are waived.

The City's contentions, nevertheless, are frivolous and without record support. The City contends that the subsequent settlement of the unrelated *Jones* case remedying unlawful conditions at the jail somehow invalidates the decree in this case because it makes it harder for the City to fund the NOPD decree. The City also claims that, although it was well aware of the relief being sought in the OPP settlement, it had no idea what it would cost and that the United States knew the cost but concealed it from the City. The district court in this case properly found such claims "patently false" and the district court administering the jail settlement agreed. 2USCA5 4620; *Jones* v. *Gusman*, Nos. 12-859, 12-138, 2013 WL 2458817, at *35 n.496 (E.D. La. June 6, 2013).

The City also claims that the decree must be vacated because an attorney involved in the negotiations wrote anonymous online web postings. This argument is meritless, as conduct the City knew about before it agreed to the decree cannot support a Rule 60(b) motion. Furthermore, there is no evidence anonymous postings on a news website influenced the negotiation and drafting of the decree, much less forced the City to enter a decree it would have otherwise rejected.

The City also claims that the decree conflicts with newly-passed state law and with the FLSA. It does not. As the City now concedes, the secondary employment provisions of the consent decree fall within the FLSA's "safe harbor" provisions for police officers. Br. 27. The new state statute, which merely regulates communication between NOPD and the City office coordinating secondary employment requirements, does not conflict with the decree. NOPD may comply with the statute by assuring that communication with the office is, where required, done in writing.

Vacating a properly entered consent decree under Rule 60(b) is an extraordinary remedy, which a court may grant only under very limited circumstances. It is not available to a party that simply changes its mind, especially where the underlying decree seeks to correct glaring constitutional violations. *White Farm Equip. Co.* v. *Kupcho*, 792 F.2d 526, 530 (5th Cir. 1986). The City has shown no mistake, surprise, newly discovered evidence, misrepresentation, injustice, or other ground that would allow, much less require, a district court to release the City from its obligations under the decree. The district court did not abuse its discretion in holding the City to its agreement, and this Court should affirm.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING A CONSENT DECREE BOTH PARTIES HAD URGED IT TO APPROVE

A. Standard Of Review

This Court reviews the lower court's entry of a consent decree for abuse of discretion. *Ibarra* v. *Texas Emp't Comm'n*, 823 F.2d 873, 879 (5th Cir. 1987).[3]

B. The Chronology Of This Case

Because this case is factually complex and the chronology of events is so important in understanding why the City's arguments are meritless, we believe it would be helpful to start by presenting a timeline for the Court to consider in deciding the issues in this case.

- Sept. 11, 2009 — U.S. issues findings letter issued for OPP
- May 5, 2010 — Mayor Landrieu requests DOJ's help in reforming NOPD (2USCA5 3874)
- May 2010 — U.S. accepts invitation to investigate NOPD (2USCA5 3899, 4337)
- March 16, 2011 — U.S. issues findings report for NOPD (USCA5 31)
- Oct. 25, 2011 — City given initial draft of NOPD decree (2USCA5 3900)

[3] As more fully described in Part II.A, *infra*, the City did not appeal the denial of its Rule 60(b) motion. This court should not consider arguments the City made for the first time in that motion, including arguments about the OPP settlement, procedures used in the fairness hearing, Perricone's involvement in the decree's negotiations, and purported conflicts with the FLSA. Nevertheless, the United States has addressed some of these arguments here where the City claims they relate to consent.

- Oct. 26, 2011 — City given draft of OPP decree with funding provisions (2USCA5 3984)
- Nov. 15, 2011 — U.S., City have first in a series of meetings to discuss NOPD decree draft (2USCA5 3900)
- February 2012 — U.S. asks Mayor to meet to discuss City funding for OPP (2USCA5 3988)
- March 2012 — Perricone's blogging revealed; he resigns (2USCA5 3959-3961)
- April 2, 2012 — *Jones* plaintiffs sue Sheriff over OPP (2USCA5 4616-4617)
- April 23, 2012 — DOJ publicly issues updated OPP findings
- May 15, 2012 — U.S. and City continue discussing OPP decree, including funding provisions (2USCA5 3994)
- May 31, 2012 — City reviews and comments on proposed OPP decree (2USCA5 3989-3990; *Jones* v. *Gusman*, Nos. 12-859, 12-138, 2013 WL 2458817, at *34 (E.D. La. June 6, 2013)
- June 28, 2012 — U.S. invites City to meet to finalize OPP consent decree funding (2USCA5 3990)
- July 19, 2012 — Sheriff emails City a proposed OPP budget of $45 million to enable compliance with OPP decree (2USCA5 3897)
- July 24, 2012 — City and U.S. jointly move for entry of NOPD decree (USCA5 190)
- Aug. 22, 2012 — U.S. emails City suggesting negotiations for OPP funding begin at $34.5 million, partway between Sheriff's proposal and current budget (2USCA5 3992)
- Sept. 14, 2012 — City and U.S. file joint motion for entry of amended NOPD decree (USCA5 1420)
- Sept. 21, 2012 — Court conducts NOPD fairness hearing; City again urges approval of decree (2USCA5 4159, 4337-4339)
- Sept. 25, 2012 — U.S. intervenes in OPP case, *Jones* (2013 WL 2458817, at *2)
- Oct. 1, 2012 — Sheriff files third party complaint against City in OPP case (*Id*. at *3)
- Dec. 11, 2012 — U.S. and Sheriff move *Jones* court to enter OPP decree (*Id*. at *3)
- Jan. 11, 2013 — Court grants joint motion and enters NOPD decree, Court notes City's desire to withdraw in minute order

(2USCA5 246)

- Jan. 31, 2013 — City moves to vacate NOPD decree (2USCA5 2051)
- Feb. 8, 2013 — City appeals entry of NOPD decree (2USCA5 3777)
- May 23, 2013 — Court denies City's Rule 60(b) motion to vacate NOPD decree (2USCA5 4595-4596)
- June 6, 2013 — *Jones* court enters OPP consent decree (2013 WL 2458817, at *1)

C. The City Consented To The Decree And May Not Unilaterally Withdraw

A party may not effectively "renounce" or "disavow" a decree after it has signed it and presented it to the court. Br. 4, 20. It makes no difference here that the City informed the judge, shortly before entry of the decree, that it no longer supported the settlement. Indeed, the City cites no authority for its proposition that such an objection is a "timely withdrawal" allowing it to escape its commitments. Br. 20. Quite the opposite is true: Once the parties present an agreement to the judge, "a federal court may hold them to their word." *White Farm Equip. Co.* v. *Kupcho*, 792 F.2d 526, 530 (5th Cir. 1986); see also *Ibarra*, 823 F.2d at 879. "[F]or purposes of determining whether the [party] entered into an enforceable settlement agreement, it is irrelevant that they attempted to revoke their consent prior to entry of judgment." *Cavallini* v. *State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 268 (5th Cir. 1995).

The City was not entitled to withdraw from the decree while it was under the court's consideration, and the court, at the time the City expressed its change of heart, "was not free to reject the consent decree solely because the City no longer

wished to honor its agreement." *Stovall* v. *City of Cocoa*, 117 F.3d 1238, 1242 (11th Cir. 1997). The court in this case properly "provided a procedure for the City to present its arguments in writing" through a motion to vacate. 2USCA5 4641. This was the City's only recourse. *Stovall*, 117 F.3d at 1242.

Contrary to the City's claim (Br. 19), it plainly consented to the NOPD decree. It invited the United States to New Orleans to help reform NOPD, spent months negotiating a settlement, signed the decree, lauded it at a press conference, presented it to the court, testified for its entry at a hearing, and filed two motions urging its adoption. USCA5 190, 1420; 2USCA5 3874, 3894, 4337-4357. A City witness told the judge that court oversight was "what this community needs more than anything." 2USCA5 4356.

A later event, such as a liability that the City incurs in a completely separate matter at a later date, does not vitiate consent. See Br. 19-22; Part II.B.1, *infra*. "[T]he scope of a consent decree must be discerned within its four corners," *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971), and the decree did not contain any provisions conditioning the City's consent on the state of the City budget, the outcome of the New Orleans Parish Prison case (see Part II.B.1, *infra*), or on the City being able to ignore constitutional violations in other City-funded institutions. When it agreed to the decree, the City was committed to "find[ing] the funds" for needed reform. 2USCA5 4357.

There is no support, on the record or elsewhere, for the City's assertions that it was "beguiled into submitting" to the "purported consensual judgment" and no reason to suspect it acted under duress or "signed in error." Br. 8, 14, 20-21. The City knew well before it signed the NOPD decree about negotiations related to the OPP decree. 2USCA5 4620; *Jones*, 2013 WL 2458817, at *34. It knew about the OPP decree because it was an active participant in the negotiations. *Jones*, 2013 WL 2458817, at *35. There is no logical or legal justification for the City's argument that the expense of the OPP decree means that the City never actually consented to the NOPD decree. Br. 19. As the City would have it, it can retroactively withdraw consent by incurring unrelated liabilities. The City's unsupported claim that it "could not agree to reforms the City would be unable to afford" does not change the fact that it negotiated, signed, and submitted the NOPD decree for approval by the court. Br. 20.

Nor does Perricone's involvement suggest the City never really consented to the decree. It is important to remember what Perricone actually did. Perricone made anonymous postings on a newspaper's website and was one of numerous commenters there. The City knew about the comments, and yet it continued to negotiate. 2USCA5 3900, 3936-3938, 4627.[4]

[4] Although the City might not have learned about every one of Perricone's comments (most having nothing to do with the decree), before it signed the decree, (continued . . .)

It cannot be the case that anonymous online comments so "tainted" the negotiations (Br. 28) that they coerced the City to agree to a decree it otherwise never would have accepted. And it is preposterous to suggest that anonymous online comments somehow "misled" experienced City negotiators. Br. 30-31.

D. The Court Did Not Change The Decree Before Or After Entry, And The Party's Alterations Were Limited To Fixing Typographical Errors And Other Minor Changes

Contrary to the City's assertions (Br. 20), the decree in force today is the same decree the City negotiated and urged the district court to approve in the parties' supplemental motion. USCA5 1420. There was no "ongoing modification of the Consent Decree" after it was entered. Br. 31. There is no docket entry indicating amendment. In claiming that the court kept changing the decree, the City relies almost entirely on a declaration from its own counsel describing various emails and calls with the court. Br. 31; 2USCA5 2265-2266. They also point to marked drafts the court circulated via email. These show the court made suggestions, but they do not show that the court actually *changed* the decree now in force. Certainly, the parties would not be able to enforce a provision that appears only in an affidavit or email. The City is simply wrong to suggest there

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(. . . continued)
the City points to no comments discovered after September 2012, when it again urged the court to adopt the decree. USCA5 1420; 2USCA5 4337-4339.

were changes entered "over either party's objection." Br. 31 (citation and internal quotation marks omitted).

The only changes made after the parties submitted the original decree for approval were minor ones the parties *jointly* negotiated and presented to the court, on September 14, 2012, in a motion and an "errata sheet." USCA5 1420, 1561-1566. The parties explained that the alterations "correct typographical errors," "add clarity," and "reflect changes requested by the Court." USCA5 1420. However, the changes that were adopted were not forced on the parties. The court proposed many changes, and the parties only accepted some of them. USCA5 1420. As the joint motion explained, the parties proffered various "modifications" "the Parties ha[d] agreed" upon. USCA5 1420.

Following the fairness hearing, the court held a series of conferences to discuss proposed edits, and that process was entirely proper. Judges can raise concerns about a decree they will adopt as a court order, and it is well within a court's discretion to suggest modifications. *United States* v. *City of Miami*, 664 F.2d 435, 444 (5th Cir. 1981) (en banc) (per curiam) (approving court's request for modifications of a consent decree).

E. The Court Properly Evaluated The Decree And Did Not Abuse Its Discretion In Finding It Fair, Adequate, And Reasonable

"A party cannot appeal a judgment to which he has consented," and the City in this case signed the decree and told the court it was fair, adequate, and

reasonable. *In re Thomas*, 223 F. App'x 310, 313 n.2 (5th Cir. 2007). It cannot now claim the decree was "inherently flawed and impermissible." Br. 4. As this Court has noted, a "valid settlement agreement[] should be enforced." *Matter of Omni Video, Inc*., 60 F.3d 230, 233 (5th Cir. 1995). The "value of voluntary compliance is doubly important" in cases involving public entities "because the remediation of governmental discrimination is of unique importance." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring).

Even if this Court were to look behind the City's consent and consider its claims, there is no indication that the decree is not "fair, adequate, reasonable and appropriate under the particular facts." *City of Miami*, 664 F.2d at 441 n.13 (internal quotation marks and citation omitted). The court reviewed the parties' joint motion, the decree, the complaint, the United States' 158-page findings letter, intervenors' arguments, and more than 150 public comments. See *Ibid.*; USCA5 19, 31; 2USCA5 102-107. The court held several conferences and conducted a full-day fairness hearing, taking testimony from the parties, experts, and the public. 2USCA5 106-107. The City, the Superintendant of Police, former victims of police violence, the Independent Police Monitor, and others all lauded the decree. Superintendant Serpas testified on behalf of the City that he "fe[lt] very comfortable that this document is fair, reasonable, and adequate" and "holds us to the standards * * * the community * * * expect[s]." 2USCA5 4351. See *Cotton* v.

Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (noting, in a civil rights class action settlement, that the "trial court is entitled to rely upon the judgment of experienced counsel for the parties" and "absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel").

In approving the decree, the court highlighted its extensive review and said the evidence showed the decree to be "fair, adequate and reasonable, and * * * not the product of fraud, collusion, or the like." 2USCA5 109. In addition, the court explained that the monitor, who would oversee implementation of the decree, would ensure "the continued involvement of the Court" and "due consideration" of concerns that may arise as procedures are developed to implement the decree. 2USCA5 109.

Contrary to the City's contentions (Br. 6, 20, 31), the court's careful review, which included questions and suggestions for improvement, does not show that the decree was "tainted," that it "was objectionable in the District Court's eyes," or that the court's ultimate approval of the decree was somehow improper. The court did not "resurrect[] a Consent Decree that it had previously rejected" (Br. 4), and its conduct was not tantamount to a ruling that the decree is not fair, adequate, or reasonable. A court may reasonably suggest changes to a decree that is fair and reasonable but not – in the court's opinion – perfect. The fact that the court "did

not immediately adopt the decree" shows the court's diligence; it does not render the decree suspect. Br. 6.

The City also alleges that the court abused its discretion at the September 21, 2012, fairness hearing because it did not enforce evidentiary rules or allow cross-examination. Br. 31. But the City did not object to the court's decision not to employ the rules of evidence for the fairness hearing, and so the City has forfeited this argument. USCA5 332, 339-340; 2USCA5 4638-4639.[5] See *Ohler* v. *United States*, 529 U.S. 753, 756 (2000). Nevertheless, the procedures were well within the court's discretion. Parties who settle have given up the full protections of a trial, and "[t]he temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Mars Steel Corp.* v. *Continental Ill. Nat. Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987). This Court has acknowledged that, in presiding over such hearings, "the trial court may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Cotton*, 559 F.2d at 1331. The City cites no authority suggesting such handling is "fraught with procedural missteps." Br. 31; see *International Union, United Auto.*,

[5] While the City objected to some exhibits and statements (see 2USCA5 4166-4169), it did not point to any specific evidence in its Rule 60(b) motion and does not now raise any of those individual objections before this Court, much less explain how the evidence prejudiced its case. The City objected primarily because of other litigation, not because it thought evidence would make the hearing unfair. 2USCA5 4204 (expressing concern that "people can get this transcript and present it in any other litigation").

Aerospace, & Agr. Implement Workers of Am. v. *Gen. Motors Corp*., 497 F.3d 615, 636 (6th Cir. 2007) (noting "no court of appeals, to our knowledge, has demanded that district courts invariably conduct a full evidentiary hearing with live testimony and cross-examination before approving a settlement").

Oddly, the City claims that these procedures "eroded 'consent,'" even though they were applied long after the City had negotiated and signed the decree and cannot logically have had a retroactive effect. Br. 31. Furthermore, at the close of the hearing, and despite the court's decision not to employ the rules of evidence, the City again urged the court to adopt the decree. 2USCA5 4337-4339. Indeed, the procedures helped, rather than harmed, the City's presentation of its case. The City benefitted from being able to introduce its evidence without restriction. 2USCA5 4337-4357. In the end, there was a voluminous record compiled through months of cooperation between the parties. The Court imposed special evidentiary restrictions the City requested. USCA5 1636-1637, 1665. The court barred witnesses from naming individual officers or City employees accused or convicted of wrongdoing, or from commenting on any matters still under investigation. USCA5 1667-1668. The court struck testimony, required witnesses to limit their testimony, and excluded some exhibits to comply with the City's request. 2USCA5 4168, 4182, 4230-4232, 4235, 4238.

The City notes that the United States was able to submit hearsay evidence and avoid cross-examination. Br. 31. But it does not point to any individual document or witness responsible for "erod[ing] 'consent'" or harming the City in any specific way. Br. 31. The district court explained that the evidence in question was not important in its assessment of the decree. 2USCA5 4640. The City also does not point to any time when it requested an opportunity to cross-examine any witness. Throughout the hearing, the City urged the court to enter the decree. 2USCA5 4337-4339.

II

THE CITY HAS PRESENTED NO ARGUMENTS THAT WOULD ALLOW THIS COURT TO REVERSE THE DISTRICT COURT'S DENIAL OF THE RULE 60(b) MOTION

A. This Court Is Without Jurisdiction To Review The District Court's Denial Of The City's Rule 60(b) Motion

The City urges reversal of an order it did not appeal. The district court entered the consent decree on January 11, 2013, but did not deny the City's motion to vacate until May 23, 2013. 2USCA5 110, 4642. The City has not appealed that second order. "Notices of appeal are entitled to liberal construction," but they cannot encompass future orders. *Ingraham* v. *United States*, 808 F.2d 1075, 1080-1081 (5th Cir. 1987). Accordingly, while this Court may review the district court's entry of the decree, it is without jurisdiction to consider the lower court's denial of the City's motion to vacate.

Where a party appeals the underlying order, but not the denial of a later Rule 60(b) motion, this Court has consistently found itself without jurisdiction to review the subsequent order. *McKethan* v. *Texas Farm Bureau*, 996 F.2d 734, 744 (5th Cir. 1993); *Schwegmann Bank & Trust Co. of Jefferson* v. *Simmons*, 880 F.2d 838, 844-845 (5th Cir. 1989). A Rule 60(b) motion is appealable and an "appeal of the underlying judgment does not bring up a subsequent denial of a Rule 60(b) motion." *Schwegmann*, 880 F.2d at 844-845.

Indeed, the City's failure to appeal precludes this Court from considering *arguments* raised for the first time in the Rule 60(b) motion, even if the City attempts to present them as reasons to reverse the district court's entry of the decree. "An appeal from the ruling on [a Rule 60(b)] motion must be separately taken if the issue raised in that motion is to be preserved for appeal." *Ingraham*, 808 F.2d at 1080-1081. Here, the City has "failed to preserve for appellate review the * * * issue[s] raised in [its] Rule 60(b) motion, because [it] did not separately appeal." *McKethan*, 996 F.2d at 744. Indeed, the City recently found itself in a similar posture. Its arguments, "raised for the first time in the City's post-judgment Rule 60(b)(4) motion," were "not properly before" this Court on an appeal from the underlying order. *Paul Davis Nat., Subchapter S Corp.* v. *City of New Orleans*, 615 F.3d 343, 345-346 (5th Cir. 2010).

B. Even If This Court Were To Consider The Arguments Made For The First Time In Support Of The City's Rule 60(b) Motion, The District Court Did Not Abuse Its Discretion In Denying The City's Motion

Even if this Court were to review the district court's denial of the Rule 60(b) motion, it would only reverse if there were an abuse of discretion. *Lowry Dev.* v. *Groves & Assocs. Ins*., 690 F.3d 382, 385 (5th Cir. 2012). And its review of a denial of Rule 60(b) relief must "be meaningfully narrower than would [its] review on direct appeal of the underlying order." *Pryor* v. *United States Postal Serv*., 769 F.2d 281, 286 (5th Cir. 1985).

Because a consent decree is binding when it is presented to a court, a party may only overturn a decree via the "extraordinary remedy" available under Rule 60(b). The rule permits a court to vacate a judgment, but it is an "uncommon means for relief," *Lowry Development*, 690 F.3d at 385, and "should be used sparingly," *Favre* v. *Lyndon Property Insurance Co*., 342 F. App'x 5, 9 (5th Cir. 2009). The rule provides for discretionary relief on "just terms," Fed. R. Civ. P. 60(b), but "does not allow district courts to indulge a party's discontent over the effects of [the party's] bargain." *Sheng* v. *Starkey Labs., Inc*., 117 F.3d 1081, 1082 (8th Cir. 1997).

The City first claims that it is entitled to relief under Rule 60(b)(1), which allows courts to vacate orders for "mistake, inadvertence, surprise, or excusable neglect." Br. 19-22. This Court has observed that the rule requires a "showing of

unusual or unique circumstances justifying such relief." *Pryor*, 769 F.2d at 286; see *id.* at 287 (holding denial of relief was appropriate in the "absence of compelling or extraordinary circumstances"). The rule "does not provide relief for mistakes made in the negotiation" of a contract or a decree, but instead "deals with mistakes that occur in the *judicial process* of enforcing" the agreement. *Cashner* v. *Freedom Stores Inc.*, 98 F.3d 572, 578 (10th Cir. 1996). "[A] party cannot have relief under Fed. R. Civ. P. 60(b)(1) merely because he is unhappy with the judgment." *Chick Kam Choo* v. *Exxon Corp.*, 699 F.2d 693, 695 (5th Cir.), cert. denied, 464 U.S. 826 (1983) (brackets in original; citation omitted).

The City also claims it is entitled to relief under Rule 60(b)(2) because of "newly discovered evidence" that could not have been uncovered "with reasonable diligence." Rule 60(b)(2); Br. 18, 28-29. To warrant such relief, the new evidence must actually be relevant and dispositive. A movant must demonstrate: "(1) that it exercised due diligence in obtaining the information; and (2) that the evidence is material and controlling and clearly would have produced a different result." *Hesling* v. *CSX Transp., Inc.*, 396 F.3d 632, 639 (5th Cir. 2005) (citation omitted). The Court requires strict application of these criteria. See *Ag Pro, Inc*. v. *Sakraida*, 512 F.2d 141, 143 (5th Cir. 1975), rev'd on other grounds, 425 U.S. 273 (1976). A court should not grant relief based on facts "well within the [party's] knowledge"

before judgment. *Templet* v. *HydroChem Inc*., 367 F.3d 473, 479 (5th Cir. 2004), cert. denied, 543 U.S. 976 (2005).

Under Rule 60(b)(3), which the City also claims supports relief (see Br. 28-31), a party must show "(1) that the adverse party engaged in fraud or other misconduct, and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Hesling*, 396 F.3d at 641 (citation omitted).

Finally, the City claims that it is entitled to relief under Rule 60(b)(5) and 60(b)(6). See Br. 18, 22. A party seeking a Rule 60(b)(5) modification of a consent decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992), and not "merely that it is no longer convenient to live with the decree's terms." *LULAC* v. *City of Boerne*, 659 F.3d 421, 437 (5th Cir. 2011) (internal quotation marks and citation omitted). Relief under Rule 60(b)(6) requires "extraordinary circumstances." *Rocha* v. *Thaler*, 619 F.3d 387, 400 & n.28 (5th Cir.), clarified, 626 F.3d 815 (2010) (citation omitted). Here, the City has not met the strict requirements for relief under any of the avenues Rule 60(b) provides.

1. Entry Of A Separate Consent Decree To Remedy Unconstitutional Jail Conditions Does Not Support Rule 60(b) Relief

The City improperly seeks to make its performance under the NOPD decree contingent upon the outcome in an entirely separate matter. Furthermore, the City

accuses the United States, without grounds, of withholding information about the jail settlement and claims that this required the district court to vacate the NOPD decree.

a. The United States Did Not Withhold Information About The Orleans Parish Prison Consent Decree, Which The City Helped Negotiate

The settlement of the OPP matter does not show any mistake, surprise, new evidence (much less evidence that could not have been discovered with diligence), fraud, misrepresentation, or inequity that would compel the district court to vacate the NOPD consent decree. Br. 18. Two courts – the district court in this case and the *Jones* court – have rejected the City's arguments (Br. 12-14) that it was caught off guard by the OPP settlement. In denying the City's motion to vacate the NOPD decree, the district court in this case found the City's claim that "it had no knowledge of the potential cost ramifications" for the prison decree "patently false." 2USCA5 4620. The *Jones* court agreed. *Jones* v. *Gusman*, Nos. 12-859, 12-138, 2013 WL 2458817, at *34, *35 n.496 (E.D. La. June 6, 2013). The City has failed to show, as it must to prevail, that the court's finding was clearly erroneous.

The record supports both courts' findings. In 2009, the United States publicly announced findings of unconstitutional conditions at the prison and sent a copy of the OPP findings letter to the Mayor's office and the City's attorney.

2USCA5 297; OPP Letter. As the *Jones* court pointed out, "the conditions at OPP have long been the subject of litigation," and the current OPP case is "the product of investigations and complaints arising in the past five years." *Jones*, 2013 WL 2458817, at *1. The City has funded the jail, including other settlements against it, for decades. Doc. 76 at 3, *Jones*, *supra* (No. 12-859).

It was no surprise to the City, and hardly an "ambush" (Br. 2), when the United States intervened in the *Jones* litigation to resolve the same issues the United States was investigating. Indeed, the City could have intervened itself had it wanted to represent its interests more directly. Instead, it waited until the Sheriff filed a third party complaint against the City in October 2012. *Jones*, 2013 WL 2458817, at *34. There is nothing "deeply suspect" (Br. 14) about the timing of the respective settlements; it is simply unfortunate in both cases that the citizens of New Orleans have had to wait so long for a remedy.

The City was included in the OPP negotiations, including funding discussions, from the beginning. In October 2011, before private plaintiffs sued the jail and before the parties met to discuss the NOPD decree, the United States sent the City the draft decree for OPP, which included the requirement that the City "allocate funds sufficient" for staff needed to maintain constitutional conditions. 2USCA5 3834, 3850, 3900, 3984, 3896. In fall of 2011, the United States invited the City to meet and discuss the OPP agreement. 2USCA5 3984-3987. Again in

February 2012, the United States asked the Mayor to meet with the Sheriff and the United States to pin down "how much money the City will provide for the running of the prison." 2USCA5 3988. The City did not accept all the United States' and the Sheriff's invitations to attend negotiations, but in May 2012, the City joined discussions about funding. 2USCA5 3994. The City reviewed the proposed OPP decree and sent comments via email on May 31, 2012. 2USCA5 3989-3990; *Jones*, 2013 WL 2458817, at *34 n.491.

Again on June 28, 2012, the United States wrote the City's attorney asking her to "identify[] the appropriate players from the City and [Sheriff's Office] to discuss and finalize [the OPP] consent decree funding" and to "propose[] dates and times for a meeting, preferably the week of July 18." 2USCA5 3990. The record shows the United States actively engaged the City in the reform process. It did not "encourage" any "misunderstandings" about the case, as the City now alleges. Br. 19. The *Jones* court found that the City "actively participated in the negotiations," including funding decisions, to resolve the case. *Jones*, 2013 WL 2458817, at *34.

Nor was the City surprised by the cost of the jail settlement. On July 19, 2012, before the negotiations of the NOPD decree were completed, the Sheriff told the United States and the City he thought he would need a total budget of $45 million to bring the jail up to constitutional standards. 2USCA5 3897. He itemized costs for 130 additional deputies, pay increases to reduce the rapid

turnover rate, and new equipment. 2USCA5 3897. He also noted that the jail was in debt from previous funding shortfalls. 2USCA5 3897. The Sheriff's estimated total budget for the jail was $22.5 million above the budget already allocated. 2USCA5 3897.[6] The Sheriff offered to provide "more specific details" and to discuss funding "with whomever the City feels is appropriate," and suggested a time to talk the next day. 2USCA5 3897.

After the Sheriff's $45 million cost estimate, the United States' August 2012 suggestion would have come as a relief to the City rather than as a surprise. The United States sent the City and the Sheriff an email in an attempt to facilitate negotiations and to resolve the dispute about funding. DOJ's email offered "[t]o start the conversation regarding a reasonable compromise" total amount of $34.5 million. 2 USCA5 3992. This figure was in between the Sheriff's request of $45 million and the previous year's funding of $22.5 million. 2USCA5 3992. The figure was not a demand, an estimate, or a "cost projection." Br. 13. The United States was hoping to catalyze negotiations between the Sheriff and the City. The

[6] The City claims that only $1 million of the $45 million is "tied directly to the Consent Decree." Br. 21. This is not the case, as $3.85 million is for increased staffing, $11.6 million for pay raises, and $3.6 million for medical staff. 2USCA5 3897. The $1 million is for new equipment "necessary to comply with the consent decree," and although this is the only enumerated expense using the words "consent decree," it would have been clear to any reader that all the items, except perhaps the $2.45 million for service of debt, were for compliance. If the City was confused, it could have accepted the invitation to discuss "more specific details." 2USCA5 3897.

figure was based on the Sheriff's estimate and was not some long-held secret. Br. 13; see also 2USCA5 3992. The United States' efforts to revitalize negotiations in the longstanding OPP case cannot plausibly be characterized as "wait[ing] until after the City signed the [NOPD] Consent Decree to saddle the City with OPP reforms" (Br. 20), or failure to "inform the City of the potential cost of the OPP Consent Decree" (Br. 2-3). At any rate, after the August 2012 email, the City again urged the court, in a supplemental motion and at the fairness hearing, to enter the NOPD decree. USCA5 1420; 2USCA5 4337-4339. The United States had no secret information about the cost of OPP, and the fact that the *Jones* Court is still holding hearings to determine the cost of OPP and the division of costs shows that this remains an open question. See Doc. 493, *Jones*, *supra* (No. 12-859).

b. Expenses Incurred In A Separate Matter Do Not Justify Vacating The NOPD Consent Decree

The fact that the City is obligated to fund the jail decree does not make the NOPD decree inequitable or justify relief from it. Added expenses unrelated to the matter at hand do not make the decree "no longer equitable," as contemplated under Rule 60(b)(5), nor do they qualify as "extraordinary circumstances" as required under Rule 60(b)(6). *Rocha*, 619 F.3d at 400 & n.28 (citation omitted). Courts may not freely apply Rule 60(b) to invalidate consent decrees. *Rufo*, 502 U.S. at 383; *LULAC*, 659 F.3d at 437. And there is no unfairness in holding the City to its promises. Where constitutional violations exist in two City-funded

institutions, the City is obligated to remedy both. The City cannot use the urgent jail reforms as an excuse not to reform its police force. The NOPD decree and the OPP decree are not "overlapping proceedings." Br. 22. All the cases have in common is the coincidence that years of – perhaps decades of – unconstitutional conditions are finally being addressed simultaneously.

The City has been underfunding the jail for years, contributing to squalid conditions, dangerous understaffing, and debt. The City is, predictably, less willing to fund an institution it does not control. But these funding arrangements, which are a matter of state law, *Jones*, 2013 WL 2458817, at *5, cannot excuse the City from its legal obligations.

The City claims – without evidence – that it is unable to afford the NOPD reforms. Br. 22. Indeed, it told the district court in this case it could not afford the NOPD decree because of *Jones*, and it told the court in *Jones* that it could not afford jail reform because of the NOPD decree. *Jones*, 2013 WL 2458817, at *35. Presumably, it seeks relief from both. Any government's budget is finite, but if "financial strain" were grounds to rescind a court order (Br. 22), judgments against government entities would rarely be enforceable. In theory, any judgment against a city affects "the City's ability to meet its myriad core responsibilities to the citizens." Br. 22. Unconstitutional conditions and compliance with court orders must be prioritized. Where there are "unconstitutional conditions and practices,

the defenses of fund shortage * * * have been rejected by the federal courts." *Gates* v. *Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974). A government "cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability." *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 631 F.2d 162, 165 (2d Cir. 1980).

Contrary to the City's arguments (Br. 22-23), its circumstances are not comparable to the defendants' unusual situation in *Rufo*, 502 U.S. at 367. There, defendants built a new jail to comply with a consent decree, but unexpected prison population growth over the intervening years hindered compliance. *Id*. at 375-377. The Supreme Court held that the district court should have considered the unforeseen circumstances. *Id*. at 385-388. The Court noted "[f]inancial constraints" may be "appropriately considered," but the Court certainly did not state that a defendant could escape a consent decree by simply identifying competing expenses. *Id*. at 392-393. Indeed, the Court emphasized that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations." *Id*. at 392.[7] Even if the City's budget situation was so

[7] The City mistakenly claims that this rule does not apply because the City did not admit to constitutional violations and the decree might go beyond constitutional requirements. Br. 23-24. *Rufo* and other cases applying this rule involve similar consent decrees, and parties may seek relief in a consent decree that they could not have obtained in a litigated case. *Rufo*, 502 U.S. at 392. The City claims that there is no more threat of constitutional violation because it has

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dire that it might otherwise support a change in the decree, a "modification should not be granted where," as here, "a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo*, 502 U.S. at 385.

Here, the City has not even begun to show that the added expense of the OPP decree makes it impossible or unjust to require compliance with the obligations the City undertook in the NOPD decree. The City has already included NOPD decree compliance in its 2013 budget. City's 2013 Annual Operating Budget 39, available at http://new.nola.gov/mayor/budget. The City incorrectly states that the district court did not consider the City's financial hardship. Br. 23. The court did consider this argument as carefully as it could, given that the City did not present any detailed evidence or argument to describe the alleged "financial strain that will occur" or to support its bald assertion that compliance would somehow "bankrupt[] the City." Br. 22, 24; see 2USCA5 2051, 4620-4623 (acknowledging the City's "finite resources"). The City expected the lower court to take its word and it now expects this Court to simply accept as fact its claim that "these expenditures will likely create" a "crippling budget shortfall." Br. 21.

(. . . continued)
made various changes. Br. 23. The City's claims find no support in the record and there is no reason to think beneficial changes would have been made absent the United States investigation and the consent decree. In any event, even after the decree, contrary to the City's assertions, problems with NOPD persist. See pp. 22-23, *supra*.

The cost is not an unreasonable burden considering that the City's total budget adopted for 2013 is over $835 million. City's 2013 Annual Operating Budget 24. The City expects to spend more than $134 million on NOPD in 2013. *Id*. at 226, 230. To put the OPP settlement in perspective, it does not equal 10% of the City's current police budget and is less than 1.5% of the total budget.

Moreover, the City fails to acknowledge that the United States has provided substantial financial criminal justice assistance to New Orleans. For example, to help fund law enforcement, DOJ has given the City some $21 million in grants, technical assistance, and aid since 2009. See 2USCA5 3876, 3879, 3882, 3886, 3888. DOJ has also provided for two federal agents to work in NOPD's internal affairs unit and provided funding to launch the City's first comprehensive pretrial services system. 2USCA5 3888; see Vera Institute of Justice, http://www.vera.org/project/new-orleans-pretrial-services (last visited July 11, 2013). DOJ has provided NOPD with extensive officer training programs and with help in working through its considerable backlog of rape kits awaiting testing. USCA5 55; 2USCA5 4008. The United States also has provided New Orleans with federal grants of almost $500 million from 2008 to 2013, including assistance from FEMA to fund the construction of a new modern OPP building. 2USCA5 3887, 4006-4008.

Compliance will hardly "bankrupt[] the City" and there is no evidence the decree threatens "the health and welfare of New Orleans residents." Br. 24. The NOPD and OPP judgments represent long-overdue obligations to the citizens of New Orleans, who are entitled to constitutional standards in policing and jail conditions. As the district court explained, "[t]he City's current displeasure regarding the OPP Consent Decree" does not warrant setting aside the NOPD decree. 2USCA5 4623.

2. Perricone's Behavior Does Not Justify, Much Less Require, Setting Aside The Decree

The City also claims that the behavior of former AUSA Sal Perricone required the court to vacate the decree. Br. 14-16, 28-31. But his conduct in making online comments, however improper, does not rise to the level of "fraud or other misconduct" and did not influence the City's voluntary agreement to reform NOPD. *Hesling*, 396 F.3d at 641. His personal opinions and comments on a blog hardly rise to the level of "a secret campaign to undermine the City, NOPD," and the Superintendent, and they cannot be construed as "a federal smear campaign by DOJ." Br. 29.[8] They have no bearing on whether the consent decree is valid. Br. 15.

[8] The City inconsistently insists the comments are part of a "campaign by DOJ" and the work of "a rogue DOJ negotiator." Br. 3, 29. Both are hyperbole. The comments were not part of the consent decree negotiations. While the City

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The City states that Rule 60(b)(3) applies where "a party knowingly misrepresents or conceals a material fact when they have a duty to disclose, and such concealment is done to induce another party to act to its detriment." Br. 28 (citing Sixth Circuit precedent). Perricone's blogging does not satisfy this standard. By concealing his identity online, Perricone did not, by any stretch of the imagination, hide "a material fact" in the negotiations. Br. 28. The comments were neither material nor unknown. And they were never part of any official proceeding, were never represented as the position of the U.S. Attorney's Office, and were written independently by one AUSA.

More importantly, Perricone's conduct does not meet the standard this Court has established in *Hesling*, 396 F.3d at 641. In order to vacate a judgment for fraud or misconduct, a party must show that the wrongdoing "prevented [it] from fully and fairly presenting [its] case," rendering the judgment "unfairly obtained." *Ibid*. That did not happen here. Perricone was only one representative on a large team of negotiators, and he played a minor role in the negotiations. The decree and the findings letter were drafted by other attorneys working in Washington, DC. The City fully participated in lengthy negotiations that went on long after Perricone had left.

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notes that another AUSA also made anonymous comments on news sites (Br. 17), she was never involved in negotiating the consent decree.

Even when there *has* been misconduct or concealment that is directly related to negotiation of a settlement (which is not present here), "[m]isconduct alone * * * is not sufficient to justify the setting aside of a final judgment" under Rule 60(b). *Summers* v. *Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004). In *Summers*, the court declined to overturn a consent judgment where one party had, despite relevant discovery requests, intentionally concealed a state lawsuit making the same claims it was attempting to resolve in federal court. *Ibid*. In addition to misconduct, the court explained, a movant must show prejudice. *Ibid*.

In this case, Perricone concealed his identity, but the City found out about his comments before negotiations concluded, so this is not a case where evidence was "discovered" after judgment, as required under Rule 60(b)(2). See *Ag Pro, Inc.*, 512 F.2d at 143. Shortly after Perricone's conduct was revealed in March, the City's attorneys told DOJ negotiators that they were upset by his behavior and publicly complained about his remarks. 2USCA5 3900. The Mayor nevertheless promised the parties would "battle through it," and they resumed negotiations. 2USCA5 3936-3938. The district court correctly found that "[t]he City's behavior" in continuing negotiations after it learned of Perricone's on-line comments "belies its assertion that Perricone's comments enabled the United States to unfairly obtain the City's agreement to enter into the Consent Decree." 2USCA5 4627.

The City resorts to the use of colorful characterizations instead of identifying any actual evidence that Perricone's behavior had an influence on the decree. It presented no evidence that the online postings "prevented [it] from fully and fairly presenting [its] case" to the court or somehow rendered the consent decree "unfairly obtained." *Hesling*, 396 F.3d at 641. Perricone's contribution to the process seems to be limited to providing the metaphor "aorta of corruption" to accurately describe problems with secondary employment. Br. 17 (citation omitted).

The United States' findings letter, drafted by attorneys in the Washington-based Civil Rights Division, concluded that secondary employment had a "corrupting effect" on the department and that "[t]here are few aspects of NOPD more broadly troubling." USCA5 126. Indeed, the Mayor himself acknowledged that the detail system has led to "officers with divided loyalty" and "the perversion of the command structure." 2USCA5 3893. Superintendant Serpas similarly acknowledged that the system required "an overhaul" to "restore public trust," and the City needed "collaboration with the Department of Justice." 2USCA5 3906, 3908. The Mayor and Superintendant did not reach these conclusions based on anonymous online comments.

3. The Decree Does Not Violate The FLSA

Despite clear law to the contrary, the City argues that parts of the NOPD decree setting rules for secondary employment "potentially violate" the FLSA and "expose the City to potential liability" under the statute. Br. 3, 25. That argument, however, is directly refuted by the City's admission in this appeal that it "certainly agrees with the District Court's conclusion that the FLSA law-enforcement safe-harbor provision applies to the NOPD Consent Decree." Br. 27. By agreeing that the decree falls within FLSA's safe harbor, the City has effectively conceded that it is not in danger of FLSA liability.

Under the safe harbor provision, the City will not be considered officers' "employer" for details, even though it will manage aspects of that employment, so the City will not be liable for overtime pay under the FLSA. See 29 U.S.C. 207(p)(1); 2USCA5 308-310, 4629. Federal regulations permit the City to "facilitate" and oversee secondary employment just as the NOPD decree requires. 29 C.F.R. 553.227(d). Many other police departments across the nation have similar policies. 2USCA5 3981, 4355.

The City argued below, despite contrary statutory and regulatory provisions, that the decree violated the FLSA. Accordingly, DOJ sought a written opinion from the United States Department of Labor addressing the decree's provisions (DOL). 2USCA5 308-310, 3898. DOL confirmed that officers' secondary

employment would fall under 29 U.S.C. 207(p)(1), which exempts "[s]pecial detail work for fire protection and law enforcement employees" from overtime requirements. 2USCA5 3898. In deciding the FLSA issue, the district court evaluated the statute, the regulations, and DOL's letter. 2USCA5 4628-4634. It pointed out that "the City has not provided any caselaw or authority contradicting" the letter. USCA5 4633. Likewise, in this appeal, the City failed to provide any legal authority contradicting the DOL's conclusion.

The City inexplicably asks this Court to "remand[]" this case "if" DOL one day changes its stated position on this issue. Br. 27. Hypothetical future changes in law cannot, of course, justify abrogating a decree that currently complies with federal law.

4. Louisiana's Newly-Enacted Statute Provides No Basis For Vacating The Decree

The City claims that a new Louisiana statute conflicts with the NOPD decree's secondary employment provisions. See Br. 25. That statute, which was neither enacted nor brought to the district court's attention until after it had denied the Rule 60(b) motion, does not justify vacating the NOPD decree.

Otherwise valid state laws cannot stand in the way of a federal court order if they would prevent enforcement. *Stone* v. *City & Cnty. of S.F.*, 968 F.2d 850, 861-862 (9th Cir. 1992), cert. denied, 506 U.S. 1081 (1993). "State policy must give

way when it operates to hinder vindication of federal constitutional guarantees." *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971).

This Court need not resolve any conflict here, however, as there is none. The decree requires the City to coordinate secondary employment through an independent, civilian run agency. 2USCA5 200. To comply with these provisions, the City has created the Office of Police Secondary Employment. The new statute requires that the office's staff:

> may only communicate with the New Orleans Police Department, its staff, officers, or superintendent regarding matters concerning paid detail or secondary employment assignments. All other matters shall be communicated in writing, in a standardized format available for public review.

La. Rev. Stat. Ann. § 33:2339(A)(1) (2013); R. 279-1 at 1.

The statute does not prohibit communication between the new office and NOPD in any way that would prevent the office from properly administering the secondary employment provisions. The law will simply require that the office and NOPD communicate in writing when discussing matters that do not "concern[] paid detail or secondary employment assignments." *Ibid*. Nothing in the decree prohibits written communication, and so long as the new office implements appropriate administrative procedures, there is no conflict. Indeed, the stated intent of the statute is not to restrict communication, but to increase transparency. Statement of Lowell C. Hazel, Archived Video of Louisiana House of

Representatives, House Floor (May 30, 2013 at 1:45:00), http://house.louisiana.gov/H_Video/2013/May2013.htm. It was amended to avoid conflict with the decree. *Ibid.*

* * * * *

Taking the City's argument at face value, the City asks this Court abrogate a decree based on pure speculation and conjecture about future costs for another decree still being decided by a different federal court; potential revelation of additional statements from a former federal prosecutor who played only a minimal role in this case; and hypothetical changes in DOL's position regarding the application of the FLSA. What is not conjecture is the fact that the City actually negotiated and signed the NOPD consent decree. The Court should hold the City to the Mayor's promise that the City will end "decades of corruption, racial profiling, and misconduct" by NOPD, "bring about significant change that will lead to a better police force," and "do what ever it takes to make this right." 2USCA5 3874, 3890-3891, 3923.

CONCLUSION

This Court should affirm the district court's decision entering the consent decree. The Court lacks jurisdiction to consider the denial of the City's Rule 60(b) motion. In the event, however, that the Court reaches the merits of the Rule 60(b) issue, it should affirm the district court's denial of that motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 11, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all counsel are registered with the CM/ECF system and service will be accomplished through that system.

s/ April J. Anderson
APRIL J. ANDERSON
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLE:

(1) contains no more than 14,000 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and,

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

Dated: July 11, 2013

s/ April J. Anderson
APRIL J. ANDERSON
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