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

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

CITY OF MEMPHIS'S POST-TRIAL BRIEF

Following an evidentiary hearing held June 17-22, 2020, the movant, the City of Memphis ("the City"), respectfully submits this Post-Trial Brief pursuant to the Court's oral direction and Order Memorializing Post-Modification Hearing Briefing Schedule (ECF No. 347) in support of its Motion for Relief from Judgment or Order ("Motion to Modify") (ECF No. 124.) The City seeks modification of the consent decree entered on September 14, 1978, in the case styled *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978) (hereafter, "Consent Decree") (Consent Decree, ECF 9-1), in order to clarify and modernize the forty-two year old decree to reflect changed factual conditions and circumstances that now exist in modern society.

In further support thereof, the City states as follows:

I. INTRODUCTION

The City originally filed its Motion to Modify in August of 2018. Because the Court requires an evidentiary hearing in order to modify a consent decree, the Court set a schedule for the parties to prepare for such a hearing. (ECF No. 159.) However, when the Court appointed an independent monitor, the parties moved this Court to stay the proceedings because they believed that "with the assistance of the Monitor's guidance, they will be able to significantly narrow, and

possibly even eliminate, many of the disputed issues before the Court through mutual agreement." (ECF No. 175, PageID 6527.) The Court granted the parties' request and ordered that the parties, with the input of the Monitor, "continue to work together towards a workable approach to complying with the Consent Decree over the course of the year." (ECF No. 178, PageID 6545.)

It became evident, after working with the Monitor, the only workable approach for the City to comply with the Consent Decree would be to modify its existing language. The Consent Decree should be modified to resolve ambiguities within the Consent Decree that emerged, in part, as a result of the significant changes in communication, technology, and law enforcement practices since the entry of the Consent Decree in 1978. Because the Consent Decree was written in 1978 but is being applied in 2020 to modern situations, it has proven to be confusing to those interpreting it, and, as a result, interpretation of the Consent Decree has varied from person to person. Indeed, in the course of seeking input from the Monitor on the correct interpretation of the Consent Decree and application of that language to policing in 2020, there have been differences of opinion that led the City to seek clarification from the Court as the ultimate arbiter. (*See, e.g.*, Mot. for Immediate Modification, ECF No. 227.) The City now seeks modification of the Consent Decree to clarify some of those ambiguities, to incorporate the Court's interpretations into the document, and to directly address some of the technologies and their uses that simply did not exist in 1978, and therefore, could not have been anticipated.

The City is not seeking to eliminate any protections provided by the Consent Decree, and, in fact, it withdrew its Motion to Vacate the Decree accordingly. The City simply seeks to update the Decree so that it is a clearer and self-contained document that is applicable to modern society and law enforcement practices, and that clearly addresses modern technologies.

The City and the Intervening Plaintiff, American Civil Liberties Union of Tennessee

("ACLU-TN"), agreed to certain proposed modifications to the Consent Decree. (*See* Proposed Modified Consent Decree, Trial Ex. 6.) The proposed modifications are suitably tailored to the circumstances and factual conditions that have changed since 1978. Further, the proposed modifications constitute, for the most part, clarifications of the Consent Decree's language as it applies to new technology and best police practices, and do not in any way attempt to deteriorate the protections of the Consent Decree.

The only area of the Consent Decree in which the parties were unable to agree on modified language was Section I: Restriction on Joint Operations. The City seeks modification of Section I to clarify some of the latent ambiguity contained therein, while essentially "codifying" the Court's Order interpreting the provision. (*See* Section I proposed by City, Trial Ex. 25.)

For these reasons, the City asks the Court to adopt the jointly proposed modifications as outlined in the Proposed Modified Consent Decree, marked as Trial Exhibit 6, and to modify Section I as proposed by the City, marked as Trial Exhibit 25.

II. LEGAL STANDARD

"A consent decree is essentially a settlement agreement subject to continued judicial policing." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). A consent decree shares the characteristics and "attributes of both a contract and of a judicial act." *Id.* (citing *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975)). "It is both 'a voluntary settlement agreement which could be fully effective without judicial intervention' and 'a final judicial order . . . plac[ing] the power and prestige of the court behind the compromise struck by the parties.'" *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) (quoting *Williams*, 720 F.2d at 920).

As this Court has noted, the "'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by

what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.'" *Vanguards*, 23 F.3d at 1017 (quoting *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984)); (ECF No. 250, PageID 8388.)

A consent decree is subject to a Rule 60(b) motion because it is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). Rule 60(b)(5) serves a particularly important function in "institutional reform litigation." *Horne v. Flores*, 557 U.S. 433, 447 (2009). "[I]njunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Id.* at 447-48.

The Supreme Court has also made clear that courts should take a flexible approach to modification under Rule 60(b)(5) in the context of institutional reform decrees. *Horne*, 557 U.S. at 450; *Rufo*, 502 U.S. at 381; *Lorain N.A.A.C.P. v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1149 (6th Cir. 1992). Such decrees implicate "sensitive federalism concerns" and involve dynamics not found in other types of litigation. *Rufo*, 502 U.S. at 380; *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995). The court must "defer to local government administrators" when making modifications to an institutional reform decree, because such individuals have the "'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform." *Rufo*, 502 U.S. at 392 (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955)). While a decree may require such officials to "do more than that which is minimally required by the Constitution, . . . a court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree." *Id.* "To refuse

modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion." *Id.*

Under Rule 60(b)(5), the "party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. Additionally, if "the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.*[1] "A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law." *Id.* at 384; *Horne*, 557 U.S. at 457 (holding that Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest" (internal quotations omitted)). "Modification of a consent decree is appropriate" under Rule 60(b)(5) when any one of the following three conditions exist: 1) "when changed factual conditions make compliance with the decree substantially more onerous;" 2) "when a decree proves to be unworkable because of unforeseen obstacles;" or 3) "when enforcement of the decree without modification would be detrimental to the public interest." *Vanguards*, 23 F.3d at 1018 (quoting *Rufo*, 502 U.S. at 384).

III. THE CITY MET ITS BURDEN OF PROVING THAT MODIFICATION OF THE CONSENT DECREE IS WARRANTED.

The evidence at trial showed how and the extent to which circumstances surrounding technology, police practice, and communication have changed since the entry of the Decree in 1978, warranting many of the proposed modifications agreed to amongst the parties, as well as the

[1] It is respectfully submitted that the modification and agreement of the parties, while not dispositive, is a strong indication that the proposed modifications are "suitably tailored."

changes to Section I suggested by the City. Additionally, the parties established that failing to modify the Consent Decree in the manner proposed by the parties in various sections of the Consent Decree could prove detrimental to the public interest. Many of these instances related to confusion, lack of clarity, or even varying interpretations of the original language of the Consent Decree that have led officers to hesitate in acting or misunderstand the prohibitions of the Consent Decree. Indeed, there was evidence that even among the Monitoring Team, there were differences of opinion about the parameters of the Consent Decree. (Trial Tr., ECF No. 344, p. 84.) The City presented sufficient evidence to support the parties' jointly proposed modifications to the Consent Decree as outlined in the Proposed Modified Consent Decree, marked as Trial Exhibit 6. The City further established through evidence at trial that Section I: Restriction on Joint Operations should be clarified and updated to account for the changed circumstances surrounding the need for and routine practice of interagency collaboration and sharing of information.

A. The parties' jointly proposed modifications to the Consent Decree should be implemented to clarify, modernize, and codify the Consent Decree into a document that is functional for a modern law enforcement agency.

1. The term "Political Intelligence" should be renamed to "First Amendment-Related Intelligence."

The term "Political Intelligence" should be renamed to "First Amendment-Related Intelligence" because "First Amendment-Related Intelligence" better encompasses what the Consent Decree was implemented to address — the protection of all First Amendment rights, not just "political" expression.

The evidence presented at trial showed that the term "political intelligence," which underpins every other provision in the Consent Decree, has caused confusion among MPD officers. If left unchanged, the resulting confusion may prove detrimental to the public interest because officers may not be clear on what they should or should not be doing under the Consent Decree.

The Court heard testimony from Memphis Police Department ("MPD") Director Michael Rallings, who explained that the term "political intelligence" is confusing to his officers.

> I'll give you one in that in one of the complaints where there was a political rally that we were asked to provide security for. And one of the supervisors made a bad call and saw the political signs come out. And according to him, when he saw that, he thought that that was something we're not supposed to be involved in. We're not supposed to participate. He pulled the police officers off. And you know, to our disappointment, we were not able to do an adequate job to keep the public safe. But again, it was an honest mistake. He didn't quite understand, you know. Political activity gets you wrapped up into the political intelligence. And so many of our officers are confused about it.

(Trial Tr., ECF No. 345, PageID 11042.)

When questioned about the same event, Zayid Saleem, the Police Legal Advisor for MPD with primary responsibility for training police officers, explained:

> So I understand that the officers were assigned to this event. It was a parade, I believe. And the goal of the officers there was to provide safety as the individuals crossed different streets and marched in the street. So it was a public safety event. I think what actually went down was they started seeing political signs and candidates who were running for office. And based upon their understanding of the Consent Decree, when they saw those signs and saw those tee-shirts, they freaked out and felt like this was not an event that they should be at and they backed out and left the scene.

(Trial Tr., ECF No. 346, PageID 11308.) When asked if he believed if changing the term "political intelligence" to "First Amendment-related intelligence" would clarify its meaning and help avoid similar misunderstandings, Mr. Saleem answered, "[i]t would indeed change the focus of those officers. Taking the word politics out of the entire equation would be helpful. When you put a perspective of First Amendment, it changes the thinking of those officers, or should. And the training will help clarify those issues." (Trial Tr., ECF No. 346, PageID 11309.)

The Court also heard testimony from Major Darren Goods, the commander of the Multi-Agency Gang Unit, who explained that his officers' interpretation of the term "political intelligence" "is gathering information, disseminating information, or filing information on people

or persons or groups that are involved in political-action-type activity." (Trial Tr., ECF No. 346, PageID 11251.)

The City presented additional evidence to support its contention that the definition of "political intelligence" should be modified to clarify that "'First Amendment-Related Intelligence' is the gathering, indexing, filing, maintenance, storage, or dissemination of information or any other investigative activity which is undertaken due to or on the basis of a person's beliefs, opinions, associations or the content of the speech or expression protected by the First Amendment." As the evidence showed, the original "relating to any" wording was subject to broad interpretation; and this Court had previously clarified the definition of political intelligence, finding that there is an action requirement embedded in the term itself. (ECF No. 151, PageID 6257.) With this understanding, the parties agreed to the proposed language to align the term to the spirit of the Court's Order.

Director Rallings further testified regarding the ambiguity of the definition of "political intelligence." When questioned if he was clear what the Consent Decree means when it states that "political intelligence" is "relating to any person's belief, opinion, associations, or other exercise of First Amendment rights," Director Rallings stated, "No. I wish I was." (Trial Tr., ECF No. 345, PageID 11043.) Director Rallings explained that some MPD officers are confused by the definition of "political intelligence" and that impacts how they investigate crimes:

> So again, I'll share what some of the officers tell me in that, you know, Director, when we go on, even if it's a criminal matter we have to go on social media, people are expressing their beliefs and opinions and their associations shown on their social media pages. They're expressing their First Amendment right, even if they're talking about, you know, shooting or having guns and having access to guns or, you know, whatever they say could be deemed as a threat, but sometimes it doesn't meet the criminal threshold. So a lot of officers are confused.

(Trial Tr., ECF No. 345, PageID 11042.) Furthermore, "some officers have said that if there's anything that's got to do with social media, I'm just not going to go look." (Trial Tr., ECF No.

345, PageID 11045.)

Director Rallings explained that the confusion surrounding the term and definition of "political intelligence" renders other provisions of the Consent Decree unclear to him. He stated:

> And I apologize, Your Honor, I just can't say that I'm 100 percent clear. Because if I'm not clear on political intelligence, then that kind of muddies the water. And I think there was mention throughout on doctrine of some possible gray areas. And that's my concern. I don't want to be in a gray area that places us in violation, because I am the one that pretty much is responsible for making sure that we maintain compliance with a team of lawyers and a monitor. So, again, excuse my ignorance, but I'm just trying to do the best I can and make sure I understand this completely. And I think that's why the modification is necessary to just help me out. Again, I'm not a lawyer. And, you know, this is somewhat confusing. And I think the clarity would definitely benefit the next chief that comes in who has to make these decisions.

(Trial Tr., ECF No. 345, PageID 11230-31.)

The Court also heard testimony from Deputy Chief Don Crowe of the MPD, who explained that the definition of "political intelligence" is "vague enough that the policeman does not quite understand it." (Trial Tr., ECF No. 345, PageID 11084.) Deputy Chief Crowe further testified that the City's proposed modifications to the term and definition of "political intelligence" would provide helpful clarity to the Consent Decree. (Trial Tr., ECF No. 345, PageID 11087-88.)[2] Thus, the evidence at trial shows that the parties' proposed modification to the name and definition of "political intelligence" is warranted.

2. The Consent Decree's "Definitions" Section B should be updated to include definitions for "Legitimate Law Enforcement Purpose," "Social Media," and "Undercover Account."

The Consent Decree should be modified to include definitions for three previously undefined terms: "Legitimate Law Enforcement Purpose," "Social Media," and "Undercover

[2] Should the Court adopt the parties' proposed term and definition modifications to "political intelligence," Section C: Political Intelligence should then be titled "First Amendment-Related Intelligence," pursuant to the term change.

Account." Changed circumstances since 1978, such as new technologies and methods of communication, justify these jointly proposed modifications. Moreover, the terms should be defined in the modified Consent Decree because they were used by the Court in its Orders interpreting the Consent Decree.

a) "Legitimate Law Enforcement Purpose"

The evidence at trial showed that the Consent Decree should be modified to include a definition for the term "legitimate law enforcement purpose." First, the Court used the terms "legitimate law enforcement activities" and "legitimate law enforcement purpose" in the Order Denying City's Motion for Immediate Modification of the Kendrick Consent Decree, ECF No. 250, but the terms are undefined in the Consent Decree. The Court explained:

> The better reading of the Monitor's interpretation, which better comports with the purposes and protections of the Kendrick Consent Decree, would require the City to reject outright *only* information constituting political intelligence that is unrelated to any **legitimate law enforcement activities**, as is prohibited by § H of the Decree.
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> Section I only outright prohibits the City's receipt of political intelligence or information relating to First Amendment-protected activities gathered as a result of investigations lacking any **legitimate law enforcement purpose**.

(ECF No. 250, PageID 8417; 8425.) If left undefined in the Consent Decree itself, one concern is the creation of additional ambiguities or gray areas that could create confusion among officers. As Chief Crowe testified, more generally, "operation under the existing Decree without modification would be detrimental to the public interest because of the lack of clarity [the City] seem[s] to have on some issues." (Trial Tr., ECF No. 345, PageID 11118.)

The Court heard from Deputy Chief Don Crowe and Zayid Saleem as to the importance of including a definition of the term "legitimate law enforcement purpose" in the Consent Decree. Deputy Chief Crowe stated that inclusion of the parties' proposed definition of the term

"Legitimate Law Enforcement Purpose" within the Consent Decree would be helpful to him as one of the senior officers whose responsibility it is to ensure compliance with the Consent Decree. (Trial Tr., ECF No. 345, PageID 11082.) Similarly, Mr. Saleem testified that including a definition of "legitimate law enforcement purposes" in the Decree would aid him in his ability to accurately teach what the Court has instructed on the Consent Decree. (Trial Tr., ECF No. 346, PageID 11303.)

The City's expert witness on the police policy, practices, and use of technology, Eric Daigle, further testified as to the substance of the parties' proposed definition of "legitimate law enforcement purpose." He explained that a "legitimate law enforcement purpose" would be to further the prevention of crime and to ensure the safety of the public and law enforcement personnel." He further explained that "the more clarity that we can get would provide more clarity in the form of a policy and training to the officers." (Trial Tr., ECF No. 345, PageID 11153.) Thus, the evidence showed that inclusion of the term "legitimate law enforcement purpose" into the Consent Decree is appropriate.

b) "Social Media"

The evidence at trial showed the need to include a definition of "social media" within the Consent Decree. Because social media is a platform for speech, it necessarily implicates the First Amendment and the Consent Decree. By including a definition of social media in the Consent Decree, the Consent Decree would be clarified and modernized to account for the significant change in factual conditions and circumstances surrounding communication, expression, and technology.

The evidence at trial showed that social media did not exist in 1978. (*See* Trial Tr., ECF No. 345, PageID 11163.) Moreover, the City's expert, Mr. Daigle, explained that if the Consent

Decree remains unmodified without express allowance for social media use by law enforcement for legitimate law enforcement purposes, the effect of that absence could detrimentally affect public interest:

> And it probably will, especially since the rate of technology enhancement and usage in law enforcement and by society is increasing at such a high level. We're all having difficulty maintaining an actual clear practice to guide officers on how to use certain areas.

(Trial Tr., ECF No. 345, PageID 11163-64.)

Additionally, Deputy Chief Crowe explained that the absence of any reference to social media in the original Consent Decree has caused confusion and caused some officers to forgo using social media for investigations. (Trial Tr., ECF No. 345, PageID 11088.) Thus, explicitly adding a definition of "social media" to the Consent Decree is warranted.

c) Undercover Account

Similarly, the evidence presented at trial showed the clear need to include a definition of "undercover account" in the Consent Decree. Chief Crowe testified that the parties' jointly proposed definition of "undercover account" that references social media clarifies the application of the various restrictions of the Consent Decree to people who are operating in an undercover capacity on a social media account. (Trial Tr., ECF No. 345, PageID 11089.) Because social media did not exist in 1978, the traditional understanding of a police officer going "undercover" would not have included contemplation and extension of his or her "undercover" presence to his or her social media accounts. (*Id.*) Indeed, the Monitor's expert on public policy and social media, Rachel Levinson-Waldman recognized "that there are certain types of investigations in which undercover accounts would serve a purpose." (Trial Tr., ECF No. 344, p. 78.)

Director Rallings also testified that updating the language of the Consent Decree to include these definitions would aid him and his officers in understanding the Consent Decree. (Trial Tr.,

ECF No. 346, PageID 11204.) The advent of social media networks warrants this particular modification to make it clear that this type of legitimate modern undercover activity is permissible under the Consent Decree.

3. Section D "Prohibition Against Electronic Surveillance" should be updated to recognize that MPD sometimes has a legitimate law enforcement purpose for viewing certain information posted to social media.

Section D of the Consent Decree should be modified as outlined in the Proposed Modified Consent Decree (Trial Ex. 6) to clarify that MPD may view and use social media for a legitimate law enforcement purpose, so long as it does not improperly catalog and disseminate that information pursuant to Section H. Just as the advent of social media warranted addition of a definition of social media, the creation and prevalence of social media in our society, including for criminals, as a method of communication in 2020 is a changed factual condition that justifies these jointly proposed modifications.

The parties' jointly-proposed Section D acknowledges that there are further situations where the Memphis Police Department may inadvertently discover information related to the exercise of First Amendment rights as defined by the Consent Decree because of the very nature of social media. It also expressly prohibits MPD from surveilling groups or persons involved in the exercise of their First Amendment rights for the purpose of First Amendment-Related intelligence except as provided in subsection G.

Director Rallings testified as to his concern with viewing anything on social media and how any activity on social media arguably implicates the First Amendment.

> If someone shows me their social media page, it starts out with all types of stuff about them. Where they're from. Where they went to school. Sometimes what they believe in. You know, if you -- if I have a social media page, it obviously will talk about the Army and being a police officer and maybe some of my own personal views. It's almost impossible to miss that.

(Trial Tr., ECF No. 345, PageID 11053.)

Director Rallings further explained how social media "is critical" to law enforcement. (Trial Tr., ECF No. 345, PageID 11158.) Indeed, it is a "treasure trove of information" (*Id.*) Social media is useful for solving crimes and also for assessing threats.

> When we talk about crimes, individuals will commit crimes. They will post it on Facebook Live while they're doing the crime. They will -- threats. We respond to about a hundred threats every single year to schools, churches, businesses, government officials and other. And those threats happen in the middle of the night. Some of them happen before school starts, and we have to react quickly. And so most of those come in to us via some social media post that some parent has shared with us.

(Trial Tr., ECF No. 345, PageID 11001.)

Furthermore, since the events of September 11, 2001, what is expected of law enforcement, and the general public, in terms of reporting potential threats has changed significantly.

> So we've spent, since 9/11, I think the slogan is, "If you see something, say something." And in the aftermath of almost every situation, school shootings, the Boston Marathon bombing, the attacks we've seen in malls, in Walmarts, there was something posted on social media that someone either failed to act or they acted on, alerted law enforcement so we can intervene.

(Trial Tr., ECF No. 345, PageID 11003.)

Director Rallings further testified that if MPD is not able to search social media for purposes of threat assessments, then MPD will be functioning in an "operational blind spot" – one that the City of Charlottesville and the Director, believed could have been useful in preventing tragic events, like the killing of an innocent protester, Heather Heyer:

> "The events led to a reassessment of the department's approach to intelligence gathering. CPD Chief Al Thomas told us that the events of May 13th revealed an operational blind spot. Thomas noted that CPD lacked advanced capabilities for social media monitoring that may have helped the department anticipate these events. Chief Thomas moved forward with a request to purchase software capable of pinpointing potential threats, based on social media activity."
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> You know, we spent an enormous time just talking about how Charlottesville police

> and others did not see things unfolding and unravelling because of a lack of understanding of how these things are organized and shared on social media. And how an event can grow from, you know, two or three people to 2,000 people in a matter of minutes and quickly overwhelm police resources. And we saw that in the bridge protest.

(Trial Tr., ECF No. 345, PageID 11008-09.)

The City's expert, Mr. Daigle, testified regarding the changed circumstances surrounding the invention and increasing use of social media by the public that warrant the parties' proposed modification to Section D. He explained:

> There are 3.725 billion active social media users. The websites, the stats show that every person has about 7.6 social media accounts. I would interpret that to be different social media accounts. And the interesting part for me, having three children was that the daily amount of time spent by citizens in this country on social media was about 142 minutes a day. I think that's very significant. The one thing that we can definitely guarantee that that has continued to increase over the years. It was not in existence in 1978.

(Trial Tr., ECF No. 345, PageID 11156-58.)

He further explained how law enforcement has changed since entry of the Consent Decree in 1978.

> You know, the old days of hiding in the bushes and surveillance teams and listening devices and recording machines and all of those undercover operations have developed into the fact that if social media is -- or let's just call it what it is, social networking is a form of networking that is now done via multimedia application, then in the olden, you know, 20, 30 years ago, networking was done in person. It was done in cafes. It was done in bars. It was done in a different application.
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> Now it's done on technology. It's done on social media. It's done on apps, on undercover apps. It's done on blogging and websites. And so because the manner in which the action occurs means that law enforcement has to react to the manner in which they investigate it. And so as the way the crimes occur changes, so does the mechanisms on how the crimes are investigated.

(Trial Tr., ECF No. 345, PageID 11169.)

Chief Crowe concluded that operation under the existing Consent Decree without modification would be detrimental to the public interest because of the lack of clarity on some of the issues surrounding social media and sharing information. (Trial Tr., ECF No. 345, PageID

11118.) He explained that what worried him is not when officers asked questions about the Consent Decree, but when they did not ask questions and possibly forwent certain aspects of the investigation. (Trial Tr., ECF No. 345, PageID 11119.)

Because social media did not exist in 1978, and because its use is increasingly important as both a method of communication (amongst criminals as well) and a tool for investigation and intelligence-gathering amongst law enforcement agencies, the City respectfully submits that the Court should accept the parties' jointly proposed modification to Section D in order to provide clarification to and modernization of the Consent Decree.

4. Section E "Prohibition Against Covert Surveillance for First Amendment-Related Intelligence" should be updated to recognize MPD and other law enforcement agencies' legitimate uses of "undercover accounts" on social media.

Here again, the creation and prevalence of social media in our society, including use by criminals, and its effects on how interactions and communications take place in 2020 is a changed factual condition that justifies the jointly proposed modifications to Section E. Section E "Prohibition Against Covert Surveillance for First Amendment-Related Intelligence" should be updated to clarify that MPD may employ "undercover accounts" on social media when investigating criminal activity, as long as those accounts are not created for the purpose of First Amendment-Related intelligence. Any First Amendment-protected information is gathered through the use of an undercover social media account shall not be retained unless necessary to further a criminal investigation. Further, MPD will implement supervisory controls to ensure all undercover social media accounts are not being used or created to violate this Consent Decree or otherwise infiltrate or identify groups expressing their First Amendment rights.

The evidence at trial showed the clear need to use undercover accounts on social media. Major Darren Goods explained that his unit uses two types of undercover accounts, and the

importance of each type of account. The first type of undercover account, also known as an alias account, is used primarily for searching for evidence of crime and probable cause, but the alias account is not used "to infiltrate" any group or social media account. (Trial Tr., ECF No. 346, PageID 11255-56.) He explained why an alias account, which provides anonymity to the investigator, is important.

> Because then people find out -- if I use my own, just say, whatever social media account to do searches that are involving gang members or some type of crime that we are actively investigating, then when I'm doing those searches and when I'm doing that investigation, that opens me up to potentially the target that we are investigating, identifying -- then they can identify who I am, who my kids are, my family, my friends. And then, you know, there is some -- could be very well catastrophic consequences to that.

(Trial Tr., ECF No. 346, PageID 11255-56.)

Major Goods further explained how a person's true identity might be revealed if he or she was investigating with his or her own personal social media account.

> There's one social media platform that if you are searching -- let's say, for instance, you aren't Darren Goods and you're searching Darren Goods. And then at some point Darren Goods, me, I'm going to get a notification from the social media platform that it's going to tell me that -- it's going to suggest that I reach out to you because I may want to friend you, and send you a friend request so that you can be one of my friends on my social media platform. So if I'm using my real name, real social media account, and I'm doing these searches, and James -- I'm searching James Bond, James Bond at some point is going to get a message from this social media platform saying that, hey, you may know Darren Goods and you might want to friend him. And then James Bond realizes -- looks at Darren Goods' page, and realizes I'm a police officer, and then he is doing -- he's involved in a lot of criminal activity. Then that absolutely not only exposes me, but it exposes every friend, every family member, every person that are my friends to James Bond. If that makes sense.

(Trial Tr., ECF No. 346, PageID 11284-85.)

Major Goods also explained the use of true undercover accounts, which are used by an officer working undercover with an assumed identity. Those undercover officers, who have received formal training in undercover operations, will oftentimes use undercover social media

accounts to "friend" different gangs and people that are involved in criminal activity. (Trial Tr., ECF No. 346, PageID 11257-58.) He concluded that the parties' jointly-proposed modifications regarding undercover accounts in this Section would allow his unit to operate effectively. (Trial Tr., ECF No. 346, PageID 11260.)

The City's expert, Mr. Daigle, presented evidence as to the changed nature of undercover work between 1978 and today. The "old days of hiding in the bushes" have been replaced by undercover work on social media. Because the manner in which crimes occur has changed since 1978, "so does the mechanisms on how the crimes are investigated." (Trial Tr., ECF No. 346, PageID 11169.) The City respectfully submits that the invention of social media and the corresponding ways in which policing practices have changed since 1978 is a changed condition that makes these modifications appropriate.

5. Section F "Harassment and Intimidation Prohibited" should be updated and clarified.

The parties propose modifying Section F "Harassment and Intimidation Prohibited" so that it can be clarified and updated. The parties agree that Section F should be updated to recognize that MPD may have officers present at gatherings of persons engaged in First Amendment activity for the purpose of ensuring public safety, as long as the MPD's presence is not for the purpose of, nor may reasonably have the effect of, harassment or intimidation. The City's expert, Mr. Daigle, testified regarding how First Amendment-related gatherings have changed since 1978. He explained that the mechanisms people use to gather large groups of people together have changed, as well as the mechanisms law enforcement uses to respond to and manage large crowds have changed. Specifically, he noted that crowd size can increase quickly because of the technological advancements in communication since 1978. (Trial Tr., ECF No. 343, PageID 10634.) Because of those changes, it is important that the City be allowed to have officers present at such gatherings

for the purpose of public safety, so long as their presence is not for the purpose of, or has the effect of, harassment or intimidation.

Mr. Zayid Saleem further testified that specifically including the proposed modification to make it clearer that having police presence at a First Amendment-related activity is not a *per se* violation of Section F of the Decree would clarify to officers about whether they should even be at a certain place, at a certain time, where First Amendment events are occurring. (Trial Tr., ECF No. 346, PageID 11315.) It would help prevent situations like the Labor Day parade incident, where a police officer who was supposed to provide security for the event left his post because he thought he was not supposed to be there. (*Id.*)

Section F should also clarify that nothing in that provision prohibits the City from implementing reasonable time, place, and manner restrictions on First Amendment activities. Mr. Saleem testified that clarifying the Consent Decree to expressly allow for reasonable time, place, and manner restrictions would not deteriorate any of the protections provided by the Consent Decree, but would simply allow the City to maintain the right to do things like impose a reasonable and constitutional curfew, or set aside separate areas for protesters and counter protesters so that they do not clash. (Trial Tr., ECF No. 346, PageID 11314.) This is consistent with First Amendment case law on reasonable time, place, and manner restrictions. Thus, the proposed modifications to Section F are warranted.

6. Section G "Investigations Which May Interfere with the Exercise of First Amendment Rights" should be updated in several respects.

The evidence at trial showed the need to modify Section G due to changed circumstances and unforeseen obstacles surrounding investigations on social media. First, the parties agree that Section G should more clearly specify which types of investigations and intelligence-gathering would require authorization by the Director or the Director's Designee. The original language of

Section G may be too broad when applied to social media in that it requires Director authorization of criminal investigations which "may result in the collection of information about the exercise of First Amendment rights or interfere in any way with the exercise of such First Amendment rights…." (Consent Decree, 9-1, PageID 51) (emphasis added). This arguably implicates every criminal investigation conducted on social media since social media is, at its core, a platform for speech.

Director Rallings explained:

> So when I look at any police officer, any, that means all of them, conducting or supervising a lawful investigation of criminal conduct, which investigation may result, the "may" is a problem. Because if they look on someone's social media, they may see something that is an exercise of First Amendment rights.

(Trial Tr., ECF No. 345, PageID 11048) (emphasis added).

The resulting problem is further highlighted when viewed in conjunction with how often social media is utilized in investigations. Deputy Chief Crowe gave three specific examples of how MPD used social media to investigate and solve crimes: a kidnapping, a purse snatching, and a murder investigation. (*See* Trial Tr., ECF No. 345, PageID 11102-10; 11115-17.) Deputy Chief Crowe also testified regarding two possible threats to local shopping malls that were ascertained by the mall's security on social media. (*See* Trial Tr., ECF No. 345, PageID 11110-14.) The commonplace and routine practice of looking at social media in the course of criminal investigations makes compliance with Section G as written unworkable, since it could be interpreted that every time an officer seeks to use this valuable law enforcement tool, he or she must first request authorization from the Director.

The updated Section G replaces that "may result" language with language that states that investigations and intelligence-gathering "which are reasonably unlikely to result in the collection of information about the exercise of First Amendment rights, or interfere in any way with the exercise of such First Amendment rights are permissible and require no special authorization under

Section G." Moreover, the revised Section G clarifies that the Consent Decree does not require Director authorization under § G to begin any and all investigations on social media, only those that are reasonably likely to result in the collection of information about the exercise of First Amendment rights or interfere in any way with the exercise of such First Amendment rights. Where a social media investigation is based on the content of the speech or other expression, authorization is always required.

The parties further agree, and the evidence presented at trial showed, that Section G should also be modified to allow for designees of the Police Director to authorize investigations under Section G. Director Rallings explained the practical necessity of having designees to authorize investigations implicated by Section G. For example, he was out of the country in Ghana for a week with spotty cell phone coverage and no email. There was no way for him to authorize an investigation under Section G during that time. (Trial Tr., ECF No. 345, PageID 11049.)

Director Rallings further explained that the sheer volume of incidents MPD investigates each year makes having designees under Section G even more important. He explained that MPD investigates approximately 118,000 incidents each year. (Trial Tr., ECF No. 345, PageID 11049.) If the Director personally had to authorize even a fraction of those incident reports, it would be extremely burdensome. Without a designee, some officers may be hesitant to directly engage the Director with the request and may even forego conducting such an investigation because of this hesitancy. Indeed, Chief Crowe testified that he believed there are officers who hesitate to seek clarification of whether an action is permissible under the Decree in the first instance. (Trial Tr., ECF No. 345, PageID 11119.) In essence, the language of Section G, if left unchanged, could have an unintended chilling effect on that officer's behavior that could potentially be detrimental to public interest. Having a designee of the Director with the authority to authorize certain

investigations who works more closely with the officers may ameliorate that chilling effect.

Furthermore, Section G, as proposed by the parties, should be updated to acknowledge that there are certain types of crimes that occur exclusively on the Internet. The evidence at trial showed that there are certain crimes like child pornography and human trafficking, which are effectuated through communications on the Internet, and that MPD has a legitimate and continuous need to monitor certain areas of the Internet to prevent these types of crimes. (See Trial Tr., ECF No. 345, PageID 11095-96; 11166.) Thus, the evidence presented at trial showed that changed factual circumstances warrant modifications to Section G, without which public interest may be detrimentally affected.

7. Section H "Maintenance and Dissemination of Information" should be updated to allow for the MPD's routine use of its photo and video recording systems.

Section H should further be updated to include provisions permitting MPD's use of its camera and video recording systems, as long as the devices are not used for the purpose of First Amendment-Related intelligence. The original language of Section H, when read literally, arguably prohibits the City from using those devices like security cameras around important City assets, like the City Hall building; SkyCop cameras placed in neighborhoods; body-worn cameras for police officers; or traffic cameras.

The evidence at trial showed that circumstances surrounding law enforcement's use of camera and video recording systems has changed significantly since 1978. The City's expert, Mr. Daigle, testified that not only are cameras prevalent in modern society, citizens expect to be recorded and also expect to have the right to do their own recording to protect their own personal interests. (Trial Tr., ECF No. 345, PageID 11174.)

Regarding the City of Memphis specifically, Director Rallings testified that the citizens of Memphis continue to demand cameras in their neighborhoods. Indeed, the City has received over

$2 million worth of camera donations from its neighborhoods. (Trial Tr., ECF No. 345, PageID 10992.)

Chief Don Crowe further testified as to the need to use the pan/tilt/zoom function on the stationary cameras used by MPD and the City. After receiving notification from the Monitor that the pan/tilt/zoom feature must be disabled on a particular camera, Chief Crowe explained that MPD no longer could "zoom in" on an individual to determine if the object she was pulling out of her pocket was a phone or a dangerous weapon, nor could MPD tilt that camera to follow a suspicious person in that area. (Trial Tr., ECF No. 345, PageID 11073-74.) Chief Crowe explained why these camera features are important for law enforcement.

> So the role of the Real Time Crime Center in these situations is to support the commander that's on the ground. Be a support unit for them. The commander on the ground needs us to help identify an object in someone's hand or a dangerous situation. That's what we would want to do so that an officer does not have to get close enough to identify a dangerous situation on their own. So it's about trying to keep the public safe.

(Trial Tr., ECF No. 345, PageID 11074-75.) For these reasons, Section H should be modified to expressly permit MPD to continue using its camera network.

The parties also agree that Section H should be updated to clarify that MPD's use of Body Worn Cameras is permissible, provided they are not used for the purpose of First Amendment-Related Intelligence. The evidence at trial showed that body worn cameras are a relatively new technology which protect both the public and law enforcement. Director Rallings explained that "body worn camera keeps us straight, and it keeps them straight." (Trial Tr., ECF No. 345, PageID 10996.) Body worn cameras are a "great tool to hold the officer accountable." (*Id.*)

Director Rallings testified that MPD has approximately 2,000 body worn cameras in use by its officers, detectives, and supervisors, at a cost of over $2 million each year. (Trial Tr., ECF No. 345, PageID 10996.) Director Rallings stated that the investment is well worth the cost

because without them MPD would not have the benefit of "the independent witness." (Trial Tr., ECF No. 345, PageID 10997.)

Other witnesses testified as to confusion surrounding the Consent Decree's implications for MPD's body worn cameras. Chief Crowe explained that questions arose regarding when and under what circumstances MPD may have its body worn cameras running at First Amendment gatherings, and that he was unable to get full clarity on that issue. (Trial Tr., ECF No. 345, PageID 11078.) He further testified that the parties' proposed modifications regarding body worn cameras would provide that clarity. (*Id.*)

The City's expert, Mr. Daigle, testified that without modification to the Consent Decree regarding body worn cameras, such an omission could detrimentally affect the public. Specifically, if the Consent Decree were interpreted in such a way that it required its officers to make an exception to the standard MPD Body Worn Camera Policy, that could become a problem.

> And so when you start to get into a rule that the rule that we have in a national standard for body-worn cameras is if you have it and you're interacting with society, you want to turn it on. Well, once you start getting exceptions to turning it on, now you're increasing discretion. And you're increasing the need for evaluation and analysis and decision making and all of those things. You have a long history of becoming detrimental. And basically the best way to describe it is as much detrimental as inconsistent. And when things are inconsistent, they're all over the place. And we can't rely on the fact that good evidence or good documentation of an incident is guaranteed to occur.

(Trial Tr., ECF No. 345, PageID 11173.)

Thus, the evidence at trial showed how factual conditions since 1978 have changed regarding law enforcement's use of photo and video equipment and body worn cameras for public safety, and that without modification to expressly allow for such use in the Consent Decree, the public could be harmed to its detriment.[3]

[3] Needless to say, one of the best tools for holding police officers accountable have been from video footage, *i.e.*, the "independent witness."

Finally, while the parties did not address this issue in the Proposed Modified Consent Decree, evidence emerged at the trial to support Section H being modified to allow for the sharing of some personal information collected during investigations into criminal conduct with non-governmental law enforcement agencies for the purpose of public safety. As it stands now, the City is prohibited from disseminating personal information about any person collected in the course of a lawful investigation of criminal conduct to any other person, except that such information may be disseminated to another government law enforcement agency then engaged in a lawful investigation of criminal conduct. (Consent Decree, ECF 9-1, §H.2.) In other words, the City is not allowed to share personal information (which is undefined) about any person collected in the course of a lawful criminal investigation with any non-governmental agency. This prevents the City from sharing information with the private security departments of local businesses, some of which have significant security concerns.

The Director testified that sharing information with private businesses, *i.e.*, non-law enforcement agencies is vital and critical in this community:

> Q. Aren't there some institutions here that have certain things on their property that would be very destructive in the wrong hands?
>
> A. I wouldn't use destructive. I would use catastrophic.
>
> Q. Okay. And those institutions have their own security force, is that not true?
>
> A. That's correct.
>
> Q. And is it important to you to be able to coordinate and cooperate and share intelligence with those institutions?
>
> A. It's absolutely critical.
>
> Q. And those institutions are not necessarily law enforcement; is that correct?
>
> A. That's correct.

(Trial Tr., ECF No. 345, PageID 11020.)

The City's expert further testified that the existing language is troublesome. If the City is precluded from sharing the identity of a person it suspects is planning a crime against a private entity with the security personnel of that entity, that could pose a significant challenge to that private entity's ability to protect itself by identifying that person and preventing the crime. Moreover, Mr. Daigle testified that best law enforcement practice would be to share that information with the private agency. (Trial Tr., ECF No. 343, PageID 10638-39.) The City respectfully requests an additional modification to Section H that would allow for sharing information with non-governmental agencies for the purpose of protecting the public in certain situations.

B. SECTION I "RESTRICTION ON JOINT OPERATIONS"

The parties agree that Section I should be updated; however, the extent to which it should be updated has not been resolved. The parties agree that the City may participate in the receiving and sharing of information from and with other law enforcement agencies, as long as the City does not direct another law enforcement agency to do what it is not allowed to do under the Consent Decree. In other words, the City may not direct another agency to act as its surrogate to violate the Consent Decree.

The parties further agree that MPD may accept anonymous tips from CrimeStoppers and other anonymous tip reporting platforms, and the receipt of that information does not implicate the Consent Decree, as long as the MPD does not retain tips that have no criminal nexus and are solely related to First Amendment activity or First Amendment-Related Intelligence.

The confusion over the original language of Section I is well-documented to the Court, as a differing interpretation from the Monitor led the City to file its Motion for Immediate Modification of this Section. (ECF No. 227.) At the time, the City believed a literal interpretation of Section I could have led to a result that would have been detrimental to public interest. (*Id.*)

The City seeks an additional modification to Section I that clarifies and codifies the extent to which it may work with other agencies. During trial, the City proposed the following language for Section I:

> The defendants and the City of Memphis shall not encourage, delegate, employ or contract with, or act at the behest of, any local, state, federal or private agency, or any person, to plan or conduct any investigation, activity or conduct prohibited by this Decree. In other words, the City may not direct another agency to act as its surrogate to violate the Consent Decree or accept information that the City knows or should reasonably have known was collected in a manner that would violate the United States Constitution.
>
> Under this section, the City may receive information from other entities that does constitute First Amendment-Related intelligence for a legitimate law enforcement purpose provided that the City may not act upon such information without obtaining an Authorization pursuant to Section G. The City may not act upon or catalog information from other agencies constituting First Amendment-Related intelligence that is unrelated to any legitimate law enforcement purpose. Nothing in this Section precludes the City from receiving tips from non-law enforcement agencies or individuals.

(Trial Exhibit 25.) This language removes the somewhat broad phrase "cooperate with" and adds an additional paragraph that codifies the Court's ruling on the City's Motion for Immediate Modification regarding Section I. (*See* ECF No. 250.)

Incorporating the Court's Order, ECF No. 250, would vastly improve the language of Section I. Director Rallings testified as to his ongoing confusion regarding Section I and what information he is able to receive from other agencies. When directed to reference the Court's Order interpreting Section I (ECF No. 250), Director Rallings explained that Section I remained confusing to him:

> Well, based on the Court Order, it says, Decree only prohibits the City from receiving information from outside law enforcement or private interests that would otherwise violate the Decree. Section I only outright prohibits the City's receipt of political intelligence. And I think I've been very clear in my testimony that it is the issue of what is political intelligence that I still lack complete clarity on. So I just -- And I apologize, Your Honor, I just can't say that I'm 100 percent clear. Because if I'm not clear on political intelligence, then that kind of muddies the water. And I think there was mention throughout on doctrine of some possible gray areas. And

> that's my concern. I don't want to be in a gray area that places us in violation, because I am the one that pretty much is responsible for making sure that we maintain compliance with a team of lawyers and a monitor. So, again, excuse my ignorance, but I'm just trying to do the best I can and make sure I understand this completely. And I think that's why the modification is necessary to just help me out. Again, I'm not a lawyer. And, you know, this is somewhat confusing. And I think the clarity would definitely benefit the next chief that comes in who has to make these decisions. Because I have to make these decisions at 3:00 in the morning, and I don't have a lawyer to talk to.

(Trial Tr., ECF No. 346, PageID 11230-31.) In any event, the Director testified that having some of the Court's Order incorporated into the Consent Decree itself would be helpful in avoiding some confusion so officers would not have to flip through two different documents. (Trial Tr., ECF No. 345, PageID 11045.)

Major Darren Goods testified that the City's proposed modification to Section I (Trial Ex. 25) would allow him to better articulate to the Multi-Agency Gang Unit staff how they can appropriately operate and receive information from other agencies. (Trial Tr., ECF No. 346, PageID 11272.)

The City's expert, Mr. Daigle, explained that interagency collaboration has changed significantly since 1978. This country has experienced "significant changes and improvements in the collaboration of sharing information" since 1978. The lack of collaboration and sharing of information in early 1970s and 1980s was a detriment to law enforcement. (Trial Tr., ECF No. 343, PageID 10640.) Specifically, the aftermath of 9/11 was a significant change of circumstances related to interagency sharing of information. (Trial Tr., ECF No. 343, PageID 10641.)

The Court also heard testimony from the City's Chief Legal Officer, Jennifer Sink, as to the City's justification for its proposed modification to Section I. Ms. Sink first testified regarding the "request for authorization" or "RFA" process that the Monitor developed to address questions regarding the application of the Consent Decree to specific developing situations. (Trial Tr., ECF No. 346, PageID 11337.) Ms. Sink described that "as we came to really understand better and

better how to apply the modern context," the RFAs changed a lot over time.[4] (Trial Tr., ECF No. 346, PageID 11337.) And following the Court's Order, ECF No. 250, the nature of the RFAs became more to "either assure ourselves [the City] that we were correct in what we thought we were allowed to do and not allowed to do, or because we really needed clarification because we were unclear." (Trial Tr., ECF No. 346, PageID 11337-38.) Because with each "new" scenario that MPD encountered, "the question becomes … a constant reevaluation to make sure we are following the right process and handling it in a correct manner." (Trial Tr., ECF No. 346, PageID 11341.) In essence, the City's desire to always err on the side of caution when it came to interpreting the Consent Decree required frequent return to the Court's Order and to the precipitating Motion to ensure that the City's understanding of the Order's application to "new" scenarios was correct, even if analogous. Accordingly, Ms. Sink explained the intent behind the additional language the City proposed in Section I:

> The rest of the language is really designed to attempt to codify, in summary form, the ruling that we received from the Court that would help us to understand or explain what is allowed and what's not allowed. So under the first paragraph, beginning the phrase, "in other words", we are really reiterating, I think, a point that everybody certainly does know, which is that the City cannot ask another agency to do something that it otherwise would not be allowed to do under this Consent Decree. The second component of that, though, is we did make a reference to not violating the United States Constitution as opposed to violating the Consent Decree. And the reason for that is because of the fact that the other joint agencies are not bound by the Consent Decree that we're working with. What is of -- ensuring that nobody would be violating the U.S. Constitution seemed to be the more instructive language for this section. The second section -- or paragraph, rather, here incorporates some important language that would incorporate other

[4] Earlier responses to RFAs from the Monitor that were answered before the Court's Order, such as the Monitor's response to an RFA marked as Trial Exhibit 14, led the City to believe that certain routine policing activities were impermissible under a strict reading of the Consent Decree because of the ambiguities created by applying language from 1978 to modern policing in 2020. As a result, the City adopted a more restrictive reading of the Consent Decree to avoid any possible scenario that would run afoul of the Consent Decree, irrespective of whether the conduct was best policing practices. It was only after the Court ruled on its Motion for Immediate Modification that the City's view of the Consent Decree evolved to be a more pragmatic application.

> aspects of our proposed modifications. For example, we have a reference here to First Amendment-related intelligence, which we proposed. We've also incorporated the term legitimate law enforcement purpose, which has been proposed. And it more clearly provides for framers of what can and cannot occur under the Consent Decree as a whole. The last sentence in particular was really meant to be instructive with regard to things like CrimeStoppers, or just concerned citizens or third parties who are just kind of unsolicited providing information that they're receiving to the City of Memphis Police Department, because they think that it's something we should be aware of.
>
> ***
>
> The last paragraph, also, does, I think, provide some clarity with regard to obtaining authorization in Section G. And also provides some clarity with regard to Section H, which is not something that we spent a lot of time talking about, but deals with, you know, the disseminating and cataloging of information.

(Trial Tr., ECF No. 346, PageID 11352-53.)

> Ms. Sink also explained the rationale for striking the phrase "cooperate with:"
>
> To delete the "cooperate with" language. And the reason for that is we found that there are questions coming up about what the word "cooperate" means, especially in the context of a joint multi-agency task force or unit. The words "cooperate with" seem inherently that doing something jointly, you are cooperating with each other. So we're asking that to be removed because of the confusion that causes and the issues that have – or questions that have come up with regard to that.

(Trial Tr., ECF No. 346, PageID 11351.)

Like Ms. Sink, Mr. Saleem testified as to the practical application of the proposed modified language to Section I. He explained that it would not only give clarity to the Decree but would also aid in training MPD officers on what conduct is permissible under the Decree. (Trial Tr., ECF No. 346, PageID 11312-13.) He further explained that by "[c]odifying the Consent Decree with the Court's finding would bring a great deal of clarity to the document, the Consent Decree, and to those officers reading it." (Trial Tr., ECF No. 346, PageID 11310.)

For these reasons, the City respectfully requests a modification to Section I as proposed in Trial Exhibit 25, which the City believes in no way lessens the protections of the Decree, but clarifies and codifies Section I to comport with the Court's interpretation and modern technologies

and law enforcement practices. As the evidence showed, without these modifications, the continuing confusion and lack of clarity on what officers can and cannot do under this Section could result in detriment to public interest.

IV. CONCLUSION

In sum, the City submits that the parties have met their burden of establishing significant changed circumstances that warrant modification of the Consent Decree as outlined in the Jointly Proposed Modified Consent Decree (Trial Ex. 6), and that the City has met its burden with regard the City's Proposed Modified Section I. (Trial Ex. 25.) There have been changed factual conditions that make compliance with the Decree onerous and unforeseen changes that make compliance with the Decree unworkable, like all of the advances in modern technology and changes in police practices since 1978 or changes in responses to terrorist attacks following September 11, 2011, and enforcement of the Decree without modifications would result in continued confusion amongst the officers who have to work under the Decree, to the potential detriment of the public. For these reasons, the City requests that the Court adopt the Jointly Proposed Modified Consent Decree and the City's Proposed Modified Section I.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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