

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

WALTER POWERS, JR., individually, and in his capacity of President of the  
Fraternal Order of Police, Crescent City Lodge #2, and its Members;  
FREDERICK C. MORTON,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA; POLICE ASSOCIATION OF NEW  
ORLEANS; MICHAEL GLASSER, individually and as President of the Police  
Association of New Orleans, Inc.,

Intervenors-Appellees

*(See inside cover for continuation of caption)*

---

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

---

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

---

VANITA GUPTA  
Acting Assistant Attorney General

MARK L. GROSS  
APRIL J. ANDERSON  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 616-9405

---

---

*(Continuation of caption)*

CITY OF NEW ORLEANS,

Defendant-Cross-Defendant-Appellee

MITCHELL J. LANDRIEU, in his official capacity as the mayor/chief executive of the City of New Orleans; RONAL W. SERPAS, in his official capacity as the superintendent of the Department of Police, City of New Orleans; KEVIN W. WILDES, in his official capacity as chairman of the City Civil Service Commission for the City of New Orleans,

Defendants-Appellees

CITY CIVIL SERVICE COMMISSION FOR THE CITY OF NEW  
ORLEANS, PARISH OF ORLEANS,

Defendant Cross Claimant-Appellant-  
Appellee

---

## **STATEMENT REGARDING ORAL ARGUMENT**

In our view, oral argument is not necessary in this appeal.

**TABLE OF CONTENTS**

**PAGE**

STATEMENT REGARDING ORAL ARGUMENT

STATEMENT OF JURISDICTION.....2

STATEMENT OF THE ISSUES.....2

STATEMENT OF THE CASE.....3

    1.    *Prior Litigation*.....3

        a.    *The United States’ Investigation Of NOPD,  
            The Consent Decree And Police Secondary  
            Employment*.....3

        b.    *The Consent Decree* .....6

        c.    *Previous NOPD Detail Policies*.....9

        d.    *The Challenged City Ordinances* .....12

    2.    *This Case* .....13

        a.    *Plaintiffs’ State Action And Its Removal To  
            Federal Court*.....13

        b.    *The Evidence At Trial* .....15

        c.    *The District Court’s Opinion* .....17

SUMMARY OF THE ARGUMENT .....20

ARGUMENT

    I    THE DISTRICT COURT HAD JURISDICTION.....22

        A.    *Standard Of Review* .....22

B.	<i>The Court Properly Exercised Jurisdiction Where Plaintiffs Raised A Federal Claim And All Defendants Consented To Removal</i> .....	22
C.	<i>The District Court Did Not Abuse Its Discretion In Exercising Supplemental Jurisdiction Over State-Law Claims Under 28 U.S.C. 1367</i> .....	25
II	THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING POWERS AND MORTON HAD NO CONTRACTS THAT THE DECREE MIGHT DISRUPT .....	29
A.	<i>Standard of Review</i> .....	29
B.	<i>Powers And Morton Worked Details Sporadically As They Arose, Having No Binding Contract Agreements For Future Work</i> .....	29
C.	<i>Any Arrangements Officers Had For Paid Details Were Governed By NOPD Policies And NOPD Could Cancel Detail Privileges At Any Time</i> .....	32
D.	<i>The Court Did Not Clearly Err In Finding That Powers And Morton Did Not Have A “Business Enterprise” Cognizable Under The Louisiana Constitution And Damaged By The Challenged Ordinances</i> .....	33
III	THE DISTRICT COURT PROPERLY FOUND THAT THE NEW ORLEANS CIVIL SERVICE COMMISSION DOES NOT HAVE JURISDICTION TO SET PAY RATES FOR OFF-DUTY POLICE DETAILS .....	35
A.	<i>Neither The State Constitution, The Civil Service Commission’s Rules, Nor State Supreme Court Precedent Requires The Commission Set Pay Rates For Off-Duty Employment</i> .....	36

- B. *In Asserting Authority Over Off-Duty Work,  
The Commission Is Requesting An Impermissible  
Extension Of Its Enumerated Powers* .....38
- C. *The City Has Long Exercised Its Authority To  
Regulate Police Details*.....41
- D. *The New Regulations Do Not Require The City  
To Pay Detailees* .....43
- E. *Examples Of The Meaning Of “Employer” From  
Other Contexts Do Not Support The Commission’s  
Claim That Details Are City “Employment” For  
Purposes Of Louisiana’s Civil Service Rules* .....45
- F. *The New Regulations Do Not Violate The Louisiana  
Constitution Art. VI, § 9(A)(2), As An Impermissible  
“Minimum Wage”* .....46

CONCLUSION .....49

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

## TABLE OF AUTHORITIES

CASES:	PAGE
<i>American Int’l Specialty Lines Ins. v. Canal Indem. Co.</i> , 352 F.3d 254 (5th Cir. 2003) .....	35
<i>Arnold v. New Orleans Police Dep’t</i> , 383 So. 2d 810 (La. Ct. App.), refusing writ, 385 So. 2d 274 (La. 1980) .....	42
<i>Board of Comm’rs of Orleans Levee Dist. v. Department of Natural Res.</i> , 596 So. 2d 281, 291 (La. 1986) .....	18
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972) .....	34
<i>Brookshire Bros. Holding v. Dayco Prods.</i> , 554 F.3d 595 (5th Cir. 2009) .....	26, 28
<i>Butler v. New Orleans Police Dep’t</i> , 885 So. 2d 1266 (La. Ct. App. 2004) .....	42
<i>Campaign for a Living Wage v. New Orleans</i> , 825 So.2d 1098 (La. 2002) .....	47
<i>Carlsbad Tech., Inc. v. HIF Bio, Inc.</i> , 556 U.S. 635 (2009) .....	26
<i>Civil Serv. Comm’n, v. Rochon</i> , 374 So. 2d 164 (La. Ct. App. 1979).....	40
<i>Clewis v. Medco Health Solutions, Inc.</i> , No. 14-10188, 2014 WL 4100740 (5th Cir. Aug. 21, 2014) .....	26
<i>Energy Reserves Grp., Inc. v. Kansas Power &amp; Light Co.</i> , 459 U.S. 400 (1983).....	19
<i>Fox v. LAM</i> , 632 So. 2d 877 (La. Ct. App. 1994) .....	29
<i>Getty Oil Corp. v. Insurance Co. of N. Am.</i> , 841 F.2d 1254 (5th Cir. 1988) .....	24-25
<i>Harris v. Quinn</i> , 134 S. Ct. 2618 (2014) .....	45

<b>CASES (continued):</b>	<b>PAGE</b>
<i>Hebert v. New Orleans Police Dep't</i> , 805 So. 2d 345 (La. Ct. App. 2001), writ denied, 811 So.2d 932 (La. 2002) .....	19, 37
<i>In re Liljeberg Enters., Inc.</i> , 304 F.3d 410 (5th Cir. 2002) .....	29
<i>Jernigan v. Ashland Oil Inc.</i> , 989 F.2d 812 (5th Cir.), cert. denied, 510 U.S. 868 (1993).....	22
<i>Kollar v. United Transp. Union</i> , 83 F.3d 124 (5th Cir. 1996) .....	22
<i>Mumblow v. Monroe Bd., Inc.</i> , 401 F.3d 616 (5th Cir. 2005).....	29
<i>New Orleans Firefighters Ass'n Local 632 v. New Orleans</i> , 590 So. 2d 1172 (La. 1991) .....	39
<i>New Orleans Redevelopment Auth. v. Burgess</i> , 16 So. 3d 569 (La. Ct. App.), writ denied, 18 So. 3d 65 (La. 2009), and writ denied, 18 So.3d 66 (La. 2009) .....	34
<i>North Carolina State Bd. of Educ. v. Swann</i> , 402 U.S. 43 (1971) .....	48
<i>Oviedo v. Hallbauer</i> , 655 F.3d 419 (5th Cir. 2011) .....	22
<i>Page v. Gulf Oil Corp.</i> , 775 F.2d 1311 (5th Cir. 1985).....	29
<i>Patin v. Department of Police</i> , No. 2012-CA-1693, 2013 WL 3215533 (La. Ct. App. June 26, 2013) .....	41-42
<i>Priester v. Lowndes Cnty.</i> , 354 F.3d 414 (5th Cir.), cert. denied, 543 U.S. 829 (2004).....	22
<i>Saacks v. New Orleans</i> , 687 So. 2d 432 (La. Ct. App. 1996), as amended on denial of reconsideration (Mar. 24, 1997), writ denied 693 So.2d 769 (La. 1997).....	42
<i>Saulter v. Sewerage &amp; Water Bd.</i> , 593 So. 2d 767 (La. Ct. App. 1992).....	40



**CASES (continued):** **PAGE**

*Shreveport Elec. Co. v. Oasis Pool Serv., Inc.*, 889 So. 2d 274  
(La. Ct. App.), writ denied, 897 So. 2d 613 (La. 2005) .....30

*Sterling v. Board of Comm’rs*,  
527 So. 2d 1122 (La. Ct. App. 1988) ..... 37-38

*Townsend v. Urie*, 800 So. 2d 11 (La. Ct. App.),  
writ denied, 797 So. 2d 674 (La. 2001).....29

*United States v. New Orleans*, 731 F.3d 434 (5th Cir. 2013).....3, 7, 35, 46

*United States v. New Orleans*, 540 F. App’x 380 (5th Cir. 2013) .....7, 41

**CONSTITUTIONS:**

U.S. Const. Art. I § 10.....22

Louisiana Constitution

    La. Const. Art I, § 4(A) .....34

    La. Const. Art I, § 4(B)(6) ..... 13, 33-34

    La. Const. Art. VI, § 9(A)(2)..... 46-47

    La. Const. Art. X, § 1.....37

    La. Const. Art. X, § 1(B) .....36, 45

    La. Const. Art. X, § 2(A).....36

    La. Const. Art. X, § 8.....37

**STATUTES:**

Omnibus Crime Control and Safe Streets Act of 1968,  
42 U.S.C. 3789d.....7

Title VI of the Civil Rights Act of 1964,  
42 U.S.C. 2000d-2000d-7 .....7

Violent Crime Control and Law Enforcement Act of 1994,  
42 U.S.C. 14141.....7

28 U.S.C. 1291 .....2

<b>STATUTES (continued):</b>	<b>PAGE</b>
28 U.S.C. 1331 .....	14, 22
28 U.S.C. 1367 .....	2, 14, 25
28 U.S.C. 1367(a) .....	25
28 U.S.C. 1367(c) .....	26
28 U.S.C. 1367(c)(a)(1) .....	26
28 U.S.C. 1441 .....	2, 23
28 U.S.C. 1441(c)(1).....	22
28 U.S.C. 1441(c)(1)(A) .....	22
28 U.S.C. 1443 .....	23
28 U.S.C. 1446(b)(2)(A).....	23
28 U.S.C. 1446(b)(2)(B) .....	24
29 U.S.C. 207(p) .....	46
29 U.S.C. 207(p)(1).....	46
La. Civ. Code Ann. Art. 1973 (2008) .....	29
La. Civ. Code Ann. Art. 2320 (2008) .....	45
 <b>REGULATIONS:</b>	
28 C.F.R. 42.101-112.....	7
29 C.F.R. 553.227(a).....	46
29 C.F.R. 553.227(d) .....	46

**MISCELLANEOUS:**

**PAGE**

United States Department of Justice Civil Rights Division,  
*Investigation of the New Orleans Police Department*  
(Mar. 16, 2011), <http://tinyurl.com/lg5yczh>.....4

Rules of the Civil Service Commission City of New Orleans  
(Feb. 17, 2014), <http://www.nola.gov/civil-service/resources/files/rules/rules-2014/> .....21

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 14-30444

WALTER POWERS, JR., *et al.*,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, *et al.*,

Intervenors-Appellees

CITY OF NEW ORLEANS,

Defendant-Cross-Defendant-Appellee

MITCHELL J. LANDRIEU, *et al.*,

Defendants-Appellees

CITY CIVIL SERVICE COMMISSION FOR THE CITY OF NEW  
ORLEANS, PARISH OF ORLEANS,

Defendant Cross Claimant-Appellant-  
Appellee

---

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

---

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

---

## **STATEMENT OF JURISDICTION**

This case was removed to federal court under 28 U.S.C. 1441. The district court had supplemental jurisdiction of state law claims under 28 U.S.C. 1367. The district court issued judgment on April 14, 2014. Plaintiffs and defendant-cross-claimant Civil Service Commission for the City of New Orleans timely appealed. This Court has jurisdiction under 28 U.S.C. 1291.

## **STATEMENT OF THE ISSUES**

1. Whether the district court properly exercised jurisdiction over state law claims where plaintiffs raised a federal claim and all defendants consented to removal.
2. Whether plaintiffs' paid "details," where off-duty New Orleans police officers worked for private employers, established binding contracts or a business enterprise where the officers worked only sporadically, and off-duty jobs were subject to police department restrictions including cancelation of any detail at any time.
3. Whether the New Orleans Civil Service Commission, authorized to set pay rates for City employment, must set pay rates for police officers' off-duty work for third parties.

## STATEMENT OF THE CASE

This case presents a challenge to ordinances the City of New Orleans recently passed to implement a Consent Decree the City entered with the United States to reform police department policies.

*1. Prior Litigation*

*a. The United States' Investigation Of NOPD, The Consent Decree And Police Secondary Employment*

Plaintiffs Frederick Morton and Walter Powers (two New Orleans police officers), and intervenor New Orleans Civil Service Commission (Commission) here challenge a portion of New Orleans' efforts to implement a 2010 federal Consent Decree reforming its police policies. *United States v. New Orleans*, 731 F.3d 434, 436 (5th Cir. 2013).

In May 2010 the United States began a nearly year-long investigation of constitutional violations by the New Orleans Police Department (NOPD). *New Orleans*, 731 F.3d at 436; ROA.135. The United States interviewed NOPD officers, supervisors, command staff, members of the public, City and state officials, and other interested community members and organizations. The United States reviewed the NOPD's policies and procedures, training materials, incident reports, use of force reports, crime investigation files, complaints of misconduct, misconduct investigations, and other data NOPD gathered. ROA.136. Federal investigators went on ride-alongs with officers, attended police briefings, observed

police work and met with representatives of police fraternal organizations.

ROA.136.

Following its investigation, the United States issued its findings on March 16, 2011. Compl. at 1-1, *United States v. New Orleans*, No. 2:12cv1924 (E.D. La. July 24, 2012) (Report).<sup>1</sup> The findings revealed a longstanding pattern of unconstitutional conduct by NOPD officers. The United States found that these ongoing constitutional violations were caused by entrenched deficiencies within “a wide swath of City and NOPD systems and operations.” Report xii. In particular, the Report found, the NOPD routinely failed to adequately supervise officers; properly review and investigate uses of force; fully investigate allegations of misconduct; and discipline officers where needed. Report xii-xiii.

Some of these problems were exacerbated by NOPD’s failure to oversee and control the system of paid “details,” in which officers, during off-duty hours, provided paid security for private entities. Report 69-75. NOPD’s largely unregulated system of details undermined the command structure, created conflicts of interest, and facilitated dangerous problems with fatigue. Report 69-75. The City’s Police Superintendent, Ronal Serpas, said that the system of details was in

---

<sup>1</sup> The district court took judicial notice of rulings entered in the Consent Decree case. ROA.786. The Report is available at <http://tinyurl.com/lg5yczh>.

need of a “total overhaul.” Order and Reasons at 7, *United States v. New Orleans*, No. 2:12cv1924, (E.D. La. May 23, 2013). He said it would be necessary to take “management of paid details out of the NOPD” and assign it to “an independent entity.” *Id.* at 8 (emphasis omitted). The United States’ Report stated that “few if any large police departments” had a system of details so “entrenched and unregulated.” Report 70. The investigators heard accounts of “ghosting,” where officers checked in with NOPD for a shift and then left for a detail, and some officers working a detail while on sick leave from NOPD. Report 70. The Mayor of New Orleans explained that the detail system has led to “officers with divided loyalty spending most of their time on details.” Order and Reasons at 7 n.28, *New Orleans*, No. 2:12cv1924, (E.D. La. May 23, 2013).

The Report also stated (71-72) that NOPD officers negotiated details directly with private employers, leading to conflicts of interest and corruption. In one instance, officers insisted a business hire certain detailees at a particular wage, threatening that otherwise the business would not get regular NOPD police protection. Report 72. Another officer called his detail employer to warn him so the employer could escape impending arrest. Report 71. There was an “expectation that officers will ‘look the other way’ when faced with a conflict between enforcing the law and protecting the business’s interest.” Report 71.



As the Mayor pointed out, the detail system also led to “the perversion of the command structure.” Order and Reasons at 7 n.28, *New Orleans*, No. 2:12cv1924, (E.D. La. May 23, 2013). Officers would negotiate details for other officers, even their supervisors, and take a cut of the pay. Report 71; ROA.585. Captain Morton, for example, worked a neighborhood watch detail coordinated by a lower-ranking officer, a sergeant. ROA.4348-4349. The sergeant could decide whether Morton got work on the detail. ROA.4349. The Report concluded it is potentially difficult for a supervisor to discipline a subordinate he or she depends on for potentially lucrative detail assignments. See Report 71.

The Report concluded that detail employment had a “corrupting effect” on NOPD and that “[t]here are few aspects of NOPD more broadly troubling.” Report 69. The United States’ 2011 findings were not new. In 1991 and again in 1993, independent investigations done by police experts found the detail system led to divided loyalties, preoccupation with off-duty work, undermining of the chain of command, fatigue, and detailees “perform[ing] tasks which are inconsistent, incompatible, or in conflict with duties of police officers.” ROA.593-594, 597-598.

*b. The Consent Decree*

On July 24, 2012, the United States filed a complaint alleging that the NOPD was engaging in unconstitutional activity. The suit was based on federal

protections against police misconduct, including the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141; the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-2000d-7, and its implementing regulations, 28 C.F.R. 42.101-112. ROA.135-136. That same day, the United States jointly moved with the City of New Orleans for entry of a comprehensive Consent Decree to remedy unconstitutional police department practices. ROA.130-259; Joint Motion, *United States v. New Orleans*, No. 2:12cv1924 (E.D. La. July 24, 2012).

On September 21, 2012, the district court held an extensive fairness hearing, which included testimony from officers, experts, and police organizations. ROA.3672; *United States v. New Orleans*, 540 F. App'x 380 (5th Cir. 2013) (per curiam). It entered the Decree on January 11, 2013. The court denied plaintiff Powers' and other NOPD officers' motions to intervene. This Court upheld the denial of intervention, and has upheld the district court's orders on subsequent challenges to the Decree. *New Orleans*, 731 F.3d 434; *New Orleans*, 540 F. App'x 380.

The Consent Decree did not bar officers from paid details, but placed restrictions on the details beyond those NOPD previously imposed. ROA.3671. The Decree required the City to "completely restructure" the paid details system (ROA.219), and set up an agency, the Office of Police Secondary Employment

(Office), to administer and coordinate paid details. ROA.219-226, 3671, 3932.

The Decree bars officers from negotiating their own secondary employment or

pay. ROA.223. An officer may contact the Office of Police Secondary

Employment to register for paid detail work in his or her off-duty hours.

ROA.220, 3512, 4358. Details will be posted, officers can then volunteer, and

eligible officers are matched with detail assignments on the basis of set criteria

designed to promote fairness and accountability. ROA.3511, 4379, 4572-4573.

The Office matches a detailee with a private employer, and the employer directs

the officer's work. ROA.3933. The private employer sets hours, location, and

duties. ROA.4380.

The Consent Decree assigned the Office of Police Secondary Employment

“sole authority to arrange, coordinate, arrange fully-auditable payment, and

perform all other administrative functions related to NOPD employees' off-duty

secondary law enforcement employment.” ROA.219, 3671. The Decree also

required the City to establish a “schedule of fees” that the Office would collect to

cover its administrative costs. ROA.221-222. The schedule would “take into

account costs, including \* \* \* hourly wage[s].” ROA.221. A private employer

would pay the Office the set hourly rate, plus a fee to offset administrative costs,

and the Office would then pass the hourly rate pay to the officers who worked the

detail. ROA.3932, 4360, 4371-4372. Under the Decree, the Office must “work[]

with the NOPD and the City” to “develop and implement an auditable payment system that ensures that secondary employment pay is made to NOPD employees” and employees may not receive any other compensation for details. ROA.222, 3518, 4403. Officers will be paid through the NOPD payroll system, with appropriate tax withholdings. ROA.4384, 4568-4569. There are weekly and daily limits on the hours an officer may devote to secondary employment. ROA.225, 4572. Officers will continue to use NOPD uniforms and City-owned cars, communication equipment, and information systems as they did before the Consent Decree. ROA.4461, 4566, 4657.

High-ranking officers may work only details that are consistent with their supervisory rank and role. ROA.4577. Thus, they are restricted from working most details unless they work them as supervisors. ROA.4347, 4500, 4645-4646. Details involving a large number of NOPD officers *require* that supervisory officers be included. ROA.227-228. Captain Morton claimed that, as one of NOPD’s 20 or so captains, there were few details he was allowed to work. ROA. 139. He claimed he “lost” about \$7,600 in wages from details over the last year. ROA.4350-4351.

*c. Previous NOPD Detail Policies*

Before the Consent Decree, NOPD regulated details, although less closely. ROA.4346. Some of the Consent Decree’s provisions merely adopt NOPD policy

in the form of an enforceable court order. Historically, officers faced limits on detail hours and were barred from working at some types of businesses, including sexually oriented businesses, casinos, and bars. ROA.374-375, 4268. They could not work as private investigators, collections agents, bail bondsmen, cocktail waitresses, or bounty hunters, among other assignments. ROA.374-375. As of 2010, they could not be paid for detail work in cash. ROA.572; Report 70. Even before the Decree, detailees had to abide by NOPD rules while in secondary employment. ROA.369, 372.

Some NOPD officers have relied on income from details and often assumed they would be available. ROA.443. Officer Powers, for example, explained that when he was hired “there was a known fact that you could supplement your income because of a detail.” ROA.4280. The opportunity to work a detail, however, was always considered a privilege, not a right. ROA.367, 4268, 4273. Officers needed written permission to work a detail, and long-term details were subject to reapproval. ROA.3682, 4315. NOPD could suspend, deny, or approve an officer’s right to work a detail. ROA.4266. NOPD might bar an officer from working a detail if, for example, the officer’s supervisors felt the officer was working too many hours. ROA.4475-4476. The Department generally denied officers detail privileges if there was an emergency requiring officers to be on duty in the City, and could deny details to a particular officer if the officer had a poor

attendance record, had abused sick leave policies, or did not file the proper paperwork. ROA.3682-3683, 4278, 4304, 4475-4476. Captain Morton, for example, was suspended from details for six months after he failed to comply with administrative policies. ROA.4337. Officers Morton and Powers acknowledged that any arrangements they had for details were subject to NOPD policy. ROA.4285, 4346.

Officers had to comply with NOPD administrative and reporting policies, including calling in when a detail started, calling again when it ended, and entering a report. ROA.4299-4300, 4558. Thus, there was a “lengthy process” of administrative oversight. ROA.4299. While NOPD rules generally permitted officers to negotiate their rate of pay on a detail (ROA.374), the Department set rates for certain traffic details through a flat permitting fee (ROA.4275-4277).

Detail policies changed over the years, including while Morton and Powers have been employed by NOPD. ROA.4266, 4275, 4305. The current NOPD policy was established in 2004 and was changed four times in the past decade. ROA.3681. Officers were previously allowed to work at bars, and once the rules changed in 1995 some had to give up details at those businesses. ROA.3684, 4268, 4273, 4558, 4560-4561. Administrative processes, such as reporting procedures, have changed repeatedly in recent years. ROA.4300, 4316. 89, 105, 306.

Under the Decree, there will be a more equitable allocation of details, allowing more officers to participate, and informal networks will be eliminated. The Decree's secondary employment provisions brought the City, which had not updated its system in years, in line with other cities that had centralized secondary or detail employment systems. ROA.4355; Report 70. A witness from the Mayor's office who helped set up the details testified that the new system will "effectively and transparently communicate what the opportunities are so everybody gets to see them. It's not a phone tree or who [sic] you do know" because "everybody's got the same access to the information." ROA.4382.

*d. The Challenged City Ordinances*

In compliance with the Decree, the City recently passed ordinances to establish the Office of Police Secondary Employment and to regulate police details. ROA.378-383, 3927. The Mayor's office proposed and the City Council passed Ordinance 25428 in August 2013 to set up administrative fees and set a schedule of hourly wages for officers working details. ROA.4360. Ordinance 25428 established "fee schedules and officer pay schedules for time-based jobs" in "secondary employment opportunities or private detail work." ROA.378. Certain "pre-existing, single-officer details that are paid at a rate lower than the schedule rate" were exempt. ROA.381. The Office of Police Secondary Employment was permitted to charge employers an administrative fee. ROA.380. If the Office

collected more in fees than it needed to cover its yearly costs to administer the details, it would refund the excess to officers in proportion to the hours they had worked that year. ROA.380. Ordinance 025429 set up a fund to administer “[a]ll revenues collected \* \* \* from the operation of the Office of Police Secondary Employment.” ROA.383.

2. *This Case*

*a. Plaintiffs’ State Action And Its Removal To Federal Court*

NOPD officers Morton and Powers filed a petition in civil district court for the Parish of Orleans against the City and the Commission. The petition alleged that the new ordinances violated state statutes, the Louisiana Constitution, and the United States Constitution. ROA.3928. Specifically, the plaintiffs argued that only the Civil Service Commission had the authority, under state law, to set wages for officers as City employees, and that this rule applied to details set up through the Office of Police Secondary Employment. ROA.3928. They also argued that the ordinances interfered with contracts officers had with private employers, in violation of the contracts clauses of the Louisiana and United States Constitutions. Further, they claimed that the Ordinances violate the state constitution’s prohibition on the state government taking a “business enterprise or any of its assets \* \* \* for the purpose of operating that enterprise or halting competition with a government enterprise.” ROA.3928 (citing La. Const. Art I, § 4(B)(6)).



After the City filed a notice of removal, the district court requested the Commission's views on removal and the Commission responded that it consented to removal. ROA.115. The court determined that removal was proper under 28 U.S.C. 1331, as the claims included a federal Constitutional challenge, and that supplemental jurisdiction over other claims was appropriate under 28 U.S.C. 1367. ROA.3933. The district court rejected plaintiffs' motion to remand, finding that "even the most cursory inspection of the petition reveals the presence of a federal question." ROA.644. The case was transferred to the United States District Court for the Eastern District of Louisiana and assigned to the judge who was in charge of administering the Consent Decree. ROA.3928.

The court granted intervention for the United States, the Police Association of New Orleans, and the association's president. ROA.3928-3929. The Civil Service Commission filed a cross claim against the City, claiming that the new ordinances violated the Commission's constitutional jurisdiction. ROA.3929.

The court then held a hearing on the plaintiffs' motion for a preliminary injunction. ROA.3929. It denied the motion, finding that the Commission likely lacked jurisdiction over secondary employment, that plaintiffs could not show substantial impairment of any contractual rights, and that plaintiffs had not shown any of the necessary elements to claim expropriation in violation of the Louisiana Constitution. ROA.3929.

*b. The Evidence At Trial*

During a three-day bench trial, the court heard extensive evidence about Powers' and Morton's off-duty work, current and former NOPD rules on details, the Commission's practices, and the operations of the new Office of Police Secondary Employment. ROA.4212-4838.

Powers' counsel admitted that Powers was not a party to any contracts when the challenged ordinances were enacted. ROA.3934, 4283-4284, 4346. He worked occasional details, and most in recent years were traffic details. ROA.4276. The City set these up through a permitting process and paid Powers a set rate for the traffic details. ROA.4276-4277.

Morton worked recurring details for a club called the Sugar Mill. ROA.4311. He also worked some special events at the Superdome. ROA.3680. Morton said his work was "very, very, sporadic," and he works "when \* \* \* events come up." ROA.3679, 4049-4050. Morton did not specify any particular damages he would have to pay if he decided not to accept an invitation to work a detail a given day. ROA.4036.

Morton's employer from the Sugar Mill testified that he had an "oral agreement" with Morton to provide security at special events. ROA.4223. Nevertheless, he admitted that there were times he "did not use him," and the employer would, on those occasions, simply "call[] him [and] explain[] the

situation.” ROA.4223. He did not describe any compensation he might owe Morton if he failed to provide work. There was no agreement he would call Morton to work a given number of jobs each month or each year. ROA.4246. When NOPD suspended Morton from details, the employer merely “found someone else” for the suspension period. ROA.4224. He did not take any other action against Morton. ROA.4242. He assumed that the NOPD could stop officers from working paid details. ROA.4243.

Other officers and detailee employers testified about their work arrangements. Agreements with detail employers were at-will, verbal agreements. ROA.368, 4284, 4345. They were not for a definite period of time; one employer described the arrangements as “month to month.” ROA.4247. An employer might have “regulars” – officers who repeatedly worked a detail. ROA.4225. If someone did not show up, the employer would not hire that officer again. ROA.4228, 3960. As one employer explained, if an officer did not come to work he would “cancel the detail with that officer and probably go to another person to do it.” ROA.4257. Officers sometimes made arrangements to work through another officer who coordinated details, but those coordinators could terminate the arrangements at any time. ROA.4025, 4266. An employer, too, could cancel the detail at any time. ROA.3983.

Officers and employers also testified that they understood NOPD could terminate a detail. ROA.4243, 4266. NOPD had rules governing detail arrangements, and details had to be approved. ROA.4031, 4102. The rules governing detail work had been changed many times over the years. ROA.4266. After the NOPD banned work at bars, for example, officers had to cancel these details. ROA.3684, 4268, 4558, 4560-4561.

In considering the claims of the Commission, the court heard evidence that the Commission has never regulated officers' off-duty work. ROA.3931, 4031, 4048, 4732. The Commission conceded it never previously reviewed or approved detail pay rates. ROA.3678.

*c. The District Court's Opinion*

The court dismissed plaintiffs' claims and the Commission's cross claim. ROA.3940.

1. In considering the parties' state and federal contract claims, the court concluded that because the officers had no enforceable contracts, "there can be no impairment, unconstitutional or otherwise" of "nonexistent contractual rights." ROA.3935. The court noted Powers conceded he was not a party to any contract when the challenged ordinances were enacted (ROA.3934) and had "no contractual agreements" for the various individual private details he had recently worked. ROA.3930. Morton worked recurring details, the court found, but he offered no

evidence that private employers had promised to hire him for future work. ROA.3931. Further, the court found, NOPD maintains control over whether officers are allowed to do details. ROA.3932-3933. The court held that the officers could not show a violation of their federal or state rights if there was simply “prospective interference with a generalized right to enter into future contracts.” ROA.3934.

The court held that plaintiffs did not suffer expropriation of a “business enterprise” in violation of Louisiana’s constitutional protections, as the officers “offered no meaningful evidence or persuasive argument that individual officers working paid details were a ‘business enterprise.’” ROA.3936. Indeed, the court stated, NOPD policy forbids officers from setting up a “corporation, company, trust, fund, or cooperative banking account” to manage paid details. ROA.3097, 3936. Furthermore, as the Office of Police Secondary Employment is not for profit, the court held, it cannot be usurping a “business enterprise” in violation of the Louisiana Constitution. ROA.3933.

The court also explained that the state and federal constitutions contain “substantially equivalent” contracts provisions (ROA.3933 (quoting *Board of Commissioners of Orleans Levee District v. Department of Natural Resources*, 596 So. 2d 281, 291 (La. 1986)), that do permit some impairment of contract rights when necessary. The court stated that it is within “the inherent police power of the

State to safeguard the vital interests of its people.” ROA.3933-3934 (quoting *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (internal quotation marks omitted)).

2. In considering the Civil Service Commission’s claims, the court found that the Commission did not have jurisdiction over police details. The court found that the Commission had power over “employment with the city” but that paid details were for “private non-City entities.” ROA.3937. The court emphasized that the Commission has “never regulated or attempted to regulate paid details or secondary employment and has never set rates for that off-duty work by NOPD officers.” ROA.3931. Importantly, the court concluded, detail work is optional, done off duty, and for the benefit of third parties. ROA.3932, 3937-3938. The third-party employers, not the City or the Office of Police Secondary Employment, direct the officers in how to perform the detail work. ROA.3933, 3938. The court stated that payment comes from third-party private citizens or entities, which distinguishes the paid details from an officer’s work for the City. ROA.3938.

The court found no support for the Commission’s assertions in state law, citing state court decisions holding the Commission had no jurisdiction over off-duty paid details. ROA.3937; see also *Hebert v. New Orleans Police Dep’t*, 805 So. 2d 345, 352 (La. Ct. App. 2001). Secondary employment, the court concluded,

was not within the Commission's "jurisdiction before the Challenged Ordinances" and "it is not within [their] jurisdiction now." ROA.3939.

### **SUMMARY OF THE ARGUMENT**

This case involves two police officers' state and federal contract claims brought in response to New Orleans' efforts to implement a federal consent decree. The case unquestionably contains a federal claim, as officers claim the new NOPD administrative system for paid details violates federal constitutional rights. Where both defendants – the City and the Commission – consented, removal was proper. The district court also properly exercised its discretion to take jurisdiction of the related state-law claim concerning the Civil Service Commission's jurisdiction over off-duty police details.

The district court properly held that the two officers did not have cognizable contract rights in off-duty details. While the officers sometimes worked a string of jobs for the same employer, the officers were not bound to provide future details and the private employer who called officers to offer work as security needs arose had no obligation to continue to provide work to any specific officer or any NOPD officer at all. Furthermore, officers and private entities knew that the NOPD detailees were bound by NOPD rules, and that NOPD was free to change its rules and had done so in the past, and could even cancel any detail at any time. There simply were no existing "contracts" for details.

The City's Civil Service Commission has never had authority to set terms for off-duty work. State courts have already examined whether the Commission had control over off-duty work, and no court has found the Commission has power over any part of the detail system. The Commission's own rules describe "Civil Service of the City" as including work "in the service of the city" and do not refer to non-public employment. Rules of the Civil Service Commission City of New Orleans I § 1.14 & 52 (Feb. 17, 2014) (CSC Rules), available at <http://www.nola.gov/civil-service/resources/files/rules/rules-2014/>. See also CSC Rule I § 1.14 (defining "City Service" as "positions of trust or employment with the city"), §1.17 (defining classified service as "all offices and positions of trust or employment in the city service"). The district court properly found, as the United States and the City argued, that the Commission did not have the right to set pay rates for officers on off-duty private work, and that the City's decision to assign that duty to the Office of Police Secondary Employment was proper under state law.



## ARGUMENT

### I

#### THE DISTRICT COURT HAD JURISDICTION

A. *Standard Of Review*

The denial of a motion to remand and the propriety of removal to federal court are reviewed *de novo*. *Kollar v. United Transp. Union*, 83 F.3d 124, 125 (5th Cir. 1996); *Oviedo v. Hallbauer*, 655 F.3d 419, 422 (5th Cir. 2011). A court's exercise of supplemental jurisdiction over state claims is reviewed for abuse of discretion. *Priester v. Lowndes Cnty.*, 354 F.3d 414, 425 (5th Cir.), cert. denied, 543 U.S. 829 (2004).

B. *The Court Properly Exercised Jurisdiction Where Plaintiffs Raised A Federal Claim And All Defendants Consented To Removal*

A defendant may remove a case to federal court if it contains a federal claim and all defendants consent. 28 U.S.C. 1441(c)(1); *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir.), cert. denied, 510 U.S. 868 (1993). That is what happened here. Officers Morton and Powers petitioned the state court for relief claiming, among other things, that the implementation of the federal Consent Decree violated “constitutional rights guaranteed to Sgt. Powers and to Capt. Morton” under the Louisiana Constitution “as well as U.S. Const. art. I § 10.” ROA.38. This is a claim “arising under the Constitution, laws, or treaties of the United States” as required under 28 U.S.C. 1331 and 1441(c)(1)(A).

The district court pointed out the federal contract claim, stating there “simply can be no doubt that even the most cursory inspection of the petition reveals the presence of a federal question.” ROA.644. It requested the Commission’s position on removal and, when the Commission consented, properly exercised jurisdiction under 28 U.S.C. 1441. ROA.645.<sup>2</sup>

It is simply not the case that plaintiffs’ petition “raised only state claims” and was “far from raising a federal question.” Powers & Morton Br. 18. Nor was the Commission correct in asserting below that the petition was “utterly devoid of an allegation of a federal claim.” ROA.125. Plaintiffs explicitly invoked *federal* contract rights. ROA.38, 643-645.

Nor are appellants correct in suggesting that the district court did not properly obtain consent for removal from all defendants, as required under 28 U.S.C. 1446(b)(2)(A). Powers & Morton Br. 19-21; CSC Br. 26. Here, the City defendants filed a notice of removal on October 1, 2013, six days after service of Powers’ and Morton’s complaint, which had been filed on September 11. ROA.24-29, 32. The Commission submitted its consent seven days afterwards, on October 7. ROA.115. While the record does not reflect when the Commission

---

<sup>2</sup> Powers and Morton also claim that the district court improperly relied on 28 U.S.C. 1443 in rejecting their motion to remand. Powers & Morton Br. 21. But the district court did not cite this section as a reason for asserting jurisdiction.

was served, one can assume it was served on or after September 11 and therefore that they consented to removal within the thirty-day period permitted for removal under 28 U.S.C. 1446(b)(2)(B).<sup>3</sup> See ROA.282. For a defendant to consent, this Court merely requires “some timely filed written indication,” *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988), and the Commission’s filing satisfied that requirement.

Indeed, Powers and Morton do not seriously question the validity of this consent; they simply ignore it. They instead point to an earlier filing in which the City told the court that it had contacted the Civil Service Commission’s attorney and then purported to relay the Commission’s views to the court. According to the City’s account, the Commission did not think there was a jurisdictional basis for removal, given that the Commission was not a party to the Consent Decree. Powers & Morton Br. 21; ROA.28. That second-hand statement, relaying an out-of-court discussion, in no way countermands the Commission’s later written consent. Powers’ and Morton’s claim the Commission “clearly **never** consented” is patently false. Powers & Morton Br. 21 (emphasis in original).

---

<sup>3</sup> No one contends the consent was untimely.

Similarly, although the Commission now says that it “originally resisted removal,” it ultimately gave the district court its written consent. ROA.115.<sup>4</sup> The Commission had the opportunity to withhold consent, but chose not to do so. The fact that it now regrets that decision does not defeat the court’s jurisdiction. Consent binds a defendant, see *Getty Oil Corp.*, 841 F.2d at 1262, n.11, and the Commission cites no precedent suggesting that consent may be withdrawn.

*C. The District Court Did Not Abuse Its Discretion In Exercising Supplemental Jurisdiction Over State-Law Claims Under 28 U.S.C. 1367*

The court properly concluded it could decide the state law claims in this case concerning the officers’ state contract rights and the Commission’s jurisdiction over off-duty pay. Once federal claims are removed from state court, a federal court has jurisdiction over “all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.” 28 U.S.C. 1367(a). A court “may decline to exercise supplemental jurisdiction” over state law claims that are part of the same case or controversy if a

---

<sup>4</sup> The Commission complains that the court gave them an ultimatum, “litigate or your rights will be deemed ‘waived.’” CSC Br. 26. There is no evidence the court forced the Commission to consent to removal. The court merely requested the Commission’s views on “whether it consents to removal” after plaintiffs moved to remand. ROA.98, 640-641. In the passage the Commission now cites in its brief, the court was insisting, *after* the Commission had consented to removal, that it “be prepared to present the evidence” about its claims at the injunction hearing. ROA.637-638.

“claim raises a novel or complex issue of State law.” 28 U.S.C. 1367(c) and (c)(a)(1). Section 1367 gives courts a “discretionary choice not to hear the claims despite its subject-matter jurisdiction over them.” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009). A court should consider “factors of judicial economy, convenience, fairness, and comity” in exercising its discretion. *Brookshire Bros. Holding v. Dayco Prods.*, 554 F.3d 595, 602 (5th Cir. 2009).

While the Commission now asserts that exercise of supplemental jurisdiction on the issue of its authority over detail pay was improper because of a “novel issue of State law” (CSC Br. 24-27), it made no such argument before the district court (ROA.119, 124-129, 646 (noting that the Police Association of New Orleans’ arguments about supplemental jurisdiction were “unrelated to” the Commission’s motion to dismiss)). For that reason the argument is waived. Cf. *Clewis v. Medco Health Solutions, Inc.*, No. 14-10188, 2014 WL 4100740, at \*2 (5th Cir. Aug. 21, 2014) (noting, on appeal, that objections to supplemental jurisdiction can be waived).

The court acted well within its discretion when it exercised supplemental jurisdiction over the state law claims in the case and rejected arguments from the Police Association of New Orleans that the case presented a “novel or complex issue of state law.” ROA.645-646. Indeed, the court ultimately decided the state

constitutional and federal constitutional claims together, given that they were dependant on the same facts. ROA.3933-3936.

The issue of the Commission's jurisdiction over off-duty work was also intertwined with Powers' and Morton's claims about their federal contract rights. Powers & Morton Br. 28. All these issues required the court to examine both the prior and the new process for negotiating details, ongoing NOPD control over detail work, private employer's control over their detailees, and the past and present processes for paying detailees. ROA.3937. Resolution of all these claims required many of the same witnesses – officers, administrators from the Office of Police Secondary Employment, and secondary employers. It also involved analysis of many of the same documents – the Decree, previous NOPD rules, and new NOPD rules.

Furthermore, the court stated that it had “a continuing obligation to ensure the effective and expeditious implementation of the Consent Decree and will devote the resources necessary to achieve this goal.” ROA.647. The district court had presided over the entry and implementation of the Consent Decree, including police officers' objections related to secondary employment, for more than a year. See Compl., *United States v. New Orleans*, No. 2:12cv1924 (E.D. La. July 24, 2012). Accordingly, considerations of “judicial economy” and “convenience” strongly favored supplemental jurisdiction. This Court favors exercise of

jurisdiction where failure to do so would waste judicial resources. In *Brookshire Brothers Holding*, 554 F.3d at 603, the Court held that it would have been an abuse of discretion *not* to exercise supplemental jurisdiction after the court had invested significant judicial resources, even if (unlike here) there were “novel or complex state law issues” to be decided.

Here, the question of the Commission’s jurisdiction over unpaid details is closely related to the administration of the Consent Decree, and the court had already spent more than a year overseeing implementation of the Decree. The court was familiar with the Decree, NOPD policies, and the practices of secondary employment. The new regulations for secondary employment were an important part of the Decree, replacing an old system where officers bargained directly with third-party employers over pay rates. The City and the United States could not move forward with implementing their agreement, including setting up the new Office of Secondary Police Employment, unless the court resolved the issue of setting pay rates. The Commission cites no case where this Court or any other court found, under circumstances like those in this case, that a court had abused its discretion in exercising supplemental jurisdiction.

## II

### **THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING POWERS AND MORTON HAD NO CONTRACTS THAT THE DECREE MIGHT DISRUPT**

#### A. *Standard of Review*

The existence of a contract is, under Louisiana law, a question of fact. *Townsend v. Urie*, 800 So. 2d 11, 15 (La. Ct. App.), writ denied, 797 So. 2d 674 (La. 2001); *Fox v. LAM*, 632 So. 2d 877, 878 (La. Ct. App. 1994); *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 439 (5th Cir. 2002) (a federal court looks to state law for principles of contract interpretation). This Court reviews questions of fact for clear error. *Mumblow v. Monroe Bd., Inc.*, 401 F.3d 616, 622 (5th Cir. 2005).

#### B. *Powers And Morton Worked Details Sporadically As They Arose, Having No Binding Contract Agreements For Future Work*

The district court properly found that Powers and Morton had no contract rights cognizable under the United States or Louisiana constitutions, as they had no contracts with employers when the ordinances were enacted. Louisiana law requires that the “object of a contract must be determined at least as to its kind.” La. Civ. Code Ann. Art. 1973 (2008). A contract that does not “state whether, when or where” a party would be required to perform services or “whether, when, or where” the other party “was required to call upon [him] for such service” does not create an enforceable obligation. *Page v. Gulf Oil Corp.*, 775 F.2d 1311, 1315 (5th Cir. 1985) (applying Louisiana law). Where two parties have established



possible terms for future work but have not identified a specific assignment and have no understanding that future services *must* be provided, they have no binding contract and obligation. *Ibid.* Simple “expectations of prospective business dealings” do not make a contract. *Shreveport Elec. Co. v. Oasis Pool Serv., Inc.*, 889 So. 2d 274, 279 (La. Ct. App.), writ denied, 897 So. 2d 613 (La. 2005).

The district court easily and correctly found that Powers “had no contractual rights to be impaired” by the challenged ordinances. ROA.3934-3935. Indeed, Powers’ attorney admitted Powers was not a party to any contracts at the time the challenged ordinances were enacted. ROA.3678, 3934, 4283-4284, 4787. Powers had not coordinated details for several years and he worked only intermittent, individual private details. ROA.3930, 4290. He had no agreements, written or oral, for continuing work. ROA.4284.

The district court did not err, much less clearly err, in finding Morton also had no continuing contracts for detail work at the time the relevant ordinances were enacted. The court said there “was no credible testimony” that he and his detail employer “ever agreed, orally or in writing, that (1) [the employer] was obligated to call Morton to coordinate or work details or (2) Morton was obligated to coordinate or work details for any particular event.” ROA.3931. Morton worked recurring details, but these were not based on ongoing contracts with enforceable obligations. See ROA.4057. Asked about his understanding of an

“agreement,” Morton said an employer “agreed to pay us as long as we provided him a service.” ROA.4317, 4346. The arrangements were informal and fluid, and his work was “very, very, sporadic.” ROA.3679. Morton said he repeatedly coordinated details for “special event[s]” at the Sugar Mill, and he worked at the Superdome “when it has special events come up.” ROA.4049-4050. However, he worked only as needed, and the employers had no obligation to continue to provide him jobs. Not only were days and times for work erratic, but the payment terms were not well-established. ROA.4050. Morton sometimes charged the Sugar Mill an “administrative fee” for bringing other officers to the job, but sometimes he did not charge a fee if he called only one officer. ROA.4050. He had no ongoing contract relationships with either employer.

Morton’s and Powers’ situations were not unique. Other officers and their employers testified that there were no guarantees for detail work. One employer, when asked how an officer could end any “agreement” to work, explained that the officer would say “I do not want to work” and “that would be it.” ROA.2853. One officer was asked what would happen if he told his employer he could not honor a commitment to supply an officer, and he said she “would usually understand.” ROA.4297. He agreed that the “arrangement” for details was that “if the coordinator contacts you to work, you work if you can. And, if the coordinator doesn’t call you, then you just don’t work.” ROA.4311. An employer had “no

obligation” to use an officer; if the employer decided to use sheriff’s deputies or others, instead of NOPD officers, “[t]hey’re free to do that.” ROA.4313.

*C. Any Arrangements Officers Had For Paid Details Were Governed By NOPD Policies And NOPD Could Cancel Detail Privileges At Any Time*

As the district court acknowledged, NOPD set rules for police details both before and after the Office of Police Secondary Employment was established.

ROA.3930, 3932, 3936. The NOPD “maintains control over whether any individual officer is permitted to work Secondary Employment.” ROA.3932.

NOPD has enforced numerous restrictions on details over the years. ROA.4328.

There have been changes in years past, including new rules that forced officers to stop working regular, recurring details. ROA.4268, 4285, 4305. NOPD could suspend, deny, or approve an officer’s right to work a detail. ROA.4266, 4285, 4310, 4315, 4476.

Accordingly, even if Morton and Powers had “unwritten” agreements with employers, any agreements included an understanding that details were subject to NOPD policies and those policies could change. There was no “contract” independent of NOPD control. Morton acknowledged that “any understandings that [he] may have with these companies \* \* \* are subject to the NOPD policy.” ROA.4346. Officers have always known that as part of their employment with NOPD they must conform detail work to NOPD rules. ROA.4278, 4304, 4315-4316, 4475-4476, 4490. As Morton admitted, working details is “a privilege” and

“something the City lets you do at their discretion.” ROA.4053. He acknowledged that he never entered into a detail arrangement without knowing “it was a privilege that could be taken away at any time.” ROA.3686, 4053-4054.

*D. The Court Did Not Clearly Err In Finding That Powers And Morton Did Not Have A “Business Enterprise” Cognizable Under The Louisiana Constitution And Damaged By The Challenged Ordinances*

The district court properly found that Morton and Powers were not deprived of a “business enterprise” within the meaning of the Louisiana Constitution. ROA.3936. The court said there was “no meaningful evidence or persuasive argument” on this point, and observed that NOPD rules barred officers from forming corporations, trusts, companies, and the like for administering detail work. ROA.3936.

The Louisiana Constitution requires that “[n]o business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise.” Art. I, § 4(B)(6). The officers cite no support for their novel theory that their detail work is a “business enterprise” within the meaning of the provision and that the Office of Police Secondary Employment was set up to expropriate it. Powers & Morton Br. 28. As noted above, police officers negotiated details with the full knowledge that they were a privilege and not a right and that the privilege could be revoked by NOPD. They did not have “a property interest” in detail work because, as explained above, they

had no “unilateral expectation of it” or “legitimate claim of entitlement to it.”

*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The officers did not have any company or partnership devoted to details; indeed, NOPD policy did not allow it. ROA.3936, 4284.

Furthermore, the new regulations Powers and Morton now challenge were not enacted for “the purpose of operating that enterprise or halting competition with a government enterprise.” La. Const. Art. I, § 4(B)(6). The Office of Police Secondary Employment was set up as a way to ensure police officers could continue to have access to detail work. The Office negotiates and allots detail opportunities (instead of allowing officers to do so) in order to avoid the conflicts of interest, distortion of the chain of command, and other problems rampant in the old system. The Decree certainly did not abolish officer-controlled details to “halt[] competition” with any government enterprise. *Ibid.*

Even if plaintiffs did have a property interest that amounted to a “business enterprise,” which they did not, the Louisiana Constitution “*subjects* the right of every person to acquire, own, and use private property ‘to reasonable statutory restrictions and the reasonable exercise of the *police power.*’” *New Orleans Redevelopment Auth. v. Burgess*, 16 So. 3d 569, 577 (La. Ct. App.) (quoting La. Const. Art. I, § 4(A) (emphasis in original)), writ denied, 18 So. 3d 65 (La. 2009), and writ denied, 18 So. 3d 66 (La. 2009). Surely the City’s efforts to root out

corruption, favoritism, poor discipline, and fatigue in its police force qualify as reasonable exercise of police power. Under plaintiffs' broad and vague application of their "business enterprise" argument, virtually any regulatory body would violate the state Constitution.<sup>5</sup>

### III

#### **THE DISTRICT COURT PROPERLY FOUND THAT THE NEW ORLEANS CIVIL SERVICE COMMISSION DOES NOT HAVE JURISDICTION TO SET PAY RATES FOR OFF-DUTY POLICE DETAILS<sup>6</sup>**

The district court correctly decided, as a matter of state law, that the Commission does not have jurisdiction to set pay rates of police officers' off-duty work. The record showed that the Commission has never before regulated pay for

---

<sup>5</sup> Powers and Morton also argue that the district court erred in its analysis of potential harm to their contract interests when they filed for a preliminary injunction. Powers & Morton Br. 22. They argue that the court erred in considering whether the officers faced "irreparable injury." Powers & Morton Br. 23. Plaintiffs did not seek appeal of the denial of a preliminary injunction and the issue is moot because the court later found, upon a full review of the merits, that the two did not face *any* cognizable harm, much less an irreparable harm. Plaintiffs also suggest that the Decree was somehow tainted because negotiations involved Sal Perricone, a former Assistant United States Attorney who resigned due to improper remarks in an online forum. This Court has already rejected such suggestions. *United States v. New Orleans*, 731 F.3d 434, 438, 443 (5th Cir. 2013).

<sup>6</sup> The district court's determination of a question of state law is reviewed *de novo*. *American Int'l Specialty Lines Ins. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003).

police details. Furthermore, no state court has ever construed the Commission's jurisdiction to cover similar work.

A. *Neither The State Constitution, The Civil Service Commission's Rules, Nor State Supreme Court Precedent Requires The Commission Set Pay Rates For Off-Duty Employment*

Under the authority provided it in the Louisiana Constitution, the Commission sets pay rates for employees in the "classified service," and includes "persons holding offices and positions of trust or employment in the employ of each city." See La. Const. Art. X, § 1(B), and 2(A). This, as the district court properly concluded, does not include off-duty work. Under the Commission's rules, the "Civil Service of the City" includes "all offices and positions of trust or employment with the city, any department, agency, board or commission thereof, or corporation organized for public purposes." CSC Rule I § 1.14. A "position" with the City is "any office or any employment, in the service of the city." CSC Rule I § 1.52. The plain language of these rules does not incorporate rates of pay for work done for private, third-party employers – it reaches *public* employment. These detail opportunities are not done in "service of the city."

Louisiana courts have consistently held that police officers' secondary employment does not fall within the Commission's jurisdiction. As the district court concluded, "[p]rior to entry of the Consent Judgment, adoption of the Challenged Ordinances, and creation of [the Office of Police Secondary

Employment], it was settled that the Civil Service Commission had no jurisdiction over off-duty paid details.” ROA.3937. In *Sterling v. Board of Commissioners*, 527 So. 2d 1122, 1124 (La. Ct. App. 1988), the court held that a fund New Orleans Harbor Police officers set up for off-duty work was not within the Commission’s jurisdiction, because “special detail pay is not ‘wages and salaries’ for duties as a Harbor Patrolman.” Instead, “special details are an option for off-duty Harbor Patrolmen.” *Ibid.* Similarly, in *Hebert v. New Orleans Police Department*, 805 So. 2d 345, 347-349 (La. Ct. App. 2001) (quoting La. Const. Art. X, § 8), writ denied, 811 So. 2d 932 (La. 2002), the state court rejected a police officer’s claim that his suspension from paid details, as a disciplinary measure, fell within the Commission’s jurisdiction to regulate “disciplinary action” taken against members of the classified civil service. The court said that the claim was not about City service, but concerned “off-duty employment of officers.” *Id.* at 352. The Commission cites no cases suggesting Louisiana’s constitutional grant of jurisdiction to the Commission covers an officer’s off-duty work or pay from third parties.

Trying to grapple with the plain language of the state constitution, the Commission fails to give any logical explanation of how off-duty police details qualify as “offices and positions of trust or employment in the employ of [the] city,” Louisiana Constitution Article X, § 1; after all, the work is voluntary, off-



duty, and for the benefit of private entities. The Commission argues that it does not matter that an officer “elects” to do a detail, because an officer “elects” to join NOPD in the first place. CSC Br. 16. This argument obviously misses the point. Once an officer joins the NOPD, the police department assigns hours, duties, and other particulars the officer must accept. Off-duty details stand apart from work for the City because the City does not direct the officer’s hours or tasks on a detail. Unlike an officer’s NOPD shift, a detail is something an officer can take or leave. Voluntariness is relevant; the court in *Sterling*, rejecting arguments in favor of the Commission’s jurisdiction, stated that “special details are an *option* for off-duty Harbor Patrolmen,” as opposed to “ordinary duties.” 527 So. 2d at 1125 (emphasis added).

*B. In Asserting Authority Over Off-Duty Work, The Commission Is Requesting An Impermissible Extension Of Its Enumerated Powers*

As the district court observed, the Commission “has never regulated or attempted to regulate paid details or secondary employment and has never set rates for that off-duty work by NOPD officers.” ROA.3931; see also ROA.3678, 4314. The Commission’s personnel director testified she believed “the Commission has no jurisdiction over off-duty payments.” ROA.3192, 3678. The director of the Office of Police Secondary Employment testified that “[i]n all of my research into this, I never heard the Civil Service Commission intervene on police details.” ROA.4658. Indeed, for traffic details, which have always been administered

through the NOPD using a permitting process, rates were set by the NOPD, not the Commission. ROA.370-371, 4276-4277.

Giving the Commission power over police details would be unprecedented. The Louisiana Supreme Court has explained that the “commission’s powers should not be expanded beyond those necessary to effectuate the objectives and purposes of the civil service” and into “areas of power affecting public employees which are not enumerated.” *New Orleans Firefighters Ass’n Local 632 v. New Orleans*, 590 So. 2d 1172, 1176 (La. 1991). In *New Orleans Firefighters Ass’n Local 632*, the Louisiana Supreme Court held that the Commission could not set residency requirements for employees, because “[t]he power to adopt a residency requirement does not fall within a commission’s express power.” *Ibid.*

The Commission does not cite any case suggesting it has authority or justification to set any conditions for off-duty details, even though police have been doing this work for years. Officers have been reporting their off-duty work, including hours, to the City, but there is no indication that the Commission has ever previously claimed the power to incorporate this off-duty work in calculation of overtime pay.

The cases the Commission cites (CSC Br. 12-13), to justify its claims to jurisdiction over off-duty pay do not support its attempts to expand its jurisdiction. They merely show, unremarkably, that the Commission has jurisdiction over

methods of computing overtime pay for City police work, *Civil Service Commission, v. Rochon*, 374 So. 2d 164 (La. Ct. App. 1979), and the length of the workweek for City employment, *Saulter v. Sewerage & Water Board*, 593 So. 2d 767 (La. Ct. App. 1992).

In *Rochon*, the Commission claimed that it, and not the City, would determine whether supplemental state payments figured into an officer's overtime calculations. 374 So. 2d at 164. But the Commission has never before tried to extend this argument to payments for off-duty details. Nor has the Commission ever claimed it had jurisdiction to set rules about off-duty hours, although it asserted in *Saulter* that only the Commission could change the work week for City employment. *Saulter*, 593 So.2d at 769. Indeed the NOPD has, at least since 2005, limited the number of off-duty hours police may spend on detail work. ROA.894, 2266, 2275, 2493, 3511. The record and state law show that work for the City and work for the Superdome or the Sugar Mill are not the same thing when it comes to the Commission's jurisdiction.

Where the Consent Decree *did* implicate Civil Service rules, the United States and the City were careful to acknowledge this and include Commission oversight. Thus, the Decree provides that the NOPD must "work with Civil Service" to reform recruiting, hiring, performance evaluations, promotions, and discipline. ROA.197-199, 209, 211. Accordingly, this Court previously upheld

the district court's denial of permissive intervention for officers seeking to challenge the Decree, because the Decree "does not modify the civil service system for NOPD officers." *United States v. New Orleans*, 540 F. App'x 380, 381 (5th Cir. 2013) (per curiam).

*C. The City Has Long Exercised Its Authority To Regulate Police Details*

The new rules for details rely on the City's longstanding authority to regulate officers' off-duty work in order to ensure off-duty work does not undermine the NOPD. This authority has never before been construed to make the City into officers' "employer" during details, therefore bringing that work within the Commission's jurisdiction. As the district court pointed out, NOPD "maintains control over whether any individual officer is permitted to work Secondary Employment." ROA.3932.

The Department has, for many years, required its officers to comply with its rules while on details. NOPD's old rules required that "[w]hile working paid details, employees shall be governed by all Department rules, orders and procedures." ROA.372. The NOPD disciplined Morton for forming a company to coordinate detail work (a violation of NOPD rules) and has suspended or investigated other officers for such detail-related misconduct as payroll fraud. ROA.586, 588, 590. For decades, the NOPD has disciplined officers for misconduct committed on details. See, e.g., *Patin v. Department of Police*, No.

2012–CA–1693, 2013 WL 3215533 (La. Ct. App. June 26, 2013) (officers disciplined for forming companies to administer details); *Saacks v. New Orleans*, 687 So. 2d 432, 436 (La. Ct. App. 1996) (officer disciplined for working for video poker company), as amended on denial of reconsideration (Mar. 24, 1997), writ denied 693 So. 2d 769 (La. 1997). Thus, it is not important to the issue presented here that the NOPD may still discipline an officer for misconduct on a detail. See CSC Br. 16. In fact, NOPD continues to discipline officers for off-duty conduct *regardless* of whether the officer was on detail. ROA.3683, 4385; *Butler v. New Orleans Police Dep’t*, 885 So. 2d 1266, 1267 (La. Ct. App. 2004) (officer disciplined for brandishing gun in pretend hold-up); *Arnold v. New Orleans Police Dep’t*, 383 So. 2d 810, 811 (La. Ct. App.) (officer disciplined for barroom brawl), refusing writ, 385 So. 2d 274 (La. 1980). This arrangement was not created by the Decree or the challenged ordinances.

In addition, officers on details previously had to conform to other NOPD restrictions, such as bans on work at bars, strip clubs, or other venues if such jobs could undermine public confidence in the department. See ROA.368, 571-572. As the rules revised in 2005 explain, “[e]mployees working paid details do so as representatives of the New Orleans Police Department” and regulations are needed because “public perception, moral character, and public associations affect the overall professional appearance of the department.” ROA.367. The Commission

cannot extend this common-sense exercise of NOPD authority over off-duty actions of its officers into a justification for an extension of the Commission's jurisdiction.

The fact that the City may indirectly benefit from enhanced security because of details (see CSC Br. 16), does not change detail work into a "position of trust or employment" with the City. Patrolling the Superdome on game night or providing security for a 24-hour pharmacy might make the City safer, but that does not mean this work is done "in the service" of the City. Police details are used around the country to augment community security beyond what a municipality might ordinarily afford. See ROA.571. There is an arguable public benefit from many other private occupations, such as medicine, law, or education, but that does not mean these jobs, even if done by moonlighting public employees, are public employment.

*D. The New Regulations Do Not Require The City To Pay Detailees*

Third-party employers, not the NOPD, provide salaries for detailee officers. ROA.3932. The district court properly described the new system: The private employers pay a set rate, and the Office of Police Secondary Employment "passes through the hourly fee to the NOPD officer." ROA.3932. As explained p. 13, *supra*, the challenged ordinances set up a new fund, "the Police Secondary Employment Fund" to support the office's operations, and administer "payment of

police officers \* \* \* for secondary employment opportunities or private detail work” defined as “security or police related work performed for compensation by an NOPD officer or employee during his or her off-duty hours.” See ROA.499-502, 3672-3673.<sup>7</sup>

As the district court pointed out, wages for paid details previously passed through the hands of informal detail coordinators, and no one contended the coordinators, rather than the businesses using detailees, were “employers.” ROA.3938. The Commission is wrong to assert (CSC Br. 14-15, 22) that passing compensation through the City-administered fund instead of directly to officers makes their off-duty work into City employment. The Commission’s rules provide that “employment with the City” is determined “irrespective of whether the pay for the offices and position of trust or employment be paid out of the city treasury either in whole or in part.” CSC Rule I § 1.14. Therefore, even if one were to

---

<sup>7</sup> It also does not matter whether some City funds were transferred into the Office of Police Secondary Employment’s account to help set up the new office. See CSC Br. 23. Funds were set aside to pay for “computers, desks, etcetera” as well as initial administrative salaries to get the Office “off the ground.” ROA.4140. It was not to be used for officers’ pay. ROA.4149. One witness worried that the City might one day have to subsidize the office’s administrative costs, but there has been no suggestion, nor could there be, that the City would ultimately be paying detailees’ wages. ROA.4113.

construe the “Police Secondary Employment Fund” as part of the City treasury, that would not establish that detailees are City employees.

*E. Examples Of The Meaning Of “Employer” From Other Contexts Do Not Support The Commission’s Claim That Details Are City “Employment” For Purposes Of Louisiana’s Civil Service Rules*

In this case, “civil service,” is defined in the Louisiana Constitution, as “offices and positions of trust or employment” with the City. La. Const. Art. X, § 1(B). Definitions of “employer” in federal antidiscrimination law (CSC Br. 21-22), are irrelevant. Nor is it instructive to explore principles of vicarious liability through state-law definitions of independent contractors or “borrowed employees.” CSC Br. 15, 23; see also La. Civ. Code Ann. Art. 2320 (2008) (discussing vicarious liability). Similarly, the United States Supreme Court tests on whether an employee is a “public employee” or “private employee” for purposes of First Amendment protections are unhelpful. See CSC Br. at 19 (citing *Harris v. Quinn*, 134 S. Ct. 2618 (2014)). These examples do not address the state constitutional provisions, the unique issue of police details, or the importance of a pass-through fund administering payroll. They have, as the district court explained, “no bearing on whether” the new regime “makes City employees of NOPD officers performing secondary employment.” ROA.3939.

To the extent an analogue is relevant, the closest comparator is, perhaps, the treatment of municipal police details under the Federal Fair Labor Standards Act.



Cities are not to be considered police officers' "employer" for details when it comes to federal laws for overtime compensation. See 29 U.S.C. 207(p)(1); ROA.4632-4633, 4758. Federal regulations permit a city to "facilitate" and oversee secondary employment, just as the NOPD Decree requires. 29 C.F.R. 553.227(d). A police officer's primary employer can "maintain a roster of officers who wish to perform such work," "select the officers for special details," "negotiate their pay," "retain a fee for administrative expenses," require secondary employers to "pay the fee for such services directly to the department," use its payroll system to distribute pay for details, and enforce standards of conduct for details. 29 C.F.R. 553.227(a). Nevertheless, detail work is still considered separate employment for calculation of overtime, benefits, and other purposes. 29 C.F.R. 553.227(d); see also 29 U.S.C. 207(p); *United States v. New Orleans*, 731 F.3d 434, 438, 441-442 (5th Cir. 2013).

*F. The New Regulations Do Not Violate The Louisiana Constitution Art. VI, § 9(A)(2), As An Impermissible "Minimum Wage"*

The City has the right to establish rules for its off-duty police, and it has regulated their off-duty work for many years. State courts have never suggested that municipal controls over police violate the Louisiana Constitution's requirement that "[n]o local governmental subdivision shall \* \* \* enact an ordinance governing private or civil relationships." La. Const. Art. VI, § 9(A)(2). It would require a strained reading of this text to conclude that it bars the City from

setting pay rates for its police on private details. And such an expansive reading would bar not only set wages but the NOPD's longstanding regulation of other aspects of the "relationship" between a detailee and a third-party private employer, such as hours and types of work allowed. Indeed, the broad reading would probably bar many routine municipal ordinances or regulations, which might affect "private or civil relationships."

Nevertheless, citing this provision and a concurring opinion in *Campaign for a Living Wage v. New Orleans*, 825 So.2d 1098, 1108 (La. 2002), the Commission argues that the state constitution bars minimum wage laws and that the challenged ordinance is, in effect, a minimum wage law. CSC Br. 17.<sup>8</sup> But the majority in *Campaign for a Living Wage* did not reach the issue of whether Louisiana Constitution Article VI, § 9(A)(2) bars minimum wage laws, and it is pure speculation to suppose that state courts would do so. Furthermore, the pay schedule at issue here is not a minimum wage law. It does nothing more than set rates for private entities' use of police officers and NOPD equipment, should they

---

<sup>8</sup> Although it cited *Campaign for a Living Wage*, the Commission did not make a "minimum wage" argument to the district court. See ROA.494. This argument is therefore not only frivolous, but is waived.

choose to hire them off-duty. If private entities hire any other security personnel, the regulations have no effect.<sup>9</sup>

---

<sup>9</sup> If city civil service rules or other state laws stand in the way of a federal court order, they must give way to enable enforcement. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971). This Court need not resolve any conflict here, however, as there is none.

**CONCLUSION**

This Court should affirm the district court's decision.

Respectfully submitted,

VANITA GUPTA  
Acting Assistant Attorney General

s/ April J. Anderson

MARK J. GROSS  
APRIL J. ANDERSON

Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 616-9405

## **CERTIFICATE OF SERVICE**

I certify that on November 3, 2014 I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I further certify that, with the exception of counsel listed below, all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on November 3, 2014, the foregoing brief was mailed to the following counsel by certified U.S. mail, postage prepaid:

Eric J. Hessler  
2802 Tulane Avenue, Suite 102  
New Orleans, LA 70119

s/ April J. Anderson  
APRIL J. ANDERSON  
Attorney

## CERTIFICATE OF COMPLIANCE

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

- (1) contains no more than 11,000 words;
- (2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and
- (3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ April J. Anderson  
APRIL J. ANDERSON  
Attorney