

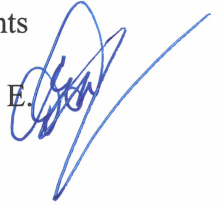
CITY OF NEW ORLEANS
LAW DEPARTMENT
1300 Perdido Street, 5th Floor East
New Orleans, Louisiana 70112

To: Jeffrey A. Rosen, Deputy Attorney General of the United States; Claire McCusker Murray, Principal Deputy Associate Attorney General; Robert Moossy, Jr., Deputy Assistant Attorney General, Civil Rights Division; and Timothy D. Mygatt, Deputy Chief, Civil Rights Division, Special Litigation Section of the United States Department of Justice

From: City of New Orleans, *via* City Attorney Sunni LeBeouf and outside counsel, Daniel E. Davillier

Re: Notice of Full and Effective Compliance with the NOPD Consent Decree

Date: November 30, 2020



I. PARAGRAPH 492 NOTICE

Reference is hereby made to the Consent Decree regarding the New Orleans Police Department (the “Consent Decree” or the “Agreement”) by and among the City of New Orleans (the “City”), the New Orleans Police Department (“NOPD” or “Department”), and the United States of America, represented by the United States Department of Justice (the “DOJ”) executed on July 24, 2012 and approved by the Honorable Judge Susie Morgan of the United States District Court for the Eastern District of Louisiana on January 11, 2013. Capitalized terms used herein without definition shall have the respective meanings ascribed thereto in the Consent Decree. After over eight (8) years of continuous improvement in constitutional policing, with the valuable assistance of the Court, the Office of the Consent Decree Monitor¹ (“Federal Monitors”), and the DOJ, pursuant to Paragraph 492 of the Consent Decree, the City and the NOPD hereby notify the DOJ that the City has determined that it is in Full and Effective Compliance with the Consent Decree and that such compliance has been maintained for over two years.

¹ The *Sheppard Mullin Richter & Hampton, LLP* law firm of Washington, D.C., was appointed by the U.S. District Court for the Eastern District of Louisiana to serve as the monitor of NOPD’s compliance with the terms of its agreement with DOJ.

II. SUMMARY OF THE CITY'S POSITION

Paragraph 491 of the Consent Decree defines “Full and Effective Compliance” as requiring either: (i) sustained compliance with all *material* requirements of the Consent Decree, or (ii) sustained and continuing improvement in constitutional policing, as demonstrated pursuant to the Consent Decree’s outcome measures. The City’s position here is based on the second provision of the Full and Effective Compliance definition. It does not appear that the Federal Monitors have assessed compliance based on this definition of Full and Effective Compliance in its prior reports or Comprehensive Reassessments. However, as detailed below, the City’s position is supported by the jurisprudence of the United States Supreme Court, the reports to date of the Monitors (including their most recent Comprehensive Reassessment of the Consent Decree Monitor Released January 24, 2019), and the policies and guidelines of the DOJ.

Additionally, in the event that the DOJ finds that there are current violations of federal law by the NOPD, or that there are unconstitutional policing issues remaining that still need to be addressed more than eight (8) years after the Consent Decree was confected, then the City requests that the DOJ, consistent with its own policies and guidelines, agree to terminate the Consent Decree and enter into a separate transition agreement with the City and the NOPD to address any remaining issues identified by the DOJ.

III. SUMMARY OF THE BASIS FOR THE CONSENT DECREE

The DOJ filed a Complaint against the New Orleans Police Department in 2011 citing three (3) specific federal statutes that were being violated by the NOPD: (i) the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, (ii) the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 378 9d, and (iii) Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d. The administration for the City of New Orleans in office at the time

agreed to enter a consent decree to address those failings. The NOPD has been operating under federal supervision since the issuance of the resulting Consent Decree in 2012.

The stated purpose of the Consent Decree is to rectify acknowledged unconstitutional policing practices by the NOPD. Federal supervision was anticipated to end once the NOPD demonstrated *sustained and continuing improvement in constitutional policing*, as determined by the Agreement's outcome measures, or through sustained compliance with *all material* requirements of *each* of the 492 paragraphs of the Consent Decree for at least two years. Compliance with these benchmarks is determined not by the DOJ, but by the presiding federal judge who independently obtains reports from a team of non-DOJ consultants, the Federal Monitors. The Federal Monitors are compensated *by the City* at approximately \$115,000 per month (on average). Without the invaluable assistance of the Federal Monitors, the City would not have been able to achieve Full and Effective Compliance.

However, now that the City has demonstrated sustained and continuing improvement in constitutional policing for over two years, it must direct its limited (and shrinking) resources to other needs as well. Like many cities in the United States, the City is experiencing significant budget shortfalls as a result of the COVID-19 pandemic. In fact, the City has been forced to start furloughing employees, including NOPD employees being supervised by the law firm serving as Federal Monitor. The reality is that while the Monitors continue to contribute valuable insight, that value was always intended to decrease as NOPD neared compliance. As it stands, their contributions are a luxury that the City can no longer afford. The average invoice of \$115,000 per month for the Federal Monitors could, for example, pay the salaries of over 20 police officers, or offset pending furloughs.

The City and the DOJ (as the only parties to the Consent Decree) anticipated the Consent Decree would remain in place for four (4) to six (6) years. The Court Order empowering the Federal Monitor expired by its own terms on September 1, 2020 and no new order has been filed.² The City is now facing its ninth (9th) year of federal supervision in 2021. The United States Supreme Court has instructed that: “[i]f a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper.”³ Based on the public reports of the Federal Monitors, it is beyond debate that the NOPD has, even under the strictest interpretation, demonstrated *sustained and continuing improvement* in constitutional policing through durable methods that will maintain constitutional compliance. Upon a showing that durable compliance with the federal laws previously violated has been achieved, the Consent Decree should be terminated, or at least materially modified *via* transition agreement to reflect the decreased level of federal control that is necessary to assure the NOPD is not actively violating the constitutional rights of its citizenry.

It is not the position of the City that the past eight years has been unnecessary, unsuccessful, or wasteful. To the contrary, the achievements of the federal court and the Monitors in guiding the NOPD have been more successful than most believed possible. The issue today is moving control over a sovereign local agency back to the locally elected officials. The constitutional trigger for federal control of the NOPD was the systemic violation of constitutional rights. Here, such systemic violations are not even alleged to remain in existence.

The City respectfully submits that Supreme Court precedent and the DOJ’s own guidelines direct that the DOJ should either: (i) join in a motion to terminate the Consent Decree if it finds that the City has demonstrated sustained and continuing improvement in constitutional

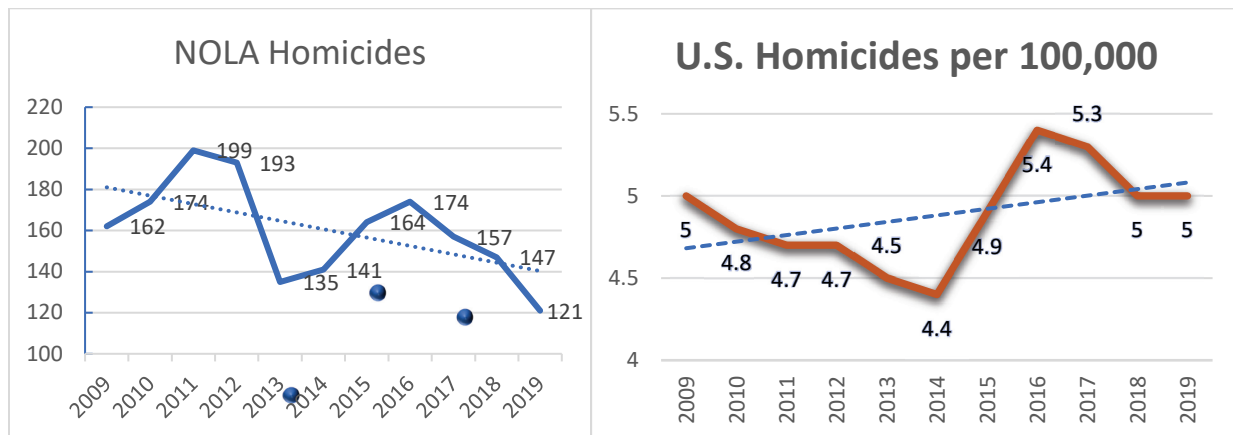
² See Order of the Court, 2:12-cv-01924-SM-JCW, Rec. Doc. 529, Filed 08/04/17.

³ *Horne v. Flores*, 557 U.S. 433, 450, 129 S. Ct. 2579, 2595, 174 L. Ed. 2d 406, 421, 2009 U.S. LEXIS 4733, *33, 77 U.S.L.W. 4611, 73 Fed. R. Serv. 3d (Callaghan) 1562, 21 Fla. L. Weekly Fed. S 1020.

policing for over two years; or (ii) commit to a transition agreement with the City to reduce the scope, duties, and costs of the completion of any items remaining under the Consent Decree to achieve sustained and continuing improvement in constitutional policing.

IV. OVERVIEW OF THE CONSENT DECREE PROGRESS AND DOJ GUIDANCE

The NOPD has completed one of the most unprecedented and extensive reform projects in the history of American policing. No one thought the NOPD could become a leading reform department, but that is exactly what has happened under the watchful eye and guidance of the DOJ, the federal court, and the team of consultants engaged as Federal Monitors. The NOPD was once synonymous with poor policing – and for valid reasons. Now, over eight years into the painful process of ripping off the Band-Aid and pursuing cures instead of triage, public trust is surging, critical force incidents have plummeted, and public complaints are steadily decreasing. All of this while the city marked a 47-year low in homicides for 2018, and then bettered that historic achievement in 2019. While state and national murder trends went up, NOPD was able to keep New Orleans trending downward.⁴



⁴ The COVID-19 crisis has caused spikes in crime rates across the country. There is not yet sufficient empirical data to meaningfully compare New Orleans to national trends. The utility of such data, however, is very limited. The historical data used shows that the NOPD reforms have been completed while bringing crime trends down. Overall crime levels in any given year do not inform of the NOPD's compliance with constitutional policing.

NOPD has fundamentally transformed its methodology and character while more effectively fighting crime, dispelling the myth that reform and crime prevention are opposing endeavors. As a result, NOPD has emerged as *the* model of successful police reform in the country. NOPD has presented at international conferences to hundreds of departments on a variety of landmark NOPD programs. NOPD has published a peer-reviewed 20-page journal article on its innovative data-driven management model. NOPD also created a first-in-the-nation police peer intervention model to prevent police misconduct and hosted a conference to help over 30 departments across the nation learn about this essential program.⁵ NOPD has provided training and guidance to the largest police agencies in the nation, including departments from New York City, Chicago, San Francisco, Newark and Baltimore. And when problems do arise, as they will in every organization, NOPD has shown that its modern structure allows it to identify and address the problems expeditiously and effectively.⁶

Against all odds, NOPD has become the premier reform agency in the country. At the same time, it remains under the same level of constant monitoring by a team of consultants at substantial cost to the local taxpayers as when the Consent Decree was instituted eight years ago. With best-practice structures in place and firmly established to sustain these historic reforms, the New Orleans Police Department is ready to move beyond the Consent Decree that catalyzed this transformation. Not only has NOPD demonstrated sustained compliance with the material requirements of the Consent Decree, but the Department has also demonstrated at least two years

⁵ (“the Boston Police Department on Thursday announced changes to its use-of-force policy and pledged to bring an innovative policing initiative from New Orleans to the city.”) - Gil Lotan, *Boston police adopt some ‘8 Can’t Wait’ reforms, pledge other changes*, MSN (Jun. 11, 2020), <https://www.msn.com/en-us/news/us/boston-police-update-use-of-force-guidelines-pledge-to-bring-innovative-peer-intervention-program-to-city/ar-BB15mexk> (last visited Nov 30, 2020).

⁶ The recent action by Chief Ferguson to disband task forces that were discovered to be operating outside NOPD policy limits is one example of the modern NOPD that is far better than the NOPD of 2012.

of overall sustained and continuing improvement in constitutional policing according to the Federal Monitors' reports and the objective outcome measures set forth in the Consent Decree.

The Consent Decree between the City of New Orleans and the DOJ targeted a four-year path to constitutional policing reforms in New Orleans. It also allowed for two paths to termination in case the path to reform took longer than anticipated. Standing at the doorstep of 2021, the NOPD is looking at its ninth year under federal control. NOPD believes that it has achieved Full and Effective Compliance with the Consent Decree by showing sustained and continuing improvement in constitutional policing as determined by the "Outcome Measures" set forth at paragraph 448 of the Consent Decree.

The team of outside consultant monitors appear to focus exclusively on the first part of the two-part definition of "Full and Effective Compliance" in paragraph 491 of the Consent Decree. The first part of the definition requires "sustained compliance with all material requirements of this Agreement." In their Comprehensive Reassessment of the Consent Decree Monitor dated January 24, 2019, the Monitors note that the path to full and effective compliance requires: (i) NOPD implementation of reforms required by the Consent Decree, (ii) Monitors assessment of each section of the Consent Decree to identify areas in Full and Effective Compliance, (iii) The Court finding that ALL sections are in Full and Effective Compliance simultaneously, and (iv) NOPD maintaining Full and Effective Compliance with ALL sections of the Consent Decree for two years. However, the contract⁷ created by the City and DOJ *via* the Consent Decree expressly provides for an alternative definition of "Full and Effective

⁷ *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("For these reasons, the scope of a consent decree must be discerned within its four corners, and not by what might satisfy the purposes of one of the parties to it.") *See also*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("Consent decrees are construed as contracts for purposes of enforcement.")

Compliance” as “sustained and continuing *improvement in constitutional policing*, as demonstrated pursuant to the Agreement’s outcome measures.” (CD at 491, *emphasis added*)

Based upon the Federal Monitors’ routine reports and the most recent Comprehensive Reassessment, there is no basis to assert that NOPD has been operating in an unconstitutional manner within the last two years (far longer, actually). When the NOPD’s starting point in 2011 (as evidenced by the DOJ’s investigative report) is compared to its current position, it is without question that “sustained and continuing improvement in constitutional policing, as demonstrated pursuant to the Agreement’s outcome measures” has been achieved. (CD at 491). The Comprehensive Reassessment of the Federal Monitors in January, 2019 found that the City had either achieved Full and Effective Compliance or was nearing Full and Effective Compliance in all but five (5) areas of the Consent Decree. In those five areas (Supervision, Performance Evaluations & Promotions, Recruitment, Community Engagement, and Stops, Searches, and Arrests), the Federal Monitors found significant progress. That was almost two years ago. There are no findings of unconstitutional policing by the NOPD for over two years.

Pursuant to the terms of the Agreement (paragraphs 491 and 492) and the plain intent of the parties, the City hereby formally notifies DOJ that it is in Full and Effective Compliance with the Consent Decree, and invites the DOJ to join it in moving to conclude the Consent Decree through a joint motion to terminate the Consent Decree. However, in the event that the DOJ contends that discrete issues of compliance (based on a finding that the City has not achieved sustained and continuing improvement in constitutional policing as demonstrated by the Agreement’s outcome measures) remain, the City requests that DOJ agree to terminate the Consent Decree and enter into a new transition agreement to address the remaining issues. The transition agreement envisioned by the City will recognize the limits set by the U.S. Supreme

Court and return management of the NOPD to the City of New Orleans, while leaving a “trust but verify” apparatus in place for the DOJ.

In that regard, we note that the Civil Rights Division of the U.S. Department of Justice published a paper in January 2017 titled: “The Civil Rights Division’s Pattern and Practice Police Reform Word: 1994-Present.” On page 37 of that document, it provides that:

In a number of instances where a law enforcement agency has accomplished significant, sustainable reform but discrete issues remain, the Division has terminated a court-supervised consent decree prior to full compliance and entered into a separate transition agreement to address the remaining issues. Such transition agreements reduce the overall burden of compliance and acknowledge the progress the agency has made toward effective, constitutional policing.

Here, the fact that the NOPD has accomplished significant, sustainable reforms is not disputed. If the DOJ finds that any discrete issues remain, any such remaining issues can be addressed in an acceptable transition agreement in accordance with existing DOJ guidance. This would be consistent with the DOJ policy that is clearly stated in the November 7, 2018 memorandum from the Attorney General regarding Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (the “DOJ Memo”). Section IV (B) of the DOJ Memo specifically addresses the use of third-party monitors in connection with Consent Decrees for State and Local Government Entities, as follows:

In most cases, the DOJ should take *direct* responsibility for ensuring a defendant’s compliance with the terms of a consent decree rather than delegating the responsibility to a monitor. If, in light of the circumstances of a given case, it is prohibitively difficult for the Department or its client’s agency to directly oversee compliance, a monitor may be considered.

Footnote six (6) to that policy statement explains that inadequate DOJ recourses to monitor a consent decree is a hallmark of overly broad supervision:

Inadequate Department resources, standing alone, will usually not constitute a circumstance that justifies the use of a monitor. If a consent decree is so complicated or long-term that Department officials cannot effectively monitor compliance, that may be an indication that the consent decree is not appropriately cabined or respectful of the state or local governmental entity's interest in local control and accountability.

For cases in which a monitor is appointed, certain guidelines must be followed, unless an exception is approved by the Deputy Attorney General or the Associate Attorney General, including: “[i]n most cases, the monitor must be replaced at an appropriate interval, **usually of no more than two or three years.**” In stark contrast, the City has paid over \$12,500,000 for over eight (8) years of monitoring services from the same team of monitors.

The City and the NOPD acknowledge and appreciate the substantial benefits that have been derived from the work of the Federal Monitors, but this is certainly an appropriate interval to stand down the Federal Monitors. The DOJ can supervise any remaining issues under the Consent Decree pursuant to a separate transition agreement.

V. KEY HISTORICAL FACTS AND EXCERPTS FROM REPORTS OF THE FEDERAL MONITOR

As New Orleans was emerging from the apocalyptic landscape of life post-Katrina in 2010, newly elected Mayor Mitchell J. Landrieu invited the DOJ to assist his administration in reforming the NOPD. After a lengthy investigation resulted in findings issued on March 16, 2011, the DOJ sent the City a first draft of a consent decree on October 26, 2011, and negotiations ensued. The Department of Justice subsequently filed its complaint in the Eastern District Court of Louisiana.⁸ On that same day, the DOJ entered a proposed consent decree with the City of New Orleans regarding the claims against the NOPD that outlined reforms needed to bring the NOPD into constitutional compliance. In short, the Mayor Landrieu administration was

⁸ Case 2:12-cv-01924-SM-DPC Document 175-1 Filed 02/05/13 Page 3 of 31

happy to have DOJ's guidance on getting the NOPD on the path to reform. The agreement anticipated that the DOJ would monitor the NOPD's improvements, but this was not the case.

Once the outside team of consultants that would become the Office of the Consent Decree Monitor were publicly revealed to the Landrieu administration and the financial reality of the Consent Decree was understood, the City begged the Court to reconsider the terms.⁹ That request was denied. As ordered, the DOJ's monitor role was ceded to the federal Judge in the proceedings, with a team of monitors hired to perform monitoring procedures for the Judge. The DOJ has no financial burden or corresponding incentive to efficiently bring the federal control to a close. This violates a core principle of the DOJ's handling of consent decree matters, as discussed in more detail below.

In ordering the Consent Decree, the Honorable Judge Susie Morgan accepted the unchallenged accusations that the NOPD had subjected individuals to excessive force, unlawful searches and seizures and discriminatory policing practices in violation of the Fourth Amendment, the Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964. The most current version of the Consent Decree is 492 paragraphs long, which concludes with the goal of "Full and Effective Compliance" being achieved by the NOPD. This critical term is defined here:

<p>"Full and Effective Compliance" shall be defined to require sustained compliance with all material requirements of this Agreement or sustained and continuing improvement in constitutional policing, as demonstrated pursuant to the Agreement's outcome measures.</p> <p>- Consent Decree para. 491.</p>

According to the Consent Decree, the U.S. District Court for the Eastern District of Louisiana is to retain jurisdiction over the claims set forth in the 2012 DOJ complaint until two years after Full and Effective Compliance has been reached. (CD at 486) Notably, however, the

⁹ Case 2:12-cv-01924-SM-DPC Document 175-1 Filed 02/05/13

federal courts have original jurisdiction over charges related to any alleged violations of constitutional policing principles arising under the Fourth Amendment, the Safe Streets Act of 1968 or Title VI of the Civil Rights Act of 1964. The eventual termination of the Consent Decree will not alter that jurisdiction. The citizens of New Orleans will always have federal protection of their federal rights.

VI. NOPD'S SUSTAINED AND CONTINUING IMPROVEMENT IS UNDISPUTED

The DOJ's 2012 Complaint in *United States of America v. New Orleans City* identified four (4) areas in which the City of New Orleans, through its agent the NOPD, had systemically violated the constitutional rights of its citizens:

- a) Unreasonable use of force;
- b) Unlawful stops, searches and arrests;
- c) Discrimination on the basis of gender, ethnicity, origin, race, or orientation; and
- d) Pervasive deficiencies in training, supervision and accountability that led to, or allowed, the above conduct.

According to the Federal Monitors, the Court must find the NOPD in Full and Effective Compliance with all sections of the Consent Decree to *start* an additional two-year full compliance clock before termination of the Federal Monitor regime is available. However, that ignores the second part of the definition of Full and Effective Compliance under the Consent Decree. In the nine years since the DOJ's investigation (and eight since the parties first entered into the Consent Decree), the NOPD has implemented and sustained continuing improvement in constitutional policing practices under the guidance of the Court and the Monitors that have cured the systemic nature of the deficiencies, and have all but eradicated even isolated incidents of unconstitutional policing. The NOPD is now, and has been for several years, consistently policing its citizens in a manner that respects and protects their constitutional rights. The reports of the Monitors confirm this fact:

[T]he Monitoring Team has found the Department to be in ‘full and effective compliance’ with *many* sections of the Consent Decree. Other sections of the Consent Decree are *nearing full and effective compliance*, and the Monitoring Team has good reason to believe these areas are capable of moving into the full and effective compliance category.¹⁰

This quote from the Monitors in January of 2019 (some 20 months ago) addresses a majority of the 492 paragraphs set forth in the Consent Decree and the broader issues of constitutional policing raised by the initial 2011 DOJ complaint. Again, the Federal Monitors are using the first part of the definition of Full and Effective Compliance as there is no mention of any area where the City has failed to achieve sustained and continuing improvement in constitutional policing.

Empirical data additionally backs up this finding. In 1992, the NOPD officers *reported* firing a firearm 66 times, causing at least 32 injuries and/or deaths. In 2018, there was but one single shot fired at a suspect, and the Monitors agreed it was a justified use of force. That pattern continued in 2019 and so far in 2020 as there was only one instance of an unjustified discharge of a weapon where a reserve officer fired his weapon into the ground, and that reserve officer was discharged for his misconduct. Further, the Consent Decree aimed to get the canine bite ratio down to 20%. The NOPD has reduced that percentage to **zero**. Likewise, the percentage of cases refused by the District Attorney based on “officer reasons” was reduced to nine-one-hundredths of one percent (0.09%) by 2018.¹¹ Those improvements were maintained in 2019 and 2020.

Sweeping changes have been made to the training, goals, incentives, procedures, and reporting used for every phase of police work from initial call to the conclusion of the investigation. And, as the public reports from the Federal Monitors show, the achieved reforms

¹⁰ Comprehensive Reassessment of the Consent Decree Monitor Pursuant to Paragraph 456 of the NOPD Consent Decree Released January 24, 2019, p. 12.

¹¹ NOPD 2018 Stop and Search Annual Report: <https://nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-Stop-and-Search-Annual-Report.pdf/?lang=en-US>

show no indication of moving back to the challenged practices of the past because the framework in which they existed has been completely and fundamentally changed. A constitutional standard and culture of respecting citizens' rights has been successfully entrenched within the NOPD.

Three years ago, in its 2017 Annual Report, the Federal Monitors reported that “the NOPD today is undeniably a better, stronger, more professional organization than it was when the Consent Decree went into effect in 2013.”¹² The Monitors added, “the NOPD has proven itself to be a respected, forward-thinking, reform-minded police agency to *which other agencies now routinely come for guidance.*”¹³ This success and growing wave of endorsement only grew stronger in the following two years (2018 and 2019). We note, “**there are no sections for which the NOPD has failed to make significant progress toward compliance.**”¹⁴ This clearly shows sustained and continuing improvement in constitutional policing.

The successful implementation of these reforms led to a “significant positive trend in the community, officer and detainee’s perception of the New Orleans Police Department,” according to surveys by the Monitors in 2017.¹⁵ As they concluded then, “[t]hese positive trends illustrate the significant effort the NOPD has dedicated to its reform efforts and to achieving the goals of the consent decree over the past three years.”¹⁶ Confirming the sustainability of those achievements, in November of 2019 the Monitors concluded:

¹² Office of the Consent Decree Monitor. “2017 Annual Report of the Consent Decree Monitor for the New Orleans Police Department Consent Decree.” April 10, 2018. Page 5.

¹³ Office of the Consent Decree Monitor. “2017 Annual Report of the Consent Decree Monitor For the New Orleans Police Department Consent Decree.” April 10, 2018. Page 5.

¹⁴ Comprehensive Reassessment of the Consent Decree Monitor Pursuant to Paragraph 456 of the NOPD Consent Decree Released January 24, 2019, p. 12.

¹⁵ Office of the Consent Decree Monitor. “Special Report of the Consent Decree Monitor For the New Orleans Police Department Consent Decree Reporting the Results of the Second Biennial Community Survey.” July 24, 2017. Page 9.

¹⁶ Office of the Consent Decree Monitor. “Special Report of the Consent Decree Monitor For the New Orleans Police Department Consent Decree Reporting the Results of the Second Biennial Community Survey.” July 24, 2017. Page 10.

In short, the 2014, 2016, and 2018 biennial surveys collectively demonstrate that officers, detainees, and the community continue to perceive NOPD as moving in the right direction...The results of the most recent biennial survey indicate the goals of the Consent Decree are being realized.¹⁷

Most importantly, isolated incidents are now properly investigated and punished, when appropriate. In fact, there have been **zero (0)** unjustified shootings of individuals by an NOPD officer since at least 2016.¹⁸ Indicative of the systemic nature of the change, the Monitors have not found a single NOPD investigation of the use of force that was not supported by the evidence since 2015 – **over five (5) years**.¹⁹ Obviously, these are large pieces of a complex puzzle, but certainly powerful indicators of Full and Effective Compliance as defined in the Consent Decree. Without question, these are durable remedies to historical violations.

The Federal Monitors, Department of Justice and the Honorable Judge Susie Morgan have continually praised the broad scope of progress of the NOPD over the past three years. In August 2017, Judge Morgan issued a statement praising the NOPD’s “tremendous progress” with transforming the department and implementing the reforms of the Consent Decree.²⁰ The Department of Justice has called the NOPD “a completely different department”²¹ with regards to use of force, a primary reason for the Consent Decree, and praised the NOPD’s reforms in other areas. While there will *always* be room for improvement, all parties have agreed that the

¹⁷ Office of the Consent Decree Monitor. “Special Report of the Consent Decree Monitor For the New Orleans Police Department Consent Decree Reporting the Results of the Third Biennial Community Survey Released November 11, 2019”.

¹⁸ Consent Decree Monitory New Orleans; “Path to Reform, Report to Judge Morgan on NOPD Progress Under the Consent Decree, January 2019” p. 14.

¹⁹ Consent Decree Monitory New Orleans; “Path to Reform, Report to Judge Morgan on NOPD Progress Under the Consent Decree, January 2019” pp. 16,17.

²⁰ Lane, Emily. “NOPD Sets 'Ambitious Goal' to Exit Consent Decree by 2020, Chief Says.” *NOLA.com*, NOLA.com,1 June2018,www.nola.com/crime/index.ssf/2017/08/nopd_consent_decree_goal_end_2.html

²¹ Lane, Emily. “Goal of Full Compliance with Consent Decree by May Not Met, NOPD ‘Sprinting’ to Get There.” *NOLA.com*, NOLA.com,1 June 2018, www.nola.com/crime/index.ssf/2018/05/goal_of_full_compliance_with_c.html.

NOPD has demonstrated significant progress in implementing the reforms of the Consent Decree and improving its services to the community. As a result, and as the Supreme Court has directed, “[t]he federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State’s obligations is returned promptly to the State and its officials.”²²

The approach of the Federal Monitors in continuing to monitor all aspects of the Consent Decree until there is a finding by the Court of Full and Effective Compliance with every section (and then for an additional two year sustainment period after that), not only ignores the second part of the definition of Full and Effective Compliance under the Consent Decree, but it is also inconsistent with the DOJ’s own policies and guidelines. As the DOJ’s Civil Rights Division has noted:

The Division’s current generation of reform agreements generally provide that the *independent monitor should stop reviewing* the agency’s compliance with certain provisions of the agreement *once the agency has fully implemented those provisions*, allowing the scope of the agreement to be narrowed over time and for the monitoring team to focus its efforts on areas where the agency is still struggling...²³

This is the well-reasoned position of the DOJ specifically because, as here, the continued use of the hired consultants to monitor aspects of the Consent Decree that they have found to be in Full and Effective Compliance threatens to erode the constitutional limits of federalism:

While consent decrees are sometimes necessary and appropriate to secure compliance with federal law, federal court decrees that impose wide-ranging and long-term obligations on, or require ongoing judicial supervision of, state or local governments are extraordinary remedies that raise **sensitive federalism concerns**.” *Horne v. Flores*, 557 U.S. 433, 448 (2009). **Such concerns are most acute when a federal judge**, directly or through a court-

²² *Frew v. Hawkins*, 540 U.S. 431, 442 (2004)

²³ The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present, p. 37.

appointed monitor, effectively superintends the ongoing operations of the governmental entity subject to the decree. This supervision can deprive the elected representatives of the people of the affected jurisdiction of control of their government. **Consent decrees can also have significant ramifications for state or local budget priorities, effectively taking these decisions, and accountability for them, away from the people's elected representatives.** *See id.* (“When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs.”). In addition, **consent decrees that are not limited to reasonable and necessary implementations of federal law may “improperly deprive future officials of their designated legislative and executive powers.”** *Frew v. Hawkins* 540 U.S. 431, 441 (2004).

... Second, if terms are not carefully and appropriately crafted, a consent decree can subject defendants to **ongoing judicial supervision long after it is no longer necessary to ensure compliance** with the decree's terms-in some cases even after the Department believes the purposes of the decree have been achieved.²⁴

Contrary to the DOJ’s stated public policy, the Federal Monitors in this case continue to track, audit, investigate and report on almost all the items set forth in the 492 paragraph Consent Decree at their discretion. Despite acknowledging compliance in many areas and near-compliance in the rest, the Monitoring Team continues to undertake the task and expense of “monitoring” compliance with each of the 492 paragraphs in the Consent Decree, plus many other newly articulated areas not found in that document. Obviously, the DOJ’s primary concern, as stated in the Consent Decree is the achievement of constitutional policing through means and measures that assure sustainability. That is one of the tangible benefits of the extended term of the federal control in place in New Orleans – years of proof of sustained Full and Effective Compliance.

²⁴ Attorney General of the United States, “Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities,” November 7, 2018, pp. 2 – 3.

After applying the acknowledged achievements evidenced by the many reports from the Federal Monitors to the complaints outlined by the DOJ in 2011, it becomes very evident that the Consent Decree has served its purpose and should be concluded before reaching year nine. A discussion of the voluminous areas of acknowledged compliance is difficult to summarize as the areas are so extensive. It is easier at this point to look at the list of areas the Monitors deemed **not yet** complete in their Comprehensive Reassessment of January 24, 2019, compared to the definition of constitutional policing. Again, the following five items were the central findings of the 2011 DOJ complaint that serve as the root of every paragraph of the Consent Decree:

- a) Unreasonable use of force;
- b) Unlawful stops, searches and arrests;
- c) Discrimination on the basis of gender, ethnicity, origin, race, or orientation; and
- d) Pervasive deficiencies in training, supervision and accountability that led to, or allowed, the above conduct.

To be clear, the NOPD disputes the assertion that *any* areas require additional time to reach ***constitutional*** compliance. Perfection has not been achieved, but constitutional compliance has been reached and “world class” status is a noble goal, but it is not a constitutional standard. The Federal Monitor’s remaining issues have been difficult to nail down as the goals expressed remain aspirational, subjective and moving. In fact, the NOPD has repeatedly asked for concrete objectives that are needed to satisfy open areas of concern. As progress has been made, the Monitors have been increasingly unable to provide clear, measurable examples of any ongoing failures by the NOPD to provide ***constitutional policing***. For example, the Monitors concluded in December of 2019 that the NOPD was nearing full compliance with the entire Consent Decree, but was still not quite ready for the start of the 24-month proving period:

We often report at these hearings that NOPD has made remarkable progress “but still has a long way to go.” I’m happy to report, while work remains to be done, NOPD does not have a long way to go to achieve Full and Effective Compliance with the Consent Decree.

While the **Department clearly is closing in on the finish line**, history tells us that many law enforcement agencies across the country have made similar reforms only to walk back from them the moment they were no longer under the microscope. Once the Department comes into Full and Effective Compliance with the totality of the Consent Decree, we then enter into a two-year period where the Department must prove its reforms will last. This two-year period is a critical time for NOPD. This really is where the rubber meets the road as they say.²⁵

The difficulty for the City at this late phase is not with accepting recognition for the great accomplishments of the NOPD, but with understanding where the finish line of “Full and Effective Compliance” stands. This stems directly from the very goal the Federal Monitors are trying to achieve, *i.e.*, “transforming the NOPD into a world class police force.”²⁶ A review of the prior findings of the Monitors make clear there has been no demonstration of evidence of systemic unconstitutional policing for well over two years.

In contrast to the NOPD’s achievements subject to objective confirmation – *e.g.*, use of force, audited bodycam footage, searches and seizures, response time, complaints, *etc.* – the Monitors identified the specific areas below as allegedly ***not yet*** in full compliance as of January 2019. Troubling and indicative of the above is the *qualitative* or *subjective* nature of the items as compared to: (1) the **quantitative** evidence that supported the DOJ’s original findings of unconstitutional policing and, (2) the DOJ’s policy of quantitative goals in consent decree

²⁵ Public Hearing Opening Statement of Jonathan S. Aronie, Consent Decree Monitor Over The New Orleans Police Department Before The U.S. District Court For The Eastern District of Louisiana Focusing on the NOPD Police Academy 17 December 2019 at <http://nopdconsent.azurewebsites.net/Media/Default/Documents/Reports/OCDM%20JSAronie%20Opening%20for%20Academy%20Hearing%202019-12-17.pdf>.

²⁶ Order, 2:12-cv-01924-SM-DPC Document 256, 05/23/13 Page 48 of 48

matters. As outstanding uncompleted objectives, the Federal Monitors offered the following observations to the NOPD:²⁷

Supervision

- *Inconsistent* review of force statements by supervisors
- Supervisors *not consistently* working same shifts as those they supervise
- Districts *not consistently* meeting patrol/supervisor ratio
- EWS still not used to *full capacity*
- Supervisors performing inadequate evaluations
- Rollcall training *inconsistent*
- *Inconsistent* quality of supervision

Stop, Searches, Arrests

- *Inconsistent* documentation of searches
- *Inconsistent* supervisor reviews of search documentation
- Consent searches *not consistently* approved by supervisors
- Training in need of further *improvement*

Recruitment

- Still not attracting *adequate* quantity and quality of recruits
- Quality of vetting process *inconsistent*
- *Insufficient* communication with recruitment partners
- *Insufficient* internal communications
- *Insufficient* communications with applicants / recruits
- *Insufficient* analysis of trends/best practices
- Processes often *inefficient*

Performance Evaluations / Promotions

- Supervisors *not consistently* preparing meaningful evaluations
- Commanders *not adequately* supervising evaluation process
- *Inconsistent* attention to correcting deficiencies in evaluation process

Community Engagement

- Geographic Deployment Plan not implemented
- Community problem solving approach *not fully implemented*
- Community Policing Form and Scorecard *not fully implemented*
- *Uneven quality* of District meetings
- *Room for improvement* in using MAX meetings to implement community policing

²⁷ Public Hearing Opening Statement of Jonathan S. Aronie, Consent Decree Monitor Over The New Orleans Police Department, Before The U.S. District Court For The Eastern District of Louisiana 16 August 2018.

<http://nopdconsent.azurewebsites.net/Media/Default/Documents/Reports/Community%20Policing%20Opening%20Statement%20at%20Court.pdf>

Of considerable note, the Federal Monitors found in January of 2019 that the NOPD had made “*significant progress*” in every one of these areas. *See* page 11 of the Federal Monitor’s “Path To Reform” Report to Judge Morgan.²⁸ While the subjective aspects of these areas are important to the DOJ and the City, they do not rise to the level of, or even imply, unconstitutional policing. Instead, they are aspirational goals that can be pursued and “theoretically” achieved without a \$115,000 per *month* cost to the City to fund the apparatus of a team of third-party monitors. Moreover, only *theoretical* compliance is possible on these points as no organization, public or private, has **ever** been 100% efficient, 100% consistent or otherwise perfect. And, significantly, there are no objective measurable criteria or metrics or even tools of evaluation for these aspirational standards.

Most critically, the list does not address a single existing violation of **constitutional policing** or cite a single data point even implying a systemic concern or negative trend. Moreover, the list of incomplete items noted by the Federal Monitors does not correlate to the objective outcome measures listed in paragraph 448 of the consent decree. When evaluating the second path to achieving Full and Effective Compliance, there is no dispute that the City and the NOPD have achieved sustained and continuing improvement in constitutional policing for over two years as measured by those “objective outcome measures.”

This expansive unquantified set of goals is the very reason that subjective goals are not favored by the DOJ as a public policy. The Department has recognized the need for “concrete and objective benchmarks” so that progress and success are definable, not merely concepts or

²⁸ “Path To Reform” Report to Judge Morgan On NOPD Progress Under The Consent Decree. January 2019 Loyola University New Orleans School of Law.

ideologies subject to change as DOJ, Court, City or monitor personnel change.²⁹ As the DOJ policy makes clear:

For cases in which a consent decree is appropriate, the consent decree must adhere to the following requirements.

1. ... Absent a compelling justification, such as where state or local governments have sought extended compliance schedules for significant capital investments, the obligations imposed by the decree should, if feasible, generally **last for no more than three years**.

2. The consent decree **must include specific and measurable actions that trigger the decree's termination**. In addition, the consent decree **must include a “sunset” provision** providing that, regardless of the decree’s specific requirements, **the decree terminates upon a showing by the defendant that it has come into durable compliance with the federal law that gave rise to the decree**. The consent decree must also provide for partial termination when the state or local government can demonstrate durable compliance with particular provisions of the consent decree.

...

5. The consent decree **must not be used to achieve general policy goals or to extract greater or different relief** from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.

6. A consent decree involving federal control of a state or local governmental institution should be limited in scope and **must be structured to ensure that responsibility for discharging the duties of the institution is returned to the relevant officials as soon as the injuries caused by the legal violations alleged have been remedied**.

The DOJ mandated objective benchmarks and limited lifespan are critical because the jurisdiction of the federal court in this Consent Decree matter is limited to constitutional policing, not subjective improvement of a sovereign state’s political bodies:

²⁹ The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present, January 2017, p. 35.

[A] federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; **must come within the general scope of the case made by the pleadings**; and must further the objectives of the law upon which the complaint was based.³⁰

...
The federal court must exercise its equitable powers to ensure that **when the objects of the decree have been attained**, responsibility for discharging the State's obligations is returned promptly to the State and its officials.³¹

The Consent Decree clearly defines “Full and Effective Compliance”, and the subjective aspirations for consistency and efficiency of the Monitors do not show that the NOPD has failed to demonstrate “sustained and continuing improvement in constitutional policing, as demonstrated pursuant to the Agreement’s outcome measures.” (CD at 491) Based on this clear definition and the jurisprudence that shapes it, the City has determined that it is in “Full and Effective Compliance” with the Consent Decree, and that such compliance has been maintained for over two years.

VII. CONCLUSION

“Full and Effective Compliance” as defined by the Consent Decree has been reached and maintained for more than two years. To the extent there is any debate about specific subparts of specific paragraphs of the Consent Decree, the City welcomes a pointed fact-based conversation about those alleged shortcomings that constitute violations of federal law or practices that rise to the level of unconstitutional policing. The City will commit to continued efforts to resolve them via a transition agreement, if necessary. But absent evidence of systemic constitutional violations, the City of New Orleans is entitled by the terms of the Consent Decree ,

³⁰ *Frew v. Hawkins*, 540 U.S. 431, 437 (2004)

³¹ *Frew*, 540 U.S. at 442.

jurisprudence, DOJ policy and guidelines, and basic principles of federalism, to bring federal control of its police department to an end.

Stated another way, even if there are areas short of technical 100% compliance with every paragraph of the Consent Decree, there is no evidence that the NOPD has not been operating in a constitutional manner for more than two years. Given NOPD's starting point in 2011, it is beyond debate that "sustained and continuing improvement in constitutional policing, as demonstrated pursuant to the Agreement's outcome measures" has been obtained and maintained for over two years. (CD at 491). Pursuant to the Consent Decree, DOJ policy and Supreme Court precedent, it is time to conclude the Consent Decree. Paragraph 492 of the Consent Decree contemplates that, once this notice of Full and Effective Compliance has been sent to the DOJ, the parties will promptly confer as to the status of compliance. Please let us know when you would like to confer on the status of the City's compliance with the Consent Decree. We thank you for your consideration and your continued cooperation in this matter.