IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-30161

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

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR A STAY PENDING APPEAL

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UNITED STATES' OPPOSITION
TO DEFENDANT'S MOTION FOR A STAY PENDING APPEAL

Appellant City of New Orleans seeks to stay implementation of a consent decree that it described as necessary to "dramatically and fundamentally reform [the New Orleans Police Department (NOPD)] to achieve protection of the constitutional rights of all members of the community, improve the safety and security of the people of New Orleans, and increase public confidence in NOPD." R. 256 at 11.[1] The decree is the product of an extensive investigation by the Department of Justice (DOJ), begun with the urging of the Mayor, who declared that the "police force, the community, our citizens are desperate for positive change" (R. 184-1 at 1); the product of findings of serious and widespread constitutional violations; and the product of testimony of the Chief of Police that the decree is necessary and "holds [the NOPD] to the standards" it "should [observe]" and the "community expects" (R. 184 at 13; R. 256 at 17). Without arguing that the decree is defective in its design or implementation, the City urges this Court to prevent it from going into effect. Specifically, the City seeks to halt the selection of a court monitor, a provision at the heart of the decree and essential to its implementation. Common to decrees of this kind, monitors are appointed to serve as the eyes and ears of the Court, to help assess if promises made are being

[1] R. _" refers to documents filed with the district court, by docket number. "Mot. _" refers to pages in the City's Emergency Motion.

kept. As the Chief of Police explained, "what this community needs more than anything is the independence of [the] [C]ourt and the independence of [the Court's] monitor who says to the people of New Orleans this department has improved." R. 256 at 17.

The City's repeated and enthusiastic support for the NOPD decree changed abruptly after the parties in a completely separate lawsuit – *Jones, et al.* v. *Gusman*, No. 12-859 (E.D. La.) – reached a settlement in December 2012 and jointly moved the *Jones* court for entry of a consent decree to remedy unconstitutional conditions at the Orleans Parish Prison (OPP), which the City funds. *Jones* docket entry 101. The request to approve the OPP decree is pending. The City has repeatedly made clear that its reversal of support for the NOPD decree results from its displeasure over the proposed OPP decree. R. 167-4 at 20; R. 257-1 at 4. As the district court noted in its order denying the City's motion to vacate, the City's displeasure with the OPP decree is not grounds to invalidate the NOPD decree. R. 256 at 29. The City has independent legal obligations concerning constitutional deficiencies in the operation of its police department and the OPP. The litigation regarding these two critical public safety institutions are unrelated and proceeding on separate tracks.

The district court, which is intimately familiar with the NOPD decree and the facts upon which it is based, has twice denied motions to stay its

implementation. R. 179; R. 258. As more fully explained below, the City fails to demonstrate that it meets the criteria for a stay.

FACTS AND PROCEDURAL HISTORY

At the request and with the cooperation of New Orleans Mayor Mitchell Landrieu, DOJ's Civil Rights Division began an investigation of the NOPD in May 2010 under the Violent Crime Control and Law Enforcement Act, 42 U.S.C. 14141; the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-7. R. 1. In its ten-month investigation, the United States uncovered a longstanding pattern or practice of unconstitutional conduct by NOPD. R. 1-1.

The United States' investigation found a pattern of officers committing civil rights violations such as widespread use of unreasonable force. R. 1 at 5; R. 1-1 at 30. This unconstitutional use of force includes deadly force, force against restrained victims, and force as retaliation. R. 1 at 5; R. 1-1 at 8, 29-31.

The United States also found rampant unlawful searches, seizures, and arrests. R. 1 at 5; R. 1-1 at 57-58. The investigation showed that NOPD officers discriminate against City residents, in ways such as failing to adequately investigate cases of sexual assault and domestic violence because of the victims' gender and failing to serve those with limited English proficiency. R. 1 at 6; R. 1-1 at 58.

The United States and the City agreed that NOPD's largely unregulated system of secondary employment, which allows officers to moonlight for third parties, causes problems with fatigue, conflicts of interest, and worse. The Mayor explained that it has led to "officers with divided loyalty spending most of their time on details, * * * cash exchanges, and the perversion of the command structure." R. 184-8 at 5. The system facilitates outright corruption. R. 1-1 at 16-17.

The United States and the City spent months negotiating a decree to solve the entrenched problems in NOPD and, on July 24, 2012, the parties signed and jointly filed it with the district court. R. 2; R. 2-1. The decree provides for reforms in searches, investigatory stops, detentions, arrests, the use of force, custodial interrogations, and photographic lineups. R. 179 at 2. It will facilitate bias-free policing, greater transparency, improved complaint intake, and community engagement. *Ibid*. It creates regulations and oversight for secondary employment. *Ibid*. The decree has a four-year term, and the parties may then request its termination, provided NOPD has been in compliance for two years. R. 2-1 at 126.

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. With the decree in place, officers will have better policy guidance, more training, closer supervision, broader officer support

systems, and mechanisms to help ensure that accountability and investigations of misconduct are fair and constructive. The decree includes unprecedented requirements that the City and NOPD provide officers with needed assistance and support. R. 114-1 at 80-81.

The parties agreed that the extensive investigations "establishe[d] a more than adequate factual record supporting the legitimacy" of the decree. R. 256 at 10; R. 2 at 5. At a press conference announcing the achievement, Mayor Landrieu "lauded the City's 'voluntary partnership' with the DOJ" and said the City now had "a clear roadmap forward." R. 256 at 9; R. 184-8 at 4, 7. Throughout the subsequent fairness hearing, the City urged the court to adopt the decree, arguing that it is fair, adequate, and reasonable. R. 184-26.

Upon the filing of the proposed decree, the court began a comprehensive review of its fairness, adequacy and reasonableness, including a full-day fairness hearing. R. 132 at 1-3; R. 159 at 4-5. The court approved the decree on January 11, 2013, finding it fair, adequate, and reasonable and not the product of fraud or collusion. R. 159 at 7-8; R. 160.

At a status conference shortly before the court entered the decree, the City informed the court that it no longer supported the agreement. The court noted the City's opposition in its minute order of January 11. R. 159 at 9. The City then moved to vacate the decree under Federal Rule of Civil Procedure 60(b) and

appealed the court's entry of the decree. R. 167-2; R. 175; R. 180.[2] The City moved to stay the decree pending the court's decision on its motion to vacate. R. 172. The court denied the stay, finding that the United States and residents of New Orleans would suffer substantial harm if a stay were granted, that the City will not suffer irreparable harm if the decree were implemented, and that the City had "made no argument regarding the likelihood of its success" in its motion. R. 179 at 9.

On May 23, 2013, the court denied the City's motion to vacate, finding that the City had not presented any legally cognizable basis for relief under Rule 60(b) or otherwise. R. 256 at 48. That same day, the City moved for a stay pending appeal. R. 257. The court denied this second motion for a stay, reiterating its findings on the relative harms and stating that the City had "failed to make any showing whatsoever" that it would likely succeed on the merits. R. 258 at 5.

[2] Relief under Rule 60(b) is "an extraordinary remedy which should be used sparingly." *Favre* v. *Lyndon Prop. Ins. Co.*, 342 F. App'x 5, 9 (5th Cir. 2009). The rule provides for discretionary relief on "just terms" in cases of "(1) mistake, inadvertence, surprise, or excusable neglect"; (2) "newly discovered evidence that, with reasonable diligence, could not have been discovered" earlier; (3) "fraud * * * misrepresentation, or misconduct by an opposing party;" or where "(4) the judgment is void; (5) the judgment has been satisfied, released, or discharged * * * or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b).

ARGUMENT

THE CITY HAS NOT SHOWN THAT IT IS ENTITLED TO A STAY OF THE CONSENT DECREE PENDING APPEAL

This Court will only reverse a district court's denial of a stay pending appeal where there has been an abuse of discretion. *Moore* v. *Tangipahoa Parish Sch. Bd.*, No. 12-31218, 2013 WL 141791, at *2 (5th Cir. Jan. 14, 2013); *Beverly* v. *United States*, 468 F.2d 732, 740 n.13 (5th Cir. 1972). Accordingly, an appellate court does not conduct "an independent application of the factors relevant to a motion for a stay," but instead determines whether the lower court has abused its discretion in evaluating them. *Voting for Am., Inc.* v. *Andrade*, 488 F. App'x 890, 893 n.6 (5th Cir. 2012). The relevant factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). The party requesting a stay bears the burden of showing it is justified. *Nken* v. *Holder*, 556 U.S. 418, 433-434 (2009).

A. The City Did Not Show A Likelihood Of Success On The Merits

As a general matter, a party may not withdraw from a consent decree once it has been submitted for approval. Every federal court of appeals that has directly addressed the issue has so held. See, *e.g.*, *White Farm Equip. Co.* v. *Kupcho*, 792

F.2d 526, 530 (5th Cir. 1986) (rejecting pre-judgment attempt to withdraw from settlement agreement); *In re Syncor ERISA Litig*., 516 F.3d 1095, 1100-1101 (9th Cir. 2008); *Stovall* v. *City of Cocoa*, 117 F.3d 1238, 1242 (11th Cir. 1997); *Moore* v. *Beaufort Cnty.*, 936 F.2d 159, 161-162 (4th Cir. 1991).

Here, the City has presented no special circumstances to show why it should not be bound by its agreement or why this Court should set it aside. In considering the City's two stay motions, the district court noted that, in its first motion, the City "made no argument regarding the likelihood of its success." R. 179 at 9. In its second, it "failed to make any showing whatsoever" that it would likely succeed on the merits. R. 258 at 5. Indeed, in its stay motion to this Court, the City makes no specific argument that the decree is invalid. The City merely states, as bullet points in its description of the case's procedural background, its three objections to the decree: (1) the United States allegedly failed to disclose costs associated with a separate matter, a consent decree to remedy constitutional violations at the OPP; (2) former Assistant United States Attorney (AUSA) Sal Perricone's participated in negotiating the NOPD decree; and (3) the decree's reform of NOPD's paid detail system might violate the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq*. Mot. 3-4. These conclusory assertions, without supporting evidence or explanation, are insufficient for the City even to preserve, much less

prevail on, a "likelihood of success" argument. At any rate, the City's bald assertions are frivolous.[3]

1. A Separate Consent Decree To Remedy Unconstitutional Conditions In The Orleans Parish Prison Does Not Undermine The Validity Of The NOPD Decree

Even before starting its NOPD investigation, the United States publicly announced findings of unconstitutional conditions at City-funded OPP in September 2009. 2009 OPP Findings Letter, available at http://www.justice.gov/ crt/ about/spl/documents/parish_findlet.pdf. Private plaintiffs later sued OPP alleging "[r]apes, sexual assaults, and beatings are common place throughout the facility." R. 256 at 22 n.102. The United States intervened as a party, and helped negotiate a consent decree. The City was involved in these negotiations from the beginning. In October 2011, the United States sent the City a draft of the decree in the OPP case, which included the requirement that the City "allocate funds sufficient to attain and maintain staffing levels necessary to carry out the requirements of this Agreement and the Constitution." R. 184 at 5; R. 184-9 at 1. The City even redlined the final OPP decree on May 31, 2012. R. 184-32; R. 184-33. That the prison decree would cost money was no surprise to the City.

[3] The means by which a party seeks relief from a consent decree is by a Rule 60(b) motion to set aside the decree. When it entered the decree, the district court told the City it would consider such a motion. The City filed a motion pointing to these three facts, among others, to justify relieving the City of its obligations. The district court denied the motion, ruling that these were not newly discovered evidence or changed circumstances since they were all known to the City before the decree was entered. R. 167-2 at 1; R. 256. This application for a stay is based upon the same three purported changed circumstances.

The City asserts that it is now "concern[ed]" about financial obligations under the prison decree and claims that they will "lead to cuts in other City departments" including furloughs and layoffs. Mot. 6. But, in July 2012, before the City consented to the NOPD decree and urged the district court to approve it, the prison sheriff sent the City a $45 million cost estimate for fiscal year 2013 – a $22.5 million increase over OPP's existing budget. R. 184-10 at 1 (Attachment A). In denying the City's motion to vacate the NOPD decree, the district court found the City's claim that "it had no knowledge of the potential cost ramifications" for the prison decree "patently false." R. 256 at 26.

The United States did not have a duty to conduct the City's cost analysis. The City has the same access to information regarding the costs of the prison reform as has the United States. Indeed, by the City's own admission, it had the cost information for the prison decree "one month" after it signed the NOPD decree on July 24, 2012. R. 114; R. 175-1 at 19; R. 256 at 24-25 & n.112.

In any event, a separate decree in an unrelated matter being heard by a separate federal district judge does not affect the fairness or reasonableness of the NOPD decree, nor does it make it any less necessary. Where constitutional violations exist in two City-funded institutions, the City is obligated to remedy both. The mere fact that the City must pay to implement the prison decree does not render the NOPD decree invalid or in any way unfair. This Court has explained

that "inadequate resources can never be an adequate justification for depriving any person of his constitutional rights." *Udey* v. *Kastner*, 805 F.2d 1218, 1220 (5th Cir. 1986). "Where state institutions have been operating under 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). The City cannot escape its responsibility to remedy constitutional violations by claiming "lack of funds to implement the trial court's order." *Smith* v. *Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977).[4] As the district court explained, "[t]he City's current displeasure regarding the OPP Consent Decree" does not warrant setting aside the NOPD decree. R. 256 at 29.

2. The Involvement Of Then Assistant United States Attorney Sal Perricone Does Not Invalidate The Decree

The City also seemingly claims (Mot. 3-4), that the NOPD decree was tainted by the behavior of former AUSA Perricone, who had been involved in the negotiations. Under an alias, Perricone made comments about current events, including the NOPD, on local news websites. R. 184-18. After his behavior came to light, Perricone resigned from the U.S. Attorney's Office in March 2012 and was no longer involved with negotiating the decree. R. 184-12; R. 184-18; R. 184-19. His conduct, however improper, did not affect the City's voluntary agreement

[4] The City's potential liability in the OPP case is no more relevant to whether the decree is valid than the City's other unrelated financial liabilities, including firemen's pensions or other expenses cited in its Motion. See Mot. 6 n.1.

to reform NOPD. The City knew about Perricone's online comments long before it agreed to the decree. R. 256 at 33; 184-12 at 2. Clearly, anonymous online comments did not coerce the City to agree to a decree that it otherwise never would have entered. As the district court found, "[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." R. 256 at 33.

3. The Decree Does Not Violate The Fair Labor Standards Act

The City also contends that parts of the NOPD decree, which set rules for secondary employment that officers may accept outside of their work for the City, "raise[] concerns under" the FLSA. Mot. 4. In the district court, the City claimed that the decree required the City to manage and oversee officers' secondary employment, and that this arrangement would make the City the officers' employer for those jobs. R. 256 at 35; R. 167-4 at 16. The City claimed it might then be liable for FLSA violations if it did not provide overtime pay. R. 256 at 35; R. 167-4 at 15-17. These concerns are unfounded.

In response to the City's objections, DOJ sought a written opinion from the Department of Labor (DOL) that the secondary employment provisions comply with the FLSA. R. 184-11 (Attachment B). 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. R. 184-11. Federal regulations permit the City to "facilitate" and oversee secondary employment just as the NOPD decree requires. 29 C.F.R. 553.227(d). The regulations explicitly allow the City to negotiate wages, assign officers to details, and retain a fee for its administrative expenses. *Ibid*.

The City has not explained why the statutory provisions and regulations exempting police officers' secondary employment do not apply here. R. 256 at 39. Indeed, at the fairness hearing, the City took the opposite position and assured the court it had engaged outside counsel with expertise in labor law "to ensure that whatever needs to be done with regard to secondary employment will comply with [the] Fair Labor Standards Act." R. 184-26 at 4. In considering the City's subsequent about face, the district court found that "the City has not provided any caselaw or authority contradicting the DOL's opinion letter." R. 256 at 39.

B. The City Grossly Overstates The Expenses That It Will Incur Without A Stay

A court should evaluate whether the movant would face irreparable harm if a stay is not granted. *Nken*, 556 U.S. at 433. However, a stay "is not a matter of right, even if irreparable injury might otherwise result." *Ibid*. (citation omitted).

In this case, the "harm" the City claims is that it would be bound by a decree it negotiated and agreed upon. There are no changed circumstances or hidden

costs that would affect the City's performance of the duties it has voluntarily undertaken. Compliance on terms it has accepted and freely negotiated hardly amounts to a harm justifying reversal of the district court's decision to deny a stay.

At any rate, the City has grossly exaggerated the financial burden it would incur under the decree during the pendency of this appeal, and any such burden is greatly outweighed by serious harm to the United States and the public interest if a stay is granted (see Section C, *infra*). The City's claim that it must spend money to begin complying with the decree does not justify a stay.

As an initial matter, the City's claims about the "exorbitant" cost of compliance pending an appeal are unfounded. Mot. 5. The City would have this Court believe that, without a stay, it will immediately become liable for millions in monitoring expenses. Mot. 2-6. This is not the case. Judging by original proposals, the monitoring team will cost, at most, between $7.1 and $8.9 million *over a four-year period*. Hillard Heintze Proposal 87-90; Sheppard Mullin Proposal, Tab 3, both available at http://www.laed.uscourts.gov/Consent/consent.htm. The cost will be paid incrementally, month by month. R. 122-1 at 2-3, 9.[5] The monitoring team must submit invoices and supporting documentation to the court, and will only be paid for services completed. R. 122-1 at 3-4, 9.

[5] The monitoring team's contract has not been finalized, but the court has approved a preliminary contract. R. 122 at 1-1; R. 122-1.

Even if a monitoring team is selected, a contract is finalized, and monitoring begins while the City's appeal is pending, a cost of roughly $2 million per year is a small fraction (less than 0.24%) of the City's $835 million budget for 2013. City's 2013 Annual Operating Budget 24, available at http://new.nola.gov/mayor/ budget. The cost is not an unreasonable burden considering that the City expects to spend more than $134 million on NOPD in 2013. *Id*. at 226, 230. In addition, this "cost" does not take into account money potentially saved by not having to defend and settle lawsuits resulting from unconstitutional police behavior and other attendant cost-savings to a City of having a well-functioning police department.

Should the City prevail on appeal and the monitoring contract be terminated, the City would not be liable for the full four-year term. See R. 122-1 at 9-10. It would only be liable for services already performed. See R. 122-1 at 9. The United States would fully support provisions in a final contract to clarify that, should the decree be set aside, the City will not be liable for monitoring services which will no longer be needed.

The City has presented no specific evidence that expenses associated with the decree will cause layoffs or other financial hardships. Mot. 6.[6] To establish irreparable harm, "[s]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Moore*, 2013 WL 141791, at *24

[6] The City has not shared any documented internal calculations it has conducted to show layoffs are necessary.

(citation omitted). DOJ helps fund local police departments, is aware of the financial constraints they face, and has provided significant financial support for police nationwide and to NOPD in particular. DOJ has given the City's law enforcement institutions some $21 million in grants, technical assistance, and other programs since 2009. See R. 184-2; R. 184-3; R. 184-4; R. 184-5. 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. R. 184-7; see Vera Institute of Justice, http://www.vera.org/project/new-orleans-pretrial-services (last visited June 3, 2013). DOJ has provided NOPD with extensive officer training programs and with help in working through its considerable backlog of rape kits awaiting testing. R. 1-1 at 25.

Moreover, the United States 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. R. 184-6; R. 184-38 at 2, 4. The City is eligible for the same "assistance with [law enforcement] funding" as any other city, and it is untrue that any request by New Orleans "fell on deaf ears" at DOJ. Mot. 6.

Contrary to the City's assertions (Mot. 8), it will not suffer any harm to its appellate rights if the decree remains in place. As the district court noted, "nothing prevents the City from obtaining meaningful appellate review" and "the City's

argument that denying a stay will preclude appellate review is without merit." R. 258 at 5. This case does not present any of the unusual circumstances the City recounts in its motion. Mot. 8. Its situation is not like that of an attorney who had to complete community service as a penalty before he could appeal a contempt order. Mot. 8. Nor is this case like those where an incomplete record prevented an appeal. Mot. 10-11. The court below has handled this case expeditiously and has not "refused to issue a ruling necessary to allow appellate review." Mot. 9.

The City's situation is no different from that of any litigant who may have to abide by a lower court's ruling and carry out some attendant obligation – such as contract performance or a prison sentence – while pursuing an appeal.

C. The United States And The People Of New Orleans Will Suffer Substantial Harm If A Stay Is Granted[7]

Before granting a request for a stay, a court should consider whether it would substantially harm the non-moving party and whether it serves the public interest. These factors merge when the United States is the opposing party. *Nken*, 556 U.S. at 435. Federal courts have firmly established that the violation of constitutional rights constitutes irreparable harm in the preliminary injunction context. See *Elrod* v. *Burns*, 427 U.S. 347, 373-374 (1976). Violation of constitutional rights is a harm that cannot easily be remedied. *Deerfield Med. Ctr.* v. *Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("once an infringement [to

[7] This section addresses both the third and fourth stay factors.

constitutional right of privacy] has occurred it cannot be undone"). "[P]rolong[ing] a continuing violation of United States Law" weighs against granting a stay. *Nken*, 556 U.S. at 436.

The City bears the burden of showing that a stay would cause no substantial harm to the United States and the public, and it has not met this burden. It has not shown that the widespread problems – problems that the City itself admitted exist – have abated.

The City recognizes that the NOPD has long been troubled and requires a "complete transformation" to overcome the history of violent crimes and malfeasance by officers and "ensure safety for the citizens of New Orleans." R. 184-1; R. 184-8. The City's past attempts to self-correct its police department have been unsuccessful, as evidenced by its request that the DOJ conduct an "independent investigation" aimed at bringing about "significant change that will lead to a better police force in New Orleans." R. 184-1. The City itself acknowledges that change is needed, as it "is continuing its reform of the NOPD." R. 202 at 3-4. However, the constitutional violations the United States found in its investigation still plague the police force. They are rooted in "a wide swath of City and NOPD systems and operations," including failures to properly recruit, train, supervise, and discipline officers. R. 1-1 at 1-50. The City has not provided the procedures to enhance oversight, transparency, and investigation of misconduct

required to correct patterns of unconstitutional conduct. Just this past March, an independent monitoring agency reported systematic problems with NOPD's stop-and-frisk procedures. *Review of the New Orleans Police Department's Field Interview Policies, Practices, and Data*, March 12, 2013, available at http://nolaipm.org/main/inside.php?page=reports_and_public_letters. Residents continue to complain of excessive force. See Edmund W. Lewis, *Residents Want End to Violence, Consent Decree*, The Louisiana Weekly, May 20, 2013, available at http://www.louisianaweekly.com/residents-want-end-to-violence-consent-decree/.

To justify a stay, the City would have to show that its citizens no longer suffer the substantial harms of unconstitutional police misconduct that the United States thoroughly documented in its investigation (R. 1-1) (summarizing the results of its investigation) – findings that the mayor himself said were an "honest assessment." R. 184-15. The people of New Orleans have continued to advocate for the decree to be put in motion in earnest. See *e.g.*, R. 225 at 4; R. 224.

The district court acted well within its discretion in refusing to stay the decree. The decree, as the City and the United States explained when they adopted it, will ensure New Orleans moves forward in eliminating unconstitutional conditions. The district court properly recognized that the "United States and residents of New Orleans will suffer substantial harm to their interests in having a

constitutional police force" if the reforms are put on hold. R. 179 at 7. Where constitutional rights are at stake, the City has "failed to demonstrate the balance of the equities favors a stay pending appeal." R. 258 at 5. The people of New Orleans have been seeking police reform for decades and should not have to pay the price of the City's misguided efforts that ultimately will only stall true reform.

This Court should deny the City's motion for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2013, I electronically filed the foregoing UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR A STAY PENDING APPEAL with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jessica Dunsay Silver
JESSICA DUNSAY SILVER
Principal Deputy Chief

Attachment A

Coon, Laura (CRT)

From: Blake Arcuri [barcuri@uwmlaw.com]
Sent: Thursday, July 19, 2012 12:52 PM
To: Coon, Laura (CRT); shrwilliams@nola.gov
Cc: Sanders, Corey (CRT); Dominguez, Silvia (CRT); Smith, Jonathan (CRT); Allen Usry
Subject: Breakdown of Needed Funds

Categories: Red Category

The figure breakdown is roughly as follows. Sheriff Gusman has more specific details and is prepared to discuss those with whomever the City feels is appropriate. He will make himself available to meet between noon today and 1 p.m. tomorrow.

130 additional deputies. ($3.85 million)

Increase pay of current deputies to competitive levels in order to reduce turnover and retain qualified personnel. ($11.6 million)

46 additional medical staff ($3.6 million)

Replace worn equipment and acquire new equipment necessary to comply with consent decree ($1 million)

Partial repayment of debt incurred to maintain jail operations in face of funding shortfall. ($2.45 million)

The total is $22.5 million of "new" estimated costs, which brings the total budget to $45 million for the year. This $45 million covers all necessary funds with the exception of the deputies healthcare and workers' compensation, both of which are already covered by the city.

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Attachment B

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

February 14, 2013

Roy L. Austin, Jr.
Deputy Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Austin:

In response to your request, we have reviewed portions of the Consent Decree in *United States v. City of New Orleans* (No. 12-1924 E.D. La.), the Department of Justice's January 9, 2013 submission to the Court, the City of New Orleans' January 11, 2013 submission to the Court, portions of the Department of Justice's report entitled "Investigation of the New Orleans Police Department," and the New Orleans Police Department's report entitled "Reforming Paid Details." Based on our review of those materials as well as consideration of applicable regulations and opinion letters, it is our opinion that section 7(p)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207(p)(1), would apply to the particular special details described in the Consent Decree and permit the New Orleans Police Department to exclude its police officers' hours worked on those special details when calculating the officers' hours worked for purposes of determining whether they are entitled to overtime compensation under section 7 of the FLSA, 29 U.S.C. 207.

If we can be of any further assistance on this matter, please let me know.

Sincerely,

Jennifer S. Brand

Jennifer Brand
Associate Solicitor
Fair Labor Standards Division
Office of the Solicitor
United States Department of Labor