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

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

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CIVIL CONTEMPT

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I. STATEMENT OF UNDISPUTED FACTS

The City incorporates by reference the Statement of Undisputed Material Facts ("Facts") filed contemporaneously with this Motion.

II. SUMMARY OF THE ARGUMENT

Starting in 2014 and continuing through 2016, this country experienced a marked increase in, and the convergence of, three phenomena: (1) outrage and protests related to police-involved killings of black men, (2) violence against law enforcement officers; (3) the use of social media as the platform of choice to promote agendas relating to the first two issues, and to expand awareness of and involvement in related social issues. Facts ¶¶ 7-17; 20-22. In some instances, such as the unchecked violence and disruption following the shooting of an African American teenager in Ferguson, Missouri, the sniper assassinations of five police officers in Dallas, Texas and Baton Rouge, Louisiana, and the pitched battles fought by protesters and counter-protesters involved in the removal of the statue of a Confederate general in Charlottesville, Virginia, law enforcement officials were caught unaware or inadequately prepared to respond to a fast moving series of events that spiraled out of control and resulted in significant injuries as well as the loss of lives. Facts ¶¶ 7-17, Depo. of Fred Godwin, pp. 50-52 (attached as Exhibit 1).

The City of Memphis experienced such an event on July 10, 2016, when an unpermitted gathering at the Fed Ex Forum protesting the one year anniversary of the shooting of an African American man in Memphis by a Memphis Police Officer, occurring less than two miles away from a permitted gathering of Civil War enthusiasts and white supremacists, turned into an unorganized mob of people who briefly shut down interstate traffic on the bridge connecting Memphis to Arkansas. Facts ¶ 15. Fortunately, due to the restrained and cool-headed reaction of

City leaders and law enforcement officials including the current Memphis Police Director, a public safety disaster was averted with no loss of lives or serious injuries. *Id.*

But without question, this convergence of events, national and local, sparked an increased focus within the Memphis Police Department on the importance of being prepared for similar events in the future. In particular, it necessitated a change in how the MPD paid attention to the role of social media, and the persistent use of social media by a handful of what can fairly be called "professional protesters" to promote *unlawful* public gatherings designed to disrupt the *lawful* business operations of important Memphis institutions such as Graceland during "Elvis Week", the City's newspaper of general circulation (The Commercial Appeal), the Chamber of Commerce, and even a gasoline refinery (Valero). Facts ¶¶ 38, 39.

During this tumultuous period, aside from isolated individual instances that can be debated and explored at an evidentiary hearing, the MPD *systemically* abided by the First, Fourth, and Fourteenth Amendments of the Constitution. It also took reasonable steps under the circumstances to abide by a forty year old consent decree entered by this Court in *Kendrick, et. al. v. Chandler et al*, No. C76-449 (W.D. Tenn. 1978) (hereafter the "Consent Decree"), while continuing to perform its prime directive: the community caretaking function of protecting its citizens.

The *Kendrick* Decree limits and in some instances prohibits the gathering of "political intelligence" by the MPD where it involves the exercise of "First Amendment rights." The definition of "First Amendment rights" includes the critical proviso that expressions of political opinions or beliefs and the right to association involving such expressions must be "for a lawful purpose." Facts ¶ 2. The City has not engaged in any systemic form of "political intelligence" as prohibited by the Consent Decree in the almost forty years since the Consent Decree was signed

by parties who are either no longer in existence or are simply before the Court in this case.[1] The City has not disrupted, interfered with, or harassed any person exercising "First Amendment rights" since the entry of the Consent Decree, and in any instances where it is argued to have crossed that line, has not done so in such a manner when viewed from the relevant legal standard, to have objectively chilled the exercise of First Amendment rights. Indeed, the MPD has allowed *all* groups seeking to express their political views and beliefs to do so, even if their events required a permit under City Ordinance, and by the failure to obtain such permits, were "unlawful." Facts ¶ 41. Even in the one instance of alleged violations of First Amendment rights cited in the Intervening Complaint — the dramatic description of the alleged "List" of names of individuals subject to escort while at City Hall — there is *no evidence* that *any* of these individuals were in fact escorted or actively surveilled while in City Hall, for the period of slightly over one month that the "watch list" was in existence. Facts ¶ 31, 33.

For these reasons, based on the evidentiary record before it, the Court should find as a matter of law that the City is not in civil contempt of the *Kendrick* Consent Order.

III. BACKGROUND

A. 1978 - The *Kendrick* Consent Decree

The September 14, 1978 *Kendrick* Consent Decree prohibited the City from engaging in "Political Intelligence" which is defined as "the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, opinions, associations or other exercise of First Amendment Rights." Facts ¶ 2. Importantly, the Consent Decree defined "First Amendment rights" as well, as "…rights protected by the First Amendment…including, but not limited to, the rights to communicate an

[1] The City is separately moving for summary judgment on the issue of whether the current plaintiff -- the ACLU of TN., Inc., has standing to pursue this litigation.

idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly *for any lawful purpose.*" *Id.* (Emphasis added).

The Consent Decree contains several other provisions limiting the authority of the City and the MPD to investigate or gather intelligence "for the purpose of Political Intelligence" when "First Amendment rights" are implicated and also requires that the Consent Decree be disseminated and publicly posted to law enforcement personnel. Facts ¶ 3.

Protests and violence toward law enforcement

In the months following the 2014 events in Ferguson, Missouri, several people were killed by police officers. Facts ¶¶ 8-10,12 ,13. Following the Ferguson incident, activist groups like Black Lives Matter ("BLM") escalated a series of protests and, in some cases, episodes of civil disobedience. To get the word out, activist groups used social media as their platform to promote their messages and to organize both protests and acts of civil disobedience. Facts ¶ 22.

One of BLM's stated primary means of drawing attention to the cause is to disrupt traffic and commerce. Facts ¶¶ 20, 21. Predictably, and despite efforts by community leaders to keep the protests peaceful, some of these disruptive demonstrations have turned violent. Facts ¶¶ 11, 14. For example, in November 2015, five BLM protestors were shot while protesting the officer-involved death of Jamar Clark in Minneapolis. Facts ¶ 11.

As the number of these oftentimes violent protests increased, so did violence against law enforcement. On December 20, 2014, two New York City police officers were shot and killed in an ambush 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. Facts ¶ 8.

On July 7, 2016, two days after Alton Sterling was killed by police in Baton Rouge and one after Philandro Castille was killed by a police office in Minnesota and the incident was live

streamed on Facebook, five Dallas police officers were killed by a sniper at a BLM protest in Dallas, Texas. Facts ¶ 14.

On July 10, 2016, a BLM protest in Memphis, Tennessee that started at the FedEx Forum became mobile, and ended up with several hundred protestors shutting down the Interstate 40 Bridge over the Mississippi River for approximately four hours. (hereafter, "Bridge Incident") Facts ¶ 15. Miraculously, no one was seriously hurt or injured during this extraordinarily dangerous event. Police Director Michael Rallings helped end the shutdown of the bridge by locking arms with the protestors and marching with the protestors off the bridge to the National Civil Rights Museum. *Id.*

Several days later, 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. Facts ¶ 17.

In the months following the Bridge Incident, public threats were made by certain individuals that were involved with the organization of the Bridge Incident to "Go back to the bridge" and "Bridge Part II." Additionally, threats were made to hold large, unpermitted rallies at the Commercial Appeal, the Chamber of Commerce, and Graceland, just to name a few. Facts ¶ 34. All of these threats were made via social media. While the cause espoused by the protestors may have been valid, the risk of violence and public harm was high. *See* Godwin Depo, pp. 50-51.

B. MPD's Office of Homeland Security

In direct response to these acts of civil disturbance and violence toward law enforcement, in March 2016 the MPD began monitoring social media in an effort to protect officer safety, as well as the safety of the public and the protestors, at demonstrations in the City. Facts ¶¶ 36, 39. The MPD's Office of Homeland Security ("OHS") was tasked with finding out when an

unpermitted protest might take place, the size of the event, and the nature of the event so the MPD could provide officers to protect the public, the protestors, and any counter protestors that might show up at such an event. Facts ¶ 36.

The initial focus of the OHS following 9/11 was international and domestic terrorism. Starting in March 2016 that focus shifted almost entirely to obtaining intelligence about planned large events with the potential for violence against large scale disruption of traffic or commerce. Facts ¶ 37.

After the Bridge Incident, Memphis Police Director Rallings tasked the OHS with creating a spreadsheet of protests to track the size of each protest, the organizers of the protests, and whether the protests were permitted. The purpose of the spreadsheet was to be able to better prepare for the protests in terms of manpower, as well as budgets. Because of the MPD's severe officer shortage, every large protest in the City inevitably requires thousands of dollars of overtime hours by MPD. Facts ¶ 40.

To accomplish the mission of OHS, Detective Tim Reynolds of the OHS and his partner started monitoring the Facebook, Twitter, and Instagram posts of persons known to have been involved with unlawful protests in the past. Information obtained from these public posts was then placed on a daily bulletin known to the Joint Intelligence Bulletin ("JIB"). Facts ¶ 39. The JIB was disseminated within MPD as well as to other law enforcement agencies in an effort to better prepare the region for any potentially large scale unlawful events with the potential for violence.

During this time, periodic threats were made by Keedran Franklin and others, such as Frank Gottie, to "go back to the Bridge" and "Bridge Part II." Facts ¶ 34. There were also threats to hold large, unpermitted protests at the Commercial Appeal, the Chamber of Commerce, and

Graceland. *Id.* It was the job of OHS to monitor the development of these large unlawful events in order for MPD to prepare for them. Facts ¶¶ 36, 39.

C. The "Die-In" at the Mayor's Home

In the early morning hours of December 19, 2016, an individual involved in the Bridge shutdown, Keedran Franklin, and others associated with a group known as the Coalition for Concerned Citizens ("CCC"), and several other masked individuals staged a "Die-In" at Mayor Jim Strickland's personal residence. The trespassing protestors, with their faces covered, "played dead" on the lawn, and peered through the windows of his residence. The Mayor was not home, but his wife and children were. Facts ¶ 23. Mr. Franklin livestreamed the incident on Facebook. *Id.* In that video post, Franklin (in a statement parroted by the CCC) stated that they would be back every Monday "to have coffee with Jim [Strickland]." *Id.*

In response to the Die-In at the Mayor's home, Director Rallings directed that the MPD come up with a way to better protect the Mayor's home from criminal trespassers in the future. Facts ¶ 24. Sgt. Reynolds, a detective in OHS, devised a strategy to have the Mayor execute an Authorization of Agency ("AOA") for the Mayor's Home. *Id.*

An AOA is an internal police departmental form that notifies law enforcement of known criminal trespassers on a specific property. The purpose of an AOA is to empower the police to arrest the persons listed on the AOA should they trespass again on that property. If an AOA is in effect, the police do not have to check with the property owner before arresting the trespassers. Facts ¶ 25.

In order to determine who to include in the AOA for the Mayor's home, Director Rallings tasked Sgt. Reynolds of OHS to determine who, besides Franklin, was present at the Die-In. Because the trespassers' faces were covered in the video, Reynolds developed a list of "associates in fact" to Keedran Franklin and/or the CCC. Facts ¶¶ 23, 26. To do this, Sgt.

Reynolds investigated the 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 also reviewed intelligence related to and arrests made at an earlier protest at Graceland during Elvis Week in August 2016 to develop his list. Facts ¶ 26.

The list of "associates in fact" of Franklin and the CCC generated by Sergeant Reynolds was then added to the AOA for the Mayor's home. Facts ¶ 28. On January 4, 2017, the Mayor signed the AOA for his personal residence. *Id.*

D. <u>The Escort List at City Hall</u>

An "Escort List" predating the events described above -- indeed, pre-existing this Mayoral Administration -- existed at City Hall. Facts ¶ 29. The list was for the use of police officers providing security within City Hall. It consisted of identifying information regarding individuals, most of them former employees, known or observed by law enforcement or city employees to have the potential of disruptive conduct if in the building. *Id.* Such individuals included persons attempting to carry weapons into City Hall, terminated City Hall employees, and persons arrested while in City Hall. Once a person's name is on the City Hall List, that person is allowed to enter City Hall, but must identify where they are going and who they intend to see. The City Hall Security desk would then phone that person or department to notify them that a person on the List was in City Hall and needed an escort through the building. *Id.*

After the Mayor executed the AOA for his personal residence, his Chief of Security, Lt. Albert Bonner, added the persons listed on that AOA to the City Hall List. Lt. Bonner's objective as to ensure that if any of the people that trespassed at the Mayor's home came to City Hall, the City Hall security team would be on notice of the potential for disruption. Facts ¶ 28.[2]

[2] The City has acknowledged that in retrospect, the inclusion of this list with the already existing escort list was a mistake in judgment. Facts ¶ 32.

Shortly after the Die-In, a group of protesters, needless to say without obtaining a permit, handcuffed themselves to 55-gallon drums filled with cement and blocked the entrance to the Valero Oil terminal in Southwest Memphis. Twelve people were arrested. Facts ¶ 29. One day after the Valero Protest, the names of the persons arrested at Valero were also added to the City Hall List. Facts ¶ 30.

Despite their presence on the Escort/AOA list, none of the persons listed on the Mayor's AOA or the Valero arrestees were ever subjected to an escort while in City Hall. Facts ¶¶ 31, 33.

On March 1, 2017, after two lawsuits were filed against the City related to the City Hall List, the City removed the names of the persons listed on the AOA for the Mayor's home from the Escort List as well the names of the persons arrested at the Valero Terminal. Facts ¶ 32.

IV. STANDARD OF REVIEW

A party is entitled to summary judgment on any claim or defense if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

To refute such a showing, the non-moving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Id.* at 322. A mere scintilla of evidence is not enough. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *McClain v. Ontario, Ltd.*, 244 F.3d 797, 800 (6th Cir. 2000). "[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 477 U.S. at 252. This Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 248–49; *Nat'l Satellite Sports v. Eliadis*, 253 F.3d 900, 907 (6th Cir. 2001). If the non-moving

party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex,* 477 U.S. at 323. If this Court concludes that a fair-minded jury could not return a verdict in favor of the non-moving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

Courts have inherent authority to enforce their judgments and orders, including consent judgments, through their contempt powers. *See Spallone v. United States*, 493 U.S. 265, 276 (1990); *Williams* v. *Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). A litigant may be held in civil contempt of court for violating a "definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6th Cir. 1987).

The burden of proof is on the petitioner. In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order. *Cincinnati Bronze, Inc.*, 829 F.2d at 590. "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).

Only if the movant establishes its prima facie case for contempt does the burden shifts to the defendant.

This Motion for Summary Judgment is premised upon the failure of the Intervening Plaintiff to come forward with clear and convincing evidence of violations of the Consent Order so as to justify shifting the burden to the City to defend its actions. In the process of demonstrating the lack of such evidence, the City will point to and discuss key facts underlying

the series of events described in the Complaint, and explored during discovery. Those facts, especially placed in appropriate context, do not rise to the level of evidence of violations of the law or of the Consent Decree and justify the City's Motion as a matter of law.

V. THE INTERVENING PLAINTIFF HAS NOT DEMONSTRATED CIVIL CONTEMPT THROUGH CLEAR AND CONVINCING EVIDENCE.

1. There is no history of findings of non-compliance with the Decree in almost forty years.

As a threshold matter, it is important to note that the City has not been found in contempt or noncompliance with the Consent Decree since 1979. Other than one instance where the Court found that the City violated the Consent Decree by photographing Iranian student protestors at the National Democratic Conference in 1979, there have been no other actions brought seeking an order of contempt of the Consent Decree. Facts ¶ 6.

2. The City does not engage in "political intelligence" of lawful conduct for the purpose of intimidation or harassment.

The City has not engaged in "political intelligence" as it is defined in the Consent Decree since 1979. "Political Intelligence" is defined as "the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, opinions, associations or other exercise of First Amendment Rights." Facts ¶ 2. In order for there to be a "First Amendment right" under the Consent Decree, the conduct must be "lawful."

The Consent Decree was a settlement reached between the parties to prevent the City's "Domestic Intelligence Unit" from investigating and maintaining files on persons "which were thought to be 'subversive' and/or advocating unpopular or controversial political opinions." Facts ¶ 1. The *Kendrick* plaintiffs alleged that the purpose of the City's collection, maintenance, and dissemination of this information was "to harass and intimidate plaintiffs and others similarly situated." (ECF No. 33-1, PageID 387).

Thus, implicit in the *Kendrick* Consent Decree's definition of "political intelligence" of lawful conduct is a malicious intent to harass and intimidate persons advocating unpopular political locations. There is no evidence that the City engaged in political intelligence for the purpose of intimidation or harassment of any person or group, Ucontroverted testimony to the contrary exists. Facts ¶ 4.

Courts have engaged in similar interpretations of consent decree prohibitions against surveillance of "political activity." The New York City Police Department is subject to the Guidelines set forth in the Stipulation of Settlement and Order in *Handschu v. Special Services Division,* 605 F.Supp. 1384 (S.D.N.Y.1985), *aff'd* 787 F.2d 828 (2d Cir.1986) ("Handschu Guidelines"). Three years after the entry of the Handschu Guidelines, counsel for plaintiff class moved to hold NYPD in contempt alleging violations of the Guidelines. *Handschu v. Special Servs. Div.*, 737 F. Supp. 1289 (S.D.N.Y. 1989), *amended*, 838 F. Supp. 81 (S.D.N.Y. 1989).

The court explained that the Handschu Guidelines' prohibition against investigation into "political activity" should be interpreted to prohibit"[o]nly activity undertaken for the purpose of learning about citizens' exercise of rights falls within the Guidelines; and their principal focus is upon surreptitious methods." *Id.* at 1301 (emphasis added). The Guidelines prohibited NYPD from "engag[ing] in any investigation of political activity except through the PSS of the Intelligence Division or its successor and such investigations shall be conducted as set forth in these Guidelines." The term "political activity" was defined in the Guidelines as: "The exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions."

Despite that broad prohibition against investigation into political activity, the district court interpreted it much more narrowly.

> The Guidelines address police purpose and method. Only activity undertaken for the purpose of learning about citizens' exercise of rights falls within the Guidelines; and their principal focus is upon surreptitious methods. The Authority correctly identified the "true evil" the Guidelines address: **"The surreptitious collection of information for the *purpose* of monitoring, investigating or indexing an individual or group's constitutionally protected views ..."**
>
> Whether particular police conduct violated the Guidelines may give rise to case-by-case dispute. But the Guidelines themselves contain no fundamental ambiguities. **Certainly none are conjured up by suggestions that the Guidelines prevent police officers from listening to radio broadcasts or reading newspapers, or inhibit community affairs officers from their appointed and salutary rounds. Of course police officers may do these things.**

Id. at 1301 (emphasis added).

Here, the *Kendrick* Consent Decree's prohibition against "political intelligence" should be similarly interpreted to prohibit the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, opinions, associations or other lawful exercise of First Amendment Rights for the purpose of intimidation or harassment of that person or group. Just like the *Handschu* Guidelines were not intended to "prevent police officers from listening to radio broadcasts or reading newspapers, or inhibit community affairs officers from their appointed and salutary rounds," neither should the Consent Decree be interpreted to prevent MPD from looking at posts made on social media, watching videos posted on Facebook, or from doing the job of protecting the public.

Furthermore, there is no evidence in the record that the City engaged in political intelligence for the purpose of intimidation or harassment. To the extent that the City has engaged in intelligence gathering related to lawful First Amendment activities, including monitoring of social media, it was for the express purposes of public safety, officer safety, and protestor safety, which is an entirely permissible function of a modern day law enforcement agency. *See e.g., Handschu v. Special Servs. Div.*, 737 F. Supp. 1289, 1301 (S.D.N.Y. 1989), *amended*, 838 F. Supp. 81 (S.D.N.Y. 1989) ("Certainly none are conjured up by suggestions that

the Guidelines prevent police officers from listening to radio broadcasts or reading newspapers, or inhibit community affairs officers from their appointed and salutary rounds. Of course police officers may do these things."). *See also* 28 C.F.R. § 23, 1998 Policy Clarification (clarified that with the advent of "modern non-intelligence information sources such as the Internet, newspapers, motor vehicle administration records, and other public record Information on-line, such sources shall not be considered part of criminal intelligence systems.")

3. Investigations into criminal conduct do not violate the Consent Decree, nor does law enforcement's viewing of social media posts.

The definition of "political intelligence" is further modified by the definition under the Decree of "First Amendment rights", which focuses upon *lawful* behavior. Facts ¶ 2. Despite the uncontroverted fact that MPD has not and does not engage in "political intelligence" for the purpose of harassment or intimidation, it has, and will continue, to gather intelligence on potentially *unlawful* activities. The OHS primarily focused its efforts during the time relevant to this matter on unlawful, unpermitted protests. The vast majority of events for which OHS attempted to gather intelligence were events being staged without the benefit and protections of a permit. Facts ¶ 41. It was, therefore, incumbent on OHS to gather enough information about these events for MPD to staff and support accordingly. In an effort to identify future events with the potential for unlawful conduct, OHS understandably investigated persons present at protests at which unlawful conduct occurred and arrests were made, such as traffic disruption leading to the "Greensward" arrests, the Bridge shutdown, the Graceland August 2016 protest, the Valero refinery protest, and those suspected of being involved in or facilitating the Die In at the Mayor's home. Facts ¶¶ 36, 39, 40, 41.

The preparation and implementation of the AOA at the Mayor's home did not violate the Consent Decree because it was the product of a criminal investigation directed by the Director of Police into unlawful conduct at the Mayor's Home. Moreover, nothing in the Consent Decree, or

the law, prohibits law enforcement from "listening to radio broadcasts or reading newspapers," or viewing publicly made social media posts, in the course of "their appointed and salutary rounds." 737 F. Supp. at 1301.

4. Any surveillance conducted by MPD was reasonable under the circumstances.

Any actions taken by the City to monitor and investigate persons or groups exercising their First Amendment rights were not for the purpose of intimidating or harassing those groups, but for the legitimate law enforcement purpose of community caretaking. "As the Supreme Court has explained, the community caretaking function of the police applies only to actions that are 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *United States v. Williams*, 354 F.3d 497, 508 (6th Cir.2003) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). While the community caretaking function is typically applied to searches and seizures under the Fourth Amendment, the same reasonableness analysis should apply to intelligence gathering by law enforcement for the purpose of protecting the peace. The government's interest must be weighed against the person's or group's interest in remaining free from government intrusion. *United States v. Rohrig*, 98 F.3d 1506, 1522 (6th Cir. 1996).

Applying that analysis to the case at bar, the MPD's actions in response to the events relevant to this Motion were reasonable under the circumstances. The police had a legitimate, and in fact critical, interest in gathering intelligence about large unpermitted events that had the potential to disrupt traffic, commerce, and public safety. That critical governmental interest in keeping the peace and protecting officer and protestor safety must then be weighed against person or group's interest in being free from governmental intrusion. Here, MPD was monitoring public posts on social media by members of the groups known to advocate unpermitted events. A person has no legitimate expectation of privacy in something he posts

publicly on social media. *See United States v. Meregildo*, 883 F. Supp.2d 523, 526 (S.D.N.Y. 2012) (reasoning that the "legitimate expectation of privacy ended when he disseminated posts to his 'friends'" because those "friends" were free to share that information "with the Government.")

Thus, the government's critical interest in public safety far outweighs the nonexistent expectation of privacy of a person who posts something publicly on social media. Moreover, there is no evidence that MPD engaged in any surveillance of any First Amendment activities before July 2016.

5. The law in this Circuit has been clarified since the 1978 Consent Decree that surveillance alone does not constitute an injury.

In 1972, the United States Supreme Court determined that an objective standard must be applied to the question of whether government action chilled a person's First Amendment rights. *Laird v. Tatum*, 408 U.S. 1, 10 (1972).

> In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual.

Id. at 11 (internal citations omitted) (emphasis added).

At the time the Consent Decree was entered in 1978, the Sixth Circuit had not yet interpreted the holding of *Laird.* In 1983, however, the Sixth Circuit definitively held that police surveillance is not necessarily constitutionally infirm, even if the focus of that investigation was directed at particular socio-political groups exercising their First Amendment rights. *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 (6th Cir. 1983). In *Gordon*, an undercover officer was placed in a high school to investigate drug trafficking. *Id.* at 778. The undercover officer was placed in classes with teachers that had "liberal reputations." *Id.* at 779. After

disclosure of the undercover investigation, the plaintiffs alleged that class discussions became stilled, and certain topics were avoided, and students refused to freely express their opinions. *Id.*

The teachers and students filed a § 1983 suit against the school system alleging that the undercover surveillance chilled their speech. *Id.* The court stated that "even accepting plaintiffs' assertion that the investigation focused on classes where students and teachers held 'liberal' socio-political views, there was no indication that the investigation had any tangible and concrete inhibitory effect on the expression of particular socio-political views in these classrooms." *Id.* at 781. The court then explained that the undercover investigation was made in good faith, and apparently prompted by the school officials' wholly legitimate concern about the possible illegal drug activity at the school. *Id.*

In a footnote, the Court clarified its position on surveillance that targets First Amendment activity.

> We find no support for plaintiff's suggestion that an undercover investigation is necessarily constitutionally infirm because the focus of that investigation was directed to classes where particular socio-political views were espoused. Courts have recognized that physical surveillance consistent with Fourth Amendment protections in connection with a good faith law enforcement investigation does not violate First Amendment rights, even though it may be directed at communicative or associative activities.

Id. at 781 n.3 (emphasis added) (internal citations omitted).

The Sixth Circuit has also held that surveillance in and of itself is not an injury capable of redress. See *Sinclair v. Schriber*, 916 F.2d 1109, 1115 (6th Cir. 1990) (finding that FBI's wiretapping of the Plaintiffs' phone lines did not constitute an injury for purposes of standing). *See also Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338, 347 (6th Cir.1984) (plaintiffs who assert that their constitutional rights were chilled by government activity must allege more than mere surveillance; they must make reference to specific instances of misconduct beyond surveillance); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 661 (6th Cir. 2007)

("[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill.")

When the Sixth Circuit finally interpreted *Laird* in 1983, it essentially foreclosed the possibility that a plaintiff could allege a First Amendment violation based upon law enforcement's good faith investigation or surveillance against him absent something more. Thus, the 1978 Kendrick Consent Decree's prohibition against "political intelligence" is, in essence, preempted by this change in federal law. Stated another way, the implementation of "political intelligence" as it is defined in the Consent Decree is permitted under Sixth Circuit law so long as the investigation or surveillance is done in good faith.

Because of this change in law, the Consent Decree must be interpreted in light of the current federal law, i.e., that government surveillance of First Amendment activities must have an objective chilling effect on a person's speech to be actionable. Because there is no evidence that the City conducted its surveillance of the groups relevant to this action in bad faith, or that the City's surveillance of First Amendment activities had an objective chilling effect on anyone's speech, the City should not be found in contempt of the Consent Decree.[3]

CONCLUSION

Because there is no clear and convincing evidence that the City of Memphis materially violated any portion of the Consent Decree, the City should not be found in contempt.

Respectfully submitted,

/s/ Buckner Wellford

[3] Moreover, the *Kendrick* Consent Decree must be modified in light of the Sixth Circuit precedent that substantially diluted, if not completely eliminated, the federal claims that support the Consent Decree. The City will be filing a Rule 60(b) Motion to set aside the Consent Decree separately.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18th, 2018, the foregoing will be served by the Court's ECF system to:

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