No. 23-30193

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

IN RE: CITY OF NEW ORLEANS

Petitioner

_____

ON PETITION FOR A WRIT OF MANADAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

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UNITED STATES' RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is neither necessary nor practicable here considering the narrow nature of the parties' disagreement and the limited time in which to hold argument.

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No. 23-30193

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ON PETITION FOR A WRIT OF MANADAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES' RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS

The United States submits this response to the petition filed by the City of New Orleans for a writ of mandamus seeking to "cancel or modify" an order of the district court scheduling a public hearing in this case. As explained below, this Court should deny the petition and remand this matter to the district court. The district court never had a meaningful opportunity to consider all of the issues raised by the City's petition, nor have the parties had a meaningful opportunity to confer regarding the City's stated concerns. Remand is therefore appropriate to give the district court an opportunity to modify its hearing order in the first instance after hearing from both parties. It would also give the parties themselves an opportunity to confer about the City's concerns and potentially narrow the scope of this dispute by proposing any agreed-upon modifications to the order for the district court to

consider. Such a resolution would obviate the need for this Court to take the drastic step of issuing a writ of mandamus.

BACKGROUND

1. In 2010, the United States opened an investigation—at the City's own request—into alleged constitutional violations by the New Orleans Police Department (NOPD). As this Court recounted in its prior opinion in this case, that "investigation revealed longstanding patterns of unconstitutional conduct and bad practices and policies within the department." *United States* v. *City of New Orleans*, 731 F.3d 434, 436 (5th Cir. 2013).

The United States issued a detailed report summarizing its investigatory findings in 2011.[1] The report described NOPD's pattern of using "excessive force in violation of the Fourth Amendment, unlawful searches and seizures in violation of the Fourth Amendment, and discriminatory policing practices in violation of the Fourteenth Amendment and [various federal statutes]." *City of New Orleans*, 731 F.3d at 436 (explaining that the investigation identified violations of the Violent Crime Control and Law Enforcement Act, 34 U.S.C. 12601; the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d–7).

[1] The report is available at: https://perma.cc/66MY-275S.

Based on these findings, the United States filed this action against the City in 2012. See Doc. 1 (Complaint).[2] The same day that the United States filed its complaint, the City and the United States agreed to a proposed consent decree to remedy the constitutional and statutory violations identified by the United States' investigation. *City of New Orleans*, 731 F.3d at 436; Doc. 159-1. The district court approved the Consent Decree in 2013. *Id.* at 437. Five years later, in 2018, the court entered an amended Consent Decree, incorporating modifications requested by the parties to streamline the compliance process and better serve the aims of the parties' settlement. Pet. Ex. A (Consent Decree).

The Consent Decree seeks to address the root causes of NOPD's unlawful conduct through various measures designed to reform NOPD policies and practices and to promote greater accountability. See, *e.g.*, Pet. Ex. A, at 65-68, 113-116. One of the central objectives of the Decree is to "ensure comprehensive, effective, and transparent oversight of NOPD" in order to "facilitate effective and constitutional policing and increase trust between NOPD and the broader New Orleans community." Pet. Ex. A, at 113. To that end, the City agreed that NOPD

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[2] Documents that appear on the district court's docket are cited as "Doc. __, at __," referring to the docket entry number and ECF page number. Citations to the City's mandamus petition appear as "Pet.__." Citations to exhibits attached to the petition appear as "Pet. Ex. __, at __," referring to the exhibit letter and page number. With respect to Exhibit A, the Consent Decree, all citations are to the ECF page number at the top of the page. "Resp. Ex. A" refers to an exhibit submitted concurrently herewith.

would, among other things, regularly hold open meetings, led by the Superintendent or Deputy Superintendent, to "inform the public about the requirements of [the Consent Decree]; NOPD's progress toward meeting these requirements; and address areas of community concern related to public trust and constitutional policing." Pet. Ex. A, at 114. NOPD also agreed to "collect and maintain all data and records necessary to facilitate and ensure transparency and wide public access to information related to NOPD decision making and activities." Pet. Ex. A, at 113.

The Consent Decree's provisions governing the duties of the appointed Monitor likewise aim to promote transparency. See Pet. Ex. A, at 116. For instance, the Decree requires the Monitor to "meet with community stakeholders to explain [its] reports, inform the public about the Agreement implementation process, and to hear community perspectives of police interactions." Pet. Ex. A, at 123. The Decree similarly requires that the Monitor's reports be publicly released and expressly contemplates that the "Monitor may testify as to its observations, findings, and recommendations before the Court." Pet. Ex. A, at 122-123.

From the beginning of this case, the district court has sought to further the Consent Decree's transparency objectives by holding numerous public hearings addressing a wide range of different subjects. See, *e.g.*, Doc. 207 (ordering the Consent Decree Monitor Selection Committee to hold public hearings at the

Superdome to select the Monitor); Doc. 405 (scheduling a public hearing for September 2014 on the use of body-worn and in-car cameras). Officials from both the City and NOPD have regularly attended and participated in these public hearings. See, *e.g.*, Doc. 410 (minute entry for September 2014 hearing, noting the appearance of the City Attorney and Deputy Mayor and Chief Administrative Officer on behalf of the City; Superintendent, Deputy Superintendents, and others on behalf of NOPD; and representatives of the Office of Independent Police Monitor); Doc. 437 (minute Entry for April 2015 hearing, noting the appearance of the City Attorney, Deputy Mayor and Chief Administrative Officer, and Director Lieutenant Colonel of the Office of Police Secondary Employment on behalf of the City; Chief, Deputy Chiefs, and Commanders on behalf of NOPD; and representatives of the Consent Decree Compliance Bureau).

2. Consistent with its longstanding practice of holding public hearings, the district court scheduled a public hearing for February 16, 2023, for the parties and the Monitor to update the court on the City's implementation of the Consent Decree. Doc. 666. After the City asked the court to postpone the hearing "due to the commitments of the [NOPD] during the Mardi Gras season," the court rescheduled the hearing for March 29. Doc. 671. On March 13, the district court issued a notice moving the location of the hearing to Loyola University, where the court had previously held an earlier public hearing in the case, see Doc. 573, so as

to ensure sufficient space for any members of the public and the press who wished to attend. Doc. 676.

On March 28—the day before the hearing was set to take place—the City submitted a letter notifying the court that the City would not authorize its personnel to participate in the "public meeting before the press." See Pet. Ex. C (Letter from C. Zimmer to Judge Morgan). The single-page letter stated the City's view that "[t]here is no requirement in the Consent Decree that NOPD participate in press conferences or public meetings." Pet. Ex. C, at 1. In response, the court cancelled the hearing and stated that it would "be rescheduled for a public court hearing in the near future." Pet. Ex. B, at 2.

On April 3, while the City and the Monitor were conferring about the rescheduled hearing, the City emailed the Monitor to reaffirm its objection to the hearing order. Resp. Ex. A (Email from C. Zimmer to D. Douglass). The email noted that "[t]he City and NOPD will be holding their own press conference in the coming weeks" that "will likely address many of the areas on the agenda [originally] proposed for March 29th." Resp. Ex. A. Later that afternoon, the district court issued an order rescheduling the hearing for April 12 and stating that it would be held in the presiding judge's usual courtroom. Pet. Ex. D. The order further directed various City and NOPD employees to appear at the hearing. Pet. Ex. D, at 1-2.

3. On April 6, the City filed an emergency petition with this Court seeking a writ of mandamus "directing the district court to cancel or modify the [April 12] hearing so that city officials are not required to prepare, attend, or make statements to the press." Pet. 3. This Court ordered the United States to file a response and administratively stayed the district court's April 3 order while the panel considers the City's petition.

DISCUSSION

This Court should deny the City's mandamus petition. A writ of mandamus is an extraordinary remedy that should issue only as a last resort. As explained below, this Court should not take such a drastic step here for two reasons.

First, the district court has not yet had a meaningful opportunity to consider all of the issues raised by the City's petition and the parties have not had a meaningful opportunity to confer about the City's objections to the court's hearing order. If given those opportunities, the district court may consider modifying the hearing order in ways that would render mandamus unnecessary and the parties may be able to develop a joint proposal for the hearing that, if accepted by the district court, would substantially narrow the potential for future disputes. Accordingly, the best course for this Court at this stage is to remand this matter to the district court. The district court's abiding receptiveness to the parties' concerns throughout this litigation suggests that the court would take seriously the parties'

views in considering any modifications to the hearing order. Granting mandamus—a last-resort remedy—is premature at this juncture.

Second, even if mandamus were not premature, the present circumstances do not justify such an extraordinary remedy. The district court's decision to schedule a public hearing for City and NOPD officials to report on the status of specified reform efforts falls squarely within the scope of the court's inherent powers to ensure the parties' progress toward the Consent Decree's goals. And the fact that the court has followed this practice since the beginning of this case—without any objection from the City—further militates against the need for extraordinary relief here.

I. This Matter Should Be Remanded To Give The District Court An Opportunity To Consider Modifications To Its Hearing Order After Hearing From The Parties

A writ of mandamus is "a remedy of last resort" that "cannot issue unless the petitioner has no other adequate means of obtaining the relief [it] seeks." *In re Paxton*, 60 F.4th 252, 259 (5th Cir. 2023). In this case, the Court should decline to issue this "drastic remedy," *Doe* v. *Tonti Mgmt. Co.*, 24 F.4th 1005, 1010 (5th Cir. 2022) (citation omitted), because it can likely cure the City's concerns through much less drastic means: namely, by remanding this matter to give the district court an opportunity to modify its hearing order after both parties have had a meaningful chance to provide their views on the plan for the hearing.

The district court has not had an opportunity to consider the parties' full views concerning the agenda for the public hearing. The City did not raise its objection to the original hearing order in a motion but, rather, in a one-page letter submitted to the district court on the day before the hearing was set to take place. And the United States never had an opportunity to substantively respond to the concerns that the City raised in that letter. Had the district court had an opportunity to meaningfully hear from both parties, it could have potentially modified its hearing order in a way that would have addressed the City's principal concerns while still furthering the core objectives of the Consent Decree. the district court has shown an openness and receptiveness to the parties' views throughout this litigation.

Indeed, just last year, the court expressly "welcome[d] suggestions from the DOJ or the City about what items [they] would like to cover at these public hearings." Doc. 651 (Tr. Of Sep. 27, 2022 public hearing), at 7. The court has also already twice amended the date and location of the hearing at issue here in response to the City's previously-raised concerns. See Doc. 671 (changing hearing date at City's request); Pet. Ex. D (changing hearing date and location). And, of course, it has adopted the parties' proposed modifications to the Consent Decree itself. See Doc. 564. In light of this history, there is good reason to believe that the district court would consider modifying the hearing order if it were given an

opportunity to hear from the parties on the specific issues that the City has raised in its petition. A remand would give the court that opportunity and may well obviate any need for mandamus.

Remanding this case to the district court would also provide the most straightforward and expeditious way to resolve this matter. Any alternative resolution could force this Court to wade into complex legal questions, see *infra* Part II, and require it to try to craft a tailored remedy in the absence of clear guidance. While the City has asserted objections to certain aspects of the district court's April 3 order—specifically, to certain topics and speakers on the hearing agenda—its petition does not offer a concrete proposal for modifying the order. Nor did the City present the district court with any proposal for modifying the hearing order to address its concerns. Thus, even if this Court were to agree with the City that portions of the April 3 order are improper, crafting an appropriately tailored remedy at this juncture—on an expedited timeline without the benefit of prior familiarity with this case—would likely prove extremely challenging.[3]

[3] It is also unclear whether a writ is even necessary to address some of the City's stated concerns here. For instance, the City seeks to preclude the district court from directing the City to "make statements to the press." Pet. 3. But the order does not contain any language requiring the City to make statements to the press. Although the order notes that the hearing will be open to the public and the media—like virtually all federal judicial proceedings—it does not say anything about the City making statements to the press. See Pet. Ex. D.

Finally, a remand would give the parties an opportunity to confer and potentially submit to the district court a joint proposal for the hearing that would mitigate the City's concerns. Although the parties did not previously have an opportunity to confer about the terms of the hearing order, the United States remains amenable to working with the City to develop a mutually agreeable plan for the upcoming public hearing. Indeed, the City's petition suggests that it does not object to every aspect of the current hearing order: it even acknowledges that at least some of the discussion topics specified in the order—such as the "discuss[ion of] the status of NOPD's compliance with the terms of the Consent Decree"—are plainly "appropriate for a court hearing." Pet. 9-10 (quoting the April 3 order).[4] A remand would permit the parties to identify any similar areas of agreement and work to narrow the scope of any potential dispute and, if necessary, seek a resolution from the district court after full briefing.

II. The City Has Not Satisfied The Requirements For Mandamus Relief

As just explained, the United States' willingness to work cooperatively with the City to propose modifications to the terms of the April 3 order obviates any need for a writ of mandamus. But, even if that were not the case, mandamus

[4] As noted above, the City has also suggested that it is already planning to make public statements about some of the topics originally identified in the hearing order. See Resp. Ex. A (noting that "[t]he City and NOPD will be holding their own press conference in the coming weeks" that "will likely address many of the areas on the agenda [originally] proposed for March 29th").

would still be inappropriate here because the City has not established that the present circumstances justify such an extraordinary remedy.

Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (citation omitted). To obtain mandamus relief, a petitioner must, as a threshold matter, "satisfy the burden of showing that [its] right to issuance of the writ is clear and indisputable." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc) (quoting *Cheney*, 542 U.S. at 381). Only "exceptional circumstances" will justify the "invocation of this extraordinary remedy." *Cheney*, 542 U.S. at 380 (citations omitted). Furthermore, even if the petitioner satisfies that demanding standard, mandamus will not be awarded as a matter of right; rather, issuance of the writ is always discretionary and this Court has often denied mandamus relief even when it has determined that a district court erred. *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 347 n.4 (5th Cir. 2017) (collecting cases).

Here, the City has not shown that it has a "clear and indisputable" right to the "drastic" remedy it seeks and, even if it had, several prudential factors counsel against issuing the writ in this case.

A. The City Has Not Established That It Has A Clear And Indisputable Right To Cancellation Or Modification Of The Upcoming Hearing

"[A] clear and indisputable right to the issuance of the writ of mandamus will arise only if the district court has clearly abused its discretion, such that it

amounts to a judicial usurpation of power." *In re Gee*, 941 F.3d 153, 159 (5th Cir. 2019) (citation omitted). In reviewing a challenged district-court action, this Court does not "replace a district court's exercise of discretion with [its] own" but, instead, "review[s] only for clear abuses of discretion that produce patently erroneous results." *Volkswagen of Am., Inc.*, 545 F.3d at 312.

In this case, the district court did not clearly abuse its discretion in scheduling a public hearing for City officials and NOPD officials to report on the status of their various reform efforts. District courts have inherent powers that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962). Those powers encompass the authority to schedule status conferences and other hearings, in public view, especially when such proceedings serve to advance the objectives of a consent decree. In focusing exclusively on whether the Consent Decree explicitly authorizes the district court to hold the hearing at issue here, the City overlooks the district court's inherent authority to ensure the parties' progress toward the Consent Decree's goals.

1. The City Mischaracterizes The Nature Of The Challenged Order

At the outset, it is important to clarify the scope of the district-court order at issue in this case. Contrary to the City's contentions, the district court did not

"order[] New Orleans city officials to hold a press conference." Pet. 20. Rather, consistent with its longstanding practice in this case, the court scheduled a "public hearing" for the parties and the Monitor to update both the court and the public on the City's implementation of the Consent Decree. See Pet. Ex. D. And, also consistent with longstanding practice (and the practices of other courts, see *infra* pp. 18-19), it directed appropriate representatives of the City to attend the hearing. See Pet. Ex. D.

Far from falling outside the scope of the court's authority under the Consent Decree, the order serves to advance one of the Decree's express objectives: "To ensure comprehensive, effective, and transparent oversight of NOPD." Pet. Ex. A, at 113; see also Pet. Ex. A at 65-68, 113-116 (outlining other transparency requirements); *Frew* v. *Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."). The fact that the order invites "[t]he public and the media" to attend hardly converts the hearing into a "press conference." Indeed, the hearing lacks many of the hallmarks of a traditional press conference: not only does it expressly preclude the press and the public from asking questions, but it is also set to take place inside a federal courtroom with a federal judge presiding. See Pet. Ex. D, at 1.

These features of the hearing illustrate that its central purpose is to ensure public access to information about NOPD's reform efforts so as to make those reform efforts more effective and further the Consent Decree's stated goals of "[t]ransparency [a]nd [o]versight." Pet. Ex. A, at 113; see also, *e.g.*, Doc. 637 (Tr. of Aug. 2022 public hearing), at 4 (noting the importance of ensuring public access to information about the proceedings); Doc. 656 (Tr. of Oct. 2022 public hearing), at 57 (same). As explained below, that purpose is well within the district court's authority.

2. The Challenged Order Fell Within The District Court's Inherent Powers

The Supreme Court has long recognized that every district court possesses the inherent authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North Am. Co.*, 299 U.S. 248, 254 (1936). These "inherent powers," the Court has explained, include "those which 'are necessary to the exercise of all others.'" *Roadway Exp., Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (quoting *United States* v. *Hudson*, 7 Cranch 32, 34 (1812)). And they likewise include those powers that are "reasonably useful to achieve justice." *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). Put differently, "[w]here it appears that a court cannot adequately and efficiently carry out its duties without employing some special device, the court has inherent power to do so." *Ibid*.

This Court has identified various forms of judicial action that fall within the ambit of a court's inherent powers. See, *e.g.*, *United States* v. *Colomb*, 419 F.3d 292, 299 (5th Cir. 2005) (collecting cases in which this Court has upheld district courts' "invocation of this inherent power"). These include routine exercises of docket-management authority, such as the issuance of "scheduling orders and the like." *Edwards* v. *Cass Cnty.*, 919 F.2d 273, 275 (5th Cir. 1990). And they also encompass more weighty exercises of authority, such as "the power to levy sanctions in response to abusive litigation practices" or the power to "appoint an auditor to aid in litigation involving a complex commercial matter." *Stone*, 986 F.2d at 902 (citations omitted).

Here, the district court's decision to schedule a hearing for City and NOPD officials to report on the status of specified reform efforts falls well within the scope of its inherent powers. Federal courts routinely schedule status conferences to solicit information from litigants, hold those conferences (and other hearings) in public courtrooms, and direct parties to address specific topics during those proceedings. Courts also regularly direct specific litigants to appear at settlement conferences or other consequential proceedings.[5]

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[5] The fact that these powers are not explicitly referenced in the Federal Rules of Civil Procedure does not mean that they fall outside the district court's discretion. Cf. Pet. 10-11 (alleging that the hearing at issue was not a conference or hearing authorized by Federal Rule of Civil Procedure 16). "A long line of cases establishes that the Rules are not always the exclusive source of a federal

This Court has recognized, for instance, that "district courts have the general inherent power to require a party to have a representative with full settlement authority present—or at least reasonably and promptly accessible—at pretrial conferences." *Stone*, 986 F.2d at 903; see also, *e.g.*, Fed. R. App. P. 33 (authorizing courts of appeals to "direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement"). Courts may not exercise this power indiscriminately, of course: as this Court has explained, "a district court must consider the unique position of the government as a litigant in determining whether to exercise its discretion in favor of issuing such an order." *Stone*, 986 F.2d at 903. But, when the circumstances justify it, courts are not precluded from directing certain individuals to appear at a specified hearing merely because those individuals work for the government. See, *e.g.*, *In re United States*, 149 F.3d 332 (5th Cir. 1998) (per curiam) (holding that the trial court did not abuse its discretion in "mandating that the United States be represented at mediation by a person with full settlement authority").

A district court's ability to solicit accurate information from government litigants is especially important when the court is tasked with overseeing

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court's powers in civil cases." *Natural Gas Pipeline Co. of Am.* v. *Energy Gathering, Inc.*, 2 F.3d 1397, 1407 (5th Cir. 1993), cert. denied, 510 U.S. 1073 (1994).

compliance with a consent decree. See generally *CBS Broad. Inc.* v. *FilmOn.com, Inc.*, 814 F.3d 91, 101 (2d Cir. 2016) ("A court's interest in protecting the integrity of [a consent] decree justifies any reasonable action taken by the court to secure compliance.") (alteration in original; citation and quotation marks omitted). Indeed, district courts are even empowered to modify consent decrees when circumstances justify it. See *Moore* v. *Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 407 (5th Cir. 2017) (explaining that consent decrees "are 'subject to the rules generally applicable to other judgments and decrees,' including modification" (citation omitted)). "This authority is part of a court's inherent powers and exists regardless of whether a particular consent decree expressly so provides." *In re Pearson*, 990 F.2d 653, 657 (1st Cir. 1993) (citing *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932)). And "[s]ince a district court has power to modify a consent decree," it is often "impossible to say that [a court] act[s] 'in clear excess' of its power in taking [a] much more tentative step," short of outright modification, to further the consent decree's objectives. *Ibid.* (citation omitted).

Not surprisingly, district courts around the country have ordered government officials to appear at status conferences in consent-decree matters and have routinely held public hearings in such matters. See, *e.g.*, Order Scheduling Status Conference, *United States* v. *Commonwealth of Puerto Rico*, Case No. 3:12-cv-2039 (D.P.R. Dec. 19, 2022) (identifying topics to be discussed at upcoming status

conference and directing officials from various commonwealth offices, including the governor's office, to appear); Scheduling Order, *United States* v. *Baltimore Police Department*, Case No. 17-cv-0099 (D. Md. Nov. 23, 2022) (setting a schedule for quarterly public hearings and monthly progress reports on specified topics); Order, *United States* v. *Penzone*, Case No. 07-cv-2513 (D. Ariz. Jan. 30, 2018) (identifying topics to be discussed at upcoming status conference and directing various officials from the county sheriff's office, including the sheriff himself, to appear at the conferences).

The widespread nature of this practice—and the fact that the City has participated in public hearings in *this* matter for years without objection—strongly suggest that the district court did not "clearly abuse[] its discretion" in a way that "amounts to a judicial usurpation of power." *Gee*, 941 F.3d at 159.[6]

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[6] As noted above, the district court has scheduled numerous public hearings on a variety of different matters since the Consent Decree first took effect. See, *e.g.*, Doc. 207 (ordering the Consent Decree Monitor Selection Committee to hold public hearings at the Superdome to select the Monitor); Doc. 405 (scheduling a public hearing for September 2014 on the use of body-worn and in-car cameras); Doc. 437, at 2-6 (setting the topics for a public hearing in May 2015 and directing various officials, including the City's Comptroller, to report on specific topics at that hearing); Doc. 450 (setting the dates for status conferences and public hearings to be held during 2016); Doc. 497 (setting the dates for status conferences and public hearings to be held during 2017 and 2018); Doc. 563 (setting dates for status conferences and public hearings to be held during 2019); Doc. 573 (directing the parties and the monitoring team to present a public status report on the Consent Decree at Loyola University School of Law in January 2019).

B. Prudential Factors Counsel Against Issuance Of The Writ

Even if this Court concludes that the district court "clearly abused its discretion" in scheduling a public hearing in this case, this Court should decline to issue the writ as a prudential matter.

"Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion." *Duncan Townsite Co.* v. *Lane*, 245 U.S. 308, 311 (1917). This Court often exercises that discretion to deny mandamus relief when a district court has taken some erroneous action based on a "mistaken resolution of a novel or thorny question of law." *Paxton*, 60 F.4th at 260 (citing various examples of "prudential denials"). The

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Numerous City officials and NOPD officials attended these public hearings to provide updates to the court. See, *e.g.*, Doc. 410 (minute entry for September 2014 hearing, noting the appearance of the City Attorney and Deputy Mayor and Chief Administrative Officer on behalf of the City; Superintendent, Deputy Superintendents, and others on behalf of NOPD; and representatives of the Office of Independent Police Monitor, United States, and Office of the Consent Decree Monitor); Doc. 437 (minute entry for April 2015 hearing, noting the appearance of the City Attorney, Deputy Mayor and Chief Administrative Officer, and Director Lieutenant Colonel of the Office of Policy Secondary Employment on behalf of the City; Chief, Deputy Chiefs, and Commanders on behalf of NOPD; and representatives of the Consent Decree Compliance Bureau and the Office of the Consent Decree Monitor); Doc. 489, at 1 (minute entry for August 2016 public hearing, noting the special attendance of certain officials "due to the focus of this particular hearing," including the New Orleans Inspector General, the Assistant Inspector General for Investigations, chair of the Mayor's advisory committee on the reform of NOPD's response to sexual assaults, Executive Director of the New Orleans Family Justice Center, and a representative of the New Orleans Sexual Assault Response Team).

Court has declined to issue the writ, for instance, when a district court has "followed numerous others in errantly applying" the relevant legal standard. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 504 (5th Cir. 2019). Thus, even if this Court were to conclude that the district court here erred (which it should not), a prudential denial of mandamus relief would be warranted: as noted, several other district courts around the country have ordered government officials to appear at public hearings or status conferences to report on the status of their compliance efforts, just as the court did here. See *supra* pp. 18-19. The widespread nature of this practice illustrates that the order at issue in this case has not produced the kind of "patently erroneous result" that this Court ordinarily requires before issuing mandamus relief. See *Volkswagen of Am., Inc.*, 545 F.3d at 319.

So, too, does the fact that the district court has held numerous public hearings in this case concerning the status of NOPD's compliance efforts without any prior objection from the City. The City's years-long acquiescence in this regular practice suggests, at the very least, that any doubts as to the validity of the practice are sufficiently "novel" as to render mandamus inappropriate here. *Paxton*, 60 F.4th at 260.

Finally, the fact that the district court has not had an adequate opportunity to address the novel questions raised by the City's mandamus petition further underscores the impropriety of issuing of the writ. As noted, rather than filing a

motion with the court, the City raised its objection to the original hearing in a one-page letter submitted to the district court on the day before the hearing was set to take place. See Pet. Ex. C. The letter asserted that the Consent Decree did not give the court the authority "to direct who will speak on behalf of the City or its police department in a public forum." Pet. Ex. C, at 1. But the letter—which was never filed on the docket—did not contain any extensive analysis of the Consent Decree's language and contained no discussion whatsoever about the court's inherent powers. And, after the court responded to the City's concerns by changing the hearing date and location, see Pet. Ex. D, the City filed the instant petition without filing any objection to the rescheduled hearing with the district court or conferring with the United States.[7] To the extent the City desired clarification of the scope of the Consent Decree, it could have filed a motion seeking such clarification and asking to stay the hearing; following that process would have given the parties an opportunity to confer regarding the City's concerns and, if necessary, properly brief the issue (on the docket) and give the court a meaningful opportunity to render a decision. The City's failure to follow that course provides yet another reason why mandamus relief is inappropriate here. See *Plata* v. *Schwarzenegger*, 560 F.3d 976, 984 (9th Cir. 2009) (explaining that it

[7] Shortly before filing the petition, the City called and emailed counsel for the United States, notifying the United States that the City would be filing an emergency petition later that day.

"would be most inappropriate for this court to address [certain] issues by the extraordinary writ of mandamus" when those issues were not "properly raised in the district court").

CONCLUSION

For the foregoing reasons, this Court should deny the City's mandamus petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2023, I electronically filed the foregoing UNITED STATES' RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Yael Bortnick
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Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 5644 words according to the word processing program used to prepare the brief.

(2) This brief 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 Microsoft Office Word 2019, in 14-point Times New Roman font.

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Date: April 10, 2023