IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ACLU OF TENNESSEE, INC.	)	
	)	
Intervening Plaintiff,	)	
v.	)	No. 2:17-cv-02120-JPM-dkv
	)	
THE CITY OF MEMPHIS,	)	
	)	
Defendant.	)	

DEFENDANT'S PRETRIAL MEMORANDUM

Background

The allegations in this case arose almost entirely out of a discrete period of time in which the City of Memphis ("the City") and the Memphis Police Department ("MPD") were on heightened alert following significant national and regional events that constituted threats to public safety, to police officers, to protesters and counter protesters who increasingly come into contact with each other at public demonstrations, even the personal safety of the Mayor, his family, and other high profile Memphians. These events are set forth in the City's Pre-Trial Order contentions and facts (ECF 122 at 4917-4918, 4947-4951), but culminated most dramatically in the series of events on July 10, 2016 where several hundred people marched down the streets of Downtown Memphis from a permitted event at FedEx Forum and stormed the I-40 Interstate Bridge.

In response to these events, MPD's Office of Homeland Security ("OHS"), and in some cases, its Real Time Crime Center ("RTCC") observed (through plainclothes as well as uniformed officers and stationary and mobile cameras) potentially controversial events of public interest; and actively monitored social media in an effort to anticipate and be in a position to

react to unlawful activity. On some occasions, photographs, social media posts, and arrest records of individuals directly participating in unlawful activity at one or more of these events were distributed within and to law enforcement or security personnel at private businesses and other governmental agencies having an interest in the same thing the Memphis Police Department had as its focus: public safety. The actions taken by OHS and RTCC, the evidence will show, fall squarely within national "best practices" recommendations for law enforcement professionals and were consistent with applicable federal guidelines.

In the weeks and months before and after the Bridge incident, local activists, sometimes the same core group of overlapping participants, continued to engage in unlawful activity such as (1) attempting to disrupt traffic at Graceland twice, including during the heavily attended annual "Elvis Week" candlelight vigil; (2) repeatedly threatened or planned to "go back to the Bridge"; (3) threatened to "hack" into the Memphis City Zoo's computer system; (4) set up a fake Twitter account purporting to be that of the Memphis Police Director; (5) trespassed on the private residence of the Mayor at a mock "Die-In"; (6) threatened to come back on a weekly basis to "have coffee with the Mayor"; (7) chained themselves to barrels at the entranceway to the Valero Refinery; (8) by report, "wondered" what would happen if "someone brought a gun" into City Council chambers.

The specific impetus behind the present litigation was an "Authorization of Agency" ("AOA") list of names prepared by a detective in the OHS after the Die-in on December 19, 2016, which had as its purpose the protection of private property rights of the Mayor, and possibly other private citizens and businesses. Through a series of events the City has acknowledged included an error in judgment, for a period of approximately one month, this AOA list was included with a list of former employees or potentially disruptive individuals who

were considered potential threats to people working in City Hall. The circumstances surrounding the preparation of the AOA and its brief inclusion with the City Hall watch list has been fully explored in the City's previous filings, including the Pre Trial Order. (ECF 122 at 4920-4921).

The Court, in its August 10, 2018 Order (ECF 120 at 4855) expressed its intention to hear evidence of the City's motivations behind the allegations in the Intervening Complaint on several issues concerning the forty year old Consent Decree which provisions are at issue in the lawsuit.[1] The evidence will demonstrate that the City acted entirely reasonably under the circumstances, and that it has been in substantial compliance with the Consent Decree for forty years with respect to the issues the Court has not already resolved as a matter of law. The City's actions do not warrant the most significant relief requested by the Intervening Plaintiff: the indefinite appointment of a "monitor. (ECF 121 at 4903). The City and MPD, in every alleged instance of alleged violations of applicable sections of the Consent Decree, did not act for the purpose of political intelligence, but instead for the purpose of protecting public safety, officer safety, and protestor safety.

In view of the potentially devastating impact of a fulsome attempt at enforcement of the Consent Decree, as the Court has interpreted its provisions, the City is contemporaneously moving to vacate, or in the alternative, substantially modify the Consent Decree. The City intends to present evidence on the potential impact of application of several sections of the Consent Decree, monitor or not, and to demonstrate at the upcoming hearing that whatever violations the Court may find regarding the Consent Decree itself, the City has not engaged in

[1] The City recognizes that the Court has found violations of the Consent Decree's Sections C(1) and G as set forth in its August 10, 2018 Order Granting in Part and Denying in Part the Plaintiff's Motion for Summary Judgment on Civil Contempt issues. (ECF No. 120). The City reserves its right to contest those findings, either in a Motion to Alter or Amend the existing Order, or if necessary on appeal following a final judgment on all issues. For the purpose of this filing, the City will not address the specific findings made by the Court in its Summary Judgment Order.

conduct which has violated anyone's federal civil rights under applicable case authorities.

I. Intervening Plaintiff Lacks Standing to Enforce the Provisions of the Kendrick Consent Decree.

For the reasons expressed in the Pre Trial Order (ECF 122 at 4925-4930, Stip. Facts 2-18, 4951-4953, Standing Facts 25-37), the Intervening Plaintiff cannot establish standing.

In the Court's Order Denying the City's Motion for Summary Judgment on Standing, the Court noted that the City cited no cases affirmatively stating that a successor in interest cannot enforce the provisions of a consent decree. (ECF No.117, PageID 4832). At least one other court in this Circuit, however, has held that a successor in interest to a consent decree lacks standing to enforce that decree. *Bauman v. City of Cleveland*, No. 1:04-CV-1757, 2015 WL 893285 (N.D. Ohio Mar. 3, 2015).

Bauman involved a landfill in the City of Cleveland. A 2006 Consent Decree provided that a construction and demolition debris license was to be reinstated for the entity, Bradley Rd., Inc. The consent decree ruled that, with respect solely to the 2006 construction and demolition license, it was to be modified to designate Edgerton Holdings LLC ("Edgerton") as the Landfill operator. Several years later, Bradley Rd., Inc. joined forces with an entity called Landsong, which replaced Edgerton as the landfill operator. Landsong sought to enforce the terms of the 2006 consent decree, and the district court found it lacked standing as a successor in interest to the consent decree.

> While Landsong readily concedes that it was not a party to the 2006 Consent Decree, it claims to have standing to enforce the decree by virtue of the fact that it is the "successor to the prior operator" of the Landfill. "The Supreme Court has held, however, that 'a well-settled line of authority ... establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it.' " *S.E.C. v. Dollar Gen. Corp.*, 378 F. App'x 511, 514 (6th Cir.2010) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975)); *see Sanders v. Republic Servs. of Ky., LLC*, 113 F.

> App'x 648, 650 (6th Cir.2004) ("Following *Blue Chip Stamps*, we have held that third parties, even intended third-party beneficiaries, lack standing to enforce their interpretations of agreed judgments."); *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.1992) ("A consent decree is not enforceable ... by those who are not parties to it.") (quotation marks and citation omitted). Because Landsong was not a party to the underlying federal litigation, or the Consent Decree that grew out of it, it lacks standing to bring the present motion.

Bauman v. City of Cleveland, No. 1:04-CV-1757, 2015 WL 893285, at *4 (N.D. Ohio Mar. 3, 2015).

Unlike in *Bauman*, where Landsong was indisputably the successor in interest to Edgerton as the operator of the landfill, here, there is a legitimate question as to whether ACLU-TN should be considered a successor in interest to American Civil Liberties Union in West Tennessee, Inc. at all. But even if ACLU-TN is considered to be the successor in interest to American Civil Liberties Union in West Tennessee, Inc., it still does not have standing to enforce the Consent Decree based on the reasoning in *Bauman* and the law in the Sixth Circuit: "even intended third-party beneficiaries of a consent decree lack standing to enforce its terms." *Aiken v. City of Memphis*, 37 F.3d 1155, 1168, 1994 WL 540738 (6th Cir. 1994).

II. The Intervening Plaintiff has not alleged or demonstrated a Constitutional violation related to the allegations in the Intervening Complaint.

The activities of which the Intervening Plaintiff complain are entirely permissible under federal law and did not violate anyone's constitutional rights. (*See* City's case law cited in Pre Trial Order, ECF 122 at 4924-4925).

Furthermore, some of the MPD's conduct relevant to alleged violations of First Amendment rights was permissible under constitutional law because it was directed toward conduct excluded from the protection of the First Amendment. Such conduct includes, but is not limited to, the following: words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"; *Cohen v. California*, 403 U.S. 15, 20 (1971); advocacy of the

use of force … where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) *(per curiam).* "And the First Amendment also permits a State to ban a 'true threat.' *Watts v. United States,* 394 U.S. 705, 708, (1969) *(per curiam)* (internal quotation marks omitted). "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black,* 538 U.S. 343, 359–60 (2003). "[A] prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* (internal quotations and citation omitted).

III. In all respects other than as already addressed by the Court in its August 10, 2018 Order, the City has substantially complied with the *Kendrick* Consent Decree.[2]

On the issues not resolved as a matter of law in its August 10, 2018 Order, the Intervening Plaintiff cannot meet its burden of proving that the City is in contempt of the Consent Decree by clear and convincing evidence. *NLRB v. Cincinnati Bronze, Inc*., 829 F.2d 585, 590 (6th Cir. 1987). "Clear and convincing evidence is a not a light burden and should not be confused with the less stringent, proof by a preponderance of the evidence." *Elec. Workers Pension Tr. Fund of Local Union |58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003).

To the extent that the City has engaged in intelligence gathering related to lawful First Amendment activities, including monitoring of social media, it has been for the express purposes of public safety, officer safety, and protestor safety, which is an entirely permissible function of a

[2] The City recognizes that the Court has found violations of the Consent Decree's Sections C(1) and G as set forth in its August 10, 2018 Order Granting in Part and Denying in Part the Plaintiff's Motion for Summary Judgment on Civil Contempt issues. (ECF 120).

modern day law enforcement agency, as noted by this Court. *See* ECF No. 120, PageID 4883. ("Instead, viewed in the light most favorable to the City, the *purpose* behind the City's actions was to promote public and police safety, not to gather or disseminate information relating to the exercise of First Amendment rights.)

IV. The City's clarification with regard to the Court's ruling regarding the distribution of personal information in JIB.

In the Court's August 10 Order, it stated as follows:

> With respect to Section H of the Consent Decree, the City "admits that it inadvertently disseminated personal information about a few persons in several early JIB to a limited number of non-law-enforcement persons." (ECF No. 112 at 4536.) The City explains, however, that the "MPD stopped circulating the JIB to non-law enforcement persons shortly after the practice started." (ECF No. 112 at 4536.)
>
> There does not appear to be any dispute that the MPD disseminated personal information "collected in the course of a lawful investigation of criminal conduct" to persons outside "another governmental law enforcement agency then engaged in a lawful investigation of criminal conduct." (See Consent Decree § H(2).) If this practice was truly inadvertent and ended quickly, however, the City may be in substantial compliance with Section H of the Consent Decree. This is a factual issue to be examined at trial.
>
> (ECF No. 120 at 4886).

As a threshold issue, the City wishes to acknowledge that the term "inadvertently" in characterizing the evidence on a specific issue its Response to the Plaintiff's Motion for Summary Judgment was a poor word choice. The testimony of the witness cited in the City's Response, Detective Reynolds, did not use that word. The testimony of Det. Reynolds instead acknowledged that for a brief period of time the MPD sent its Joint Intelligence Briefings (JIB) to certain "agencies" outside the Memphis Police Department and "some businesses Downtown." Det. Reynolds testified that "[w]e took them out and gave them, you know, need to know basis

information." He did not specify when this practice stopped, testifying that "I don't recall. But it wasn't too far into…" (ECF No. 110 at 4208).]

In preparing to present evidence on this subject following the Court's ruling, counsel learned that the JIB have in fact continued to be distributed to persons or at least to entities which may not be considered "law enforcement persons", or in the terminology employed in Section H of the Consent Decree, "law enforcement agencies." The City's attorneys have advised Intervening Plaintiff's counsel of the additional information, and applicable dates of distribution to these individuals and entities. The City's attorneys propose that attorneys for Intervening Plaintiff, should they desire to do it, be given the opportunity to inspect documents and question witnesses on that subject, and to supplement the record on this specific issue following the hearing.

The information counsel for the City presently has is that the individuals or entities not currently employed by the Memphis Police Department which continued to receive the JIB until August 15, 2018 are former police director Toney Armstrong[3], whose position presently is Director of Security at St. Jude, a representative at UT Health Sciences Center, and a representative of the Shelby County School system. The private businesses (other than St. Jude, if former Director Armstrong's status as a Memphis Police Reserve officer is disregarded) that were initially included in the distribution list of the JIB, which was the subject of Det. Reynolds' testimony in the record, were, counsel is advised, removed from the distribution list on March 11, 2017.

Section H (2) prohibits, except for information relating to "criminal investigations", the dissemination of personal information to other "law enforcement agencies." The agreed ESI

[3] Former Director Armstrong is a MPD reserve officer.

protocol for the identification and production of electronic records in this case used a March 2017 stopping point date. JIB have been produced in discovery in accordance with dates set forth in that protocol through March 2017. The City's attorneys have not yet had the opportunity to determine whether any JIB distributed after March 2017 contained "personal information" -- whether or not related to a "criminal investigation" -- which the Court, as per its August 10 Order, clearly considers relevant to determining whether the City is in violation of Section H of the Consent Decree.

The City has notified Intervening Plaintiff that it will provide all the JIB from March 2017 to August 15, 2018 to counsel for Intervening Plaintiff for inspection.[4] The City further stipulates that subject to the Court's approval, counsel for the City has advised counsel for the ACLU-TN that they City has no objection to Intervening Plaintiff having the right to supplement the record as to whatever personal information may have been included in those JIB within a reasonable time frame following the August 20 evidentiary hearing. The City is prepared to address the issue in any other way considered appropriate by the Court so that the Court has a full and complete record of the evidence it considers appropriate on this subject, and Intervening Plaintiff has an opportunity to review and present that evidence.

V. The Court should vacate or significantly modify the Consent Decree to comport with modern times.

Because the Consent Decree is obsolete, impractical, even unworkable if read literally in certain respects, the City seeks to vacate or significantly modify the Consent Decree under a separately filed Rule 60 Motion. The significant changes in law and circumstances since the entry of the Consent Decree as it pertains to nationally recognized police surveillance "best practices" activities effectively "renders [its] continued enforcement detrimental." *John B. v.*

[4] The Intervening Plaintiff already has the JIB for the timeframe of June 2016 until March 2017.

Emkes, 710 F.3d 394, 402, (6th Cir. 2013) (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 390 (1992); *accord Doe v. Briley*, 562 F.3d 777, 782–83 (6th Cir.2009)).

VI. Significant Sanctions and the Indefinite Appointment of a Monitor are inappropriate in this case.

Other than the discrete instances where the Court found that the City violated two provisions of the Consent Decree, there is no evidence before the Court that the City has not been in substantial compliance with the Consent Decree since 1979. Moreover, the evidence will demonstrate that the MPD has never acted in any manner *for the purpose of political intelligence*, which is a critical term used repeatedly throughout the Consent Decree.

It is well settled that the "purpose of civil contempt is to assure compliance with orders and regulations in the future, not to punish for failure to comply in the past." *Brown v. Luna*, 936 F.2d 572, 1991 WL 119410, at *2 (6th Cir. 1991). Furthermore, and for the reasons argued in more detail in the City's Rule 60 Motion to Set Aside or Modify the Consent Decree, the provisions of this Consent Decree are impractical and/or unworkable for a modern day police force to apply while still performing its core function of protecting its citizens. Since the purpose of civil contempt is to ensure future compliance with a court's order, and the Consent Decree should, at the very least, be significantly modified, a finding of civil contempt against the City which includes significant costs or restrictions serves no useful rehabilitative purpose.

VII. Proposed Findings of Facts and Conclusions of Law

A. Findings of Fact on the Issue of Standing[5]

[5] The City adopts the stipulated facts on standing reflected in the Pre Trial Order. (ECF 122 at 4927-4930, Stip. Facts 1-19).

1. ACLU-TN never formally adopted the bylaws of the separately chartered entity West Tennessee Civil Liberties Union, Inc., which acronym "WTCLU" was repeatedly used to designate "the plaintiff" in the *Kendrick* litigation.

2. ACLU-TN never formally adopted the bylaws of the American Civil Liberties Union of West Tennessee, alleged by the Intervening Plaintiff to be a "chapter" of ACLU-TN at the time of the *Kendrick* litigation.

3. A West Tennessee Chapter to the ACLU-TN existed at the time relevant to the *Kendrick* Consent Decree, but there is no evidence that the "West Tennessee Chapter" was the entity that was a party to the *Kendrick* Consent Decree.

4. The ACLU-TN was not the entity which initiated, funded, or pursued the *Kendrick* case.

5. The WTCLU was dissolved in 1983.

6. The West Tennessee Chapter of ACLU-TN was closed in 1987 because the budget was inadequate to support it. The West Tennessee Chapter was reorganized in the 1990s, but no longer exists today.

7. ACLU-TN was not a party to the *Kendrick* Consent Decree.

B. Findings of Fact on the Issue of Contempt [6]

8. On August 9, 2014, Michael Brown was killed in Ferguson, Missouri, during an encounter with a police officer. Protests erupted and continued for the next several months, during which time business were looted or vandalized and dozens of people were arrested.

[6] The City adopts the stipulated facts set forth in the Pre Trial Order (ECF 122 at 4930-4935, Stip. Facts 18-50).

9. On December 20, 2014, two New York City police officers were shot and killed by a gunman who had posted statements on social media that he planned to kill police officers and was angered about the Eric Garner and Michael Brown cases.

10. In April 2015, three weeks after Freddie Gray died in police custody in Baltimore, peaceful protests turned violent including looting and arson.

11. On July 17, 2015, Darrius Stewart died in a confrontation with a Memphis Police Officer. In the aftermath, the MPD received a number of threats to officers.

12. In November 2015, protestors were shot while protesting the officer-involved death of Jamar Clark in Minneapolis.

13. On June 4, 2016, MPD Officer Vernell Smith was killed when a criminal suspect stole a car and attempted to drive down Beale Street, in the process endangering hundreds of pedestrians.

14. On July 5, 2016, Alton Sterling was killed by police in Baton Rouge, Louisiana.

15. On July 6, 2016, Philandro Castille was killed by a Minnesota police officer during a traffic stop. The incident was live streamed on Facebook by Castille's girlfriend.

16. On July 7, 2016, five Dallas police officers were killed by a sniper at a Black Lives Matter protest in Dallas, Texas.

17. On July 18, 2016, three Baton Rouge police officers were killed by Gavin Long, a prolific user of social media, with dozens of videos, podcasts, tweets and posts using a pseudonym. Long advocated for "fighting back" instead of "just over simple protesting."

18. A core organizational tactic used by activists groups since 2014 has been highway shutdowns and disrupting commerce.

19. In Memphis, several activists used peaceful and for the most part lawful protests of the Memphis Zoo's use of the Overton Park "Greensward" as a mechanism for disrupting traffic, including lying down in the roadway and essentially forcing the Memphis police officers present to arrest them. Several other protesters did the same thing at unpermitted protests at Graceland on July 12, 2016 and during "Elvis Week" in August 2016.

20. Modern day activist groups increasingly use social media as their primary platform for disseminating information about events they are planning.

21. In the early morning hours of December 19, 2016, several masked individuals associated with a group called the "Coalition for Concerned Citizens" ("CCC"), including Keedran Franklin, staged a "Die-In" at Mayor Jim Strickland's personal residence. The protestors, with their faces covered, "played dead" on the lawn, and were peering through his windows. One of the protestors, Keedran Franklin, livestreamed the incident on Facebook. In that post, Franklin stated that he would be back every Monday "to have coffee with Jim [Strickland]." The CCC parroted the "coffee with the Mayor" Franklin message.

22. In response to the Die-In, Director Rallings directed that the MPD come up with a way to better protect the Mayor. Detective Reynolds in the OHS, recommended that the Mayor execute an Authorization of Agency ("AOA") for the Mayor's Home.

23. Since Franklin was associated with the CCC, and since he had been instructed by the Director to be a part of the criminal investigation of the "Die In", Detective Reynolds included open source social media posts involving the CCC as part of that investigation in an attempt to identify individuals who may have been involved with the incident.

24. Detective Reynolds obtained the names for the AOA list from open source social media contacts of Franklin and the CCC, as well as looking up the identities of individuals

arrested along with Franklin in the past. Reynolds's list included persons that had either attended, publicly supported, or encouraged unlawful, unpermitted protests, including the Graceland protest. Detective Reynolds "populated" the list of associates of Franklin and the CCC into the AOA for the Mayor's home.

25. On January 4, 2017, the Mayor signed the AOA for his personal residence. The Authorization of Agency at the Mayor's Home was created in direct response to an unlawful criminal trespass on the Mayor's lawn.

26. An "Escort List" pre-dating the events giving rise to this lawsuit was in existence for the use of police officers providing security at City Hall. It consisted of identifying information regarding certain former employees or individuals known or observed by law enforcement or city employees to have engaged in disruptive conduct or who have expressed a willingness to commit disruptive acts while in City Hall. Once a person's name was on that City Hall Escort List, that person is allowed to enter City Hall, but that person must identify where they are going and who they intend to see. They might require an escort while in the building.

27. On January 16, 2017, several individuals handcuffed themselves to 55-gallon drums filled with cement and blocked the entrance to the Valero Oil terminal in Memphis. Twelve people were arrested. The next day, several individuals involved with the Valero protest attended a City Council meeting at City Hall. Although the names of the individuals arrested at the Valero protest were added to an AOA list, none of the individuals on that list were escorted while in City Hall.

28. On February 7, 2017, Fergus Nolan attended a City Council meeting at City Hall, Although his name was on the AOA list added to the City Hall list, he was not escorted. He was

briefly questioned after it was reported that he made a statement "wondering" what would happen if someone carried a gun into City Council Chambers.

29. On March 1, 2017, the City removed the names of the persons listed on the AOA for the Mayor's home and the names of the persons arrested at the Valero Terminal from the City Hall Escort List.

30. None of the persons listed on the City Hall Escort List have ever been subject to an escort through City Hall, despite their names being on the Escort List for a brief time.

31. Threats continue to be made through social media by certain individuals to disrupt, shut down, or otherwise interfere with commerce, traffic, or public safety in Memphis.

32. The monitoring of social media accounts by MPD is conducted through the Office of Homeland Security ("OHS") and, in some instances, its "Real Time Crime Center." OHS officers have been trained to gather intelligence relating to large public gatherings, threats to large crowds, national trends and "threat mitigation." The initial focus of OHS was international threats to the public after 9/11, but that focus shifted into one of domestic threats such as a Las Vegas-style shooting, vehicles being driven into crowds, people carrying illegal bombs, whether domestic terrorism or part of a larger conspiracy over time.

33. OHS began to monitor social media accounts to "handle high profile protest activities" following Sgt. Reynolds' visit to Nashville in 2016 to observe how the Nashville law enforcement authorities handled an unpermitted Black Panther rally.

34. OHS also began in 2016 the daily distribution of what is known as the Joint Intelligence Bulletin ("JIB"). The JIB was designed to collect and distribute information from federal, state, and local agencies regarding known threats to public safety for dissemination to other law enforcement agencies.

35. In 2016 Director Rallings requested that Sgt. Reynolds in OHS prepare a spreadsheet of demonstrations and protests. The purpose of this spreadsheet was so that Director Rallings could make certain that he knew how many civil disturbances the MPD responded to for budgetary purposes.

36. Although the vast majority of the events appearing on this spreadsheet did not obtain the requisite permits, very few arrests were made, and with a few exceptions the MPD allowed all of the individuals at these unpermitted events to exercise their right to protest. MPD has not disbursed or otherwise interfered with any of those protests. The Director was concerned about recognizing the right to protest and having it done lawfully

37. MPD has openly used social media "collators" since October 2014, primarily in the "Real Time Crime Center."

38. The City has demonstrated that it would be impossible to comply with a literal interpretation of Section H of the Consent Decree.

39. None of actions found by the Court to constitute technical violations of the Consent Decree, nor any of the other actions taken by the City were proven to have been “for the purpose” of political intelligence. The City is in substantial compliance with Sections D, E and F of the Consent Decree.

40. Even in cases where the City has engaged in political intelligence, the evidence supports a conclusion that the actions were for otherwise appropriate police purposes such as public safety, police safety, crowd control, traffic control, police manpower, budgeting purposes, and tactical planning for the aforementioned purposes.

41. The City has not been shown to have harassed or intimidated any persons exercising their First Amendment Rights or in violation of Section F of the Consent Decree.

42. The City has not engaged in conduct which had the purpose of, nor the effect of, deterring any person from exercising First Amendment rights in violation of Section F of the Consent Decree.

43. Although the Court has found that the City has violated Section G of the Consent Decree in at least some respects, the Court finds that the lack of personal knowledge of the requirements of this Section on the part of the current Police Director, the small number of probable violations of this Section with respect to the current Police Director, and the instances of the Director's personal involvement in, and supervision of lawful investigations of potentially criminal conduct, establish substantial compliance with the Consent Decree.

44. There is no evidence that the MPD's monitoring of social media, which included persons or groups exercising First Amendment rights, was motivated by an intention to deter or hinder free speech.

45. The evidence does not establish that the City operated any offices for the purpose of engaging in political intelligence, so the City is in substantial compliance with Section C (2) of the Consent Decree.

C. Conclusions of Law

1. The ACLU-TN lacks standing to enforce the Decree as a non-party to the Consent Decree. The Intervening Plaintiff has the burden of establishing standing, and it has failed to do so.

2. The ACLU-TN lacks standing to enforce the Decree as a successor in interest to the American Civil Liberties Union, Inc.

3. The doctrines of laches and equitable estoppel prevent Intervening Plaintiff from making any claims related to the open and obvious use by MPD of certain technologies and techniques including but not limited to body worn cameras, SkyCops and pole cameras.

4. The Intervening Plaintiff failed to meet its burden of proof for a finding of contempt.

5. The Intervening Plaintiff has not alleged, nor has the Court identified, any instance of a Constitutional violation related to the allegations in the Intervening Complaint.

6. In order to establish a finding of contempt under the Consent Decree, the complainant must have suffered an objective chilling of their First Amendment rights. A mere subjective chilling effect is not enough to establish a finding of contempt. The Intervening Plaintiff has not carried its burden of proof to demonstrate such objective chilling of First Amendment Rights to warrant a finding of civil contempt.

7. To the extent that the Court has already found four specific violations by the City of the Consent Decree, those violations do not merit significant sanctions.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, a copy of the foregoing was served via the Court's ECF system to the following counsel of record:

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