

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CITY OF NEW ORLEANS,
Defendant-Appellee

v.

CRESCENT CITY LODGE NO. 2, FRATERNAL ORDER OF POLICE, INCORPORATED;
WALTER POWERS, JR.

&

COMMUNITY UNITED FOR CHANGE,
Movants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4541

STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument in this case.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This is an appeal from a district court's final judgment denying motions to intervene as of right or, in the alternative, by permission. The district court entered

its order denying intervention on August 31, 2012.¹ USCA5 1283-1307. Movants timely filed notices of appeal on September 19, 2012, and October 24, 2012. USCA5 1569-1570; R. 144. The denial of a motion to intervene as of right is an appealable final order; this Court has jurisdiction of the district court's decision denying intervention as of right under 28 U.S.C. 1291.

This Court has provisional jurisdiction to determine whether a district court's decision to deny permissive intervention was erroneous. *Stack v. Gamill*, 796 F.2d 65, 67 (5th Cir. 1986). Where the district court acted within its discretion in denying a motion for permissive intervention, this Court must dismiss the appeal for lack of jurisdiction. *Ibid.* If the district court abused its discretion in denying a motion for permissive intervention, this Court retains jurisdiction and must reverse. *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 330-331 (5th Cir. 1982), cert. denied, 480 U.S. 931 (1987).

STATEMENT OF THE ISSUES

1. Whether the district court correctly denied appellants' motions to intervene as of right, where appellants did not satisfy the standards for intervention as of right.

¹ References to the record on appeal are cited as "USCA5 ___." Documents filed in the district court but not included in the record on appeal are cited, by number, as "R. ___." References to briefs filed by appellant Fraternal Order of Police and appellant Community United for Change are cited as "FOP Br." and "CUC Br." respectively.

2. Whether the district court acted within its discretion when it denied appellants' motions for permissive intervention.

STATEMENT OF THE CASE

The United States filed a complaint in the United States District Court for the Eastern District of Louisiana on July 24, 2012, alleging that the New Orleans Police Department (NOPD), an agent of the City of New Orleans (City), engages in a pattern or practice of subjecting individuals to excessive force and unlawful searches and seizures, in violation of the Fourth Amendment, and discriminatory policing practices, in violation of the Fourteenth Amendment and other federal law. The United States sought declaratory and injunctive relief under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141 (Section 14141), the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d (Safe Streets Act), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-7, and its implementing regulations, 28 C.F.R. 42.101-42.112 (Title VI). USCA5 19-30.

That same day, the United States and the City jointly moved for entry of a consent decree that was intended to resolve the United States' claims against the City. USCA5 190-200. The district court ordered any interested party to file a motion to intervene by August 7, 2012. USCA5 334-336. Crescent City Lodge

No. 2, Fraternal Order of Police, Inc., and Walter Powers, Jr.,² a Sergeant in the NOPD (collectively, FOP), moved to intervene as of right and, in the alternative, for permissive intervention, on August 6, 2012. USCA5 341-343, 585-594, 730-740, 797-806. Community United for Change (CUC), a non-profit association of local citizens interested in police reform, also moved to intervene as of right and, in the alternative, for permissive intervention, on August 7, 2012.³ USCA5 381-386, 616-627. Both the City and the United States opposed the motions. USCA5 545-571, 897-901, 904-913.

The district court held a hearing on the motions on August 20, 2012 (USCA5 612-613), and invited interested persons, including appellants, to submit additional comments on the proposed consent decree after the hearing (USCA5 864-865).

On August 31, 2012, the district court denied the motions to intervene. USCA5 1283-1307. On September 14, 2012, the United States and the City filed a

² Powers moved to intervene individually and as President of FOP. USCA5 341-343.

³ Also on August 7, 2012, two additional applicants moved to intervene as of right and, in the alternative, for permissive intervention: (1) the Police Association of New Orleans, Inc., and Michael Glasser, an officer with the NOPD and the President of the Police Association of New Orleans, Inc. (collectively, PANO); and (2) the Office of the Independent Police Monitor and Susan Hutson, the Independent Police Monitor for the City of New Orleans (collectively, OIPM). USCA5 450-451, 470-479. Mr. Glasser and Ms. Hutson moved individually and in their respective positions as head of the associations they represent.

joint motion for entry of an amended consent decree.⁴ USCA5 1420-1421. FOP filed a notice of appeal on September 19, 2012 (USCA5 1569-1570); CUC filed a notice of appeal on October 24, 2012 (R. 144).

The district court held a fairness hearing on September 21, 2012 (USCA5 1672-1674), and on January 11, 2013, the court entered an order granting the United States' and City of New Orleans' joint motion for entry of the consent decree and approved the consent decree, with minor amendments agreed to by the parties (R. 159).

STATEMENT OF THE FACTS

1. Investigation And Negotiation

On May 15, 2010, the United States began a comprehensive investigation into the patterns and practices of the NOPD. Over the course of its investigation, the United States gathered information through interviews and meetings with NOPD officers, supervisors and command staff, as well as members of the public, City and State officials, and other interested community members and organizations. USCA5 56. The United States' investigation included on- and off-site review of documents, including policies and procedures, training materials,

⁴ The amended consent decree included modifications "to correct typographical errors and to add clarity; to reflect changes requested by the Court; and, as appropriate, to incorporate edits suggested in comments submitted to the Court pursuant to its Order of July 31, 2012." USCA5 1420.

incident reports, use of force reports, crime investigation files, data collected by the NOPD, complaints of misconduct, and misconduct investigations. USCA5 56.

The United States also participated in ride-alongs with officers and supervisors, attended police briefings, observed police activity, and met with representatives of police fraternal organizations and several officer “round tables” to elicit officer concerns and ideas about how to improve services provided by the NOPD.

USCA5 56.

The United States participated in more than 40 meetings with members of the New Orleans community, including those requested by the United States as well as regularly-scheduled community meetings. The United States also met with local judges, members of the District Attorney’s Office, the Public Defender’s Office, the Civil Service Commission, the Office of the Independent Police Monitor (OIPM), and the City Council, Louisiana State legislators, the Business Council of New Orleans and the River Region, the New Orleans Police and Justice Foundation, and the New Orleans Crime Coalition. USCA5 56.

Following its exhaustive, ten-month investigation, the United States issued a Report of Findings (Report) on March 16, 2011. USCA5 31-188. In it, the United States identified reasonable cause to believe that the NOPD had engaged in a pattern or practice of misconduct that violated the Constitution and federal law. USCA5 37. Specifically, the United States found that the NOPD engaged in a

pattern or practice of unconstitutional force (USCA5 58-83); unconstitutional stops, searches and arrests (USCA5 83-88); and, discriminatory policing (USCA5 88-108). The United States concluded that certain policies and practices contributed to and caused the patterns and practices of unlawful conduct. These included deficiencies in recruitment (USCA5 108-111); training (USCA5 111-117); field supervision (USCA5 117-126); management of secondary employment (*i.e.*, paid details) (USCA5 126-132); performance evaluations and promotions (USCA5 132-136); the system for investigating and adjudicating complaints of officer misconduct (USCA5 136-157); strategies for community-oriented policing (USCA5 157-163); officer assistance and support services (USCA5 163-164); custodial interrogation practices (USCA5 164-170); and, resources for community oversight (USCA5 170-171).

After issuing its Report, the United States and the City spent nine months negotiating a settlement that was intended both to remediate the pattern or practice of unconstitutional policing by the NOPD and balance the interests of those to be most affected and benefited by the decree. During the course of drafting and negotiating the proposed decree, the United States consulted with subject matter experts, as well as various persons and organizations who would be affected and/or benefitted by the decree, to ensure that their concerns were heard and considered. This effort included meeting with police commanders, supervisors, and line

officers; police association leaders; the OIPM; and a broad spectrum of advocacy groups, criminal justice organizations, and other interested community members.

On July 24, 2012, the United States filed a Complaint in the district court, alleging that the NOPD engages in a pattern or practice of subjecting individuals to excessive force and unlawful searches and seizures, in violation of the Fourth Amendment, and discriminatory policing practices, in violation of the Fourteenth Amendment and other federal law. The United States sought declaratory and injunctive relief under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141 (Section 14141), the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d (Safe Streets Act), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-7, and its implementing regulations, 28 C.F.R. 42.101-42.112 (Title VI). USCA5 19-30.

The same day it filed the Complaint, the United States and the City jointly moved for entry of a comprehensive consent decree that was intended to resolve the United States' claims against the City and ensure that police services are delivered to the people of New Orleans in a manner that complies with the Constitution and laws of the United States. USCA5 190-200. The proposed consent decree requires the City and its police department to implement new policies, training, and practices throughout the NOPD, including each of the areas the government's investigation found problematic. See generally USCA5 201-329.

The decree was intended to hasten the process of providing NOPD officers with 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. USCA5 196. The decree itself, however, does not establish any specific policies for changing, improving, modifying or reforming the NOPD. Rather, the decree provides that the NOPD itself will develop “comprehensive and agency-wide policies and procedures that ensure consistency with, and full implementation of,” the decree within a year of its effective date. USCA5 216. Moreover, the decree requires the NOPD to work with the Civil Service Commission to develop and implement a formalized officer performance evaluation system, and to develop and implement fair and consistent promotion practices. USCA5 280-282.

The decree also provides for an unprecedented level of input by the entire New Orleans community to ensure that the required reforms are effective and sustained. Specifically, the decree requires the NOPD to implement community oriented, problem-solving policing; to form community partnerships; to engage with the community in providing training; and, to meet with the community of each District it serves. USCA5 265-268, 311-312. The decree also includes provisions requiring a Police Community Advisory Board, which will further facilitate regular communication and cooperation between the NOPD and

community leaders. USCA5 312-313. Moreover, the decree incorporates the entire Memorandum of Understanding between the Office of the Independent Police Monitor (OIPM) and the NOPD, which will help ensure that constitutional policing is sustained long after the term of the decree has ended. USCA5 313.

2. *Motions To Intervene*

In response to the joint motion for entry of the consent decree, the district court invited any interested person to submit written comments on the proposed decree, invited any interested person to file a motion to intervene under Federal Rule of Civil Procedure 24, and scheduled a hearing to consider the fairness of the proposed decree. USCA5 334-338. Four groups moved to intervene: Crescent City Lodge No. 2, Fraternal Order of Police, Inc., and Walter Powers, Jr., individually and as President of the FOP (USCA5 341-343); Community United for Change (CUC), a non-profit association of local citizens interested in police reform (USCA5 381-386); the Police Association of New Orleans, Inc., and Michael Glasser, individually and as President of PANO (collectively, PANO) (USCA5 450-451); and, the Office of the Police Monitor and Susan Hutson, individually and as the Independent Police Monitor (collectively, OIPM) (USCA5 470-479). All four groups moved to intervene as of right, and, alternatively, by permission.

FOP argued in its motion to intervene as of right that members of the NOPD have a property right in their employment that is affected by the proposed decree. USCA5 351-354. FOP explained that it does “not condone illegal or unconstitutional acts” by officers, but faulted the decree for “put[ting] restrictions in place that go far beyond remedying alleged unconstitutional or illegal activities.” USCA5 354. FOP claimed that officers’ property right in their employment “is affected by virtually every part of the proposed Consent Decree which regulates virtually everything that the members of the NOPD do.” USCA5 351. FOP further argued that, absent intervention, members of the NOPD cannot protect their property interest because neither the City nor the United States is positioned to represent their interests adequately. USCA5 354-356. FOP also argued for permissive intervention on grounds that its claim shared a common question of law or fact with the underlying action and its participation would not unduly delay or prejudice the parties. USCA5 356-357.

CUC indicated in its motion to intervene as of right that it “agrees with the factual findings of the Department of Justice as to patterns and practices” of illegal conduct by the NOPD, but believes the decree is “insufficient to combat and change the culture of lawlessness in the NOPD.” USCA5 383. CUC thus moved to intervene as of right, arguing that it has an interest in the underlying action based on its significant efforts to bring about meaningful change in the NOPD.

USCA5 387-390. CUC further argued that the weaknesses it identified in the proposed decree would impair its efforts to protect its interests in a reformed NOPD, and that neither the City nor the United States could adequately protect its interests (USCA5 390-394) – that of “the people who are the primary victims of the culture of corruption” identified in the Report (USCA5 390).

Both the City (USCA5 545-548) and the United States (USCA5 549-571) opposed the motions. The United States readily acknowledged the diversity of interests impacted by the proposed decree, including those of officers, community members, criminal justice organizations, and others, and recounted its efforts to communicate with, and respond to, those interests throughout the investigation and negotiation process. USCA5 549-552. The United States argued, however, that while many groups had a clear and genuine interest in the final implementation of the proposed decree (as did the entire City of New Orleans, including those who live, work in, and visit the City), none of the groups seeking intervention had a *legally* protected interest that would be impaired by the decree. Specifically, the United States argued that the decree does not affect police officers’ right to employment, and absent a collective bargaining agreement or Memorandum of Understanding with the City, the decree does not interfere or conflict with any contractual employment rights. USCA5 557-560. The United States also argued that the decree provides that any corrective action to be taken under the decree

must be done in accordance with Civil Service rules, and that all provisions of the decree must be consistent with those rules. USCA5 560.

With respect to CUC, the United States applauded its efforts and focus on reforming the NOPD, but respectfully noted that CUC's interest in reforming the NOPD did not translate into a legally protected interest in the case. USCA5 564. The United States further argued that FOP's and CUC's interests were represented adequately by the existing parties. USCA5 565-566.

Finally, the United States argued that permissive intervention was not appropriate in this case. The United States explained that permitting the movants to intervene would likely delay implementation of the decree and prejudice the existing parties. USCA5 567-568. The United States instead recommended that the district court grant the movants status as *amicus curiae* so that their interests and concerns could be heard and considered by the district court without interfering with the timely implementation of the proposed decree. USCA5 568-570.

3. *Hearing On Motions To Intervene*

The district court held a hearing on the motions to intervene on August 20, 2012. USCA5 612-613. FOP again argued that they had a property right in their employment, and that the consent decree could "potentially change the way [their] property rights are handled." USCA5 812. FOP acknowledged, however, that

there was no case law directly on point governing intervention as of right for organizational members that have property interests in their employment stemming from civil service protections, but do not have a collective bargaining agreement or other contractual relationship with their employing jurisdiction. USCA5 812-815. FOP noted that the parties to the consent decree questioned police officers during the consent decree negotiations, but that “no one has ever asked for the actual input as to the form and content” of the decree, and that no one represented the police officers in the negotiation process. USCA5 812. FOP also expressed concern that police officers would not have direct participation in implementing the decree. USCA5 815-819.

CUC again asserted an interest in the matter at issue based on decades of involvement in police reform. USCA5 820-821. CUC argued that the United States could not adequately represent its interests in police reform because the community involvement provided for in the proposed decree did not designate authority to members of the community for active and meaningful oversight. USCA5 822-824. CUC acknowledged, however, that the proposed consent decree does not prohibit the organization “from doing what [it has] been doing for 30 years.” USCA5 825. CUC suggested that a more robust role for community members and a lengthier monitoring period was needed to ensure real opportunity for meaningful police reform. USCA5 828-829.

The United States responded that its “overarching goal” is for the consent decree to “be successfully implemented to stop the pattern and practice of unconstitutional policing” uncovered during its investigation. USCA5 845. The United States stated that it believed the proposed decree “truly represents a once in a lifetime opportunity to at last truly transform the New Orleans Police Department.” USCA5 845-846. The United States explained that it had incorporated into the proposed decree input and ideas received from the movants,⁵ as well as other interested parties who had not sought to intervene. USCA5 846. The United States also stressed the importance of maintaining community and officer involvement during implementation of the decree. USCA5 847.

The United States opposed intervention, because it would be unduly cumbersome and potentially delay or even undermine or compromise implementation of the decree. USCA5 848. The United States instead advocated for *amicus* participation on behalf of the would-be intervenors. USCA5 848.

In response to the court’s questioning, the United States explained that the consent decree is intended to be, and will be, fully implemented consistent with existing civil service rules, such that the officers would not face an impairment of

⁵ For example, the proposed consent decree addresses specific concerns identified by the officers and their associations, such as officer training, officer assistance, and secondary employment, and those identified by CUC, such as independent police monitoring and oversight. USCA5 846-847.

any existing right. USCA5 852-853. The United States also explained that, in drafting the proposed decree, it considered the interests and concerns of the entire New Orleans community, not just the individuals who moved to intervene. The United States recognized that there are competing interests among members of the greater New Orleans community, including among those seeking to intervene. USCA5 854. But allowing the movants to intervene, the United States explained, would unnecessarily and inappropriately elevate certain interests above others, particularly where the goal of the decree is to protect the interests of the entire New Orleans community. USCA5 854-855.

The City also opposed intervention, primarily to maintain “the efficiency and timeliness of the reform.” USCA5 862. The City explained, however, that police officers would have an opportunity to participate in drafting the policies and procedures required by the consent decree – particularly those that relate to, or overlap with, civil service rules (*e.g.*, promotions and disciplinary actions). USCA5 862-864.

At the conclusion of the hearing, the court again encouraged any interested person, including appellants, to submit written comments on the consent decree. USCA5 864-865. The court explained that, by submitting additional comments, it would “have the benefit of [the movants’] thoughts whether [they] are allowed to intervene and participate in the fairness hearing or not.” USCA5 865.

4. *Order Denying Motions To Intervene*

On August 31, 2012, the district court denied the motions to intervene. USCA5 1283-1307. With respect to FOP, the court found that as civil servants, FOP members had a property right in their employment, but did not “have the legally protectable interest *in the subject matter of this litigation* required for intervention as of right.” USCA5 1297. The court distinguished the present circumstances from those found sufficient to warrant intervention in *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996) (en banc), a case brought under the employment discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e. The district court explained that the *Edwards* decision turned on a unique feature of Title VII – one which 1) precludes review by nonparties of Title VII remedies where the nonparties have been given an opportunity to object and be heard, and 2) was not applicable in the present case. USCA5 1299-1300. The court further reasoned that the proposed consent decree did not address employment discrimination complaints like the decree in *Edwards*. USCA5 1299-1300. The district court also held that the proposed decree’s references to the Civil Service system did not affect officers’ property rights in their employment. USCA5 1300. Rather, the proposed decree explicitly provides that the NOPD is to work with the Civil Service Commission to develop policies and procedures that are consistent with the decree *and* Civil Service protections. USCA5 1300-1301.

The court made clear in its ruling, however, that the City and the United States could not use the proposed decree as a means of legally sanctioning a violation of Civil Service rules, and held that if any proposed policies conflict with Civil Service rules or procedures, the court would entertain motions to intervene for the limited purpose of asserting officers' Civil Service property rights. USCA5 1301-1302.

The court also distinguished the Ninth Circuit's decision in *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), on the ground that, unlike the officers in that case, FOP members do not have a collective bargaining agreement or Memorandum of Understanding with the City. USCA5 1302-1303. Because the proposed consent decree is not inconsistent with any contractual rights, the court concluded that FOP did not establish a legally protectable interest in the subject matter of the litigation. USCA5 1302-1303. The court noted further that FOP failed to show that the United States will not represent its interests adequately. USCA5 1303. After denying FOP's motion to intervene as of right, the court exercised its discretion to deny permissive intervention on the ground it would unduly delay the proceedings. USCA5 1304. The court noted that it had "provided ample opportunity for [FOP] to assist the Court in its consideration of

the proposed Consent Decree without prejudicing the parties or delaying the proceedings.”⁶ USCA5 1304.

With respect to CUC, the court found that it had also failed to identify a legally protectable interest in the litigation. USCA5 1294. Moreover, the court found that, even if CUC had a legally protectable interest in the litigation, its interests would not be impaired by the litigation because it could still initiate suits against unconstitutional practices. USCA5 1294. Finally, the court exercised its discretion to deny permissive intervention on the ground it would unduly delay the proceedings and prejudice the parties. USCA5 1295.

5. *Fairness Hearing*

On September 21, 2012, the court held a hearing to consider the fairness, adequacy, and reasonableness of the proposed consent decree. USCA5 1672-1674. Even though the court had previously denied FOP’s and CUC’s motions for intervention, it permitted them to participate fully in the Fairness Hearing by addressing the court at the hearing, calling witnesses, and introducing exhibits.⁷ On January 11, 2013, the district court granted the United States’ and the City’s

⁶ The court denied Glasser’s motion to intervene individually on the same basis it denied FOP’s motion to intervene: Glasser failed to show a legally protectable interest in the subject matter of the litigation that would be impaired absent intervention, and permitting intervention would unduly delay the proceedings. USCA5 1304.

⁷ The court granted the same permission to the OIPM and PANO.

joint motion to enter the decree and approved the amended consent decree. R. 159. On January 29, 2013, PANO moved for relief from the judgment denying its motions to intervene. R. 165. On January 31, 2013, the City moved to vacate the consent decree (R. 167-2), which the United States opposed (R. 184). On February 4, 2013, the City moved to stay implementation of the decree (R. 172), which the district court denied on February 8, 2013 (R. 179). This appeal, however, is limited to the district court's order denying FOP's and CUC's motions to intervene.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that neither FOP nor CUC met the requirements for intervention as a right. Although both filed timely motions to intervene, neither established that it had a legally protectable interest in the subject matter of the litigation that would be adversely affected if it was not permitted to intervene. FOP members may well have a property right in their employment by virtue of their status as civil service employees, but nothing in the proposed decree disturbs that right. Rather, the decree explicitly states that any policies and procedures implemented pursuant to the decree must be developed by the NOPD in conjunction with the Civil Service Commission and must conform to Civil Service rules and protections. For that reason, their property interest in their employment is not affected by the subject matter of this particular litigation. Nor can FOP

establish any other property right that would be affected by this litigation, as they have no contractual relationship with the City.

Moreover, the NOPD, together with the City, is tasked with developing the specific policies and procedures required by the decree. FOP members will therefore have an opportunity for direct participation in implementing the requirements of the decree. The district court permitted FOP to address the court directly at the fairness hearing to present its concerns about the decree. The district court also held that FOP will have an opportunity to intervene if any of the policies and procedures developed pursuant to the decree potentially conflict with Civil Service rules and protections, thus ensuring that FOP members' property right in their employment will remain protected, and unaffected, by this litigation.

CUC, while working consistently for effective police reform in New Orleans, cannot establish a legally protectable interest in the subject matter of this litigation that is recognized by substantive law, and certainly not one that would be adversely affected by this litigation if intervention were denied. Nothing in the decree prevents CUC or its members from continuing to advocate for police reform in New Orleans. Nor can CUC show that the United States will inadequately represent its interests. The United States and CUC have the same ultimate objective: constitutional policing by the NOPD. Where would-be intervenors share the same objective as a party, as is the case here, adequate representation by

the party of the would-be intervenors is presumed. In addition, CUC cannot overcome the strong presumption that the United States adequately represents the interests of its citizens.

Finally, the district court acted well within its broad discretion in denying FOP's and CUC's motions for permissive intervention. No extraordinary circumstances were present here, where the district court explained that granting permissive intervention would unduly delay the proceedings and prejudice the parties. Moreover, the district court provided FOP and CUC with ample opportunity to present their concerns to the court for consideration.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY DENIED FOP'S AND CUC'S MOTIONS TO INTERVENE AS OF RIGHT

A. *Standard Of Review*

This Court reviews *de novo* a district court's decision to deny intervention as of right. *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc).

B. *The District Court Correctly Concluded That Neither FOP Nor CUC Met The Criteria For Intervention As Of Right*

Federal Rule of Civil Procedure 24(a)(2) permits a person to intervene in litigation if four specific criteria are met: (1) the application for intervention is timely; (2) the applicant has an interest relating to the property or transaction

which is the subject of the underlying action; (3) the denial of intervention would significantly impair or impede the applicant's ability to protect his interests; and, (4) the applicant's interests are not adequately represented by the existing parties. *Edwards*, 78 F.3d at 999. If an applicant fails to satisfy any one of these requirements, a court must deny intervention as of right. *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994).

Here, there is no dispute that FOP's and CUC's motions to intervene were timely and, as such, they satisfied the first criteria for intervention as of right. But both FOP and CUC failed to establish additional criteria necessary for intervention. First, FOP cannot show a legally protectable interest related to the underlying subject matter that would be impaired unless it is permitted to intervene. Second, CUC cannot show either a legally protectable interest affected by the litigation, or inadequate representation of its interests by the United States.

1. FOP Cannot Establish A Legally Protectable Interest In The Underlying Action That Would Be Impaired Absent Intervention

Intervention as of right is appropriate only where the applicant has a "direct, substantial, [and] legally protectable interest" in the subject matter of the proceedings. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) (en banc) (citation omitted), cert. denied, 469 U.S. 1019 (1984). "[I]t is plain," this Court explained, that the applicant must establish "something more than an economic interest." *Id.* at 464. That "something more" is an interest

“which the *substantive* law recognizes as belonging to or being owned by the applicant.” *Ibid.*

The issue here is not whether FOP members have protected rights in their employment. Certainly, they do. The issue is whether FOP members have a legally protectable interest in the subject matter of *this* particular litigation. They do not, and therefore cannot meet the requirements for intervention as of right.

FOP argues (FOP Br. 12-13) that its members receive Civil Service protections from the Louisiana Constitution, and therefore have a property right in their employment. The United States agrees. FOP further argues (FOP Br. 14), however, that this property right is sufficient to establish a legally protectable interest in this litigation because the decree “directly affects its members.” This reasoning is incorrect. Nothing in the decree affects, in any way, FOP members’ Civil Service right to employment. Rather, the decree explicitly states that any policies and procedures implemented pursuant to the decree *must* be developed in conjunction with the Civil Service Commission and must be in compliance with the protections afforded by Civil Service rules. The decree thus ensures that FOP members’ Civil Service right to employment is unaffected by the decree. For example, the proposed decree requires the NOPD to work with the Civil Service Commission to develop a fair and accurate performance evaluation and promotion program that comports with best practices, identifies effective and ethical officers

for promotion, and identifies officer weaknesses for appropriate and effective response. USCA5 280-282. The proposed decree also requires the NOPD's misconduct investigations and adjudications to conform with established Civil Service protections. USCA5 301, 305. FOP does not, and cannot, explain how any of the decree's proposed policies and procedures – policies and procedures that must conform with Civil Service protections – would impair their employment property rights if it is not permitted to intervene.

Thus, the facts of this case are readily distinguishable from those in *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), a case upon which FOP heavily relies. See FOP Br. 17-19. The Ninth Circuit held in *City of Los Angeles* that the police union had a legally protectable interest in the remedy sought by the United States because the union and the city operated pursuant to a Memorandum of Understanding (MOU), which governed the terms and conditions under which members of the union were employed by the city.⁸ 288 F.3d at 396, 399-400.

⁸ The Ninth Circuit also held that the police officers' union had a legally protectable interest in the merits of the action because it contained factual allegations that its members committed unconstitutional acts, and because the United States retained the right, in certain circumstances, to dissolve the consent decree and litigate the merits of the action on the basis of the original complaint. *City of Los Angeles*, 288 F.3d at 399. The consent decree here contains no such provision for dissolving the decree and pursuing the merits of the complaint.

The Ninth Circuit explained that

the Police League's interest in the consent decree is two-fold. To the extent that it contains or might contain provisions that contradict terms of the officers' MOU, the Police League has an interest. Further, to the extent that it is disputed whether or not the consent decree conflicts with the MOU, the Police League has the right to present its views on the subject to the district court and have them fully considered in conjunction with the district court's decision to approve the consent decree.

Id. at 400.

Here, FOP members do not operate under a collective bargaining agreement or MOU with the City. Thus, while FOP members' *right* to employment is subject to civil service protections (and remain unaffected by the proposed consent decree), the day-to-day *terms and conditions* of FOP members' employment are, as they always have been, within the control and discretion of the NOPD. As explained by the City, the Civil Service rules "protect classified employees against firing and other discipline without cause," but they "do not guarantee employees a right to have input on the policies and procedures governing the departments in which they work." USCA5 904; see also La. Const. Art. X § 12. In other words, the NOPD is permitted to develop policies and procedures that its employees must follow as a condition of their employment, provided those policies and procedures conform to Civil Service protections. FOP's efforts to transform its members' Civil Service protections – *which are unaffected by the explicit terms of the proposed consent decree* – into the contractual right recognized as a legally

protectable interest in *City of Los Angeles* necessarily fail. See *Lombas v. Department of Police*, 467 So. 2d 1273, 1276 (La. App. 4 Cir.) (noting that NOPD policies and procedures “do not confer substantive rights” to NOPD officers), writ denied, 470 So. 2d 120 (1985).

FOP’s argument (FOP Br. 18) that its lack of a collective bargaining agreement or MOU with the City *strengthens* its case for intervention is equally unavailing. FOP asserts (FOP Br. 18) that its members “don’t have a voice in anything” and that the City “has demonstrated that it has not and will not involve” FOP in the “process.” But the terms of the consent decree and the process for its implementation clearly show otherwise.

FOP members do not have a legally protectable right to have input on the policies and procedures that will govern their employment with the NOPD. But they do have, and will continue to have under the decree, an opportunity to provide input and feedback on developing policies and procedures required by the decree. As explained in the City’s memorandum to the district court, the NOPD developed an Executive Development Committee (EDC) and Administrative Policy Review Committee (PRC) (both of which include police personnel) to develop and review proposed policies, and the NOPD has contracted with a policy development expert to assist with this process. USCA5 911. Proposed policies are provided to, and reviewed by, various subject matter experts – *including police officer personnel* –

who have the opportunity to review and make changes to the draft policies.

USCA5 912. Once approved, the policies are provided to various police associations – *including FOP* – for comments. USCA5 912. FOP and its members are thus already given, and will continue to be given, an active voice in the development and review of police policies and procedures under the decree.

Even more important, the district court made clear when denying FOP’s motion for intervention that “[i]f changes are proposed to any NOPD policies that may conflict with Civil Service rules and procedures, FOP * * * may move to intervene for the limited purpose of asserting their Civil Service property rights,” and such motions would be considered timely. USCA5 1301-1302. For this reason, FOP cannot establish any potential impairment to its members’ Civil Service employment property rights if denied intervention.

FOP’s reliance on this Court’s decision in *Edwards* is also misplaced. The consent decree at issue in *Edwards* resolved a race discrimination lawsuit filed against the City of Houston pursuant to Title VII of the Civil Rights Act. 78 F.3d at 989-992. The decree would have guaranteed a specific number of promotions of minority officers as a remedy for the Title VII violation. *Id.* at 991-992. That remedy superseded some of the provisions of the Fire and Police Civil Service Act and local law. *Id.* at 992. Organizations representing other officers who were not members of the minority groups to benefit under the decree moved to intervene,

arguing that the proposed remedy denied them opportunities for advancement within the department under a race-neutral promotional system protected by state and local law. *Id.* at 1004.

This Court reversed the district court’s decision denying the motion to intervene, explaining that the decree’s “prospective interference with [career and] promotion opportunities” for the moving police officers gave rise to a legally protectable interest.⁹ *Id.* at 1004 (quoting *Black Fire Fighters Ass’n of Dallas v. City of Dallas*, 19 F.3d 992, 994 (5th Cir. 1994)). No such possible interference exists here. The consent decree does not propose to resolve discriminatory employment practices like those at issue in *Edwards*; rather, as the district court correctly noted, it proposes to remedy “Title VI non-employment claims having to do with the NOPD’s practices with respect to citizens.” USCA5 1300. More

⁹ Contrary to FOP’s assertions (FOP Br. 16-17) and the district court’s explanation (USCA5 1298-1300), Title VII’s provision precluding interested non-parties from challenging a Title VII remedy if given notice and an opportunity to object at a hearing had no bearing on this Court’s holding that the police officers in *Edwards* had a legally protectable interest in the subject matter of the litigation sufficient to support intervention. This Court considered whether the preclusive effect of Title VII barred a movant from *seeking* intervention, and held that it did not. 78 F.3d at 995-998. This Court then considered, in the context of whether the motion was *timely*, the prejudicial effect of the preclusion provision on the movants. *Id.* at 1002. This Court did not consider, much less hold, that the preclusive effect of Title VII gave rise to a legally protectable interest. As discussed above, this Court concluded that the officers had a legally protectable interest in the litigation because the consent decree adversely affected their career and promotional opportunities. *Id.* at 1004.

importantly, the remedy proposed under this decree, unlike the decree in *Edwards*, does not infringe upon any officer's protected right or contradict Civil Service protections. As previously explained, any changes to NOPD's promotion policies *must* conform with Civil Service rules and protections. If, in fact, it is determined that any of the yet-to-be determined promotion policies (or any other policies implemented pursuant to the decree) conflict with Civil Service rules, FOP will be afforded the opportunity to intervene. USCA5 1300-1301. But because FOP failed to establish that it has a legally protectable interest in the subject matter of the underlying litigation, and failed to establish that its interests would be impaired if denied the right to intervene,¹⁰ the district court correctly denied its motion.¹¹

2. *The CUC Cannot Meet The Criteria For Intervention As Of Right*

a. *CUC Does Not Have A Legally Protectable Interest In The Litigation*

CUC argues (CUC Br. 19) that it has “a direct, vital, and legally protectable interest” in the litigation because of its “decades of work on police reform in New Orleans.” The United States recognizes and applauds the significant efforts CUC has made in seeking reform of the NOPD. To that end, the United States met

¹⁰ The district court also held that FOP failed to establish that the United States would not adequately represent its interests in the litigation. The United States does not rely upon that finding on appeal.

¹¹ Michael Glasser, moving individually, also cannot establish a legally protectable interest in the subject matter of the litigation for the same reasons set forth above.

frequently with CUC throughout the investigation and negotiation process. The United States also recognizes that community groups, like CUC, will play a significant role in ensuring the successful implementation of the decree and a return to constitutional policing in New Orleans. But CUC's longstanding efforts in seeking police reform do not translate into a legally protectable interest sufficient to grant intervention as of right. As explained above, this Court has identified a legally protectable interest as one "which the *substantive* law recognizes as belonging to or being owned by the applicant." *New Orleans Pub. Serv., Inc.*, 732 F.2d at 464. CUC has not identified any right the substantive law recognizes that is affected by this litigation. The district court thus did not abuse its discretion in denying intervention on this ground.

CUC nonetheless argues (CUC Br. 21) that *City of Los Angeles* held that a similarly situated community group likely had a protectable interest in the subject matter of that litigation. This overstates the Ninth Circuit's decision. The Ninth Circuit surmised that a community group "*may* have a protectable interest related to the subject matter of the litigation," 288 F.3d at 402 (emphasis added), but then declined to so hold. *Id.* at 402 n.5. The court explained that the community organizations' connection to the case was "less direct" than those recognized in cases upon which the groups relied, which involved special interest groups challenging measures the organizations themselves helped to create. *Ibid.* The

Ninth Circuit noted that the community organizations' work in police reform differed from the special interest groups because the community groups' work was general in nature and not related to the specific decree at issue. *Ibid.* The Ninth Circuit also noted that the community organizations were seeking to enforce a program they supported, rather than to challenge a program with which they disagreed. *Ibid.* In any event, the Ninth Circuit did not affirmatively hold that a community group, like CUC, had a legally protectable interest in the subject matter of the litigation. In fact, CUC cannot identify *any* court that has held a community group has a legally protectable interest in police reformation. The district court therefore acted well within its discretion in concluding that CUC failed to establish this necessary prerequisite for intervention as of right. USCA5 1294.

Even if CUC could establish a legally protectable interest in the litigation, the district court correctly concluded that its interests would not be impaired if denied intervention. Like the Ninth Circuit concluded in *City of Los Angeles*, the district court here concluded that nothing in the proposed decree would prevent CUC, or any other interested community organization or person, from continuing to work on police reform. USCA5 1294-1295; see also *City of Los Angeles*, 288 F.3d at 402. Moreover, the district court concluded that nothing in the proposed decree would prevent CUC, or any other interested community organization or

person, from initiating suit against NOPD officers who engaged in unconstitutional police practices. USCA5 1294; see also *City of Los Angeles*, 288 F.3d at 402.

CUC argues (CUC Br. 24) that its position is different from that of the community group in *City of Los Angeles* because it “is advocating for stronger reform measures for the NOPD than are proposed by [the] Consent Decree.” CUC has worked tirelessly for police reform in New Orleans and the United States supports and encourages those efforts. But again, as explained by the district court, nothing in the decree will prevent CUC from continuing to work on police reform in New Orleans. USCA5 1294-1295. The district court correctly concluded that CUC failed to establish a legally protectable interest that would be adversely affected if denied intervention. USCA5 1294-1295.

b. The United States Adequately Represents CUC Interests

Because the district court concluded that CUC failed to establish a legally protectable interest in the litigation that would be impaired absent intervention, the court did not consider the fourth prerequisite for intervention as of right: whether the would-be intervenor’s interest is adequately represented by the existing parties. USCA5 1295. Had it, the court would have necessarily concluded that CUC could not overcome the presumption of adequate representation by the United States.

CUC bears the burden of establishing inadequate representation, although the burden is “minimal” and can be met by showing the representation “may be”

inadequate. *Sierra Club*, 18 F.3d at 1207 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The burden, however, “cannot be treated as so minimal as to write the requirement completely out of the rule.” *Cajun Electric Power Coop. v. Gulf States Utils.*, 940 F.2d 117, 120 (5th Cir. 1991) (citation omitted). Accordingly, this Court has identified two presumptions of adequate representation. *Edwards*, 78 F.3d at 1005.

The first presumption of adequate representation applies in suits involving matters of sovereign interest when, as here, one of the parties is a governmental entity charged by law with representing the interests of the would-be intervenor. *Edwards*, 78 F.3d at 1005. This presumption applies whether the would-be intervenor is a citizen or political subdivision of the governmental entity, and in such circumstances the would-be intervenor bears a “heightened showing” of inadequacy of representation.¹² *Ibid.*; see also *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994). CUC cannot make this heightened showing of inadequate representation here because “the individual and organizational community members are the exact constituents the United States is seeking to protect in this action.” *City of Los Angeles*, 288 F.3d at 402.

¹² The presumption does not apply, however, where the governmental entity appears in its capacity as employer, rather than sovereign, as the City does here with respect to FOP. *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994).

The second presumption applies “when the would-be intervenor has the same ultimate objective as a party to the lawsuit.” *Edwards*, 78 F.3d at 1005; see also *Kneeland v. National Collegiate Athletic Ass’n*, 806 F.2d 1285, 1288 (5th Cir.) (denying movants’ motion for intervention where would-be intervenors and defendants had same objective of preventing disclosure of documents), cert. denied, 484 U.S. 817 (1987). To overcome this presumption, the person seeking intervention must show “adversity of interest, collusion, or nonfeasance.” *Kneeland*, 806 F.2d at 1288.

Both the United States and CUC want police reform in New Orleans that will lead to constitutional policing beneficial to all of New Orleans’s citizens.¹³ CUC simply argues that the proposed consent decree is not the best way to achieve that objective. CUC Br. 26-27. But differences between parties on how best to achieve the same goal does not mean those parties lack a common interest; it merely indicates they support different strategies for achieving that goal. A disagreement about strategy, however, does not support intervention. *City of Los Angeles*, 288 F.3d at 402-403 (“Any differences [the community groups and the United States] have are merely differences in strategy, which are not enough to

¹³ FOP also has an interest in constitutional policing and, to that end, the United States adequately represents those interests. FOP, however, articulates additional interests concerning specific conditions of employment (*e.g.*, use of pepper spray, etc.) that the United States is not presumed to represent. But as explained above, those interests are not legally protectable interests affected by this litigation.

justify intervention as a matter of right.”). Because CUC cannot show adversity of interest, collusion or nonfeasance, it cannot overcome the presumption of adequate representation of its interests by the United States.

II

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING APPELLANTS’ MOTIONS FOR PERMISSIVE INTERVENTION

A. *Standard Of Review*

Where a party does not meet the requirements for intervention as of right pursuant to Rule 24(a), it may nonetheless seek permission to intervene where it asserts “a claim or defense that shares with the main action a common question of law or fact,” Fed. R. Civ. P. 24(b)(1)(B), provided intervention will not “unduly delay or prejudice the adjudication of the original parties’ rights,” Fed. R. Civ. P. 24(b)(3). This Court reviews a district court’s decision to deny permissive intervention for clear abuse of discretion. *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc). “Under this standard, the Court will reverse a district court decision only under extraordinary circumstances.” *Cajun Electric Power Coop. v. Gulf States Utils., Inc.*, 940 F.2d 117, 121 (5th Cir. 1991) (citation and internal quotation marks omitted). Thus, a district court may deny permissive intervention even where the requirements of Rule 24(b) are satisfied. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir.) (en

banc), cert. denied, 469 U.S. 1019 (1984). The inquiry on appeal, then, is not whether “the factors which render permissive intervention appropriate” under Rule 24(b) exist, but “whether the trial court committed a *clear* abuse of discretion in denying the motion.” *Ibid.* (quoting *Korioth v. Briscoe*, 523 F.2d 1271, 1278 (5th Cir. 1975)) (emphasis added). When applying this “restrictive” standard, this Court will reverse a district court’s decision to deny permissive intervention only where “extraordinary circumstances” are present. *New Orleans Pub. Serv.*, 732 F.2d at 471.

B. The District Court Did Not Abuse Its Discretion In Denying Appellants’ Motions For Permissive Intervention

No extraordinary circumstances exist in this case to support a reversal of the district court’s discretionary decision to deny appellants’ motions for permissive intervention. The district court explained that its decision to deny FOP and CUC permissive intervention was based upon its concern that permitting them to intervene “would unduly delay” the proceedings. USCA5 1295, 1304. The district court also explained that intervention by FOP was not necessary because the court provided FOP “ample opportunity * * * to assist the Court in its consideration of the proposed Consent Decree” (USCA5 1304), and that intervention by CUC would not offer “significant assistance” to the court (USCA5 1295). The district court’s reasoning was sound, and does not reflect an abuse of its discretion, much

less an abuse that is “clear.” *New Orleans Pub. Serv.*, 732 F.2d at 471 (citation omitted).

The consent decree represents the results of lengthy, intense negotiations between the United States and the City. It takes into consideration and attempts to balance the interests of *all* relevant entities – the police, community organizations, monitors, citizens, and public officials. These interests, of course, are not always aligned. During the course of negotiating the decree, both the United States and the City had to compromise to reach an agreement that is fair and will effectively serve all groups’ shared interest in constitutional policing.

FOP and CUC, however, appear to argue that their particular interests and concerns should have been given higher priority in the proposed decree. See, *e.g.*, FOP Br. 19-22; CUC Br. 28-30. If permitted to intervene, both FOP and CUC would presumably seek to rewrite the decree to include provisions that are more aligned with their particular interests. Under those circumstances, permitting them to intervene would delay the entry and implementation of the decree, prejudice the existing parties, and thereby prejudice the hundreds of thousands of other New Orleans residents who also have an interest in bringing about constitutional policing in New Orleans, but who were not granted intervenor status. Thus, the district court did not clearly abuse its discretion in denying FOP’s and CUC’s

motions for permissive intervention on the ground that it would unduly delay the proceedings.

Nor did the district court clearly abuse its discretion in denying FOP's and CUC's motion to intervene on the ground that intervention was not necessary to convey their interests and concerns to the court. USCA5 1295, 1304. The district court invited FOP and CUC (and all other interested persons) to submit written comments to the Court regarding the fairness, adequacy, and reasonableness of the proposed decree. USCA5 864-865. Both FOP and CUC submitted multiple filings to present their views to the court. USCA5 602-611, 616-627, 730-740, 797-806. Moreover, the district court permitted FOP and CUC (and other interested persons) to address the court directly at the fairness hearing, which they did. See generally See generally USCA5 1672-2015. The district court's actions ensured that it could hear, understand, and consider FOP's and CUC's concerns about the proposed decree without interfering with or delaying the implementation of the decree, if ultimately entered. The district court thus carefully balanced the interests of the parties with the interests of those seeking to intervene. Doing so was a thoughtful and measured approach to considering the competing interests of those who may be affected by the decree, and was well within the district court's broad discretion.

CONCLUSION

This Court should affirm the district court's decision denying FOP's and CUC's motions for intervention.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Angela M. Miller
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4541

CERTIFICATE OF SERVICE

I certify that on February 19, 2013, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS APPELLE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all counsel are registered with the CM/ECF system and service will be accomplished through that system.

s/ Angela M. Miller
ANGELA M. MILLER
Attorney

CERTIFICATE OF COMPLIANCE

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

(1) contains 9000 words;

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

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

Dated: February 19, 2013

s/ Angela M. Miller
ANGELA M. MILLER
Attorney