

1 IN THE UNITED STATES DISTRICT
2 FOR THE WESTERN DISTRICT OF TENNESSEE
3 WESTERN DIVISION

4 ACLU OF TENNESSEE, INC.,

5 Plaintiff,

6 vs.

 No. 2:17-cv-02120-JPM

7 THE CITY OF MEMPHIS,

8 Defendant.

10 MODIFICATION HEARING

11 BEFORE THE HONORABLE JON PHIPPS MCCALLA

12 (Via Zoom Videoconference)

13 Wednesday

14 17th of June, 2020

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23 CANDACE S. COVEY, RDR, CRR
24 OFFICIAL REPORTER
25 FOURTH FLOOR FEDERAL BUILDING
 MEMPHIS, TENNESSEE 38103

UNREDACTED TRANSCRIPT

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Wednesday

June 17, 2020

The Zoom Modification hearing in this case began on this date, Wednesday, 17th day of June, 2020, at 9:30 a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: All right, ladies and gentlemen. Today we are here in connection with a hearing concerning the motion to modify the Kendrick decree, the Kendrick Consent Decree that was entered many years ago. Of course, during the November 21, 2019 hearing, the Court set today as the trial date for the City's motion for modification, which was, of course, filed some -- in August of 2018, initially.

The hearing will include individuals from both the Monitor's team, and it will include individuals for the City of Memphis and, of course, with participating Plaintiff is the ACLU.

I understand the ACLU today will have one person with them today, which will be Ms. Yarbrough; is that correct, Mr. Castelli?

MR. CASTELLI: Yes, Your Honor. Ms. Yarbrough will be here on behalf of ACLU, and then Ms. Weinberg,

1 executive director, will be here as the client
2 representative.

3 THE COURT: Certainly. And now I know,
4 Mr. McMullen, we have you here today. And I've seen several
5 of your colleagues during the morning. Who will be assisting
6 you today? Will you unmute your mic, and then we'll be able
7 to hear you. And just the touch screen up in the bottom --
8 or the bottom left corner. I see Ms. Jeffreys is there.
9 She's muted but she's got her picture up. So that's
10 perfectly fine. All right. So there we go. I think we've
11 got -- Ms. Silk is helping out there, and hopefully we can
12 hear everybody.

13 Yes, sir. Test how are we doing.

14 MR. MCMULLEN: Okay. Your Honor, can you hear me
15 now?

16 THE COURT: Yes, that's fine. And who is
17 assisting you today?

18 MR. MCMULLEN: Assisting me today is Mr. Mark
19 Glover. Ms. Jennie Silk. Ms. Mary Tullis. And the client
20 representative is chief legal officer for the city, Jennifer
21 Sink.

22 THE COURT: All right. Well, thank you. And
23 then of course, we've gone over -- we have not gone to the
24 Monitor yet, and he's going to tell us who is going to be
25 with him today and who will be the first witness. We're

1 going to go through the witness list in just a moment.

2 We do need to go over a couple of details. For
3 everyone who is listening in, this is a court proceeding, and
4 according to the judicial council of the United States and
5 Judicial Conference of the United States, there can be no
6 recording of this proceeding. The official record is the
7 record that is prepared by the court reporter, who is here
8 with us. That is the only official record. And video
9 recordings and audio recordings are not allowed. Please
10 respect that, recognizing that the Court is bound by the
11 determinations of the Judicial Conference, and we must make
12 that announcement. And we ask for your cooperation in that
13 regard.

14 Certainly it's a public proceeding, but it's no
15 different than if we were in court and you were all sitting
16 in the gallery. You would obviously not be recording there.
17 You would not be taking photographs. Those things are simply
18 not allowed under the rules of the United States as
19 articulated by the judicial council.

20 Now, the second thing is that there may be some
21 documents that may be introduced. And we need to be mindful
22 of privacy rights of every individual. One of the things
23 that we do not allow in federal court are the listing of
24 personal addresses, social security numbers or other personal
25 identifiers. So if any document that you have contains that

1 information as to any individual, that particular document
2 will have to have that portion redacted before it can be
3 displayed or shown or marked as an exhibit.

4 If it's important to have that information at
5 some point, it can only be received under seal and cannot be
6 unsealed without a motion and an order of the Court.

7 Typically, personal identifiers in cases such as this are not
8 appropriate to be disclosed. And so we'll need to follow
9 that, and that will allow individuals who are supporting
10 every part of every team to make sure that any document does
11 not contain that type of information.

12 Now, for those who are watching, you may then see
13 a document which will have some blacked-out material on it.
14 The Court will, of course, look at that if necessary to make
15 sure that it is information that should not be publicly
16 disclosed. But I hope everyone understands that that is
17 important and, of course, this is a case about, in many ways,
18 protecting First Amendment rights, association rights and
19 other rights. So we all would understand that that is not
20 something that would be available publicly for any of you
21 without certainly some substantial review.

22 Now, we're going to go to Mr. Stanton.

23 And Mr. Stanton, how are you this morning?

24 MR. STANTON: I'm doing very well, Your Honor.
25 Good morning.

1 THE COURT: Good morning. And I am going to ask
2 you the sequence of witnesses today. We went over that in
3 part in our initial conference. But we indicated that at the
4 end of every day and, of course, in this circumstance at the
5 beginning of the day, we would go through the sequence of
6 witnesses so that every party would be well prepared for
7 their portion of the cross examination when they have that
8 opportunity.

9 What will be our sequence of witnesses that you
10 anticipate presenting today or even partially tomorrow?

11 MR. STANTON: Yes, Your Honor. The sequence,
12 first witness from the monitoring team will be Rachel
13 Levinson-Waldman. I'm happy to share her title with you, if
14 you want it, as well or just the name.

15 THE COURT: The name is fine.

16 Professor, I think that we have you on the line
17 somewhere, and so when each person takes the stand, we will
18 ask them to repeat their name so it's clear in the record.

19 And our second witness?

20 MR. STANTON: Our second witness, Your Honor, is
21 Dr. Theron Bowman. It's T-H-E-R-O-N. Bowman, B-O-W-M-A-N.

22 THE COURT: All right. And our anticipated third
23 witness?

24 MR. STANTON: That's Mr. David McGriff.
25 M-C-G-R-I-F-F. David McGriff.

1 THE COURT: All right. And the next witness?

2 MR. STANTON: Will be Dr. Sheila Peters, Your
3 Honor.

4 THE COURT: All right. If you know the next
5 witness, the fifth witness?

6 MR. STANTON: That would be John Henegan. Your
7 Honor, we mentioned that may have to go out of order,
8 depending on how far we get today. It may be our first
9 witness tomorrow, but he is anticipated to be our final
10 witness.

11 THE COURT: All right. I think that's certainly
12 enough so everybody will be well prepared. In this
13 proceeding it is agreed that, of course, the Monitor will
14 make a presentation first and present witnesses. Those
15 witnesses as they're presented will be subject to cross
16 examination by the City of Memphis and, of course, by the
17 ACLU.

18 The City has the burden of demonstrating that the
19 modification in this case or any modification in this case is
20 appropriate in the case and without adequate showing, then no
21 modification will be made, even though the parties have
22 agreed on a number of modifications. And I'm assuming that
23 there will be sufficient evidence submitted on each one of
24 those. But we will, of course, wait and see.

25 I am also going to ask if you wish to make brief

1 opening statements, you're certainly allowed to do so. This
2 is a trial on these issues. You're not required to. And we
3 tell everyone it's not necessary, but it's certainly allowed.

4 Because the Monitor will be going first, I will
5 go to the Monitor first on that. It's interesting, we would
6 normally go to ACLU second, and in this case I think we
7 agreed to reorder virtually everything. So we will actually
8 go to the City of Memphis second and then ACLU. I point out
9 that that is a reordering of the presentation because of the
10 burden of proof that rests on the City in these matters. And
11 it was agreed upon in conference that we would actually
12 reorder the normal order of presentation and proof.

13 So Mr. Stanton, do you wish to make an opening
14 statement in this matter?

15 MR. STANTON: Your Honor, I do have a brief
16 presentation to make. I'm happy to proceed there. Of
17 course, if there's other, I guess, opening statements from
18 the parties I could defer to whatever the Court would like,
19 but I do have a brief presentation I'd like to make on behalf
20 of the monitoring team.

21 THE COURT: I think that we're ready to proceed
22 with that. And of course, Mr. McMullen will be second and,
23 of course, Mr. Castelli third in that regard. These should
24 be relatively short, and I understand that no one's
25 anticipating something more than probably -- I'm not sure how

1 long. How long, Mr. Stanton? I guess I should ask that
2 first.

3 MR. STANTON: We'll try to be as brief as
4 possible, Your Honor, I think 10 to 15 minutes. Closer to
5 maybe 15 minutes, just kind of a brief update to the Court
6 and then to the observers, Your Honor.

7 THE COURT: That's certainly fine. And you may
8 proceed.

9 MR. STANTON: Thank you, Your Honor. And may it
10 please the Court and certainly to counsel for both parties,
11 Plaintiff and Defendants in this case. Your Honor, my team
12 and I, we're here today to present testimony and evidence
13 that chiefly concerns two issues. First, the reasons that
14 have been offered for modifying the Kendrick Consent Decree
15 and secondly, the proposed modifications themselves. And
16 getting to this point, Your Honor, as you know, has not been
17 easy. As the Court is aware, the lawsuit that brings us here
18 today alleged that the City violated the Kendrick Consent
19 Decree, which was designed to protect freedom of speech,
20 freedom of expression and other First Amendment freedoms in
21 several ways.

22 Now, there were allegations, Your Honor, as
23 you're aware, of fake or undercover social media accounts,
24 spying on activists who were doing nothing illegal and
25 sharing community members personal information with other law

1 enforcement and non law enforcement agencies. And in an age,
2 Your Honor, of rapidly increasing technology and rapidly
3 diminishing privacy, these allegations were indeed troubling.

4 And so when the evidence established at the trial
5 before this Court, Your Honor, in 2018 that many of these
6 allegations were, in fact, true, the Court imposed five
7 sanctions and appointed me as the independent monitor and the
8 monitoring team of experts that you will hear from on today
9 and throughout this hearing. And to assist with restoring
10 Your Honor, you appointed us to assist with restoring the
11 City to full compliance with the Kendrick Consent Decree.

12 And to that end I'd like to just take a brief
13 moment, Your Honor, to provide a synopsis of the work of the
14 monitoring team. Since our appointment by this Court in
15 December of 2018, Your Honor, we have been very active and
16 engaged. We have filed seven reports, six of which have been
17 made available to the public.

18 We requested and received and reviewed --
19 reviewed nearly two gigabytes of data from the City and the
20 ACLU of Tennessee, and I'm told, Your Honor, that that's the
21 equivalent of more than 250,000 pages of text. Your Honor,
22 we've exchanged more than 5800 internal and external e-mails.
23 We've conducted more than 70 weekly monitoring team
24 conference calls and additional ad hoc calls as necessary.

25 Likewise every week, Your Honor, we have been on

1 calls, over 70 calls since our inception, Your Honor, with
2 the City of Memphis and counsel for the City. And we've also
3 had the ACLU, the Plaintiffs in this case, to join in on ad
4 hoc calls as well and as needed for both parties.

5 Your Honor, we've conducted seven in-person
6 monitoring team members, as you're aware. The testimony will
7 show that we have experts, nationally-renowned experts from
8 across the country on our team. Those meetings took place in
9 February, April and July and August and November of 2019, as
10 well as most recently, Your Honor, March 10th of this year,
11 2020.

12 We've met in person or telephonically or
13 virtually with the following, Your Honor, the following
14 Memphis Police Department personnel. Beginning with Police
15 Director Michael Rallings. We've met with Lieutenant Colonel
16 David Rudolph. Numerous times with Deputy Chief Don Crowe
17 and Major Darren Goods, who's head of the Multi-Agency Gang
18 Unit. We've also met on a number of occasions, Your Honor,
19 with police counsel and advisor Zayid Saleem more than a
20 dozen members of the MPD's command staff.

21 We've taken a tour of the Real Time Crime Center
22 at the Memphis Police Department's Training Academy. And
23 speaking of the Training Academy, Your Honor, we've actually
24 been boots on the ground and observed consent decree
25 trainings at the Memphis police academy. We've consulted

1 with social media platforms, such as facebook and facebook's
2 legal and public policy and law enforcement teams as well as
3 law enforcement at the agencies such as the FBI.

4 Your Honor, we've watched and maintained the
5 monitoring team's website known as memphisdpdmonitor.com. I'm
6 happy to report, Your Honor, we've seen an uptick in traffic
7 to the website. We've engaged with the community in sharing
8 vital information and trying to be as transparent, as I know
9 that's important to this Court as possible with proceedings
10 in our work. In fact, we posted public comment procedures
11 and protocols in our new, quote, trial and public comment
12 page on our website, and we've notified the media and
13 community contacts about those protocols.

14 We've appeared before this Court, as you're
15 aware, Your Honor, either in person or telephonically or
16 otherwise brought matters to this Court's attention on more
17 than 20 occasions. We've conferred via e-mail, telephone and
18 even through our website, met in person with dozens of
19 community members. And I will say, Your Honor, that I'm
20 unaware of that every individual -- there's not one
21 individual that I'm aware of or community or organization
22 group that has reached out to us, many telephonically, via
23 e-mail or our website that wanted to sit down and meet with
24 us, share concerns, share information, share their thoughts
25 about the Consent Decree that we did not provide that

1 opportunity to.

2 And many of those individuals -- organizations
3 we've shared those names. There were others that wanted to
4 remain anonymous, Your Honor. And so again, we're very
5 pleased with the outreach in the community and those who have
6 contacted us to share their opinions as we do our work.

7 Your Honor, we've actually done things
8 untraditionally. As an example, I participated in a Facebook
9 Live interview with a grassroots organizer here in the City
10 of Memphis to share the information that we are -- we have
11 and the work that we're doing. Numerous interviews with
12 local media and national media, Your Honor, that has gotten
13 attention of this case.

14 Your Honor, we've hosted three community
15 engagement forums, the first being in July of 2019, the
16 second in November of 2019 and the most recent March 10th of
17 this year. If I could just take a moment, Your Honor, these
18 community engagement forums have been vitally important to
19 the work that we do. And again, I have to commend the
20 citizens, those that have taken their time out on a Tuesday
21 or Wednesday evening and come out and shared, listened in and
22 quite frankly told us how they really feel about the Consent
23 Decree and their experiences.

24 We've learned a lot from our -- between the first
25 community engagement forum and the second, Your Honor. In

1 fact, we saw an uptick of nearly threefold in participants,
2 and a lot of that, Your Honor, was simply because of the
3 advice and a lot of the suggestions that we received from
4 members of the community. And so we again, took more of a
5 atypical approach. We were told that some people don't go to
6 the Internet, or oftentimes people won't read a press release
7 or look at the general media to find out what's going on.
8 And so we've utilized a lot of the partnerships and contacts
9 and community members to notify their contacts, and we did
10 see an uptick.

11 We provided more information. We didn't want to
12 assume that people had been to our website. So we had
13 materials in hand at that second meeting. And we were very
14 pleased with the turnout. I want to say thank you to
15 Dr. J. Lawrence Turner, who provided his facility at the
16 church, Mississippi Boulevard Christian Church, which is
17 centrally located and was very accessible to the Memphis
18 community as a whole.

19 We did see, Your Honor, a downtick for our
20 March 10th community forum, which was held at the Ben Hooks
21 library, main library on Poplar. We believe, Your Honor,
22 amongst a number of things that the looming pandemic was one
23 of the reasons on March 10th that we did not have as large of
24 a turnout and participation at the third community forum.

25 Your Honor, we've met with persons and members of

1 Memphis, a number of groups, I've named just a couple. I've
2 highlighted here the Memphis Shelby County Crime Commission
3 and their leaders as well as the Memphis Interfaith Coalition
4 and hope organization, also known as MICAH.

5 Your Honor, we've submitted to the Court comments
6 from community members on four separate occasions.

7 September, October of 2019 as well as in May of this year,
8 Your Honor. You've made that abundantly clear to the
9 community in court and certainly to the monitoring team and
10 the parties that you want to hear from the members of the
11 community, and we're pleased that a number of organizations
12 or individuals have shared that information with us or
13 directly with you, Your Honor, via e-mail, via US mail, as
14 well as, you know, we've received multiple information,
15 pieces of information in submission to audio and video format
16 from members of the community.

17 Your Honor, we've retained and worked with
18 Dr. Sheila Peters of Fisk University to schedule and conduct
19 focus groups. We provided realtime responses to requests for
20 authority or authorization, also known as RFAs for discreet
21 MPD activity or clarifications regarding the same on 25
22 occasions just for the observers. Again, these are items,
23 Your Honor, that you set up. The Court called them framework
24 for when the City has realtime issues.

25 You've designated me and authorized me to serve

1 in a special master capacity, so we've had a number of
2 issues, over two dozen, Your Honor, whether it's two o'clock
3 in the afternoon or sometimes as early as two o'clock in the
4 morning that the Memphis Police Department and its counsel
5 wanted clarification on were they within the framework and
6 the tenets of the Kendrick Consent Decree. And again, we
7 have a process that you designed that we were able to turn
8 around and give them realtime information and the authority
9 so not to impede upon public safety.

10 We've also communicated, Your Honor, to the
11 Court, and you've heard me say this before. I think it's
12 worth repeating again. One of the recommendations that we've
13 consistently heard from the community, and that is that the
14 Court considers adding one or more members of the community
15 to the monitoring team. Your Honor, obviously we will remain
16 deferential to the Court in this regard. It may be that once
17 this hearing is concluded and these proceedings are concluded
18 and as this team transitions into an audit and compliance
19 phase that the Court may consider that request from the
20 community.

21 Now, during this trial you will hear testimony
22 from all four subject matter experts on the monitoring team
23 as well as from Dr. Sheila Peters. Dr. Peters is a clinical
24 psychologist and professor at Fisk University and facilitator
25 and lead investigator for the focus groups in this matter.

1 The City and the ACLU, as you know, Your Honor,
2 they've recently completed several sessions of mediation
3 sanctioned by this Court. I'm pleased to report that there
4 were a very robust, thorough series of dialogue, discourse
5 and even a debate, meaningful debate. The parties now will
6 be walked into 17 disputed issues as it relates to the
7 Consent Decree and were able, Your Honor, after a series of
8 more than four mediation sessions and nearly three and a half
9 weeks of, again, very robust dialogue were able to come to an
10 agreement on all but one issue. And that issue, Your Honor,
11 is Section I. And that is something obviously that we will
12 take up in our presentation, Your Honor, on behalf of the
13 monitoring team.

14 But again, I want to commend the ACLU, having --
15 you appointed me to serve as the mediator, Your Honor, and
16 having served and worked closely along and put a lot of long
17 hours in, Your Honor, for both the ACLU and the City for
18 making such a strong and good faith effort in working in a
19 very collaborative manner to find common ground without, most
20 importantly, Your Honor, compromising the tenets and the
21 spirit of the Kendrick Consent Decree.

22 But, again, my team on today and throughout these
23 proceedings will present testimony regarding all aspects of
24 the Consent Decree, as well as the parties' proposed
25 modifications to assist this Court in determining whether,

1 and if so, to what extent modification of the Consent Decree
2 is appropriate.

3 So first, Your Honor, you'll hear from, as I
4 mentioned earlier, Rachel Levinson-Waldman. Ms. Waldman is a
5 lawyer with the Brennan Center for Justice and the team's
6 public policy and social media expert. She will testify
7 regarding the City's proposed social media policy. The
8 City's compliance with its social media reporting obligations
9 under Sanction 5 of this Court's order and impressions from
10 community members.

11 Next, Your Honor, you'll hear from Dr. Theron
12 Bowman. Dr. Bowman is a former police chief of Arlington,
13 Texas and a professor and the team's law enforcement and
14 police practices expert. Dr. Bowman will discuss where the
15 Kendrick Consent Decree fits within the national context of
16 consent decrees as well as address some of the offered
17 rationales for modifying the Consent Decree.

18 As I mentioned earlier, next you'll hear, Your
19 Honor, from David McGriff. Mr. McGriff is the former deputy
20 commissioner of the Tennessee Department of Safety & Homeland
21 Security. And Mr. McGriff will discuss the monitoring team's
22 audit and compliance plan.

23 And finally, Your Honor, you'll hear from John
24 Henegan, the First Amendment lawyer and the team's
25 constitutional law expert, who will discuss each of these

1 party's proposed modifications to the Kendrick Consent
2 Decree. Finally, Your Honor, we trust that our presentation
3 will be helpful to the Court and informative to the public.
4 Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Stanton.

6 Mr. McMullen, do you wish to make a brief opening
7 statement on behalf of the City? And again, you're not
8 required to. It's entirely up to you.

9 MR. MCMULLEN: Yes, Your Honor. I would like to
10 make a brief three to five-minute statement on behalf of the
11 City.

12 THE COURT: Yes, sir.

13 MR. MCMULLEN: 18 months ago we filed a motion
14 for modification. We came to the conclusion that we did not
15 want to base that motion on hypotheticals. We asked the
16 Court to delay the motion in order for us to live under the
17 Consent Decree as interpreted. We realized we needed clarity
18 for the officers and the citizens and to modernize the
19 Consent Decree to give the officers the clarity on how to
20 operate and allow all the citizens to know what the Consent
21 Decree meant in laymen's terms.

22 We realize today there's a nationwide distrust of
23 the police, and we therefore withdrew the part of our motion
24 asking to vacate the Consent Decree. What we have before us
25 today is our motion to modify the Consent Decree to

1 incorporate 21st century policing, to match 21st century
2 policing with the 1978 Consent Decree.

3 We operated under the Consent Decree for over a
4 year and had a number of issues that we addressed with the
5 Monitor, with the Court and with the ACLU. That time period
6 that -- which caused us to work together and allowed the ACLU
7 to see the issues that we faced, allowed us to understand
8 better the issues that the ACLU had with police operations,
9 and with input with the Monitor, we were able to mediate most
10 of the issues. I think the Monitor mentioned in his
11 statement, there were about 17 issues of disagreement, and we
12 came to an agreement on about 16 of those. And we put
13 together a joint proposed modification of the Consent Decree.

14 And there were three things, overarching things,
15 that we considered in modifying the Consent Decree. One, we
16 wanted clarity. We wanted a layperson to be able to read the
17 Consent Decree and know exactly what it meant. We wanted to
18 modernize it. We wanted to be able to use 21st century
19 policing and still comply with the 1978 Consent Decree. And
20 then we wanted to codify that information and those practices
21 into a document that everyone could read and understand.

22 As I said before, we mediated those issues, and
23 we came to an agreement on all issues except Section I, which
24 is a restriction on joint operations. And we are here today
25 to put on proof of the need for modifications, the reasons

1 for the modifications that we face and to put on proof as to
2 how we think Section I should be applied today in the 21st
3 century -- in 21st century policing. I'm hopeful that the
4 Court will consider the agreement we have had with the ACLU,
5 and we're hopeful that the Court will consider our
6 recommendations for Section I under the Consent Decree.

7 Thank you, Your Honor.

8 THE COURT: Certainly. Thank you.

9 And then, Mr. Castelli, on behalf of ACLU?

10 MR. CASTELLI: Yes, Your Honor. A brief
11 statement. I think it's important at the beginning of this
12 week's proceedings for the Court to understand kind of the
13 ACLU's approach to the proposals that we've agreed to with
14 the City and with the help of the Monitor. So you know,
15 first of all, the original action grew out of the enforcement
16 action, and this Court found that indeed, the City had
17 violated the decree and filed several instances of contempt.

18 And I think that demonstrated at the time and
19 demonstrates now the importance of this Consent Decree and
20 the constitutional rights that it protects. But when the
21 Court rendered its order in October 2018, the Court
22 recognized that the decree was old. It was 40 years old.
23 The terminology was somewhat outdated. But recognized the
24 importance of the concepts that the decree stood for and the
25 protections, the constitutional rights that it afforded.

1 We took the Court's words to heart about some of
2 the outdated language of the Consent Decree, the discussion
3 about the advances in technology since 1978, that the decree
4 probably didn't or certainly didn't consider at the time
5 because they didn't exist. And we took that approach into
6 any negotiations and discussions or debates we had with both
7 the monitoring team and with the City.

8 I think we benefitted from the year of the
9 monitoring team's work when the City asked for the stay of
10 this to really see what the issues were, how they played out
11 in real time. Benefitted from the Monitor's ability to go in
12 and get the information without having to get that
13 information through a discovery process. And then get the
14 benefit of the experts on the monitoring team, who could
15 analyze that information and then let us know how this works,
16 how it works in other departments around the country. Those
17 presentations have been made to the Court over the course of
18 the last year in certain areas.

19 So our approach to the proposals that we've
20 submitted to the Court has really been about trying to
21 preserve the original protections and the original language
22 of the Consent Decree. But to identify areas where there
23 needed to be updated language to take into account new
24 technologies or new ways of doing things. For example, the
25 way information may have been gathered and cataloged in 1978

1 has certainly changed in the digital age. And dealing with
2 things like the use of cameras, Blue CRUSH cameras, the use
3 of Internet and social media.

4 And so we took -- we went in with the approach of
5 instead of totally reconstructing the Consent Decree, let's
6 keep as much of this original language as we can, original
7 protections as we can, but add to it so that we're taking
8 into account what is happening in today's society with regard
9 to those technological advances and changes.

10 Several -- both the Monitor and Mr. McMullen
11 mentioned the 17 items that were in dispute. I think it's
12 important to know that we didn't come to an agreement that
13 led to an actual change on all 17. Some of those we agreed
14 that there didn't need to be a change. So the parties agreed
15 no, we do not need to add something to the Decree to resolve
16 that issue. We need to leave it as is.

17 And again, as has been mentioned, the one issue
18 that we were unable to come to an agreement on is Section I,
19 which is about joint operations. The ACLU's position on that
20 is simply the language in the Decree we feel should remain
21 intact. That that language is clear. And the Court has
22 interpreted that language. So we believe that the -- with
23 regard to any concerns about there being any
24 misunderstandings of what Section I does, that has already
25 been resolved by the Court through the interpretation of the

1 Decree and this Court's various orders over the course of the
2 last year.

3 And so what we're asking the Court is with regard
4 to Section I, to leave the language as is. But with regard
5 to some of the proposals that the City and the ACLU have
6 presented, that the Court accept those. Thank you, Your
7 Honor.

8 THE COURT: Thank you, Mr. Castelli. We are now
9 ready to proceed with our first witness. Let me tell you
10 about the schedule for the day. We have to be mindful, but
11 we will take breaks during the day. We will take a break
12 approximately every hour and a half. It may be a little
13 different. And when we take those breaks, we will probably
14 take a 15-minute break. That may seem a little long, but
15 there are a lot of people involved in the proceeding, and
16 that seems appropriate. So you'll be able to plan on breaks
17 at an appropriate time.

18 We're going to go, of course, until about 11:00
19 on our first witness. And when we find a natural time to
20 stop, then we will stop as to that witness, take that
21 15-minute break and then resume about 11:15. And of course,
22 we'll go about -- and it's going to be about 45 minutes to an
23 hour in that next session. So you'll have to have a way to
24 think about that.

25 We will take a short lunch break because people

1 need to have a break at that time. And it -- but it will be
2 relatively short. It will probably be about 40 to
3 45 minutes, depending on our exact timing. That's some
4 guidance for you.

5 We will conclude the day at approximately
6 five o'clock and will resume tomorrow at nine o'clock if that
7 is feasible so that we can conclude the case in a reasonable
8 time frame. But for everyone who's not familiar with court
9 proceedings -- I know all of the parties are -- there are
10 always breaks because we have staff, and we have people who
11 are working around us all the time. And people need a short
12 break at those times. So that's how that will work. And
13 that may help assist those who are listening and thinking
14 about how they want to think about their day.

15 Now, Mr. Stanton, you may call your first
16 witness, and we will have the witness sworn in.

17 MR. STANTON: Thank you, Your Honor. And at this
18 point, Your Honor, I'm going to turn things over for the
19 first witness for examination by counsel to the monitoring
20 team. He's been a tremendous asset and credit to our team
21 over the last 18 months and that's Mr. Will Perry, Attorney
22 Will Perry, Your Honor.

23 THE COURT: Certainly. Mr. Perry, and you may
24 call your first witness.

25 MR. PERRY: Thank you, Your Honor. We would like

1 to call Rachel Levinson-Waldman.

2 THE COURT: All right. And Ms. Levinson-Waldman,
3 we will need to see you on the screen in just a moment, at
4 which time you'll need to raise your right hand, and you will
5 be sworn in by Mr. Sample.

6 Mr. Sample, you may proceed.

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RACHEL LEVINSON-WALDMAN,

**was called as a witness and having first been duly sworn
testified as follows:**

THE COURT: Counsel may proceed.

MR. PERRY: Thank you, Your Honor.

DIRECT EXAMINATION

QUESTIONS BY MR. PERRY:

Q. Ms. Levinson-Waldman, what do you do for a living?

A. I'm a lawyer.

Q. Where did you go to law school?

A. I went to the University of Chicago Law School.

Q. Before that, where did you go to college?

A. I attended Williams College.

Q. What did you study at Williams?

A. I was a religion major.

Q. Did you know when you were in college that you wanted
to be a lawyer?

A. I started to think about it then. I actually took
some classes on constitutional law while I was in college
that I found really interesting. I wanted to take some
(inaudible) in college and my next step, so I was out of
school for about four years after college.

Q. What did you do during that interim period between
college and law school?

1 A. I worked in Seattle and primarily focusing on domestic
2 violence-related issues.

3 Q. What made you leave that work and go to Chicago to law
4 school?

5 A. You know, I was sort of ready for the next step, and I
6 was ready to do something maybe that wasn't direct services,
7 and pursuing a law degree seemed like a good way to sort of
8 think about, you know, the next avenue of public service.

9 Q. How did you know -- did you know anything about
10 University of Chicago's reputation when you chose that law
11 school?

12 A. I did. My father is a constitutional law professor.
13 He was a long time professor at the University of Texas law
14 school. So when we were talking about law schools, he
15 certainly would have been very happy if I returned home to
16 Texas. But he was very enthusiastic about Chicago and about
17 sort of its reputation for being (inaudible).

18 Q. Did your dad encourage you to attend law school?

19 A. I can't say he encouraged it. There were certainly a
20 lot of conversations around the dinner table about law and
21 justice, so it probably wasn't a huge surprise that I ended
22 up going.

23 Q. Other than your dad, have you got any other lawyers in
24 your family?

25 A. My husband is a lawyer as well. We met in law school.

1 Q. What kind of work does your husband do?

2 A. So he's done a variety of things. He formerly served
3 in the labor department under President Obama. And he helped
4 run the D.C. attorney general's office for about five years.
5 He currently -- he founded several years ago and runs an
6 organization called Tzedek DC, which provides free civil
7 legal aid to poor residents of the District of Columbia who
8 are in debt crisis.

9 Q. You and your husband have any children,
10 Ms. Levinson-Waldman?

11 A. We do. We have a son Eli, who just turned six and a
12 daughter Sarah, who's just about nine.

13 Q. Do you think Eli and Sarah will continue the family's
14 legal traditions?

15 A. Unclear but I will say they are certainly honing their
16 negotiating skills.

17 Q. Now, Ms. Levinson-Waldman, what's your present
18 employer? Where do you work right now?

19 A. I work for the Brennan Center for Justice at NYU law
20 school.

21 Q. Did you start at the Brennan Center immediately after
22 you graduated from law school?

23 A. I did not, no.

24 Q. What did you do first?

25 A. I clerked for a federal judge, for Margaret McKeown,

1 who's a judge on the US Court of Appeals for the Ninth
2 Circuit.

3 Q. What does it mean to clerk for a judge?

4 A. When you clerk for a judge, you are assisting them in
5 their management of the cases. So for an appeals court
6 judge, a federal appeals court judge, which is who I was
7 clerking for, it means a lot of research and writing. So
8 researching the cases that are coming before the judge. The
9 cases that the lawyers are relying on. Writing memos for the
10 judge and his or her colleagues on the bench to prepare them
11 for oral arguments. And then helping to draft opinions,
12 concurrences, dissents, things like that.

13 Q. How long did you clerk?

14 A. I clerked for a year, which is sort of a fairly
15 standard clerkship term.

16 Q. Was the Brennan Center your next job after your
17 clerkship?

18 A. No.

19 Q. Where did you go in between?

20 A. My clerkship -- my first position after my clerkship
21 was with the US Department of Justice. I served in the civil
22 rights division as a trial attorney.

23 Q. How long were you with the DOJ?

24 A. I was with DOJ for about two and a half years.

25 Q. What kinds of cases did you work on there?

1 A. So I was in a section of the civil rights division
2 called the Housing and Civil Enforcement Section. And so
3 primarily we were working on Fair Housing Act cases. So what
4 that means is circumstances where people were being
5 discriminated against in housing on the basis of race, color,
6 national origin, religion, familial status or disability.
7 The Department of Justice could sue or intervene to vindicate
8 the rights of people who were being discriminated against.

9 Q. How did you enjoy that experience?

10 A. It was really gratifying to work for the civil rights
11 division. It was really a huge honor to have the opportunity
12 to work there. Despite the fact that I'm in court today, I
13 did not love litigating, so I was looking for another way to
14 use my legal training and use my legal degree.

15 Q. Did you find such a way?

16 A. I did.

17 Q. Where did you go after DOJ?

18 A. So from DOJ I joined an organization called American
19 Association of University Professors, which is a membership
20 organization for faculty members at colleges and universities
21 across the country. It's dedicated really to the
22 preservation and defense of academic freedom.

23 Q. What did you do for the association?

24 A. I was in-house counsel. So the organization had a
25 fairly small in-house counsel's office. I was associate

1 counsel for the first year that I was there. And then I was
2 senior counsel also working with an outside general counsel
3 for the remainder of my time at the AAUP.

4 Q. How long was that time? How long were you there?

5 A. I was there for almost exactly five years.

6 Q. When you left AAUP, is that when you joined the
7 Brennan Center?

8 A. Yes. Right after my maternity leave. So I was on
9 maternity leave, then I joined the Brennan Center in January
10 of 2012.

11 Q. Have you been there ever since?

12 A. I have.

13 Q. Ms. Levinson-Waldman, what is the Brennan Center?

14 A. Brennan Center was founded about 25 years ago. It was
15 founded when Justice William Brennan was stepping off the
16 Supreme Court. And his friends and family and former clerks
17 wanted to establish a center that was dedicated to his
18 progressive vision of the Constitution, so the Brennan Center
19 was set up.

20 It's affiliated with NYU law school, although I'm in
21 D.C. It's a nonpartisan law and policy institute. It's, I
22 would say, about 130 employees probably split between our New
23 York office, which is where the majority of the employees are
24 in our D.C. office. A lot of lawyers and also economists,
25 researchers, things like that.

1 Q. Do you work in a specific program or division of the
2 Brennan Center?

3 A. I do. So the Brennan Center has three different
4 programs overall. There's our democracy program, which
5 focuses on the ballot, free and fair elections, campaign
6 finance reform, independent judiciary. There's our justice
7 program which focuses on ending mass incarceration. And then
8 I'm in our Liberty & National Security Program, also called
9 shorthand LNS program.

10 Q. What does that program focus on?

11 A. So historically, the LNS program has focused on post
12 9/11 civil liberty issues. So privacy, secrecy,
13 surveillance, domestic intelligence gathering, overt
14 classification, Islamophobia, kind of the range of civil
15 liberties issues that arose and certainly were sharpened in
16 the wake of 9/11. I would say in the last probably six years
17 or so our work has expanded also to cover a number of issues
18 relating to policing and technology, civil liberties and
19 civil rights policy issues surrounding the use of policing
20 and technology.

21 Q. What is your specific role with LNS?

22 A. Sure. So my title with the LNS program is senior
23 counsel.

24 Q. What does that role entail?

25 A. It entails a variety of things. So one of the Brennan

1 Center's kind of stock-in-trade is reports. Policy reports
2 to educate. Policy makers to educate the public, to educate
3 kind of other interested experts on issues. So they do
4 research and writing for reports and law review articles. We
5 put out white papers. I do writing for more sort of popular
6 audiences, you know, op-eds and explainers to do public
7 education on our issues.

8 We often submit comments to federal agencies, if an
9 agency is considering putting a rule in place or initiating
10 some kind of information collection, we would send the
11 comments through a notice-and-comment process. We submit
12 public records requests on a variety of issues. And I also
13 assist in overseeing the junior staff and some of the work in
14 the program.

15 Q. As senior counsel to the LNS program, does the Brennan
16 Center put you forward as an expert in any particular areas?

17 A. It does, yes.

18 Q. What are those areas?

19 A. Primarily issues relating to use of technologies and
20 especially sort of -- not -- especially but not exclusively
21 surveillance technologies. So I would say that's been
22 predictive policing technologies, use of body-worn cameras,
23 social media monitoring and then things like license plate
24 readers, cell phone trackers, surveillance cameras, kind of a
25 range of other surveillance tools and technologies used by

1 police.

2 Q. Have you participated in any media interviews about
3 the subjects that you mentioned?

4 A. I have, yes.

5 Q. What are some of those? By what medias?

6 A. Sure. So some of the outlets that I've spoken to and
7 been quoted in have included the New York Times, the
8 Washington Post, the Wall Street Journal, Wired and Ars
9 Technica.

10 Q. Has any of your written work been published?

11 A. Yes, it has.

12 Q. What are some examples of places where your work has
13 been published?

14 A. So they include Washington Post as well. Wired, the
15 Atlantic, The New Republic and USA Today.

16 Q. Ms. Levinson-Waldman, have you specifically authored
17 any scholarly publications as part of your work at the
18 Brennan Center?

19 A. I have, yes.

20 Q. Thank you. Now, Ms. Levinson-Waldman, did you receive
21 a set of premarked exhibits earlier this week?

22 A. I did.

23 Q. I'd like you to look at MT trial Exhibit 1. Just take
24 a look at that for a moment.

25 A. I'm pulling it up. Okay. I've got it.

1 Q. Do you recognize that document?

2 A. I do.

3 Q. What is it?

4 A. The title is Selected Recent Publications of Rachel
5 Levinson-Waldman.

6 Q. Did you help prepare that document?

7 A. I did.

8 MR. PERRY: Your Honor, I'd like to move MT trial
9 Exhibit 1 into evidence.

10 THE COURT: It's marked and received as one in
11 the case without objection.

12 (WHEREUPON, the above-mentioned document was
13 marked as Exhibit Number 1.)

14 MR. PERRY: Thank you, Your Honor. With your
15 permission, I'm going to share my screen with the Court now
16 so that all viewers can see MT trial Exhibit 1.

17 THE COURT: Yes, sir. Thank you.

18 BY MR. PERRY:

19 Q. Now, Ms. Levinson-Waldman, Exhibit 1 lists six
20 publications. Have you written all of those publications
21 during your time with the Brennan Center?

22 A. Yes, I have.

23 Q. Are you the sole author of these publications, or did
24 you have coauthors?

25 A. I'm the sole author on five of them. On the second

1 publication that's listed, I had several coauthors who are
2 colleagues at the Brennan Center.

3 Q. Would you read the title of the first listed
4 publication.

5 A. Yes. It's Private Eyes, They're Watching You: Law
6 Enforcement's Monitoring of Social Media.

7 Q. And where was that article published?

8 A. That was published in the University of Oklahoma Law
9 Review.

10 Q. If you would go ahead and read the title of the
11 remaining publications on that exhibit.

12 A. The second publication is a Brennan Center report
13 titled Social Media Monitoring, published in 2019. The third
14 one is a law review article titled Government Access to and
15 Manipulation of Social Media: Legal and Policy Challenges,
16 published in the Howard University Law Review in 2018. Below
17 that is a white paper I authored for the Brennan Center
18 titled Cellphones, Law Enforcement, and the Right to Privacy.
19 How the Government is Collecting and Using Your Location
20 Data, published in 2018.

21 The next is a law review article published in the
22 Emory Law Journal in 2017, titled Hiding in Plain Sight: A
23 Fourth Amendment Framework For Analyzing Government
24 Surveillance in Public. And the final one is a report that
25 was published by the Brennan Center titled What the

1 Government Does With Americans' Data, published in 2013.

2 Q. Thank you. Ms. Levinson-Waldman, do any themes
3 connect these six articles?

4 A. Yes. So the theme that connects these, you know, in
5 some ways, the titles show a major theme, which is the use of
6 surveillance technologies by the Government. And sort of
7 generally the development of technologies and legal and
8 policy issues surrounding those. I think also more
9 generally, they address the notion of kind of the proper
10 balance of information sharing between the Government and the
11 people in the democratic society and the notion that the
12 people should be able to get information about what the
13 Government is doing and the Government gets limited
14 information about what the people are doing unless there's,
15 you know, a reason to conduct something like a criminal
16 investigation.

17 Q. I understand. As far as you are aware, have any of
18 the articles listed here been cited by courts when the courts
19 deal with the subject that the articles discussed?

20 A. Yes.

21 Q. Which of those articles?

22 A. The third one listed, the article in the Howard Law
23 Journal was cited by Judge McCalla in his opinion in
24 October 2018 finding the City in violation of the Kendrick
25 Consent Decree.

1 Q. Very briefly, what is that article about?

2 A. That article is looking at how police use or can use
3 social media. So looking at sort of different mechanisms or
4 different tools for using social media to collect
5 information. To watch what people are doing. To gather
6 information, whether it's criminally related or not. It
7 looks at the constitutional issues that are raised, so
8 focusing especially on First Amendment and Fourth Amendment
9 questions. And then also it sets out some policy
10 recommendations in terms of what appropriate use might look
11 like.

12 Q. Thank you. Now, Ms. Levinson-Waldman, are you here
13 today to testify on behalf of the Brennan Center?

14 A. I am not, no.

15 Q. What brings you here today?

16 A. I am here today as a member of the monitoring team.

17 Q. How did you come to be a member of the monitoring
18 team?

19 A. In probably November of 2018, I received a call from a
20 friend and colleague in D.C., a gentleman named Roy Austin.
21 Mr. Austin is a lawyer, now a lawyer at a law firm in town.
22 He had served as a lawyer in several roles in the previous
23 presidential administration. And he reached out because he
24 knew from Mr. Stanton that Mr. Stanton was under
25 consideration as a potential monitor for this case and that

1 Mr. Stanton was looking to potentially bring somebody onto
2 the team who would bring some expertise on issues related to
3 social media and policing and policy questions.

4 And so Mr. Austin reached out to connect me with
5 Mr. Stanton to have a conversation about that. Him and I
6 spoke in probably early December of 2018 and learned more
7 about the case, about the Consent Decree and Judge McCalla's
8 opinion and the history of the case. And once Mr. Stanton
9 was appointed as the Monitor and we were able to have more
10 conversations about what my role would look like and what the
11 monitoring team was going to be doing and then I received
12 approval from the Brennan Center to join the monitoring team.
13 I joined officially in probably late January of 2019.

14 Q. What is your role on the monitoring team?

15 A. My title is Subject Matter Expert on Public Policy and
16 Social Media.

17 Q. Will you describe for the Court some of the work that
18 you have done in fulfilling that role.

19 A. So as with all of the members of the monitoring team,
20 I have been part of weekly phone conversations. The
21 monitoring team has a weekly call where we're able to touch
22 base about issues that have arisen, questions that are coming
23 in, documents we may be working on. There are documents that
24 we've traded back and forth with the City and with the ACLU,
25 draft policies. And so I've had an opportunity to give input

1 on and suggestions on those policies.

2 There are times when Mr. Stanton has reached out to
3 the monitoring team to solicit input on requests for
4 authorization or requests for information that he has
5 received from the City. I've also worked on providing input
6 on some communications from Mr. Stanton and the team to the
7 City. And I've also conducted research that I've shared with
8 the team on several different issues on policies around use
9 of body-worn cameras at First Amendment-protected events or
10 First Amendment events. Research on social media policies in
11 use by police departments around the country. And also
12 research on policies regarding use of social media by various
13 federal agencies.

14 Q. Have you facilitated meetings with any outside groups
15 or people to help inform the monitoring team's work?

16 A. I have.

17 Q. What groups of people have those been?

18 A. Sure. I helped facilitate a meeting with
19 representatives from facebook to understand more about
20 facebook's policies with respect to law enforcement access to
21 user data as well as policies around use of undercover
22 accounts, use of multiple accounts and generally
23 understanding the different kind of privacy settings and
24 independent access to data up to this point.

25 Q. Did you find that meeting helpful in your work with

1 the monitoring team?

2 A. I did, yes.

3 Q. And did that meeting help inform the testimony that
4 you're giving today?

5 A. It did, yes. In terms of understanding particularly
6 the limitations that facebook sets on use of undercover kind
7 of alias accounts and the limits on the numbers of accounts
8 that any one individual can have.

9 Q. Now, Ms. Levinson-Waldman, the monitoring team has
10 submitted, as you heard Mr. Stanton say in his opening
11 remarks, several periodic reports to update the Court and the
12 public on its work. As the monitoring team's subject matter
13 expert on public policy and social media, have you prepared
14 any specific documents in connection with those reports?

15 A. I have, yes.

16 Q. I'd like you to refer back to the set of documents
17 that you received earlier this week and take a look at MT
18 trial Exhibit 2. Let me know when you have it in front of
19 you.

20 A. Yes. I have that in front of me.

21 Q. Do you recognize that document?

22 A. I do.

23 Q. What is it?

24 A. It's a chart entitled Police Department Policies
25 Regarding Use of Social Media For Investigative Purposes and

1 Situational Assessment.

2 Q. Did you prepare that document?

3 A. I did.

4 Q. Was it submitted as part of the monitoring team's
5 reports?

6 A. Yes.

7 MR. PERRY: Your Honor, at this time I'd like to
8 move MT trial Exhibit 2 into evidence.

9 THE COURT: Marked and received without objection
10 as two.

11 (WHEREUPON, the above-mentioned document was
12 marked as Exhibit Number 2.)

13 MR. PERRY: Thank you, Your Honor. With your
14 permission, I'm going to share my screen with the Court now
15 so that all viewers can see MT trial Exhibit 2.

16 THE COURT: Yes, sir. Go right ahead.

17 BY MR. PERRY:

18 Q. Ms. Levinson-Waldman, can you explain for the Court
19 what this exhibit is?

20 A. Yes. This is an exhibit that compares, I believe,
21 about 17 different policies that are in use by local police
22 departments or sheriff's offices or in one case a fusion
23 center that govern how the department uses social media to
24 collect information. So not for outward-facing kind of
25 public education or public communication purposes, how the

1 department can use social media to gather information or
2 intelligence, conduct criminal investigations, do situational
3 assessment, things like that.

4 Q. Will you take a few moments and help me walk through
5 the different categories in this chart. So the leftmost
6 column is police department. What's that chart? What's that
7 column cover?

8 A. Sure. So that's just showing the name of the
9 particular department that I was looking at to which that
10 specific policy relates.

11 Q. Are all of the departments listed in that column
12 specific to cities?

13 A. So it's cities and counties. It's a combination of
14 police departments and sheriffs' departments. And then
15 there's one fusion center that's listed as well.

16 Q. Okay. We're moving one column to the right. The next
17 title is Title and Link to Policy. What's that?

18 A. That just shows the title of the particular policy
19 that that department uses. And insofar as I was relying on
20 information that was publicly available, so information that
21 was available on line. It shows the link to the particular
22 policy to allow the reader to go and access that original
23 policy itself.

24 Q. We're going to move one, two, three policies to the
25 right to the column that says Specific Rules For Situational

1 Assessment/Awareness Or Other Non Investigative Efforts.

2 What information does that column contain?

3 A. That column was distinguishing between use of social
4 media as part of a criminal investigation to gather
5 information as part of, you know, crime protection or
6 investigating a crime that's being committed or being planned
7 as opposed to what's in this column, the circumstances in
8 which social media might be used to do some kind of other
9 situational assessment, risk assessment, event planning,
10 things like that, where it's not necessarily related to a
11 crime that's in process or being planned, but a more general
12 kind of situational awareness.

13 Q. I'm going to move two more columns to the right. To
14 the column that says, specific language on undercover/covert
15 activity. What information does that column contain?

16 A. That column covers if the policy had language
17 specifically relating to use of an online undercover account.
18 So if they're governed, provided permission for or imposed
19 restrictions on use of alias or other kinds of undercover.

20 Q. Thank you. Now, Ms. Levinson-Waldman, is the Memphis
21 Police Department one of the law enforcement departments
22 that's included on this chart?

23 A. It's not, no.

24 Q. Why not?

25 A. Because there's not yet a finalized publicly available

1 policy on using social media.

2 Q. Have you worked with the City to help develop such a
3 policy?

4 A. Yes. Through the monitoring team, yes.

5 Q. Did the information in this chart inform the work that
6 you and the rest of the monitoring team did as you worked
7 with the City on its own policy?

8 A. Yes.

9 Q. Thank you. I want you to refer back to the set of
10 exhibits that you have there. And I want you to pull up MT
11 trial Exhibit 3.

12 A. Yes. I have that up.

13 Q. Do you recognize that document?

14 A. I do.

15 Q. What is it?

16 A. This is a document that's a chart of federal social
17 media policies. Policies in use by different federal
18 agencies.

19 Q. Did you prepare that chart?

20 A. I did with assistance of a counsel from Butler Snow.

21 Q. Was that chart submitted as part of the monitoring
22 team's reports?

23 A. Yes.

24 MR. PERRY: Your Honor, at this time I'd like to
25 move MT trial Exhibit 3 into evidence.

1 THE COURT: Marked and received as three in the
2 case without objection.

3 (WHEREUPON, the above-mentioned document was
4 marked as Exhibit Number 3.)

5 MR. PERRY: Thank you. With your permission,
6 I'll share my screen, I'll share that document with the
7 Court.

8 THE COURT: Certainly. Go right ahead.

9 MR. PERRY: Scroll down one more page for me.
10 Thank you. That's great.

11 BY MR. PERRY:

12 Q. Now, Ms. Levinson-Waldman, it looks like this chart
13 includes a cover memo from Mr. Stanton to the Court. Did you
14 help prepare that memo?

15 A. Yes, I did.

16 Q. According to that memo, what is the chart that follows
17 it? What does that chart cover?

18 A. Sure. So the title of the chart is Federal Agency
19 Policies Regarding Use of Social Media For Investigative
20 Purposes and Situational Awareness. It covers the social
21 media modeling policies of various federal agencies.

22 Q. Which federal agencies does it cover?

23 A. I'll list them out. The Bureau of Alcohol, Tobacco,
24 Firearms and Explosives, ATF. The Drug Enforcement
25 Administration. The Department of Homeland Security. FBI or

1 the Federal Bureau of Investigation. The Federal Emergency
2 Management Agency or FEMA. The Internal Revenue Service, IRS
3 Criminal Investigations division. The U.S. Marshals Service.
4 The U.S. Postal Inspection Service. The U.S. Secret Service.
5 And the Social Security Administration.

6 Q. Now, Ms. Levinson-Waldman, do all of the agencies
7 listed there have publicly available social media policies?

8 A. They do not, no.

9 Q. Which agencies do have public or available policies?

10 A. The ones that did were DHS, the Department of Homeland
11 Security, IRS, FEMA and FBI, Federal Bureau of Investigation.

12 Q. Now, I'd like you to look at page 2 of that memo.

13 MR. PERRY: Pull up page 2 on the screen.

14 BY MR. PERRY:

15 Q. Now, it looks like quite a bit of page 2 discusses the
16 FBI policies in particular. Why is there so much information
17 here about the FBI policies?

18 A. We focus significantly on the FBI for a couple of
19 reasons. In part, Judge McCalla had posed some questions
20 about the FBI and what their policies were. I think there
21 was a sense that as an agency that focuses on investigation
22 and intelligence, the policies that the FBI has in place
23 could offer a guide or information as to appropriate social
24 media policies. And the FBI has quite a bit of language. So
25 there was also a lot to cover in terms of the description of

1 the FBI policies.

2 Q. Do you have any opinions about the FBI policies?

3 A. I do, yes.

4 Q. Have you testified about those opinions before?

5 A. Yes, I have.

6 Q. What are those opinions?

7 A. My opinion is, you know, it's helpful that the FBI
8 does have a publicly available policy. There are certainly a
9 number of agencies that we've looked at that we were fairly
10 sure do use social media, for which there was nothing that
11 was publicly available. At the same time, I had concerns
12 about the substance of the FBI's policy in terms of what's
13 reflected on page 2 here and also reflected in the chart.

14 The FBI has kind of a structure of investigations, and
15 this dates to the post 9/11 period that includes something
16 called preassessments and also assessments. And these are
17 investigations that are not criminally predicated. There's
18 no individualized suspicion of wrongdoing that's necessary.

19 And at the same time, they allow for the use of fairly
20 intrusive surveillance and other investigative techniques.
21 And so both for the preassessment and for the assessment,
22 there are various kinds of sort of social media monitoring or
23 social media use that are enabled for these categories.

24 Q. Ms. Levinson-Waldman, I'm going to share on the screen
25 now a document called MT trial Demonstrative A. I'm going to

1 scroll to the second page of that document.

2 MR. PERRY: Perfect. That's good. Thank you.

3 BY MR. PERRY:

4 Q. Ms. Levinson-Waldman, do you recognize that document?

5 A. Yes, I do.

6 Q. What is it?

7 A. This is Judge McCalla's sanctions order following on
8 his order finding the City in violation.

9 Q. Now, you can see we're going to scroll slowly from
10 pages 1 to 3 of that document. There are several numbered
11 paragraphs there.

12 MR. PERRY: Let's scroll to numbered
13 paragraph 5 -- sorry 4. Make that 4. Let's stop when we get
14 to 4. Yeah. Let's pull that into the center of the screen
15 if we can do that. That's great.

16 BY MR. PERRY:

17 Q. Now, would you -- I would like you to read number
18 paragraph 4 aloud, please, Ms. Levinson-Waldman.

19 A. Sure. So paragraph 4 says, "The City shall establish
20 written guidelines for the use of manual social media
21 searches and of social media collators in compliance with the
22 Decree. The City shall make these guidelines available to
23 all officers with access to social media collators and to all
24 officers assigned to OHS and RTCC. The City shall submit
25 these guidelines to the Court no later than January 14th,

1 2019, for review and approval."

2 Q. Has the City proposed a social media policy that
3 contains the written guidelines that paragraph 4 requires?

4 A. Yes.

5 Q. Have you had an opportunity to review that proposed
6 policy?

7 A. Yes.

8 Q. How, in your opinion, does the City's proposed policy
9 compare with the FBI guidelines that you were discussing in
10 Exhibit 3?

11 A. The City's proposed policy incorporates the FBI's
12 language in a couple of different ways. One of the most
13 significant elements is that it incorporates the use of the
14 preassessment and assessment categories of investigations,
15 and it pulls the FBI's language of what the categories mean
16 and the kinds of surveillance or other investigative tools
17 that are permitted in them. It also uses some of the FBI's
18 language relating to limitations on or procedures for
19 accessing First Amendment-related information.

20 Q. Does the incorporation of the FBI's policies into the
21 City's proposed policies raise any concerns for you?

22 A. It does, yes.

23 Q. What are those concerns?

24 A. So speaking again to the concern about the use of
25 assessments generally, both assessments and preassessments,

1 these are a combination of low level investigations, in that
2 criminal predication isn't required. But as I said, it does
3 enable the use of pretty wide varieties of tools. I'm not
4 aware of other local law enforcement agencies that
5 incorporate this structure. And I think insofar as we've had
6 concerns about the FBI's use of assessments and in fact those
7 concerns have been borne out. There are examples of the FBI
8 misusing assessments to target First Amendment-protected
9 speech.

10 So I think in light particularly of what the Consent
11 Decree is meant to do in terms of protecting the exercise of
12 First Amendment rights, I would have a very significant
13 concern about incorporating the FBI's approach in this way.
14 In addition with respect to the FBI's language about
15 restrictions on accessing First Amendment-protected speech,
16 it does have that language. The FBI has that language, but I
17 believe it's a lower standard. It's a lower floor than the
18 one that the Kendrick Consent Decree already sets out. And
19 that language would be intention with the requirements of the
20 consent.

21 Q. Thank you, Ms. Levinson-Waldman. Aside from the
22 concern that you've mentioned about assessments, does
23 anything else bother you about the incorporation of the FBI
24 policies into the City's proposed social media policy?

25 A. I mean, I think in general in terms of concerns about

1 the social media policy, it also would authorize the use of
2 impersonating accounts. I think of impersonating an account
3 as being one that pretends not just to be somebody that I'm
4 not. Not just a situation where, for instance, if I were
5 setting up an account I would make up a name and find, you
6 know, some picture out there to try to connect with somebody
7 on social media. But where I actually pretend to be somebody
8 else entirely. A person that's known to the person I'm
9 trying to connect with. And I have a concern that the policy
10 doesn't require that impersonating accounts only be used
11 where the person being impersonated has given their consent.

12 Q. Ms. Levinson-Waldman, I want you to refer to the list
13 of exhibits that we sent you earlier this week again, and I
14 want you to take a look at MT trial Exhibit 4.

15 A. Yes. I have that up.

16 Q. Do you recognize that document?

17 A. I do.

18 Q. What is it?

19 A. This is a letter that Mr. Stanton sent to Judge
20 McCalla on January 8th, 2020.

21 Q. Did you help prepare that letter?

22 A. I did.

23 MR. PERRY: Your Honor, I'd like to move MT trial
24 Exhibit 4 into evidence.

25 THE COURT: It's been marked and received without

1 objection as 4.

2 (WHEREUPON, the above-mentioned document was
3 marked as Exhibit Number 4.)

4 MR. PERRY: Thank you. With your permission, I'm
5 going to share that document --

6 THE COURT: You may.

7 MR. PERRY: -- on my screen.

8 THE COURT: Certainly.

9 MR. PERRY: Thank you.

10 Scroll down to the first page, please. Great.
11 Thank you very much.

12 BY MR. PERRY:

13 Q. Now, Ms. Levinson-Waldman, does Exhibit 4 capture
14 concerns that you were expressing a moment ago about using
15 the FBI's policies as a baseline for the City's social media
16 policies?

17 A. It certainly reflects an aspect of that concern, yes.

18 Q. Would you explain to the Court what aspect of that
19 concern this letter addresses?

20 A. Sure. So this letter is in relation to several
21 opinions that were released in October of 2019 from the
22 Foreign Intelligence Surveillance Court, which oversees
23 issues related to kind of implementation and use of the
24 Foreign Intelligence Surveillance Act. And what these
25 opinions demonstrate really revealed for the first time

1 because often very little is known about what's occurring in
2 the context of what I'll also call FISA cases. What it
3 revealed was a couple of things that the FBI had done, had
4 done in violation of the law and guidelines.

5 One was that the FBI had searched information that was
6 collected for national security purposes. So information
7 that's targeted at foreigners overseas but that's known to
8 collect a fair amount of information about Americans. FBI
9 had searched those databases of information, specifically
10 looking for data about Americans but without meeting the
11 required standard of individualized suspicion.

12 So that was a fairly significant violation of both the
13 Fourth Amendment and the limitations in place under FISA.
14 The FBI also had failed to comply with certain documentation
15 and other procedural requirements that had been put into
16 place about how it was going to log and report out the
17 searches that it was doing.

18 Q. Ms. Levinson-Waldman, pending before the Court right
19 now and held in abeyance for these proceedings are two
20 versions of a proposed social media policy for the City. One
21 version incorporates the FBI's policies. The other version
22 does not. Have you reviewed both versions?

23 A. I have.

24 Q. Do you have an opinion about which version the Court
25 should approve?

1 A. I believe the Court should approve the version that
2 does not incorporate the FBI policy information.

3 Q. Thank you, Ms. Levinson-Waldman. I'd like to return
4 us, if I may, to MT trial Demonstrative A, the Court
5 sanctions order. I'm going to put that document back on the
6 screen. We're going to move from paragraph 4 to paragraph 5.
7 We're going to scroll down to paragraph 5.

8 If you would, Ms. Levinson-Waldman, please read that
9 paragraph aloud.

10 A. That paragraph states, "The City shall maintain a list
11 of all search terms entered into social media collators or
12 otherwise used by MPD officers collecting information on
13 social media while on duty. This list shall be filed under
14 seal every three months until the Court orders otherwise.
15 The first filing shall be submitted no later than January
16 14th, 2019 and shall reflect all such social media searches
17 conducted from November 1st, 2018 through December 31st,
18 2018.

19 Q. Now, Ms. Levinson-Waldman --

20 MR. MCMULLEN: Your Honor, this is Bruce
21 McMullen.

22 THE COURT: Yes, sir.

23 MR. MCMULLEN: I'd like to object.

24 THE COURT: All right.

25 MR. MCMULLEN: And the basis is this sanction is

1 already before the Court and is not relevant to a
2 modification hearing. Whether or not -- the only three
3 things that are relevant to the modification hearing is when
4 there's a change of factual conditions making compliance with
5 the Consent Decree onerous. The second is when a Consent
6 Decree proves to be unworkable because of unforeseen
7 obstacles and whether enforcement of the Decree without
8 modification would be detrimental to the public interest. To
9 the extent to whether the City was alleged to have deviated
10 from the Consent Decree are not -- is not relevant.

11 THE COURT: Let's hear from counsel opposite.
12 Yes, sir. Mr. Perry?

13 MR. PERRY: Thank you, Your Honor. I'll say two
14 things in response to that objection. First, as Mr. Stanton
15 outlined in his opening remarks, the first portion of the
16 monitoring team's presentation is about whether the Consent
17 Decree should be modified at all. The City's current level
18 of compliance with the Decree and with the Court's orders is
19 necessarily relevant to that inquiry.

20 Secondly, with respect to the second kind of
21 parameter that Mr. McMullen mentioned, whether the City has
22 complied with the Court's order so far speaks directly to
23 whether its compliance is onerous or not, whether compliance
24 with the Consent Decree is onerous or not. So I think by the
25 City's own admission, this information is relevant to the

1 matters that the Court is discussing today.

2 THE COURT: And reply on that from the City, if
3 any?

4 MR. MCMULLEN: Yes. Yes, Your Honor. If we were
5 seeking to vacate the Consent Decree, it is relevant to the
6 extent whether we substantially complied with the Consent
7 Decree. But as the Court knows, we withdrew our motion to
8 vacate the Consent Decree, and there are only three matters
9 to be considered for modification. And I've enumerated those
10 three matters before. And so whether or not there was
11 alleged deviation from the -- from your Court's order, which
12 is not the Consent Decree, issue a Court's order, whether
13 there was alleged deviation from the Court's order is not
14 relevant to modification.

15 THE COURT: It appears that it's necessary for
16 the purpose of adequate context of our -- and also put on the
17 issue of previous compliance. I understand that the City's
18 objection is on a strict relevance question. However, that
19 is interpreted broadly. And I'm going to allow Mr. Perry's
20 broad leeway or some leeway in that regard, assuming that we
21 don't spend our whole time on this issue. Is this something
22 we can handle relatively efficiently and reasonably promptly,
23 Mr. Perry?

24 MR. PERRY: Thank you, Your Honor. This
25 discussion of this matter will be rather brief.

1 THE COURT: Go right ahead.

2 MR. PERRY: Thank you, Your Honor.

3 THE COURT: Certainly.

4 BY MR. PERRY:

5 Q. Ms. Levinson-Waldman, I'm going to have you read that
6 paragraph again. It's still on the screen there. What I
7 would like you to do is refer to that set of documents that
8 we sent you earlier this week. And I want you to look at MT
9 trial Exhibit 5. Let me know when you have that document
10 before you.

11 MR. MCMULLEN: Your Honor, I have no objection to
12 the document in substance, but as we spoke before, under the
13 subject of investigation, there are a number of names that we
14 feel should be redacted.

15 THE COURT: Right. I don't disagree. We need to
16 be thoughtful in terms of that, and the Court's initial
17 comments dealt with the issue of redaction. I'm looking to
18 make sure at this time we not display anything that should be
19 redacted. And then -- but we can go ahead as long as we can
20 avoid displaying materials that have redactable information,
21 so --

22 MR. PERRY: Your Honor, we'll only be showing the
23 cover letter --

24 THE COURT: Sure.

25 MR. PERRY: -- that's a part of that exhibit, and

1 it has no personal information in it.

2 THE COURT: The cover letter is certainly fine.
3 And to the degree that there's other material, I was looking
4 quickly to the degree that there may be some other material,
5 we will allow the redacted version to be submitted, which
6 will be publicly available. All right. Counsel may proceed.

7 MR. PERRY: Thank you, Your Honor.

8 THE COURT: Certainly.

9 BY MR. PERRY:

10 Q. Ms. Levinson-Waldman, we're looking at MT trial
11 Exhibit 5. Do you recognize that document?

12 A. I do.

13 Q. What is it?

14 A. It is a letter that Mr. Stanton sent to Judge McCalla
15 on February 28, 2020.

16 Q. Did you help prepare that letter?

17 A. I did.

18 MR. PERRY: Your Honor, I'd like to move MT trial
19 Exhibit 5 into evidence.

20 THE COURT: Marked and received and certainly
21 we'll peruse the material and make sure that there's nothing
22 ultimately received that should be redacted.

23 (WHEREUPON, the above-mentioned document was
24 marked as Exhibit Number 5.)

25 THE COURT: Yes, counsel may proceed.

1 MR. PERRY: Thank you, Your Honor. I'm going to
2 share my screen with the Court, share that document with the
3 Court.

4 THE COURT: That's fine.

5 MR. PERRY: Thank you, Your Honor. Scroll down
6 past the cover page, please. That's perfect. Thank you very
7 much.

8 BY MR. PERRY:

9 Q. Ms. Levinson-Waldman, please read aloud and for the
10 Court the first paragraph of that letter.

11 A. That paragraph says, "Dear Judge McCalla." Then says,
12 "My team and I recently determined that the City of Memphis
13 has been departing from Sanction 5 of your October 26th and
14 29th, 2018 orders. ECF Numbers 151 and 152. The City has
15 done so without seeking permission or guidance from my team
16 or from the Court and does not dispute the departure. After
17 having given the City an opportunity to explain itself and
18 gathered input from the ACLU-TN, which takes the same view as
19 my team, I am bringing this matter before the Court."

20 Q. Does that paragraph reflect your views about
21 Sanction 5 and the City's compliance with it?

22 A. Yes.

23 Q. Can you explain briefly why you feel that the City's
24 reports do not comply with Sanction 5?

25 A. Well, Sanction 5, as we previously read, obligates the

1 City to provide social media search terms by all of the
2 officers at the MPD. But the terms offered by MPD officers
3 who were part of the Multi-Agency Gang Unit, and undercover
4 officers were not part of the search terms that were provided
5 to the team.

6 Q. We'll talk about this a little bit more shortly, but
7 in your time on the monitoring team, have you had any
8 discussions with community members specifically about the
9 Multi-Agency Gang Unit?

10 A. I have, yes.

11 Q. Can you share with us not the specifics of those
12 conversations but your impression based on those discussions
13 about how the community members with whom you spoke feel
14 about a multi-agency gang unit?

15 A. So my impression, my takeaway from those conversations
16 was a real depth, breadth of concern about and mistrust of
17 both the agency gang units, the role that it was playing and
18 the City and particularly with respect to protesters and
19 activists.

20 Q. Thank you, Ms. Levinson-Waldman. I think you
21 mentioned that the City's Sanction 5 reports also did not
22 include the search terms of MPD officers who operate
23 undercover social media accounts; is that right?

24 A. Correct.

25 Q. Did you have any concerns about that omission, given

1 what you have explained about facebook's real-name policy?

2 A. Sure. So in the context of facebook's real-name
3 policy -- and facebook has sent letters to this effect as
4 well -- the policy is that if you have an account on
5 facebook, it is supposed to reflect who you actually are.
6 Your name. Your picture. The policy doesn't provide for
7 alternate uses. It doesn't provide -- there's a specific ban
8 on having more than one account. And so as one area of
9 concern, it appears that the City's use of undercover
10 facebook accounts didn't comply with facebook's policy, and
11 the failure to provide those search terms, I think, leads to
12 concerns not just with the policy but also generally the
13 ability to oversee the use of those accounts, the use of
14 social media and to ensure that it's within the bounds of the
15 Consent Decree and the Constitution.

16 Q. Thank you. Ms. Levinson-Waldman, now, the Court held
17 a video hearing about Sanction 5 last month. Were you able
18 to attend that hearing?

19 A. Yes. I attended by video.

20 Q. Did you hear the presentations and testimony by the
21 City and the ACLU at that hearing?

22 A. I did.

23 Q. Did any of the information that you heard at the
24 hearing change your opinion that the City has failed to
25 comply with Sanction 5?

1 A. No.

2 Q. Did you have an opportunity to review the post hearing
3 brief by the City?

4 A. Yes.

5 Q. Anything in that brief change your opinion that the
6 City has failed to comply with Sanction 5?

7 A. No.

8 Q. Ms. Levinson-Waldman, I'm going to move to the last
9 kind of portion of your testimony today. Last year after a
10 hearing in August, the Court invited members of the public to
11 submit comments. Members of the public who had attended the
12 August hearing. Did you have an opportunity to review those
13 comments?

14 A. Yes, I did.

15 Q. Earlier this year the Court adopted a public comment
16 procedure, during which it allowed members of the public to
17 submit their opinions regarding the City's proposed
18 modifications to the Consent Decree. Did you have a
19 opportunity to review those comments?

20 A. Yes.

21 Q. Mr. Stanton mentioned in his opening remarks that the
22 monitoring team has held three community engagement forums
23 since it has been appointed. One last July, one last
24 November and one in March of this year. Were you able to
25 attend and participate in those forums?

1 A. I attended and participated in the two forums in 2019
2 in July and November. The one in March of this year,
3 unfortunately, I wasn't able to attend due to COVID travel
4 restrictions and public health restrictions coming into play.
5 And that forum was not live streamed, so I didn't attend that
6 forum.

7 Q. Ms. Levinson-Waldman, the monitoring team's public
8 website provides information for contacting the monitoring
9 team directly. Have you had the opportunity to speak
10 directly with members of the Memphis community about the
11 Consent Decree?

12 A. I have, both through those forums and through meetings
13 that the team has had with community members.

14 Q. What is your impression, based on these interactions,
15 which you've described with community members of public
16 sentiment in Memphis regarding the City's proposed
17 modifications to the Consent Decree?

18 A. So my impression, my takeaway from what we heard in
19 those forums and from other conversations is a concern about
20 making modifications to the Consent Decree and a real desire
21 to ensure that the Consent Decree remained in place with all
22 of the current sort of robust restrictions that it currently
23 includes.

24 Q. Ms. Levinson-Waldman, do you have any specific
25 opinions about the proposed changes to the Consent Decree

1 that the City and the ACLU have put forward?

2 A. There are --

3 MR. MCMULLEN: Your Honor? Your Honor? Your
4 Honor, I would like to object. I think the question is kind
5 of broad. I think Mr. Perry has established Ms.
6 Levinson-Waldman as a social media expert. Giving an overall
7 opinion on it should be limited to the social media aspect of
8 it, not the overall document or her interpretation of the
9 language.

10 THE COURT: Counsel opposite?

11 MR. PERRY: Your Honor, if you'll allow me to
12 proceed a bit. I don't think Ms. Levinson-Waldman is going
13 to stray beyond her expertise. And in fact, she will defer
14 to another expert on the team to talk in detail about the
15 specific modifications that the parties are proposing.

16 THE COURT: Certainly with that limitation, go
17 ahead and be mindful that as soon as we get the responses to
18 that series of questions, we'll take our first 15-minute
19 break.

20 MR. PERRY: Your Honor, that will be perfect.
21 That will wrap up my direct.

22 THE COURT: That would be perfect. Let's go
23 ahead and let you make inquiry.

24 MR. PERRY: Thank you, Your Honor.

25 Let's pull up MT trial Demonstrative B. Scroll

1 down to those.

2 BY MR. PERRY:

3 Q. Ms. Levinson-Waldman, these are short summaries of
4 your -- of the concerns that you have about the proposed
5 changes of the Kendrick Consent Decree; is that right?

6 A. Yes, that's correct.

7 Q. Would you briefly describe each one of these.

8 A. Sure.

9 MR. MCMULLEN: Your Honor, I'm going to object
10 again. A legitimate law enforcement purpose, she's never
11 been established as an expert in law enforcement practice or
12 procedures.

13 THE COURT: Right. I understand this is going to
14 be a very limited inquiry. I may be incorrect in
15 understanding that.

16 Mr. Perry, just a limited inquiry as to issue
17 identification?

18 MR. PERRY: Absolutely. Very limited and also
19 I'll point out that some of the publications offered in our
20 first exhibit address not just social media but policing and
21 the use of policing in the context of social media as a --

22 THE COURT: I understand.

23 MR. PERRY: -- this testimony is relevant.

24 THE COURT: No, I do understand. And I
25 understand this is more issue spotting.

1 MR. PERRY: Yes, Your Honor.

2 THE COURT: If that's what that is, then we're
3 certainly going to allow it. I understand that someone else
4 may address some aspects of this; is that correct?

5 MR. PERRY: That's correct, Your Honor. This
6 will be a brief issue spotting and a brief description.

7 THE COURT: That's fine. Then go ahead.

8 MR. PERRY: Thank you, Your Honor.

9 BY MR. PERRY:

10 Q. Please proceed, Ms. Levinson-Waldman, into your first
11 and final thought, the new proposed definition for legitimate
12 law enforcement purpose.

13 A. That's correct. And specifically the concern that it
14 could allow the MPD to take action for perceived but low
15 level threats to police officers.

16 Q. Thank you. Let's move to the second proposed changes
17 there. Proposed change to the definition of political
18 intelligence. What is your concern there?

19 A. My concern there with respect to the possibility that
20 investigations could be undertaken that are due in part to
21 First Amendment-protected activity. But that if there's
22 another justification to point to, that other justification
23 could be used essentially as pretext to also focus on First
24 Amendment-protected activity.

25 Q. Thank you. Let's move to the third proposed. It's

1 the proposed second paragraph in Section D of the Consent
2 Decree. What is your concern about that paragraph?

3 A. My concern there is about the incorporation of a
4 reference to threat assessments. And a concern specifically
5 about potential use for threat assessments as certainly an
6 issue that has come up in social media and other contexts.

7 Q. Thank you, Ms. Levinson-Waldman. Fourth and finally,
8 do you have a concern about the proposed 8th paragraph to
9 Section G of the Consent Decree? What is your concern there?

10 A. My concern here, this is a paragraph that refers to
11 types of crimes that are described as essentially taking
12 place solely on the Internet and not necessarily having First
13 Amendment implications. And the incorporation of a reference
14 to cyberbullying as one of those types of investigations,
15 which I believe could have significant First Amendment
16 issues.

17 Q. Thank you, Ms. Levinson-Waldman. Have you previously
18 communicated these concerns to the City and to ACLU-TN?

19 A. Yes. We, the team had meetings with the City and the
20 ACLU yesterday.

21 MR. PERRY: Thank you, Ms. Levinson-Waldman.

22 Your Honor, I have no more questions at this
23 time.

24 THE COURT: All right.

25 We are going to take our morning break. It is

1 three minutes after the hour. And so we will make that a
2 break for 12 minutes, if that works for everyone. And you
3 can disable your -- you can mute your site, and you can also
4 take your video off. But you'll remain in the conference.
5 So we'll see everyone at 15 after the hour. Thank you very
6 much.

7 (Short break.)

8 THE COURT: I think that we have everyone. And
9 so Mr. McMullen, if you're ready for any cross examination of
10 the witness, we'll let our witness come back on with unmuted
11 and live.

12 MR. MCMULLEN: Yes, Your Honor.

13 THE COURT: There we go.

14 MR. MCMULLEN: Your Honor, Ms. Tullis is going to
15 share her screen with an exhibit that has already been
16 produced.

17 THE COURT: That's fine. I just need to make
18 sure we can see it okay.

19 MR. MCMULLEN: Ms. Tullis, can you just pull up
20 the top of that letter. Go to the top address part of it.
21 Can the Court see that letter?

22 THE COURT: Certainly. Yes. And we can mark
23 that. I'm looking to see if we have it already as an
24 exhibit.

25 MR. MCMULLEN: It's in Exhibit 5, Your Honor.

1 THE COURT: That's what I thought. So we'll just
2 go to page -- here it is. Here it is. Exhibit 3 in this
3 document, which is Exhibit 5. And so we're all set. Yes,
4 sir. Absolutely.

5 MR. PERRY: Your Honor, this is Will Perry.
6 That's not MT trial Exhibit 5. I think that's one of the
7 City's exhibits.

8 THE COURT: It is as to 5, and there were a
9 number of documents attached to 5.

10 MR. PERRY: I see.

11 THE COURT: And it appears to be in that group of
12 materials.

13 MR. PERRY: That's fine. Thank you, Your Honor.

14 THE COURT: Okay. I think everybody is together
15 now. I think, counsel, I think we're ready to proceed then.
16 Is the witness ready?

17 THE WITNESS: Yes, Your Honor. Thank you.

18 THE COURT: Thank you.

19 **CROSS EXAMINATION**

20 **QUESTIONS BY MR. MCMULLEN:**

21 Q. How are you doing, Ms. Levinson-Waldman?

22 A. I'm good.

23 Q. All right. I want to go back to you read from a
24 letter from the monitoring team discussing the disclosure of
25 certain search terms from certain agencies; do you remember

1 reading from that letter?

2 A. Yes.

3 Q. Did you also read the City's response to that letter?

4 A. No, I did not. Not out loud.

5 Q. Were you also aware that when we provided those search
6 terms, we were very clear about what divisions we were not
7 providing search terms for with the Monitor?

8 A. I understand that in the letter accompanying the
9 search terms, you listed the agencies from which those search
10 terms were drawn.

11 Q. And we did not list -- we did not provide terms with
12 sex crimes, did we?

13 A. That's correct.

14 Q. Because on those that they involved certain
15 investigations where those terms are provided and produced
16 would compromise those investigations; isn't that correct?

17 A. I don't think I can express an opinion on the reason
18 that those weren't provided.

19 Q. Okay. I want to go to the end of the document to
20 page 6. Do you see Section C at the bottom of page 6? Can
21 you read that, Ms. Levinson-Waldman.

22 A. Yes. Beginning right under C?

23 Q. Okay. Can you go ahead and read C withholding or
24 reporting of social media terms by undercover accounts. Can
25 you go ahead and read what the City responded to the Monitor

1 with.

2 A. Yes. The paragraphs under C read, "The letter
3 directed the City to explain why it has not reported the
4 search terms from the undercover social media accounts used
5 by MPD. The City attempted to be clear in its November 20th,
6 2020 letter." Although I believe that would be November
7 20th, 2019 letter. "That it objected to the inclusion of
8 social media searches of undercover accounts in its quarterly
9 reporting due to the danger of exposing the undercover
10 accounts, as well as potentially compromising the undercover
11 officers' identities and safety."

12 Should I keep reading?

13 Q. Continue on.

14 A. "For the same reasons as explained in Section 1B,
15 supra, the City is very concerned about potential disclosure
16 of the search terms that would be reported from undercover
17 accounts. The concern is even greater regarding the search
18 term used by a person who is, quote/unquote, deep undercover,
19 disclosure of which could out the undercover officer and
20 potentially endanger his or her life."

21 Q. Were you aware that was our response to that letter?

22 A. I was aware of your letter responding to the team,
23 yes.

24 Q. And so you were aware that -- were you aware that we
25 offered the monitoring team an opportunity to come in and

1 view those search terms?

2 A. Yes.

3 Q. And our trepidation was producing it in a paper form
4 that may be inadvertently disclosed? Were you aware that
5 that was our trepidation?

6 A. I understand that that's what was represented in the
7 letter, yes.

8 Q. Okay. You do agree that exposing certain undercover
9 police officers could endanger their lives? You do agree
10 with that general proposition?

11 A. I'm not sure that that's something on which I can
12 express an opinion, but I certainly do understand --

13 Q. I agree. I agree. I'll withdraw the question. I
14 agree with you. All right. Did you -- have you ever -- who
15 have you talked to from the Multi-Agency Gang Unit?

16 A. We had a meeting collectively, the team and the City
17 with Major Darren Goods.

18 Q. Okay. Did you have any one-on-one or any questions
19 with Major Goods when the team met with him collectively?

20 A. I believe I did have a couple of questions for Major
21 Goods.

22 Q. What questions did you have?

23 A. I would need to refer to my notes to pull up those
24 specific questions.

25 Q. Okay. Do you know how the Multi-Agency Gang Unit

1 operates?

2 A. I understand, based on the information the City has
3 provided, the overall structure of the Multi-Agency Gang
4 Unit.

5 Q. Let me ask you this. Do you agree that police
6 departments can have undercover accounts with certain types
7 of investigations or should have undercover accounts with
8 certain types of investigations?

9 A. I recognize that there are certain types of
10 investigations in which undercover accounts would serve a
11 purpose. I think that they are also susceptible to misuse
12 and abuse.

13 Q. I understand that. So is it fair to say you don't
14 think any police department should have any undercover
15 accounts?

16 THE COURT: That's not what the witness said.
17 I'll let counsel -- I don't think that's what you said, was
18 it, Ms. Levinson-Waldman?

19 THE WITNESS: No, Your Honor.

20 THE COURT: So there's no predicate for the
21 question. It can be rephrased. That was simply not said.
22 That would not be a productive question.

23 BY MR. MCMULLEN:

24 Q. I think your response to me was you can see there
25 could be a purpose for a undercover account, but your fear is

1 the abuse of that account; am I quoting you or paraphrasing
2 you pretty correctly?

3 A. That's accurate.

4 Q. So tell me, tell me the situations in which you think
5 undercover accounts should be used.

6 A. I don't think that we have discussed a -- an
7 exhaustive list, specific list of kinds of cases where
8 matters in which undercover accounts would be appropriate or
9 wouldn't be appropriate.

10 Q. Okay. I realize we haven't discussed it. I was just
11 asking you, in your opinion, in what situations do you think
12 it's appropriate to use undercover accounts?

13 A. I think my concerns and my opinions on undercover
14 accounts go in large part to the framework of protections
15 built around the use of undercover accounts. So I think one
16 of the issues that would come up would be clearly
17 articulating if there are going to be undercover accounts.
18 The circumstances in which those undercover accounts would be
19 used. The types of investigations. Limitations on using
20 those accounts to infringe upon or shield the exercise of
21 First Amendment-protected activity. Super (inaudible)
22 control regarding accounts. Oversight and auditing and
23 potentially some sort of judicial oversight for use of
24 undercover accounts.

25 Q. I understand. If I understand you correctly, you're

1 explaining some of the things. You're fearful about abuse,
2 and you're explaining certain types of oversight that you
3 would like to see. But I was trying to get more
4 fundamentally what types of investigations do you think
5 undercover accounts have a purpose?

6 A. I don't think that that's something that I can come up
7 with here on the stand, a list of kinds of investigations in
8 which undercover accounts would be appropriate. And again, I
9 think it's difficult to have that conversation in a vacuum
10 without also incorporating the procedural and other
11 protections that would need to be in place.

12 Q. You said you talked to the community members, you
13 talked to people in the community about the Consent Decree;
14 is that correct?

15 A. Well, we had the forums, and then we had some
16 one-on-one sessions with community members.

17 Q. Did you find a lot of community members were confused
18 by the language in the Consent Decree and what that really
19 meant?

20 A. I did not find that there was confusion about the
21 language of the Consent Decree itself. Not that I recall.
22 There certainly may have been, but I don't recall that being
23 a substantial threat in those -- in the comments.

24 Q. You don't recall any citizens having trouble
25 understanding what -- how it applied in the community forums?

1 A. Well, certainly there are questions about how it
2 applied. I think maybe most significantly there were
3 questions about the monitoring team's role. What the role is
4 of the Monitor and the team overall with respect to
5 overseeing and helping to facilitate the implementation of
6 the Consent Decree and what that meant with relation to the
7 language of the Consent Decree and the case.

8 Q. You spent some time talking about the social media
9 policy of the FBI. I gleaned from your testimony that you
10 don't think the social media policy of the FBI is
11 appropriate?

12 A. I don't think it would be appropriate to -- certainly
13 to incorporate into a local police department's policies.
14 And if I had my way, there would be changes to the FBI's
15 policies for the bureau itself, but I do not have that
16 authority.

17 Q. Okay. And you said you reject some of the ideas you
18 felt came from the FBI social media policy, and you
19 recommended that they incorporate social media policies that
20 you developed; did I understand correctly?

21 A. Well, I think -- so that's correct that I recommend
22 that the proposed policies that incorporates the FBI's
23 policies, that that not be approved. With respect to the
24 reference to the policy that I developed, the other policy
25 that's available was one that was developed back and forth

1 with input from the monitoring team, the City and the ACLU.

2 Q. Have you ever developed any social media policies for
3 any law enforcement agency in the country?

4 A. I have not been a part of developing other social
5 media policies.

6 Q. Okay. And when you -- you put forth a graph, and I
7 think you used the term outward facing on Exhibit 3. What do
8 you mean by that was outward-facing research? What does that
9 mean?

10 A. I was distinguishing -- I'm not sure I referred to
11 outward-facing research. What I was distinguishing between
12 was I was particularly interested in publicly available
13 policies that govern the use of social media by police
14 departments to view and collect information and I was
15 distinguishing that from policies which are much more sort of
16 commonly available that govern how a police department where
17 individual officers might use social media for outward-facing
18 public engagement, education, things like that.

19 So an example might be using a police department or
20 using an officer's Twitter account to say, we're looking for
21 a person of interest. We're having a block party on
22 such-and-such date. This precinct is going to be closed
23 during this week. Things like that. I would see that as
24 outward facing as opposed to collecting information from
25 social media.

1 Q. You listed a number of agencies. Did you talk to
2 anyone in those agencies that were listed in that chart?

3 A. I did not reach out to those agencies.

4 Q. Okay. So that information was done by a Google search
5 with certain search terms to pull up that information?

6 A. Yes.

7 Q. Okay. All right. You do recall a request for
8 authority -- we call them RFAs -- that exchanged between the
9 City and the monitoring team on various situations?

10 A. Yes.

11 Q. Okay. And to explain what an RFA is, that's when the
12 City comes to a situation where they're unclear or have some
13 question about how they can proceed, then they would reach
14 out to the Monitor; is that correct?

15 A. Correct.

16 Q. And would you be a part of the decision making on
17 whether the situation the City described implicates the
18 Consent Decree or not? Would you be a part of that
19 discussion?

20 A. Not in every circumstance. There were some times, I
21 believe, when the timing necessitated an immediate response
22 from the Monitor. But when there was sufficient time to
23 solicit input from the monitoring team, then I would be part
24 of those.

25 Q. Was there ever any disagreements or different

1 interpretations of what was allowed and not allowed in those
2 RFAs from members of the monitoring team?

3 A. There was certainly discussions among the monitoring
4 team about what was permitted and what wasn't.

5 Q. So is it fair to say even among the monitoring team,
6 who are highly educated, specialized experts in certain
7 areas, there was some confusion or some difference in
8 interpretation as to what was allowed in the Consent Decree
9 and what was not allowed; is that a fair statement?

10 A. I wouldn't say that there was confusion. But there
11 were times when there were differences of opinion about the
12 parameters of the Consent Decree.

13 Q. And your understanding globally of the Consent Decree
14 is it's a document that will basically describe how police
15 would interact with First Amendment protesters or with the
16 public; is that correct?

17 A. Well, my understanding from the Consent Decree is that
18 it's broader than that. That it's not just how police
19 interact specifically with protesters, for instance, people
20 who are on the street exercising their First
21 Amendment-protected activity, but also even in the conduct of
22 criminal investigations, that when those investigations could
23 implicate or infringe upon First Amendment-protected rights,
24 that it sets out procedures to ensure that that infringement
25 is necessary and is as limited as possible. And that, of

1 course, it has other provisions as well speaking to things
2 like exchanges of information among law enforcement entities.

3 Q. And that Consent Decree is what the patrolman
4 is supposed to be -- patrolman guide with dealing with the
5 public with First Amendment issues; isn't that fair to say?

6 A. I'm sorry. That it's supposed to be part of the
7 patrolman's guide, you said?

8 Q. Yes.

9 A. Well, I'm not sure if by patrolman's guide you're
10 referring to a specific document. So I'm not sure that I
11 tend to opine on that. Certainly the Consent Decree requires
12 that officers be trained on the provisions of the Consent
13 Decree.

14 Q. Okay. Now, you mentioned Sanction 5. And under
15 Sanction 5, that was a sanction of a court order. Well, the
16 deviation that the monitoring team allege happened was a
17 deviation from the Court's order, not the Consent Decree; is
18 that correct?

19 A. Correct. From the Court's order setting out remedies
20 for the violation, yes.

21 Q. And that has been appealed to Your Honor, and there
22 has been no ruling on that; is that correct?

23 A. Correct.

24 Q. Okay. And that has been briefed by both sides; is
25 that correct?

1 A. Yes, that's correct.

2 Q. Have you had an opportunity to read the brief on
3 behalf of the City?

4 A. Yes.

5 Q. So at this point it is alleged violation of the
6 Monitor's -- alleged violation alleged by the monitor team;
7 is that correct?

8 A. I believe that ACLU has submitted materials on this as
9 well. But that's correct, that it's an alleged violation.

10 Q. Okay. I'm glad you brought up the ACLU. Do you think
11 the ACLU has adequately represented its clients in this
12 litigation?

13 A. I believe Mr. Perry is trying to speak but is maybe on
14 mute. Or no. I'm not sure how to answer that.

15 MR. PERRY: Your Honor, I object. I object to
16 that, Your Honor, on grounds of relevance.

17 THE COURT: Objection sustained.

18 MR. MCMULLEN: Your Honor?

19 THE COURT: We need to go to the next matter.

20 MR. MCMULLEN: Okay.

21 THE COURT: It would not be relevant in the
22 matter.

23 MR. MCMULLEN: Your Honor, I have one or two more
24 questions. Then I'll be finished.

25 BY MR. MCMULLEN:

1 Q. Ms. Levinson-Waldman, the demonstrative that you gave,
2 Demonstrative B that set out four different areas that you
3 have some complaint -- some objection to changes in the
4 Consent Decree, are these the only areas that you have any
5 objection to modification?

6 A. These are the areas that I had raised. I can't speak
7 for other members of the monitoring team who are going to be
8 addressing the proposals in more detail.

9 MR. MCMULLEN: Your Honor, at this time I would
10 like to enter into evidence the proposed modified Consent
11 Decree.

12 THE COURT: That can be marked as 6 in the
13 matter. I don't think -- it's part of the record, but it's
14 certainly okay to have it in this hearing. I don't see
15 any --

16 MR. MCMULLEN: It's a part -- thank you, Your
17 Honor.

18 THE COURT: Right. We can mark it though. And
19 we just need to make sure that we have that available
20 electronically, if possible. But we'll mark that as --
21 without objection, we'll mark that as 6 in the case.

22 MR. PERRY: Your Honor, may I confirm that we're
23 referring to Document ECF 327-1?

24 THE COURT: I believe that's it. And we're
25 checking that right now just to make sure we have the right

1 document. But we will make sure that we have the correct
2 document. So that will be 6 in the case. The proposed
3 Consent Decree submitted by the parties in the matter.

4 (WHEREUPON, the above-mentioned document was
5 marked as Exhibit Number 6.)

6 MR. MCMULLEN: I have one final question. Hold
7 on, Your Honor. I'm sorry.

8 THE COURT: Certainly.

9 MR. MCMULLEN: Okay, Your Honor. Yeah. We
10 wanted to make sure that was in evidence because it was at
11 least marked because we discussed the modified -- proposed
12 modified Consent Decree.

13 BY MR. MCMULLEN:

14 Q. Is it your understanding that the ACLU and the City of
15 Memphis has come to an agreement on the modification except
16 for Section I?

17 A. Yes.

18 Q. Do you oppose using undercover accounts in the ICAC
19 unit, Internet Crimes Against Children?

20 A. I would need to know more about the specifics
21 regarding the function and methods of the unit and how
22 undercover accounts are used specifically.

23 Q. Have you found at any time MPD did not honor the
24 monitor team's request to come visit, to come look at or to
25 interview anybody at MPD?

1 A. No. I believe that we've been able to visit and
2 interview individuals we've requested.

3 MR. MCMULLEN: No further questions, Your Honor.

4 THE COURT: Mr. Castelli, are there any questions
5 from ACLU?

6 MR. CASTELLI: Yes, Your Honor, a few questions.

7 CROSS EXAMINATION

8 QUESTIONS BY MR. CASTELLI:

9 Q. Good morning, Ms. Levinson-Waldman.

10 A. Good morning.

11 Q. I want to go back to the discussion about undercover
12 accounts. I believe in your direct testimony, you had
13 discussed impersonator or impersonation accounts. And I want
14 to make sure I understand what that is. My understanding is
15 that that would be wherein someone has created an account
16 that is impersonating an actual, real-life person. So if I
17 create an account that was -- and said I am Bruce McMullen,
18 that would be an impersonation account; is that how you are
19 identifying it?

20 A. Correct, yes.

21 Q. Okay. So there would be other types of undercover
22 accounts that a law enforcement agency might use?

23 A. Yes.

24 Q. And so such as creating an entirely fake identity, an
25 account that is not an individual that actually exists but is

1 a fake identity; would that be a type of undercover account?

2 A. Correct.

3 Q. Okay. And then perhaps are there accounts where
4 people are not really purporting to be someone else or
5 purporting to be a fictional individual, but they're just a
6 double account?

7 A. Right. Maybe somebody has two accounts because in
8 order to connect with different people, but they're not
9 purporting to be somebody else.

10 Q. All right. Just in your estimation and your
11 experience, would that type of like double account where you
12 know whose account it is, is that an undercover account, or
13 is that just another entity -- another type of social media
14 account?

15 A. So it's a little fuzzy, but I wouldn't call -- as long
16 as it's not purporting to be someone else, whether it's an
17 actual defined person or a fictitious person, kind of along
18 the lines of the Bob Smith account that was used in this
19 case. I suppose I wouldn't call that an undercover account
20 per se.

21 Q. That's a good point. So the Bob Smith account that
22 was part of the original enforcement proceedings, that would
23 be one of these -- that's not an impersonator account.
24 That's the other type of kind of fictitious account, correct?

25 A. That's right.

1 Q. Okay. But just so I understand the testimony then but
2 all of these types of accounts, these undercover accounts,
3 whether it's an impersonator account or a fictitious account,
4 your opinion is that they need to be under some kind of
5 supervisory control if they're going to be used by law
6 enforcement?

7 A. I think that from the point of view of good policy and
8 accountability, the police use of social media accounts that
9 any kind of undercover account used, whether it's an
10 impersonating account or the use of a fictitious account to
11 connect with people on line that follow that would need to be
12 subject to oversight and supervision.

13 Q. The Exhibit 6 that has been marked, the proposed
14 modifications, you've reviewed that document, correct?

15 A. I'm sorry. You said that's trial Exhibit 6? I just
16 want to be sure.

17 Q. Yes, trial Exhibit 6.

18 A. I'm sorry. I think we might be talking about
19 something different.

20 MR. PERRY: It's ECF 327-1. It's the joint
21 proposed.

22 THE WITNESS: I'm sorry. Thank you. Yes. I am
23 familiar with that.

24 BY MR. CASTELLI:

25 Q. Okay. And are you aware of in the proposed changes of

1 proposals that there be supervisory controls established for
2 any type of undercover account?

3 A. Yes. I believe that -- well, I'm sorry. Actually, I
4 think I would ask you to direct me to the place. I don't
5 want to speak unless I can take a moment to review the
6 exhibit.

7 Q. Well, let me see if I can share my screen then and put
8 that up for everyone to see. If you'll --

9 MR. CASTELLI: If the Court is okay with that?

10 THE COURT: Certainly.

11 MR. CASTELLI: Sorry. I can't see it on my
12 screen. Are we seeing what's this proposed modified judgment
13 and decree? Is that what is showing?

14 THE COURT: Yes, it is.

15 MR. CASTELLI: All right.

16 BY MR. CASTELLI:

17 Q. And then if you'll look, I believe, it's in the -- in
18 Exhibit 6 in the proposed modified Consent Decree Section
19 E2(b) is what I was referring to. So if you can review that
20 and then answer the question.

21 A. Yes. And could you just repeat the question so I'm
22 sure I'm answering.

23 Q. Yes. I think my question was, was it your
24 understanding from your review of this document that there
25 was a proposal to implement supervisory controls over any

1 type undercover account utilized by the City?

2 A. Yes. Yes.

3 Q. Okay. Would you agree that that is something that
4 would be -- if undercover accounts are going to be used in
5 law enforcement practices, that this is something, in your
6 opinion, is necessary?

7 A. Absolutely. I think this is critical.

8 Q. Thank you. You had also outlined, I think, four areas
9 that you have raised some concerns with some of the
10 proposals. It's my understanding that we might get more
11 in-depth information about that from Mr. Henegan when he
12 testifies later; is that correct, about your concerns as
13 well?

14 A. Yes. And I believe also from Mr. Bowman.

15 Q. Okay. Great. Then I won't -- I can certainly defer
16 to them. One that I think falls particularly within your
17 expertise I wanted to ask about is a concern regarding
18 cyberbullying. Is that cyberbullying is kind of an on line
19 or activity on social media; is that right?

20 A. My understanding of cyberbullying -- and this is
21 without sort of having a definition in front of me -- and you
22 know, that would end up being helpful, but that
23 cyberbullying, right, would involve basically online
24 bullying. So use presumably primarily of social media but
25 maybe other kind of online sources or tools as well to bully

1 another person.

2 Q. So is your concern with keeping that in this list of
3 kind of Internet crimes -- well, I guess, can you tell me
4 more about what your concern with including that particular
5 type of crime is in the list of Internet crimes?

6 A. Yes. I can send my concern, and I do want to note
7 that I think Mr. Henegan will get into this in more detail.

8 Q. Okay.

9 A. But my concern here is that it's listed specifically
10 as being among the kinds of crimes that I believe the
11 language is -- essentially take place exclusively online and
12 may not -- are not likely to implicate First
13 Amendment-protected activities. And because bullying often,
14 especially when we're talking about through online activity
15 through social media, so bullying through speech essentially,
16 seems likely to raise First Amendment concerns, at least in
17 some circumstances. Not in all, but it seems to potentially
18 tread more into the First Amendment.

19 Q. Okay. I think another concern you raised was
20 regarding the revised definition of political intelligence or
21 First Amendment-related intelligence. My understanding and
22 concern was that some of the language you felt might be
23 interpreted to mean that investigating -- if the sole reason
24 wasn't for political intelligence, then it might not be
25 covered by the Decree; am I getting that right?

1 A. Would it be possible to pull up the language or the
2 definition, and then I could refer to that in --

3 Q. Yes. Absolutely. It would be very helpful. Let me
4 do that. And again, can you see the definition in this,
5 again, is in trial Exhibit 6. I believe it's Number 5 there
6 on the screen.

7 A. Yes.

8 Q. If I'm doing this right. And I believe the language
9 that you had taken some issue was "undertaken view" or "on
10 the basis of." Is that the language that you had some
11 concerns about?

12 A. That's right.

13 Q. Okay. And can you just explain to me again briefly
14 what your concerns were that you had articulated earlier?

15 A. Sure. So the concern, as you say, is arising from
16 this language "investigative activity," which is undertaken
17 due to or on the basis of a person's beliefs, opinions,
18 associations, et cetera, and a concern that if there is some
19 other justification articulated for whatever kind of
20 investigative activity it is, that it won't necessarily be
21 categorized or classified as activity undertaken due to or on
22 the basis of the First Amendment-protected activity. Like
23 maybe that is one ground.

24 But there could be another ground that's pointed to
25 where legitimate or pretextual but sort of help insulate that

1 activity in circumstances where it does implicate First
2 Amendment-protected activity but can be described as not
3 technically being, you know, strictly on the basis of or only
4 on the basis of that activity.

5 Q. So if this definition were interpreted as or read, or
6 if language was added to say that if it were in part
7 undertaken due to on the basis of a person's beliefs, that
8 might resolve your concern?

9 A. I think if it said something like "due in whole or in
10 part to," then I think that would resolve the concern.

11 Q. Okay. Thank you.

12 MR. CASTELLI: Those are my questions for the
13 witness, Your Honor.

14 Thank you, Ms. Levinson-Waldman.

15 THE WITNESS: Thank you.

16 THE COURT: Redirect?

17 MR. PERRY: I have no redirect, Your Honor.

18 THE COURT: I need the witness to go through the
19 last concern in connection with proposed paragraph 5 on
20 page ID 9960 -- which we'll ask to put back on the screen,
21 Mr. Castelli -- and again, discuss what you have considered
22 in terms of the language that you think would be necessary to
23 assure that there's no improper gathering, indexing, filing,
24 maintenance, storage or dissemination of information. So let
25 the witness go back through that one more time. I think

1 everybody is now on the page. I think we're ready.

2 THE WITNESS: And sorry, Your Honor. Just to
3 specify the specific language that I would recommend?

4 THE COURT: Well, also you've expressed a concern
5 which we've noted. And it's in the record, but I wanted to
6 give you a chance to just explain that a little bit more.

7 THE WITNESS: Sure. With respect to the
8 definition of First Amendment-related intelligence.

9 THE COURT: Yes. Exactly. And you can talk
10 about alternative language because there might be more than
11 one way to say what you said initially. I'm not sure you
12 have other alternative language.

13 THE WITNESS: Thank you, Your Honor. From my
14 perspective, it could be fairly straightforward. So taking
15 this specific language, First Amendment-related intelligence
16 is the gathering, indexing, filing, maintenance, storage or
17 dissemination of information or any other investigative
18 activity, which is undertaken due to or on the basis of a
19 person's beliefs, opinions, associations or the content of
20 the speech or expression protected by the First Amendment.
21 My concern is that that can be read effectively to mean which
22 is undertaken solely due to or on the basis of these various
23 exercises of the First Amendment. And that there could be
24 some ambiguity there about what the standard is for the point
25 at which investigative activity would trigger this definition

1 of First Amendment-related intelligence.

2 And so one proposal that I think would suffice to
3 fix this would be picking up with any other investigative
4 activity, which is undertaken, in whole or in part, due to or
5 on the basis of a person's beliefs, et cetera, which would
6 clarify that it doesn't have to be the sole reason, but if it
7 is a reason, then it would fall under the category of First
8 Amendment-related intelligence.

9 THE COURT: That concept is one that exists in
10 other areas of the law. Is there any specific reference that
11 you would make to other areas of the law where that concept
12 is used?

13 THE WITNESS: Well again, in part, I would point
14 back to FBI policies as -- and not to overly criticize the
15 FBI, but looking at policies the FBI has in place that have
16 made individuals in groups vulnerable to targeting on the
17 basis of First Amendment-protected activity. The FBI's
18 policies prohibit -- I would have to look at the precise
19 language, but essentially prohibit investigation where that
20 investigation is solely due to First Amendment-protected
21 activity. And despite that language or maybe because the
22 language includes that solely limitation, there are multiple
23 examples of FBI investigations that have targeted First
24 Amendment-protected speech. Investigations that haven't
25 followed appropriate procedures.

1 And so I think that's one of the sort of red
2 flags or warning signals in thinking about potential
3 weaknesses here and wanting to be sure that that's shored up
4 to ensure the strongest possible protection of First
5 Amendment-protected activities while, of course, allowing the
6 MPD also to carry out its law enforcement mission.

7 THE COURT: Let's go back to the parties.
8 Certainly the Court wanted to make inquiry there. Is there
9 any followup from the Monitor on this question as to this
10 witness?

11 MR. MCMULLEN: Not from the City, Your Honor.

12 THE COURT: Okay.

13 MR. CASTELLI: Not from the ACLU, Your Honor.

14 THE COURT: And what about the Monitor?

15 MR. PERRY: No further questions, Your Honor.

16 THE COURT: Now let's go to the City.

17 The witness then is excused. Of course, you're
18 certainly welcome to stay on. But we appreciate, always
19 appreciate your being here.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: And I think everyone appreciates your
22 expertise. It's much appreciated. I think we're ready now
23 for -- this issue may come up again. So we will probably
24 deal with it with some other witnesses also.

25 Now let's go to the Monitor as to our next

1 witness. And we certainly have a list. I understand that
2 this will be Dr. Bowman. But let me reconfirm that.

3 MR. PERRY: It will, Your Honor, and I'm going to
4 defer to the independent Monitor, Mr. Stanton.

5 THE COURT: All right. Mr. Stanton, you may call
6 your next witness.

7 MR. STANTON: Thank you, Your Honor. We call
8 Dr. Theron L. Bowman, Your Honor.

9 THE COURT: Dr. Bowman, if you would raise your
10 right hand, Mr. Sample will administer the oath.

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THERON BOWMAN,

**was called as a witness and having first been duly sworn
testified as follows:**

THE COURT: Counsel may proceed. We've got the list of the spelling of the names, but I am going to let you also make sure that everyone understands how Dr. Bowman's name is spelled.

MR. STANTON: Thank you, Your Honor.

DIRECT EXAMINATION

QUESTIONS BY MR. STANTON:

Q. Would you please state and spell your name for the record, sir.

A. Yes. It's Theron, T-H-E-R-O-N. Bowman, B-O-W-M-A-N.

THE COURT: And Dr. Bowman, I'm going to ask you to move just a little closer to your mic. We can hear you fine, but it's a little faint. And I'll let counsel from now on be mindful that we need to be able to hear just a little better.

MR. STANTON: Yes, Your Honor.

THE COURT: Thank you.

BY MR. STANTON:

Q. And Dr. Bowman, if you wouldn't mind speaking up just a little bit more. Would you share with the Court what it is that you do for a living?

1 A. Yes. I am currently a police practices consultant, a
2 police practices expert working on police practices cases in
3 the US and in the UK.

4 Q. And Dr. Bowman, how long have you worked in the areas
5 of policing and police practices?

6 A. I'm in my 37th year of policing and police practices
7 work.

8 Q. And do you have any formal education in those areas?

9 A. Yes, sir. I have a master's degree in public
10 administration with a minor in criminology and criminal
11 justice. I also have a doctorate degree in urban and public
12 administration.

13 Q. If you don't mind, would you share with the Court,
14 Dr. Bowman, when and where that you obtained those degrees,
15 master's and doctoral degrees?

16 A. Yes. I obtained the master's degree and the doctorate
17 degree both from the University of Texas at Arlington. The
18 master's degree in 1991. The doctorate degree in 1997.

19 Q. And Dr. Bowman, did you have to write a dissertation
20 for your doctorate?

21 A. Yes, sir. I did. I wrote a dissertation. In fact,
22 my dissertation topic was the predictive value of policies in
23 determining police officer actions.

24 Q. Okay. And aside from your dissertation, Dr. Bowman,
25 have you authored any publications in the areas of policing

1 and police practices?

2 A. Yeah. I've authored many, many publications. Clearly
3 in excess of 50 of my publications have been published in
4 various textbooks and books and magazines and journals.

5 Q. Thank you, Dr. Bowman.

6 MR. STANTON: At this time I would like to pull
7 up a document that's been marked as MT trial Exhibit 6.

8 BY MR. STANTON:

9 Q. Dr. Bowman, if you could look on the screen there. Do
10 you recognize this document?

11 A. Yes, sir. I do.

12 Q. And can you tell the Court, tell us what this document
13 is.

14 A. That document on the screen is my -- is a portion of
15 my bio. A biographical representation consolidated of my
16 career.

17 Q. And Dr. Bowman, does this document detail the
18 educational as well as publication information that we've
19 discussed?

20 A. It does. This cover letter, the cover letter with the
21 text on it as well as the subsequent pages of my vitae do
22 detail my career and working comprehension.

23 Q. Thank you, Dr. Bowman.

24 MR. STANTON: Your Honor, if there's no
25 objection, I'd like to move MT trial Exhibit 6 into evidence.

1 THE COURT: Yes. Marked and received. That
2 should be our Number 7.

3 MR. STANTON: Thank you.

4 THE COURT: Yes. Received without objection.

5 (WHEREUPON, the above-mentioned document was
6 marked as Exhibit Number 7.)

7 MR. STANTON: Thank you, Your Honor.

8 THE COURT: Certainly.

9 BY MR. STANTON:

10 Q. Now, Dr. Bowman, have you done any teaching in the
11 areas of policing and police practices?

12 A. Yes, sir. I've taught mostly graduate courses at
13 Division 1 colleges and universities for most of the last
14 30 years. I've taught a number of classes on a range of
15 criminology and criminal justice and policing topics.

16 Q. And your CV, does it provide more detail about your
17 teaching experience and educational background?

18 A. Yes, sir. It does.

19 Q. Dr. Bowman, do you also conduct research on specific
20 subjects within the areas of policing and police practices?

21 A. Yes, I do.

22 Q. Okay. Can you give us some details about that
23 research?

24 A. Sure. My vitae details just some of the areas of
25 research I focused in. One area in particular is UASs or

1 unmanned aerial systems, where I've not only conducted a
2 great amount of research, but in many ways for many years was
3 considered a world authority on unmanned aircraft systems.
4 In fact, as a part of that work created the first urban
5 police department and received the first FAA authorization of
6 any urban police department in the US to fly in Class B
7 airspace. And so I've conducted a lot of research in UASs,
8 but I've also conducted other research coronary to policing.

9 In particular in collaboration with the Police
10 Foundation in Washington, D.C., we've researched the effect
11 of shift work on police officer performance. I created a
12 fellowship program with UTA, University of Texas at Arlington
13 criminal justice department to implement what we call a
14 teaching police department concept based on the medical
15 model, where doctors and nurses actually learn from problems
16 and mistakes and diagnoses. And I've also, as part of my
17 research, partnered with the UTA department of engineering to
18 obtain a number of National Science Foundation grants on wave
19 forms and bandwidth compression, video compression
20 technologies. And that's to name a few.

21 Q. Thank you, Dr. Bowman. You mentioned earlier, you
22 said UASs, unmanned aerial systems. Is that drones, just for
23 the record, just to be clear?

24 A. Yes, sir. Yes, sir. The common vernacular for UASs
25 today is drones.

1 Q. Thank you, Dr. Bowman. Now, turning to your
2 professional experience, Dr. Bowman. Have you ever been a
3 law enforcement officer?

4 A. Yes, sir. I am.

5 Q. And where have you served as a law enforcement
6 officer, Dr. Bowman?

7 A. I've served a total of 34 years as a law enforcement
8 officer, all within the City of Arlington. The first
9 29-plus, almost 30 years, I served in the Arlington Police
10 Department in various capacities. The last 14 of those years
11 as the chief of police in Arlington, Texas. And Arlington is
12 one of the 50 largest cities in the country. It has a
13 population of approximately 400,000 people, with about 700
14 officers. 250 are nonsworn.

15 But I also spent about five years -- the last five
16 years of that time as the public safety director in Arlington
17 overseeing both the police and fire departments, as well as
18 many other city services that dealt with the public safety.
19 And so between the public safety director position and the
20 police chief, I have almost 35 years of public service
21 experience.

22 Q. And that director position that you just mentioned, if
23 you would explain to the Court your duties there, what that
24 entailed, public safety director.

25 A. Sure. As the director of public safety, I was an

1 assistant city manager in the city. I was the number two,
2 right behind the city manager in running the city. As the
3 public safety director, I had management and executive
4 oversight over the police department, fire department, the
5 parks and recreation department, code compliance department,
6 as well as many other functions, the animal services, animal
7 control function, the public library system as well fell
8 underneath my control. Underneath my control. So as the
9 public safety director, I also have primary responsibility
10 for managing public safety of the 2015 NCAA National
11 Championship football game and the NCAA 2014 Final Four
12 tournament. Some of the games were in my city as well.

13 Q. Thank you, Dr. Bowman. On your CV it's noted that
14 there is a -- something that's called The Bowman Group.
15 Dr. Bowman, can you explain what The Bowman Group is.

16 A. Sure. In 1998 I incorporated my business,
17 Theron L. Bowman, Inc., also known as The Bowman Group and
18 began serving clients in the capacity as a consultant. That
19 work started in 1998 and continues today, some 22 years
20 later.

21 Q. Thank you, Dr. Bowman. And are you a member of any
22 professional law enforcement or public safety organizations?

23 A. Sure. I have, over the years, either held or
24 maintained membership in a number of law enforcement/public
25 safety organizations. For many years, almost ten years, I

1 was a commissioner in accreditation of law enforcement
2 agencies. I've served in the International Association of
3 Chiefs of Police in many positions and capacities there at
4 IACP. I continue my membership in IACP today as well.

5 I'm a member of the board of directors of John Jay
6 College of Criminal Justice. Christian Regenhard Center for
7 Emergency Response Studies. And I've held that association,
8 that position for more than ten years now. And I retain
9 membership with the National Organization of Black Law
10 Enforcement Executives. Again, just to name a few.

11 Q. Thank you, Dr. Bowman. And is a more complete list of
12 your professional affiliations included in your CV, which has
13 been marked as an exhibit?

14 A. Yes, sir.

15 Q. Now I want to turn, Dr. Bowman, to why you're here
16 today. Would you share on this afternoon the capacity of why
17 you're here to testify today.

18 A. Sure. I am a law enforcement expert on the monitoring
19 team for the pending Consent Decree.

20 Q. And do you recall, could you share with the Court,
21 Dr. Bowman, how you became a member of this monitoring team.

22 A. Sure. To the best of my knowledge, I was referred to
23 the team by a former assistant US attorney named Steve
24 Parker. I met Steve Parker when -- in 2009 and '10. I
25 served on the US Department of Justice site team, the

1 investigative team that went into New Orleans to conduct a
2 pattern and practice investigation of the New Orleans Police
3 Department following the Katrina incidents. I was one of the
4 lead experts in that investigation. I compiled quite a
5 voluminous amount of work.

6 Steve Parker worked with the USDOJ team on that
7 particular investigation. And then after a Consent Decree
8 was established between the USDOJ and the New Orleans Police
9 Department, I was asked to serve on that monitoring team and
10 work with Steve Parker on that team as well.

11 So Steve had become familiar with my work, both as an
12 investigator serving as an SME with USDOJ but also my work as
13 a police monitor in New Orleans. And so Steve provided my
14 name to the Memphis team, and I had a conversation with the
15 Monitor. And I was asked to join the team, and here I am
16 now. I am honored to be a member of this team.

17 Q. Thank you. And Steve Parker, as you mentioned, the
18 former assistant US attorney, he was a former AUSA here in
19 Memphis, and to your recollection and the chief of the civil
20 rights unit in the office; is that your recollection?

21 A. That is my recollection. Yes.

22 THE COURT: Gentlemen, we've reached the time
23 where we did say we would take a lunch break. And so we will
24 do that. We're going to try to stay on schedule so
25 individuals who are watching and participating will know when

1 we're on and when we're in session and when we're not. So
2 we're going to take that 45-minute break. This is the only
3 lunch break and of course, restroom break for those, and then
4 we will resume promptly at 1 o'clock.

5 Now, Mr. Sample is going to tell us whether we
6 should disconnect or whether we should -- you should remain
7 in place. And Mr. Sample, I understand the plan was that
8 people would remain -- can remain but simply mute and
9 disconnect their video, that is, and then resume promptly at
10 1 o'clock. Otherwise, we would have to start over. It's
11 just like as if we were in court. So Mr. Sample, if I'm
12 correct about that, you can say yes. If I'm not correct,
13 please help us know what to do.

14 THE CASE MANAGER: You are indeed correct, Your
15 Honor. Thank you.

16 THE COURT: All right. That's fine. Well, this
17 is our lunch break. We recognize that we'll see hopefully
18 everyone promptly at 1 o'clock. Thank you all very much.
19 And we will simply mute and disconnect our video. But stay
20 on the Skype for government call -- not the Skype. I'm
21 sorry. Zoom for Government. We changed technologies the
22 last two days. Thank you.

23 (Lunch break.)

24 THE COURT: This is Judge McCalla. I think we
25 have everyone again. I'm looking for a couple of individuals

1 on the screen. Okay. I think we are. I've got to wait on
2 the Monitor to activate his video.

3 MR. STANTON: I'm sorry, Your Honor. It looks
4 like I was on mute. Can you see and hear me now?

5 THE COURT: I can hear you and see you now. So
6 we are ready to proceed. Counsel may proceed. And I see our
7 witness. Of course, our witness is up already. So counsel
8 may proceed.

9 MR. STANTON: Thank you, Your Honor.

10 BY MR. STANTON:

11 Q. Dr. Bowman, you had mentioned how it was that you
12 became, before the break, a member of the monitoring team. I
13 want to follow up with that line of questioning. Can we go
14 back to what is your role -- since you've joined the
15 monitoring team, can you share with the Court exactly what's
16 your role on the team?

17 A. Sure. My role clearly is one of the law
18 enforcement/policing experts on the team. So my role is to
19 essentially review the information for us, more from the ends
20 of --

21 THE COURT: Right. Doctor, let me ask you. The
22 court reporter indicates that once again, you faded a little
23 on the volume. And if you don't mind speaking up just a
24 little bit more, a little more and that will take care of it.
25 So I'm going to let you start over. I know you were

1 explaining your role. I think I heard that, but let's make
2 sure that it's easy for the court reporter.

3 THE WITNESS: Okay. I certainly will. I
4 apologize, Your Honor. It's just my mild-mannered self being
5 a police chief over the years.

6 THE COURT: I understand. Thank you.

7 THE WITNESS: Certainly. Yeah.

8 A. My role on the monitoring team is as a police
9 practices/law enforcement policing expert on the team. My
10 role is to look at the information that's provided to review
11 it through the law enforcement lens, make sure that I can
12 interpret what I see and communicate with the rest of the
13 team what I see, how I perceive it from the law enforcement
14 perspective.

15 BY MR. STANTON:

16 Q. Thank you, Dr. Bowman. And do you have any previous
17 experience actually serving on monitoring teams?

18 A. Yes, sir. I do. I have quite a bit of monitoring
19 team service experience.

20 Q. Would you share that with the Court this afternoon.

21 A. Sure. Well, in fact, I currently serve on four
22 monitoring teams. Memphis is included. But I serve on three
23 other teams. I mentioned New Orleans previously, and I've
24 served on the New Orleans team since 2012. In New Orleans, I
25 have primary oversight over stops, searches, arrests, as well

1 as bias-free policing, but I've also had oversight over
2 recruitment, hiring and retention, as well as public
3 integrity.

4 In Baltimore, the team in Baltimore, I have primary
5 oversight over all policy work. All of the department
6 policies will go through my area, as well as stops, searches
7 and arrests. I have secondary oversight over bias-free
8 policing and First Amendment rights in the City of Baltimore.

9 And then on the other Consent Decree that I work on in
10 the City of Chicago, Chicago is interesting. It's the newest
11 Consent Decree. I'm a member of the monitoring team, but I
12 actually did not -- was not part of the proposal of the
13 current monitoring team. I was brought on to the team after
14 the selection process for the monitoring Chicago because the
15 City of Chicago, who is the Defendant in the suit, as well as
16 the Plaintiff, which is the state attorney general's office
17 in Chicago, along with the federal judge there, insisted that
18 I be a part of the Chicago team.

19 And I so I am a part of the Chicago monitoring team.
20 And in Chicago I review all policies related to training.
21 I'm primarily responsible for all of the training function,
22 including recruit inservice training as well. I am primarily
23 responsible for all of the oversight of the stops, searches
24 and arrests for the City of Chicago as well.

25 And then again, in Memphis, I'm law enforcement expert

1 over the Kendrick Consent Decree work.

2 Q. Needless to say, Dr. Bowman, you're busy between
3 Memphis, New Orleans, Baltimore and Chicago Consent Decree
4 teams; is that a fair assessment?

5 A. Yes, sir.

6 Q. Dr. Bowman, have you ever been involved in police
7 practices investigations or audits?

8 A. Yes, I have.

9 Q. And would you share just that work and where you've
10 done and where you've performed those activities, those
11 investigations.

12 A. Right. I have been involved in a number of police
13 practices investigations and audits in places like Maricopa
14 County, Arizona. In Cleveland, Ohio. In Los Angeles County,
15 California. Seattle, Washington. Albuquerque, New Mexico.
16 Newark, New Jersey. New Orleans, as I mentioned previously.
17 Aiken, South Carolina. Meridian, Mississippi. Wilmington,
18 Delaware. And a number of places in Texas as well. So I
19 would characterize my involvement in this type of work as
20 being extensive.

21 Q. Okay. As you would say just to name a few; is that
22 right, Dr. Bowman?

23 A. Yes, sir.

24 Q. And awards, have you won any awards or otherwise been
25 recognized for your extensive work in this area, Dr. Bowman?

1 A. Sure. Yes. I have been recognized and inducted into
2 the Evidence-Based Policing Hall of Fame. That's at George
3 Mason University in Washington, D.C. I've won the UTA
4 distinguished Alumni Award. That's my alma mater. I've been
5 awarded the Gary P. Hayes Award by the Police Executive
6 Research Forum.

7 I've been named the award winner for the W.E.B. Dubois
8 Award for Leadership. I've been named the University Scholar
9 by my alma matter. The NAACP has presented me with the
10 Harold Washington Heritage Award for Government Service and
11 then many others as well. So I've been recognized for my
12 commitment to the work that I do, as well as the quality of
13 the work.

14 Q. Thank you, Dr. Bowman. And with all of this
15 experience, has this experience in those areas, have they
16 helped to form the testimony that you've giving, providing
17 for the Court today?

18 A. Yes, sir.

19 Q. Now I want to turn to what we call the Kendrick
20 Consent Decree, Dr. Bowman. It's questions with regard to
21 the Decree.

22 A. All right.

23 Q. I'd like to first begin by asking you to help place
24 the Kendrick Consent Decree into context. So first,
25 Dr. Bowman, roughly how many US law enforcement agencies are

1 there in the United States?

2 A. There are approximately 15,000 state, local and
3 federal law enforcement agencies in the US.

4 Q. Roughly, how many of those law enforcement agencies
5 are currently under a Consent Decree?

6 A. I don't know the exact number but certainly fewer
7 than 20 of those 15,000 agencies are currently under a
8 Consent Decree. So if you look at the numbers, 20 into
9 15,000 is far less than the one percent of all police
10 agencies in the country fall under any kind of Consent Decree
11 currently.

12 Q. And based on those numbers and statistics, Dr. Bowman,
13 is it fair to say that Memphis is fairly unique with this
14 Decree?

15 A. Sure. Sure. Absolutely. I mean, just look at the
16 numbers alone. 20 or fewer than 20 out of 15,000 agencies,
17 Memphis is one of those 20 out of 15,000. And then Memphis
18 is the only of the 15,000 agencies that fall underneath the
19 Kendrick Consent Decree. So Memphis is very, very unique.

20 Q. With your experience, Dr. Bowman, what about the age
21 of the -- are you familiar with the age of the Kendrick
22 Consent Decree?

23 A. Sure. The Kendrick Consent Decree is 1976, I believe.

24 Q. '78?

25 A. Yeah. '78. And so it's been around longer than most

1 other Consent Decrees. It may have been around longer than
2 any other currently active Consent Decree. Most of the other
3 Consent Decrees have come about since 1994, following the
4 SAFE Streets Act, which authorized the justice department to
5 sue police departments under Sanction 14141 of the US code,
6 commonly known as patterns and practice investigations. So
7 most of the Consent Decrees have come about as a result of
8 USDOJ patterns and practice investigations since 1994.

9 Q. Thank you. And when we talk in context of Consent
10 Decrees. If you would share, Dr. Bowman, when a city is
11 placed under a Consent Decree, what does that communicate to
12 you as a former law enforcement officer, police practices
13 expert?

14 A. Sure. Cities under a Consent Decree have entered into
15 an agreement with a plaintiff because they have been accused
16 of being engaged in extralegal practices that rise to the
17 level of needing typically federal court intervention. And
18 so again, that doesn't happen every day. It doesn't happen
19 to many jurisdictions around the country. And as I just
20 stated, fewer than 20 of 15,000.

21 But when I see an agency under a Consent Decree, it
22 tells me that that agency has agreed to subject itself to a
23 set of standards to bring it into compliance with an area
24 that is problematic and typically extralegal than that
25 agency.

1 Q. And is it appropriate in such cases, Dr. Bowman, to
2 impose higher standards on law enforcement or on a law
3 enforcement agency than would otherwise be dictated by best
4 practices?

5 A. Yeah. Yeah. Absolutely. And in many cases and I
6 think the same is likely to be the case in Memphis, the
7 results, the product of the Consent Decree will actually
8 itself establish a new best practice in a particular area.
9 But typically higher standards are established for an agency
10 that has agreed to and accepted and is under a Consent
11 Decree, and then those standards typically are then applied
12 across the field as a best practice.

13 Q. And in his order, the Court's order holding the City
14 of Memphis in contempt of the Decree, Judge McCalla explained
15 that and I am quoting, Memphis is unique in having imposed a
16 higher standard on itself than the First Amendment, but it is
17 not alone in confronting the questions presented by modern
18 surveillance.

19 MR. STANTON: And for counsel, that's ECF
20 Number 151, page ID Number 6278.

21 BY MR. STANTON:

22 Q. Dr. Bowman, have the monitoring teams in New Orleans
23 and Baltimore, the teams that you've worked on, have they had
24 to deal with problems presented by modern surveillance?

25 A. Yes, yes. I think every city that I'm in address --

1 every city with a Consent Decree in the US and then some
2 cities who are not, as well as a place in the UK, have very
3 significant issues concerning modern surveillance.

4 Q. Could you share what some of those maybe most common
5 of those issues or problems that you've observed?

6 A. I think many of the Consent Decrees address these,
7 quote/unquote, surveillance issues from what I would call the
8 community perspective, whereas they restrict the police
9 departments or police agencies from taking actions against
10 citizens who were engaged in First Amendment activity. For
11 example, Section E of the New Orleans Consent Decree is
12 actually titled First Amendment Right to Reserve and Record
13 Officer Conduct. And the language in that section prohibits
14 the New Orleans Police Department from abridging the First
15 Amendment rights of citizens and community members who are
16 trying to record NOPD or who are trying to engage in First
17 Amendment activity.

18 So most of the Consent Decree, the modern Consent
19 Decrees will establish some type of protective First
20 Amendment purpose and a requirement that the police agencies
21 protect the First Amendment rights. The Kendrick Consent
22 Decree is a little bit different.

23 Q. And has there been a range of responses by police
24 officers in these different cities to these problems, or have
25 the responses all been the same or similar?

1 A. No. Every city is different and unique. Every set of
2 facts, circumstances is different and unique to that city.
3 So there isn't one playbook. There isn't one set of best
4 practices. Each city will take a look at what options are
5 available and then typically will employ the options that are
6 most appropriate for the unique circumstances in that
7 jurisdiction. So no. There's not a one-size-fits-all
8 approach to this area, but each city has to custom tailor the
9 right prescription for its situation.

10 Q. And you mentioned not a one size fits all. So in that
11 regard, Dr. Bowman, would you say that there are any,
12 quote/unquote, best practices that would emerge from some of
13 these responses you've seen across the country?

14 A. Again, there's not a one size fits all. There's a
15 huge amount of literature out there. In fact, I would
16 characterize the literature as being voluminous. But the
17 literature also is often contradictory. The prescriptions
18 are varied. Sometimes they're conflicting, and even the
19 experts in the industry don't always agree what's best for
20 one city versus another. So there's a lot of information,
21 but it often conflicts. And there is not one standard
22 prescription that can apply across the field to every police
23 agency.

24 Q. Thank you, Dr. Bowman. And so as a general matter, to
25 talk about the Kendrick Consent Decree, is it your opinion

1 that the Kendrick Consent Decree prevents the Memphis Police
2 Department from implementing any of those best practices?

3 A. No.

4 Q. And does the Consent Decree, Kendrick Consent Decree,
5 that is, for example, prevent the MPD from using social
6 media?

7 A. No.

8 Q. Now, I mentioned best practices. I want to go back to
9 were you -- I just want to confirm that you were able to
10 listen to and hear the testimony earlier this morning from
11 expert Rachel Levinson-Waldman; is that correct?

12 A. That's correct.

13 Q. And did you hear the testimony where she had some
14 concerns as it relates to the definition of legitimate law
15 enforcement purpose?

16 A. Yes, sir. I did.

17 Q. And Dr. Bowman, along those lines of that definition
18 -- and I'm referring to the definition that's been cited in
19 referring to both parties' proposed modified Consent Decree.
20 The new definition of legitimate law enforcement purpose. Do
21 you have concerns with that definition, the new definition?

22 A. I do.

23 MR. STANTON: And I believe that's been marked,
24 Your Honor, as trial Exhibit 6.

25 THE COURT: Yes, sir.

1 MR. STANTON: And I want to see, do we have that?
2 It may be easier for opposing counsel of Baker Donelson to
3 introduce that if we can get that on the screen, or we have
4 it under a different number, Demonstrative G, if you would.
5 And Your Honor, this should be the same exhibit as trial
6 Exhibit Number 6.

7 THE COURT: Yes, it is.

8 MR. STANTON: Okay. And if you would go to
9 page 3, please. Or just keep going down. Yes, Number 3.

10 BY MR. STANTON:

11 Q. Dr. Bowman, do you see Item Number 3, definition
12 Number 3 entitled Legitimate Law Enforcement Purpose?

13 A. I do.

14 Q. And you just shared with the Court that you have some
15 concerns with this proposed definition, that the definitional
16 language proposed by the parties; is that correct?

17 A. That is correct.

18 Q. And could you share with the Court what your concern
19 is first and then if there is a fix or what you would
20 recommend with your professional experience and expert
21 experience of how -- what you would recommend to the Court
22 this could be remedied.

23 A. Okay, sure. First, you know, I hesitate a little bit
24 because this language, I believe, represents the combined
25 product and agreement between the Plaintiff and the

1 Defendant. But when I look at just the text of this
2 language, legitimate law enforcement purposes means an
3 activity conducted for the purpose of furthering the
4 prevention of crime. I really believe that furthering the
5 prevention of crime is all-encompassing. That language is
6 really all of this part of that sentence needs.

7 But then when you add "and/or ensuring the safety of
8 the public," that opens up other potential interpretations of
9 what this means. That language is less problematic than this
10 last piece "and law enforcement personnel." So if you read
11 that together, the prevention of crime and/or ensuring the
12 safety of the public and law enforcement personnel, I'm
13 concerned that really public safety and law enforcement
14 personnel safety can really be encompassed within those
15 prevention of crime words and that adding the additional
16 language isn't necessary.

17 But furthermore, when you add "law enforcement
18 personnel safety" -- or "ensuring the safety of law
19 enforcement personnel," it could also be interpreted as
20 meaning ensuring the safety of law enforcement personnel who
21 place themselves in officer-created jeopardy situations. Or
22 who because of situations they create are now their purpose
23 is legitimized when the situation should have been
24 deescalated or presented -- or prevented otherwise. So that
25 additional language, "ensuring the safety of law enforcement

1 personnel," I think not only is it unnecessary, but it also
2 opens up the potential, the potential understanding and
3 interpretation of this to include illegitimate situations
4 including -- in addition to some legitimate law enforcement
5 situations.

6 My fix would be to just end it at "prevention of
7 crime." Scratch out "and/or ensuring the safety of the
8 public and law enforcement personnel." And then continue
9 "while adhering to law and agency policy designed to protect
10 privacy, free speech, association and other civil rights and
11 civil liberties of all people."

12 Q. Thank you, Dr. Bowman.

13 MR. STANTON: You can take that down.

14 BY MR. STANTON:

15 Q. I want to turn now, Dr. Bowman, to some of the
16 rationales that's been offered by the City for modifying the
17 Consent Decree. The City has explained that, quote,
18 technology, criminals' use of technology and police practices
19 have changed significantly in the time since the Consent
20 Decree was entered. I just quoted from the City's pretrial
21 brief at ECF Number 324, page ID 9940.

22 So I'd like to take those three items, Dr. Bowman.
23 Technology, criminals' use of technology and police practices
24 have changed significantly in the time since the Consent
25 Decree was entered. I want to take those items, if you will,

1 in reverse. So let's start first with police practices. The
2 City maintains that there is a large body of knowledge and
3 literature regarding the practices and standards that modern
4 (inaudible) reasonably (inaudible) and administer law
5 enforcement agencies should follow; is that correct?

6 A. There is a large body of knowledge, but even the
7 writers don't agree. There isn't a standard set of knowledge
8 or prescriptions that apply to every law enforcement
9 situation in even remotely similar circumstances. So that's
10 partially correct. There is a large body of knowledge, but
11 the knowledge is often not coherent, and you can't just
12 accept what's out there at face value without looking at the
13 unique circumstances for a particular city or jurisdiction.

14 Q. And to the extent that any generally accepted
15 practices can be derived from this body of knowledge and
16 literature that the City refers to, how should those
17 practices apply to law enforcement agencies that are under a
18 Consent Decree?

19 A. Again, agencies that are under a Consent Decree are
20 under that Consent Decree for a reason. And that means that
21 they have been engaged in extraordinarily -- or they have
22 admitted that there is something about their activity that
23 they consent to fix it through the mechanism of a Consent
24 Decree. So the fact that they're under a Consent Decree
25 indicates that there are real problems in one or more areas,

1 in that particular area. And that you cannot paint and
2 repair those problems with a broad brush. You must be
3 absolutely specific and apply the right fix to the unique
4 situation and characteristics within that jurisdiction, and
5 here we're talking about Memphis.

6 Q. And that gets to the second item, Dr. Bowman. And
7 that's criminals' use of technology. Again, according to the
8 City and with respect to the criminal investigation, social
9 media provides law enforcement with a treasure-trove of
10 information, resources and tips; do you agree?

11 A. A treasure-trove, no. No. That's just -- that's not
12 -- in my opinion, not the right characterization of what
13 social media does. Social media is just one form of open
14 source information, and most of what's out there on social
15 media has no legitimate law enforcement value whatsoever. So
16 I would not agree that social media provides a treasure-trove
17 of information for law enforcement.

18 Q. And that gets us to the third item, and that is
19 changes in technology, Dr. Bowman. According to the City,
20 quote, the Kendrick Consent Decree is outdated, and is not
21 serving to protect the citizens of Memphis as it was intended
22 to do. In fact, it is causing them increased harm and a
23 substantial decrease in overall safety, end quote.

24 Dr. Bowman, is that view consistent with your
25 observations?

1 A. I can't -- I cannot say that that is the case. The
2 Kendrick Consent Decree is a document only shared between the
3 Plaintiff and the Defendant. What I do know is technology
4 has changed over the years. It continues to change, but as
5 far as the impact on the Consent Decree and the citizens of
6 the City of Memphis, the impact of a Consent Decree on the
7 citizens of the City of Memphis, I don't know if the Consent
8 Decree itself is having that negative impact. But I think it
9 is within the rights of the parties to the Consent Decree to
10 look at it, to provide and prescribe and to recommend changes
11 to it. And over time, that process problem should be
12 recognized as valid.

13 Q. One area that the City claims the Consent Decree
14 restricts it in performing and you mentioned this term
15 earlier, Dr. Bowman, and that's the, quote/unquote, open
16 source searches. You mentioned this term earlier, open
17 source searches. Can you explain what they are?

18 A. Well, sure. A lot of times police departments and
19 even some writers will conflate the term open source searches
20 or open source information with the term social media. And I
21 think it's important to know that at least according to the
22 2001 NATO Open Source Intelligence Handbook, there are at
23 least four distinct categories of open source information and
24 intel.

25 And the handbook would say that those are open source

1 data, which essentially is the raw print from a primary
2 source. And it can be anything like a tape recording, a
3 photograph or some other item. Open source information
4 that's edited raw data to provide some type of validation and
5 filtering. A third category would be open source
6 intelligence. We've heard that word a few times. And open
7 source intelligence is edited. It's information that has
8 been deliberately discovered, distilled and disseminated to a
9 select audience of people. And then finally, validated open
10 source intel is information to which a high degree of
11 certainty can be attributed.

12 So when we use the term open sources, open sources
13 include newspapers and the Internet. It includes books and
14 phone books, journals, radio broadcasts. It includes TV.
15 Individuals and other sources. So social media sites are
16 just a fraction of the open sources that law enforcement
17 agencies can access.

18 And even when we talk about Internet sites, Internet
19 sites do not equate to social media. And real quickly, for
20 example, we talk about Internet. Open source information on
21 the Internet includes search engines like Google, Bing,
22 Yahoo, America Online, Ask, Lycos, Dogpile, search.com,
23 Volunia and other specialized directories like Yellow Pages,
24 Yelp, Manta, Hotfrog and jade.com. And there are many other
25 Internet open sources.

1 But Internet open sources also include e-commerce and
2 auction sites and classified sites like eBay, and Craigslist.
3 Classifiedads.com. And key GG provide some open source
4 information as well.

5 And then there are other image hosting platforms.
6 Platforms like Flickr, Shutterfly would be one, Snapfish.
7 And then video hosting sites like YouTube, Vimeo, Hulu, and
8 Ustream. All are Internet open source sites that are not
9 necessarily social media sites. And so it's important that
10 when we talk about open source, we don't conflate the
11 definition of open sources with social media.

12 Q. Thank you, Dr. Bowman. And just one other question as
13 it relates to open sources, open source searches and that is,
14 in your view, does the Consent Decree, the Kendrick Consent
15 Decree prevent the City from performing open source searches?

16 A. No.

17 Q. Now, I've referenced this before, the fact that the
18 City and the ACLU, the parties have come to an agreement on
19 several proposed modifications to the Kendrick Consent
20 Decree. But there's one aspect of the Kendrick Consent
21 Decree on which they have not agreed to. That's been
22 discussed earlier today, but I want to go there to that
23 section, and it's the amount and nature of proposed
24 modification of Section I. I would like to take just a few
25 minutes to talk about that section.

1 MR. STANTON: If we could have the monitoring
2 team Demonstrative correct. Exhibit correct.

3 BY MR. STANTON:

4 Q. Can you take a look at this. I'm going to read it
5 aloud, if you could take a look, Dr. Bowman, at Section I of
6 the Kendrick Consent Decree. It reads, "The Defendants and
7 the City of Memphis shall not encourage, cooperate with,
8 delegate, employ or contract with or act at the behest of any
9 local, state, federal or private agency or any person to plan
10 or conduct any investigation, activity or conduct prohibited
11 by this Decree."

12 Are you familiar with this section, Section I, of the
13 Kendrick Consent Decree?

14 A. Yes.

15 Q. And I believe you've seen the City's position that
16 Section I prevents the City from participating in operations
17 with joint task forces such as the Joint Terrorism Task
18 Force, or it's called the JTTF or the Multi-Agency Gang Unit,
19 also known as MGU. Is that your opinion, or do you have a
20 opinion with regard to whether Section I prevents the City
21 from participating in operations with joint task forces?

22 A. Nowhere in Section I does it say the City is
23 prohibited from participating in joint task forces or in the
24 multi-agency gang units. So absolutely not.

25 Q. And Dr. Bowman, along those lines, would you expect

1 that the -- and I'm using the acronym JTTF or MGU, would you
2 expect those task forces to share information with MPD
3 officers that is unrelated to any legitimate law enforcement
4 activities?

5 A. No.

6 Q. Okay. And why is that?

7 A. Well, because JTTF, the Joint Terrorism Task Force and
8 typical task forces or multi-agency units, they are focused
9 on a crime prevention or crime-fighting mission. They're not
10 focused on a mission outside of law enforcement. And so I
11 would not expect information coming from either one of those
12 entities that are not legitimate law enforcement information.
13 That falls outside of the mission of either one of those
14 types of operations, as I know them, as they are operated in
15 places around the country.

16 MR. STANTON: And I am going to -- just for
17 counsel, I want to cite to where the Court in ECF Number 250,
18 just the citation to a quote from Judge McCalla, ECF 250,
19 page ID 8417 and 8418.

20 BY MR. STANTON:

21 Q. If you would just follow along with me, Dr. Bowman,
22 where the Court says Section I, quote, may prevent the City
23 from receiving information from federal law enforcement
24 agencies that implicates or may implicate First
25 Amendment-protected activities or political intelligence

1 unless it engages in the review and authorization processes
2 required by Section G of the Decree.

3 And my question to you, Dr. Bowman, in reviewing that
4 order from the Court, in your opinion, is it good practice to
5 require the MPD to engage in a review and authorization
6 process before it can accept information about First
7 Amendment-protected activity?

8 A. Not only is it good practice as a chief executive
9 officer of a law enforcement agency, I would insist that that
10 would occur. And it's also legally required.

11 MR. STANTON: Dr. Bowman, those are all the
12 questions that I have for you at this time. Thank you so
13 much.

14 Your Honor, we'll tender the witness.

15 THE COURT: Mr. McMullen, you may cross examine.

16 MR. MCMULLEN: Thank you, Your Honor.

17 **CROSS EXAMINATION**

18 **QUESTIONS BY MR. MCMULLEN:**

19 Q. Dr. Bowman, while we have you on Section I,
20 restriction on joint operations --

21 MR. MCMULLEN: Could we put that up on the
22 screen, Mary.

23 It's the same section that you read through with
24 Mr. Stanton.

25 MR. STANTON: Mr. McMullen, if it's okay, we'll

1 have them put that up just for...

2 MR. MCMULLEN: Okay. I think we got it up.

3 BY MR. MCMULLEN:

4 Q. So Dr. Bowman, just so I'm clear, you think that MPD
5 can accept information and intel from other police agencies
6 that are not bound by the Consent Decree nor do they operate
7 within the confines of the Consent Decree?

8 A. What my interpretation of this section is saying is
9 that the Defendants cannot cooperate or act at the behest of
10 any organization that plans to conduct any investigation or
11 activity or conduct that's prohibited by the Consent Decree.
12 So they can't engage in prohibited conduct, and they can't
13 receive information that's prohibited by the Consent Decree.
14 But this does not bind the City from participating with a
15 task force or participate in a multiunit agency that derives
16 information of law enforcement criminal value.

17 Q. But -- well, let's talk about law enforcement and
18 criminal value. What if they receive information that
19 identified threats or situation awareness bulletins in which
20 another organization obtained by doing social media searches
21 and doing certain searches and operations that are prohibited
22 by this Consent Decree? Is it your reading that MPD can
23 receive that information and potentially act on it?

24 A. The police department cannot receive, they can't
25 encourage, they can't cooperate with any information that's

1 derived from a process that is not consistent with Consent
2 Decree requirements.

3 Q. Okay. So in the Multi-Agency Gang Unit, you're
4 familiar with that; is that correct?

5 A. Yes, sir.

6 Q. Do you know the different police agencies that are
7 part of that?

8 A. I don't know every agency that's a part of the local
9 Multi-Agency Gang Unit. I like Ms. Levinson-Waldman had an
10 opportunity to interact with Major Goods, and so I've heard
11 this description of the agencies that are a part of that
12 agency and the work that that organization does, but I can't
13 quote the names of all of the participating agencies.

14 Q. Okay. Let's assume the Multi-Agency Gang Unit works
15 with the sheriff's department also, and they work as a unit.
16 And the sheriff's department is not bound by this Consent
17 Decree. And if they receive information about a possible
18 threat, not a crime, about a possible threat in the
19 Multi-Agency Gang Unit, it is your belief that they could
20 share that with the MPD officer who's in the Multi-Agency
21 Gang Unit?

22 A. It is my belief that that information must be vetted
23 to ensure that it is consistent with Consent Decree
24 requirements before it can be viewed by the MPD.

25 Q. Okay. So how is the Memphis Police Department

1 supposed to vet the information that comes in? If they're
2 still working there in the unit, it's a number of them
3 working there in a unit. They're working together in a unit,
4 and there's information coming in from the sheriff's
5 department, maybe information coming in from other agencies,
6 is it your belief that the MPD officer that works in that
7 unit has to vet that information, meaning go to each of those
8 agencies, show them the Consent Decree and go through it and
9 make sure they did not obtain it inconsistent with the
10 Consent Decree? Is that your testimony?

11 A. No, sir.

12 MR. STANTON: I'm sorry. Your Honor, before
13 Dr. Bowman answers this line of questioning, I'm trying to be
14 flexible, but I'd like to object. The Court has already
15 opined and weighed in on what is permissible by the
16 Multi-Agency Gang Unit or task forces as it relates to
17 Section I. So I'm going to object that this matter has been
18 adjudicated and addressed by the Court.

19 THE COURT: Well, I understand that. It is cross
20 examination. A lot of latitude is given. I'm going to allow
21 the question, but it does not affect the prior rulings of the
22 Court.

23 MR. STANTON: I understand.

24 THE COURT: Sure. We can allow the question
25 because it goes to different issues.

1 BY MR. MCMULLEN:

2 Q. Okay. You can go ahead and answer the question, sir.

3 I'm sorry. I didn't hear you.

4 A. No. That's not my interpretation.

5 Q. Okay. So I'm having trouble understanding. If we're
6 part of a joint task force, if MPD is a part of a joint task
7 force who is circulating information -- and I want to put
8 this up on the screen for you. This is the Tennessee Fusion
9 Center. And this is a bulletin that would come in. It's a
10 situation awareness bulletin that comes from the Tennessee
11 Safety & Homeland Security. Can you see that? Can you see
12 that entire document?

13 A. I can see most of the document.

14 Q. Okay. Now, can you see it now to read it, to be able
15 to read it?

16 A. I can see most of the document. I can see it
17 satisfactorily.

18 Q. Okay. This is a situation awareness document that
19 comes in from the Tennessee -- from the Fusion Center,
20 Tennessee Fusion Center, which is under the Tennessee
21 Safety & Homeland Security. Okay.

22 MR. MCMULLEN: Go down in to details, Mary.

23 BY MR. MCMULLEN:

24 Q. Well, let's start at the top. I'll read the first
25 part. Under scope, "The Tennessee Fusion Center, TFC, is

1 releasing this situation awareness bulletin to inform law
2 enforcement and public safety personnel about the possible
3 risk of violence to COVID-19 demonstrations by individuals
4 supporting boogaloo, a term referencing a second US civil
5 war." And I want to toggle down to details. And it
6 referenced the FBI arrested two members charged -- and if you
7 go down.

8 MR. MCMULLEN: Highlight, Mary, "according to."

9 BY MR. MCMULLEN:

10 Q. According to open source media, it's reportedly a
11 member of an anti-government/anti-authority violent extremist
12 group, supports boogaloo and boasts on social media that he
13 would bring high-powered weapons to and cause trouble at a
14 rally. Now -- and then after that, you can go to the last
15 page. And I'm skipping around just to save time. And
16 they'll talk about -- when you go to under U, they talk about
17 the hashtags that are emerging on line. And those hash tags
18 are used with social media posts, not like Google search or
19 anything of that nature. And at the end of the note, they
20 list the hashtags.

21 MR. MCMULLEN: Go to the hashtags. Highlight
22 them.

23 BY MR. MCMULLEN:

24 Q. Now, you're saying your reading of the Consent Decree,
25 we can or cannot accept this information and act on it?

1 A. I have not evaluated that information, but what I
2 believe, Mr. McMullen, is that it's incumbent upon the
3 Memphis Police Department to review, to review, to vet the
4 information, to ascertain whether or not it's restricted
5 under the Consent Decree. Any information that goes out to
6 the Memphis PD or that is circulated through the Memphis PD
7 should be vetted before it's circulated.

8 And so I'm not the one to tell Memphis PD how they
9 should vet that. I'm not the one to tell them what resources
10 they should apply to that process or who in the agency should
11 have that responsibility. That's not my role as the law
12 enforcement expert. But I am saying that this information
13 should be vetted before it's accepted or viewed by the MPD,
14 regardless of how that process is designed and undertaken.

15 Q. Well, okay. Let me pose this to you. The Tennessee
16 Fusion Center doesn't have a director authorization, and they
17 don't get authorization from Director Rallings here before
18 they do their social media searches, which is required by the
19 Consent Decree. So assuming that is correct, then we
20 couldn't accept that information.

21 A. That sounds like a statement to me. And I won't
22 refute that statement if that's your opinion.

23 Q. Well, let me ask you this. This is a question.
24 Hypothetically, if the Tennessee Fusion Center did not get
25 authorization from Director Rallings from MPD to do a social

1 media search and the Tennessee Fusion doesn't have a director
2 authorization process that we know of, is it your opinion
3 that we could not accept this information?

4 A. Mr. McMullen, I'm trying to be as concise in
5 responding to your question as I can be. I think that the
6 best way that I can, the most concise response is to say that
7 those fewer than 20 police agencies who currently fall under
8 Consent Decrees in the US all have restrictions and
9 conditions placed upon them that are unique to the
10 circumstances addressed in their Consent Decree.

11 And they are required to prescribe solutions that will
12 bring them into compliance. Sometimes the solutions are
13 multimillion dollar technology systems. Sometimes the
14 solutions are personnel systems. But it's incumbent upon the
15 Plaintiff to prescribe those solutions.

16 And so while I hear what you're saying, what you're
17 not saying is that it's not possible to comply. And I
18 believe it is possible to comply. With the requirements of
19 this Consent Decree, it's incumbent upon the MPD to determine
20 how to comply.

21 Q. Okay. Let me ask you another question. When a
22 dignitary from the Government, former president or something
23 comes into town with his own secret service detail with
24 information they may have that may be of some threat to that
25 dignitary, that if they obtained that information through

1 social media searches without the approvals or without the
2 restrictions of a Consent Decree, is it your testimony that
3 we could accept -- that MPD can accept that information and
4 cooperate with them and coordinate with them for the safety
5 of that individual?

6 A. Is it reasonable suspicion or probable cause that a
7 crime is occurring?

8 Q. No. When you do a threat assessment, you just
9 identify. It's not probable cause. It's not to the point at
10 which you could activate arrests. You're doing threat
11 assessments. Let me ask you. Let me withdraw that question.

12 Do you believe police departments should do threat
13 assessments?

14 A. I believe many, if not most, police departments do
15 threat assessments, yes.

16 Q. So you believe they should do threat assessments?

17 A. I think they do as a matter of practice. Many, if not
18 most, police departments do.

19 Q. Are threat assessments beneficial?

20 A. Because I don't know and understand the processes that
21 every police department that conducts threat assessments, I
22 don't understand the process they -- processes they undertake
23 to perform those processes, I don't know if they're engaged
24 in the legal or extralegal or totally legal activity. I
25 don't know what information they are accessing or where or

1 how. I can't tell you that it's beneficial.

2 Typically the end does not justify the means. And so
3 the means must be legal. The means must be constitutional.
4 And when there are special conditions like the Consent Decree
5 applies and the means also should fall within the
6 restrictions imposed by the Consent Decree and state law and
7 so on and so forth. So I don't know what every department is
8 doing, and so I don't know that what they're doing is
9 beneficial or not. But certainly threat assessments can be
10 beneficial if performed the right way and constitutionally.

11 Q. Okay. And you haven't engaged anybody at MPD about
12 how they do threat assessments or some of the assessments and
13 some of the challenges they have with whether or not to
14 accept information from outside sources?

15 A. We've interviewed MPD personnel. I don't -- just
16 without reviewing my notes, I don't recall the specific
17 questions or the specific nature of the complete discussion,
18 but we have interviewed MPD personnel who have spoken along
19 those lines and on those topics. I've been chief, one of the
20 chiefs, for example, one who has articulated that.

21 Q. Do you recall an RFA or request for authority sent to
22 the Monitor, Ed Stanton, having to do with a law enforcement
23 symposium that was going to be here in Memphis, Tennessee,
24 and it involved several law enforcement agencies coming here?
25 And the question to the Monitor, Mr. Stanton, was whether or

1 not we could receive information from them or share
2 information with them. Were you part of that decision
3 making?

4 A. Yes. I remember the RFA coming through, and I
5 remember the monitoring team having a discussion on the
6 Memphis RFA.

7 Q. And was it your opinion that we could not receive or
8 share information with those agencies?

9 MR. STANTON: Your Honor, if I may. And again,
10 this is cross examination, but just for the record, I would
11 like to renew my objection that these are matters that have
12 been adjudicated by the Court.

13 THE COURT: Objection sustained.

14 We need to move on. This matter has been
15 resolved.

16 MR. MCMULLEN: Okay.

17 BY MR. MCMULLEN:

18 Q. You do believe in the use of technology in law
19 enforcement; is that fair to say?

20 A. Absolutely.

21 Q. Okay. And you testified earlier that this may be one
22 of the oldest Consent Decrees in the country; is that
23 correct?

24 A. That's correct.

25 Q. And it was entered into before the technology that's

1 commonly used in police practice was even invented; isn't
2 that correct?

3 A. I think it would be, Mr. McMullen, more correct to say
4 that it came into existence prior to most of the modern
5 technology that's being used in police departments. But I'm
6 in some police departments that are using technology that's
7 dated pre Kendrick Consent Decree. So it would not be
8 accurate for me to say most technology in departments. And
9 certainly the modern technology it does predate that.

10 Q. Okay. The technology that's used and that's
11 considered best practices today for police departments; is
12 that fair to say?

13 A. I think modern technology is a better characterization
14 of it.

15 Q. Okay. And that modern technology, just so we're
16 talking about the same thing, the Consent Decree was entered
17 into before the Internet was used in law enforcement; is that
18 fair to say?

19 A. I think that's a fair statement.

20 Q. Before you had the speed and storage of digital
21 photographs; is that fair to say?

22 A. I think that's fair to say as well. Yes, sir.

23 Q. Before you had open source searches such as Google,
24 Yahoo, things of that nature; is that fair to stay?

25 A. Well, certainly those are Internet-based searches that

1 did not occur prior to the Internet.

2 Q. And social media websites; is that fair to say?

3 A. I think that's fair to say as well. Yes, sir.

4 Q. Wouldn't you say since -- isn't it fair to say since
5 the Consent Decree, there's a variety of crimes now that
6 require a modern-day technological fighting tool?

7 A. I would say that there are crimes whose solution, in
8 some cases identification, would be better facilitated using
9 modern-day technology. But at the same time, there are many
10 police departments around the country who don't have modern
11 technology who are still on paper and pencil and pen systems
12 who find a way to serve their citizens to the best of their
13 ability, using little to no technology. And those cities
14 tend to not be among the highest crime per capita cities in
15 the country. Those cities and towns tend to not be among the
16 highest per capita crime areas nor the most violent crime
17 areas.

18 And so technology is a force multiplier. Technology
19 can certainly facilitate identification in solving crimes.
20 But technology in itself, I think, is not an absolute
21 necessity to be able to investigate and resolve crime and
22 crime issues.

23 Q. I'm sorry, Dr. Bowman. I was on mute. You do agree
24 that modern-day technology is best practices today for
25 fighting crime? The use of modern-day technology is the best

1 practices today for fighting crime?

2 A. Again, Mr. McMullen, I can't paint the whole police
3 arena with a broad brush because it's not just the technology
4 or how that technology is applied, what kinds of training
5 goes with the technology. And even once the technology is
6 deployed, how that technology is deployed and actually used.
7 What is the uptake in the organization or an agency and are
8 they maximizing the use of that technology, based on its
9 intended use.

10 So just having a modern records management system
11 won't protect you from modern records if what goes into the
12 system is junk. Or if you don't have the person operating
13 the system who knows how to retrieve the data from the
14 system. So technology itself is not the answer, but it's how
15 it's used, which technology and so on and so forth. So I
16 apologize for the long answer, but that's the most concise.

17 Q. I want to share the screen here. Your consulting
18 firm, you advertise technological solutions with fighting
19 crime; is that correct?

20 A. I advertise technology solutions for police agencies.

21 Q. Right. And what you're advertising is best practices;
22 is that fair to say?

23 A. Yeah. As I advertise, it's an opportunity for
24 organizations to work with my company to understand what
25 technology solutions are out there and how to best apply

1 those solutions to both modernize their agency and make their
2 agency operations more effective and efficient.

3 Q. Okay. I want to go back to the exhibit when you were
4 talking about the definition of legitimate law enforcement
5 purposes. And before we get to that, I just have one quick
6 question, while we find that. The Consent Decrees that you
7 have been involved in previously were primarily excessive
8 force and race discrimination; is that fair to say?

9 A. No.

10 Q. Okay. What other Consent Decrees besides excessive
11 force and discrimination?

12 A. Well, the Consent Decree in Baltimore, for example,
13 also has a large technology component. Stops, searches,
14 arrests, technology, bias-free policing, promotions,
15 recruitment, hiring, detention, internal affairs, the public
16 integrity. They cover a wide range of topics. And each
17 agency where those topics are covered, those areas were
18 identified as problematic. And for most agencies, there's a
19 technology nexus in the Consent Decree.

20 Q. All right. Let's look at -- you were looking at the
21 definition of legitimate law enforcement purpose, and I think
22 you said if you put a period after "prevention of crime,"
23 that would be an adequate definition of legitimate law
24 enforcement purposes.

25 A. I would put a comma after "prevention of crime" and

1 strike out the rest of that sentence. And start back up with
2 "while adhering to law and agency policy designed to protect
3 the privacy, free speech, association and other civil
4 rights."

5 Q. What about how does the City hear when a crime has
6 been committed and you're going after the perpetrator?
7 That's not prevention of crime. If you leave it right there,
8 you'll leave that out of legitimate law enforcement purpose,
9 wouldn't you?

10 A. I think when you look at one of the reasons or one of
11 the rationales for making an arrest so that you take a
12 criminal or potential criminal off the street, you adjudicate
13 that criminal. If he or she is found guilty, then you take a
14 person off the street who was potentially a repeat offender.
15 And so if you look at the profile of crimes, you find
16 typically based on prior research that seven percent of
17 crimes are committed by repeat offenders. And so by making
18 that arrest, you theoretically, at least, reduce the
19 opportunity for that person to further engage in future
20 criminal offenses. So obviously, making arrests is a crime
21 prevention effort. You're preventing further victimizations.

22 Q. Okay. So that's what you interpret prevention of
23 crime to encompass threat assessments, make an arrest after a
24 crime. What about public safety that doesn't have a lot to
25 do with a crime? An area that's over crowded, where people

1 may be trampled? That may not be a crime but someone may be
2 hurt. It may be public safety. Is that subsumed in your
3 definition of prevention of crime?

4 A. I think in most cities and states, they have
5 disorderly conduct rules and laws and regulations. They have
6 laws that mandate peaceably assembly that do go to crime. So
7 yeah. I think that is covered under crime prevention.

8 Q. So any public safety prevention activity, in your
9 mind, is preventing crime?

10 A. No.

11 Q. No?

12 A. No.

13 Q. Okay. Tell me what public safety measures -- well,
14 actually, I agree with you. In your mind are there any
15 public safety measures that police departments do that does
16 not prevent crime?

17 A. I can't think of one. I can't think of one that would
18 not also fall under the definition of prevention of crime.

19 Q. If they are responding to a car accident or some type
20 of natural disaster, you would put that under the prevention
21 of crime? And when I say they, if Memphis Police Department?

22 A. Okay. So responding to a natural disaster, you can
23 characterize it however you want, but you're protecting the
24 peace. You're positioning the units to prevent loitering.
25 To prevent theft. To prevent the consequences thereof. So I

1 think that crime prevention also applies in that particular
2 hypothetical that you're proposing now. So yeah.

3 Q. What about an auto accident?

4 A. When -- well, it's hard for me to imagine how an auto
5 accident would be the source of information coming from an
6 agency that's transmitted against the requirements of the
7 Consent Decree. But an auto accident, just like many other
8 things police officers do when they get there, they get there
9 to make sure that the people who are there have a proof of
10 financial responsibility, which is a law. They're there to
11 make sure that people who are involved in the accident
12 exchange identification, which is the law. They are there to
13 make sure that nobody hits and run or leaves the scene
14 without leaving information, which also is a law. So even in
15 terms of traffic accidents, yeah, I think there is a crime
16 prevention function and mission, even in responding to a
17 traffic accident or a traffic situation.

18 Q. So in your definition of legitimate law enforcement
19 activity, you include that under prevention of crime?

20 A. Yes, sir.

21 Q. Okay. You mentioned something about NATO in 2001.
22 You were talking in particular about NATO use of the
23 Internet?

24 A. No. I was just referring to the NATO Open Source
25 manual from 2001, which is one of the more concise

1 publications I've found that deal with the open sources.

2 Q. So in open source, you're talking about technology,
3 search engines and things like that?

4 A. Yeah. Open sources, as I've characterized them,
5 includes search engines but also includes newspapers, TVs,
6 radios, Internet, books, journals, you know, broadcasts,
7 social media sites as well. So open sources include a number
8 of different categories of information.

9 Q. You know, that manual is 19 years old. You will agree
10 that it's a little outdated to be dealing with technology
11 that we're having today? You will agree with that?

12 A. No.

13 Q. You don't?

14 A. No.

15 Q. Do you know when facebook was invented, when facebook
16 became a regularly used social media site?

17 A. I can't quote the year.

18 Q. Okay. But from your viewpoint, NATO 2001 Open Source
19 technology is the most -- is relevant to open source of
20 searches and use of social media today in 2020?

21 A. NATO defines open sources, and I've referenced that to
22 provide NATO's definition of open sources. That's versus the
23 tendency to conflate social media with open sources. And I
24 think the NATO Open Source manual does a good job of
25 distinguishing between what's social media and what's an open

1 source. And so I think it's a good reference.

2 And though as far as its being a 2001 publication, you
3 know, Sir Robert Peel created the Peelian Principles for
4 policing, you know, 280-something years ago. So -- and
5 they're still relevant. So the age itself doesn't make the
6 document irrelevant.

7 Q. Now, if I heard you correctly earlier in your
8 testimony, you said social media really doesn't provide a lot
9 of useful information for law enforcement; was that your
10 statement? I don't want to mischaracterize it, but was that
11 your statement?

12 A. No. No. Social media was -- the quote was "social
13 media is a treasure-trove of information." My statement is
14 that it is not.

15 Q. Okay. In 2001, that's when 9/11 occurred. That's my
16 memory. Does that jibe with your memory?

17 A. Yes, sir.

18 Q. And the NATO book written in 2001, most of -- it
19 didn't take into consideration the changed circumstances
20 after 9/11 occurred; wouldn't that be fair to say?

21 A. I think that would be fair to say. It was written in
22 November of 2001. And it was, you know, September 11th is
23 when 9/11 occurred. So I don't know that it incorporated the
24 events from two months prior. It could. But I think it's
25 fair to say it certainly didn't incorporate the two-year

1 aftermath of 9/11.

2 Q. Definitely, I think we can agree this Consent Decree
3 was entered into before 9/11; we're in agreement on that?

4 A. Certainly, sir.

5 MR. MCMULLEN: All right. I have no further
6 questions. I have no further questions.

7 THE COURT: All right.

8 Mr. Castelli, any questions?

9 MR. CASTELLI: First, kind of a housekeeping
10 measure. There was a Fusion report that was shared to the
11 witness. Are we going to make that an exhibit, Mr. McMullen?

12 MR. MCMULLEN: Yes.

13 THE COURT: We can mark that as 8. The Fusion
14 report. And we need to make sure we have one here. I think
15 we do. So I think we're okay. We will check and make sure
16 that we've got -- I know we do, but it may take a second.

17 MR. CASTELLI: I believe it was Defendant's
18 Number 6.

19 THE COURT: It is.

20 MR. MCMULLEN: It's going to be part of a
21 cumulative exhibit, and we're going to get it into evidence
22 through Director Rallings.

23 THE COURT: All right. Well, I think they're
24 asking to use it in the cross examination; is that right,
25 Mr. Castelli?

1 MR. CASTELLI: Yeah. I see no reason. We're not
2 going to object to it. Unless the Monitor has any objection,
3 go ahead and admit it so it can be used.

4 THE COURT: Without objection then, the Fusion
5 report may be necessary to call on IT at one or more offices
6 to help display that for Mr. Castelli. So we've given that a
7 number, which is Number 8. And refer to it as Fusion report.

8 (WHEREUPON, the above-mentioned document was
9 marked as Exhibit Number 8.)

10 THE COURT: Counsel, you may proceed if you're
11 able to do that with this information.

12 MR. CASTELLI: I am, Your Honor. Thank you.

13 THE COURT: We will take our break at 2:30, so
14 you may have a little bit of time.

15 MR. CASTELLI: Thank you, Your Honor.

16 **CROSS EXAMINATION**

17 **QUESTIONS BY MR. CASTELLI:**

18 Q. Dr. Bowman, good afternoon. I wanted to start -- I
19 think Mr. McMullen has asked you many questions about the
20 definition of crime prevention, so I'm not going to add
21 anything there. But I did want to just kind of come back to
22 the concerns that you had about including in this definition
23 of legitimate law enforcement purpose, the terms "public
24 safety and law enforcement safety." Can you tell me why --
25 what reason you think those terms should be removed as you've

1 suggested?

2 A. Well, Mr. Castelli, I think that public safety and
3 crime prevention are redundant. Those two terms in
4 particular are redundant. I think crime prevention covers
5 public safety in the iterations that would apply to the MPD
6 in the Consent Decree. I'm sorry. The law enforcement or
7 safety of law enforcement personnel, I believe that's a
8 broader category that could be construed to include
9 situations where law enforcement personnel create their own
10 requirement for additional safety.

11 I used the term "officer-created jeopardy," which is a
12 topic of current events today. And that's essentially where
13 officers have the opportunity, if not the obligation, to
14 deescalate a situation. But because of decisions that they
15 make to not deescalate, they move themselves into a situation
16 where deadly force or greater force then becomes necessary.
17 So I think by including officer safety as a part of this
18 definition also includes situations where officer-created
19 jeopardy is covered under the definition of legitimate law
20 enforcement purpose. And I think that's really conflicting
21 when we do that.

22 Q. Okay. So if I'm understanding you correctly, the
23 parts of law enforcement personnel safety that you would
24 consider to be legitimate, part of a legitimate law
25 enforcement purpose you also believe would be included under

1 prevention of crime?

2 A. Absolutely. Absolutely.

3 Q. Okay.

4 A. Absolutely.

5 Q. And so your concern is really that this may allow
6 other things that you would not consider legitimate law
7 enforcement purposes to creep into this definition?

8 A. That is absolutely correct. The safety of law
9 enforcement personnel is essential, I mean, that the cops
10 must be safe. They must be protected. But I can't envision
11 a scenario where law enforcement personnel safety doesn't
12 also fall upon the definition of crime prevention.

13 Q. And I just wanted to clarify that. It's the concept
14 of keeping law enforcement and the public safety, you're not
15 objecting to that?

16 A. No.

17 Q. You're just saying prevention of crime covers that?

18 A. That's correct.

19 Q. Okay. I think I understand your position. Thank you.
20 Moving on to Section I. And I will put up the demonstrative
21 exhibit that we were looking at earlier. Do you see the
22 definition on your screen or the excerpt from the Consent
23 Decree on your screen?

24 A. Yes.

25 Q. All right. So my understanding of your testimony,

1 both on direct and with Mr. McMullen, is that it's your
2 opinion that this does not in any significant way hinder the
3 Memphis Police Department from performing its function; am I
4 correct? Is that a good summary of what your opinion is?

5 A. Yes.

6 Q. I think discussions we've had in the past, I think you
7 have mentioned the just vast amount of information that is
8 out there that would be available to Memphis. Do you have an
9 opinion about what information this may actually be limiting
10 or prohibiting Memphis from having and what effect that might
11 have on its ability to perform its functions?

12 A. I think by design this limits the amount of what the
13 Consent Decree calls First Amendment intelligence or
14 political intelligence. It mimics the amount of that
15 information that they can receive and operate from. I think
16 it mimics the social media information that's not related to
17 a criminal offense or not related to a crime. It prohibits
18 them from receiving that information if it's not related to a
19 criminal offense. But I think that's it.

20 Again, most information in social media is -- it's not
21 valid and cannot be verified. There's a lot of information
22 out there, but any police department has to have the
23 apparatus to evaluate information and then responsibly use
24 whatever information that they push into their crime-fighting
25 apparatus. And so this is no different. And I think it does

1 not significantly hinder the MPD's ability to be a successful
2 crime-fighting organization.

3 Q. So are you saying that generally, any information you
4 receive, whether it's First Amendment-related or not should
5 go through some sort of vetting or analysis to determine what
6 its worth is to crime prevention or crime fighting?

7 A. Absolutely. Absolutely.

8 Q. I wanted to, if I can, have you look at one more
9 thing. Going back to the Fusion Center report that's now
10 been marked as Exhibit 8. Can you see that on the screen?
11 I'll roll back up to the top.

12 I think Mr. McMullen had read some of this or this may
13 be the -- yes. Had read some of this during your
14 examination. But would you agree with me that these, this
15 information coming from the Fusion Center is concerning
16 criminal conduct or potential criminal conduct?

17 A. You know, I really can't tell. It looks like that's a
18 30-page document.

19 Q. Yeah.

20 A. I don't know what pages that I haven't seen. I
21 haven't had an opportunity to see or evaluate the contents of
22 this document prior to right now. And so I really don't
23 know. And it would not be fair for me to --

24 Q. Sure.

25 A. -- make an assumption because I really don't know.

1 Q. Well then, maybe more generally and just putting aside
2 then this document, you know, would you agree that Section I
3 certainly allows law enforcement agencies to share
4 information about crime interagency, between the agencies?

5 A. Yes, it does.

6 MR. CASTELLI: Your Honor, those are my
7 questions.

8 Thank you, Dr. Bowman.

9 THE WITNESS: Yes, sir.

10 THE COURT: Any redirect? We're about to our
11 break time, but I am going to inquire of the Monitor. Any
12 additional questions for Dr. Bowman, or should we take our
13 break now?

14 MR. STANTON: Your Honor, I have maybe three to
15 five minutes just to clarify a few things. Maybe a break now
16 would be sufficient.

17 THE COURT: We'll take a short break. That may
18 help everybody review their notes. And it's basically 2:30.
19 This is a 15-minute break for the afternoon.

20 And of course, we'll come back, and we will be
21 here for a substantial period of time. So I'll see everybody
22 again. You can remain connected, but just go to mute, and
23 also you can disconnect your video. Thank you.

24 (Short break.)

25 THE COURT: All right. I think we have everyone.

1 Counsel may proceed. Let's make sure everybody can hear.
2 There we go.

3 MR. CASTELLI: Can you --

4 MR. STANTON: Can you hear me now, Judge?

5 THE COURT: There we go. You're good.

6 MR. STANTON: Thank you, Your Honor. Just very
7 briefly.

8 **REDIRECT EXAMINATION**

9 **QUESTIONS BY MR. STANTON:**

10 Q. Dr. Bowman, there were a series of questions on cross
11 examination from Mr. McMullen, and I believe a couple from
12 Mr. Castelli asking for your opinion or interpretation as to
13 the Kendrick Consent Decree; do you remember those questions?

14 A. Yes, I do.

15 Q. Yeah. And is it fair or safe to say that when you
16 provided your interpretation, that interpretation also
17 included the opinions of Judge McCalla, this Court?

18 A. That's correct.

19 MR. STANTON: I have nothing further, Your Honor.

20 THE COURT: All right. If there's nothing else
21 then, Dr. Bowman, always good to see you and thank you very,
22 very much. Of course, so you're welcome to stay with us, but
23 you're also welcome to go to the non video portion and mute.
24 So thank you so much.

25 THE WITNESS: You're welcome.

1 THE COURT: Absolutely. Who will our next
2 witness be?

3 MR. STANTON: The next witness, Your Honor, will
4 be Mr. David McGriff. And counsel to the monitoring team,
5 Mr. Perry.

6 THE COURT: Yes.

7 All right, Mr. Perry. And I see Mr. McGriff. I
8 see Mr. McGriff. I think we've got Mr. McGriff here. We'll
9 go ahead and swear him in and then let counsel proceed.

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DAVID MCGRIFF,

**was called as a witness and having first been duly sworn
testified as follows:**

THE COURT: Counsel may proceed.

MR. PERRY: Thank you, Your Honor.

DIRECT EXAMINATION

QUESTIONS BY MR. PERRY:

Q. Good afternoon, Mr. McGriff.

A. Good afternoon.

Q. Please introduce yourself.

A. My name is David McGriff.

Q. What do you do for a living, Mr. McGriff?

A. Currently I'm the deputy commissioner with the
Department of Children's Services, State of Tennessee.

Q. How long have you held that position?

A. About five months.

Q. What are your responsibilities at DCS?

A. I oversee the division of juvenile justice for the
State of Tennessee.

Q. Do you have any supervisory responsibilities?

A. I do.

Q. About how many employees do you oversee?

A. The juvenile justice division has approximately 300
employees. I have about 15 direct reports to me. Those are

1 the directors in the division.

2 Q. You said that you've been at DCS for about five
3 months?

4 A. That's correct, sir.

5 Q. What were you doing before you got there?

6 A. Happily retired.

7 Q. How long had you been retired?

8 A. Approximately a year.

9 Q. What line of work were you in before you retired?

10 A. I actually retired from the Tennessee Department of
11 Safety & Homeland Security.

12 Q. Mr. McGriff, before we get to that, would you tell the
13 Court please where are you from?

14 A. Born in Nashville, Tennessee. Spent most of my adult
15 life in Memphis and Shelby County.

16 Q. Did you go to high school in Memphis?

17 A. No, sir.

18 Q. Where did you go to high school?

19 A. I went to high school in Upstate New York.

20 Q. How did you wind up in New York?

21 A. My father was transferred in his business.

22 Q. Okay. Was he in the military?

23 A. No, sir.

24 Q. Okay. Did you graduate from high school in New York?

25 A. I did not.

1 Q. Why not?

2 A. Well, I was 17 years old, and I joined the United
3 States Marines.

4 Q. How long did you serve in the Marines?

5 A. Four years.

6 Q. Did you complete your high school education?

7 A. I did, sir.

8 Q. When did you do that?

9 A. While I was in the US Marine Corps.

10 Q. Did you see combat while you were in the Marines?

11 A. I served in the Republic of South Vietnam.

12 Q. Thank you for your service.

13 A. Yes, sir.

14 Q. Mr. McGriff, what rank did you hold when you left the
15 Marine Corps?

16 A. Sergeant E-5.

17 Q. Now, what was your first job after you left the Marine
18 Corps?

19 A. I made application with the Metropolitan Police
20 Department in Washington, D.C.

21 Q. What that application successful?

22 A. It was, sir.

23 Q. What did you do -- how long were you in D.C.?

24 A. Approximately five years I served with the
25 Metropolitan Police Department.

1 Q. What did you do after that?

2 A. I took a lateral entry position with the Memphis
3 Police Department in 1974 in Memphis, Tennessee.

4 Q. What made you come back to Memphis from D.C.?

5 A. My wife.

6 Q. Is she from Memphis?

7 A. That's correct, sir.

8 Q. How long did you serve as an officer with the MPD?

9 A. A little over two and a half years.

10 Q. What rank did you have when you left the MPD?

11 A. I left as a patrol officer.

12 Q. Mr. McGriff, I sent you a set of documents earlier
13 this week of a set of exhibits. I would like you to pull up
14 MT trial Exhibit 7. MT trial Exhibit 7 when you have a
15 moment. Let me know when you have it in front of you.

16 A. Yes, sir.

17 Q. Do you recognize it -- do you recognize that document?

18 A. It appears to be a picture of me.

19 Q. Is there anything else on that document that you
20 recognize?

21 A. Yes, sir. The contents of this page has to do with
22 me, and it all appears to be correct.

23 Q. Does it summarize your work history and experience in
24 law enforcement?

25 A. Yes, sir.

1 MR. PERRY: Your Honor, I'd like to make MT trial
2 Exhibit 7 the next trial exhibit.

3 THE COURT: That's fine. Marked and received as
4 9 without objection. Will you make sure we also have the
5 Fusion report, which I think we've now located, so that was 8
6 and previously marked.

7 (WHEREUPON, the above-mentioned document was
8 marked as Exhibit Number 9.)

9 THE COURT: Counsel may proceed.

10 MR. PERRY: Thank you, Your Honor. I want to
11 share my screen so that everyone can see MT trial Exhibit 7.

12 Thank you. We'll scroll down a bit. That's
13 great.

14 BY MR. PERRY:

15 Q. Now, Mr. McGriff, you mentioned that at some point
16 after you worked for the MPD as a patrol officer, you
17 became -- well, immediately before you retired, what was your
18 job?

19 A. I was the deputy commissioner and chief of staff with
20 the Tennessee Department of Safety & Homeland Security, State
21 of Tennessee.

22 Q. Can you, based on this exhibit and your memory, can
23 you give us just kind of a brief rundown of the jobs that you
24 held in between working for MPD and becoming chief of staff
25 and deputy commissioner of the Department of Safety &

1 Homeland Security?

2 A. Yes, sir. I left the Memphis Police Department
3 towards the end of 1976 and took a position as a criminal
4 investigator with the district attorney general in Shelby
5 County, Tennessee. I left the district attorney's office in
6 2013. During the time that I was with the district
7 attorney's office, I was assigned as a task force supervisor
8 with the Drug Enforcement Administration, the federal drug
9 task force in Memphis for approximately ten years.

10 I was then reassigned as a deputy director of the
11 state Violent Crime and Drug Task Force in West Tennessee. I
12 later was promoted to director of that drug task force. And
13 then subsequently to that, I was promoted as the chief
14 criminal investigator in the district attorney's office.

15 Q. During that time, did you receive any specialized
16 training in law enforcement strategies or tactics?

17 A. Just about every year.

18 Q. Can you describe some of that training and where you
19 got it from?

20 A. I underwent inservice training. I underwent
21 specialized training in organized crime, investigative
22 techniques. I was selected and attended the FBI National
23 Academy in Washington, D.C., which is a management course.
24 And I continued to take classes and additional training in
25 the area of law enforcement.

1 Q. I want to get back to your previous job as deputy
2 commissioner and chief of staff with the Department of
3 Safety & Homeland Security. What were your responsibilities
4 there, Mr. McGriff?

5 A. Well, I was the -- I oversaw the day-to-day operations
6 of the department. And specifically was an oversight in
7 certain divisions of the department, which were internal
8 audit, budget, Tennessee Highway Safety Office, Homeland
9 Security and Driver Services division.

10 Q. All right. Did you have -- well, about how many
11 employees did you oversee?

12 A. The department has approximately 2,000. I oversaw
13 approximately a thousand.

14 Q. How many direct reports did you have?

15 A. Approximately 25.

16 Q. Was the training and experience that you've described
17 both before and after you were deputy commissioner of the
18 Department of Safety & Homeland Security inform the testimony
19 that you're here to give today?

20 A. It did, sir.

21 Q. Now, Mr. McGriff, since you've retired from your law
22 enforcement career now working for DCS, are you here to
23 testify on behalf of DCS today?

24 A. Absolutely not.

25 Q. Why are you here to testify today?

1 A. I'm a member of the consulting and monitoring team
2 assigned by the Court and the chief Monitor, Ed Stanton.

3 Q. How did you come to be a member of the monitoring
4 team?

5 A. I was contacted by Mr. Stanton approximately 18 months
6 ago, while I was happily retired. And he asked if I would be
7 interested in assisting him in the monitoring of the Memphis
8 Police Department as it relates to the Kendrick Consent
9 Decree.

10 Q. Did you know Mr. Stanton before he contacted you about
11 the monitoring team?

12 A. I did, sir.

13 Q. How did you know him?

14 A. I knew him as the United States attorney for the
15 Western District of Tennessee.

16 Q. And were you at the Department of Safety & Homeland
17 Security at that time?

18 A. I was, sir.

19 Q. What is your role on the monitoring team?

20 A. I'm with the -- I say I'm with. I'm a part of the
21 audit and compliance of the team itself.

22 Q. Are you the subject matter expert in that area?

23 A. That's correct, sir.

24 Q. Are the responsibilities that you have as the audit
25 and compliance expert on the monitoring team similar to the

1 work that you did at the Department of Safety & Homeland
2 Security?

3 A. It is, sir. I had the occasion to not only supervise
4 the director of internal audit, but I collaborated with them
5 on pre-audits and certainly reviewed each and every audit
6 that this unit had conducted in the department.

7 Q. Can you talk about what are your responsibilities on
8 the monitoring team?

9 A. I had the initial responsibility of putting together
10 the audit and compliance plan with the collaboration and
11 assistance of the rest of the team, however, with my
12 responsibility to initially formulate it.

13 Q. Mr. McGriff, I want you to look at that stack of
14 documents that you've got. I'd like for you to pull up
15 MT trial Exhibit 8.

16 A. Yes, sir.

17 Q. Do you recognize that document?

18 A. I do, sir.

19 Q. What is it?

20 A. This is the audit and compliance plan that was
21 prepared by myself and the rest of the monitoring team
22 submitted to the Court.

23 Q. Does that document appear accurate as you and the rest
24 of the monitoring team prepared it?

25 A. It does, sir.

1 MR. PERRY: Your Honor, I'd like to move MT trial
2 Exhibit 8 into evidence.

3 THE COURT: Marked and received as 10 in the
4 case. Marked and received as 10 without objection.

5 (WHEREUPON, the above-mentioned document was
6 marked as Exhibit Number 10.)

7 MR. PERRY: Thank you, Your Honor. I'd like to
8 share my screen with the Court. I'm going to pull up
9 MT trial Exhibit 8. Let's scroll down to the first page
10 there. Great.

11 BY MR. PERRY:

12 Q. Now, Mr. McGriff, I'd like you to walk me through the
13 organization of this plan. First, how many sections does it
14 consist of?

15 A. Seven.

16 Q. And what does each section cover?

17 A. It covers the requirements and the order of the Court
18 as it relates to the Kendrick Consent Decree.

19 MR. PERRY: I want to scroll up a little bit on
20 this first page. I'm sorry. Scroll down. That's good.
21 Yeah. Go down enough so we can see Subsection A. That's
22 perfect. Okay.

23 BY MR. PERRY:

24 Q. So I see here in Subsection A, it says Consent Decree
25 requirements. And then we're going to scroll up a little bit

1 so we can see B. And B is just compliance and auditing
2 protocols. Does each section of this audit and compliance
3 plan have those two subsections?

4 A. They do, sir.

5 Q. And what do those two subsections cover?

6 A. The first subsection in each section covers the
7 requirements of the Consent Decree. And the second
8 subsection in each section covers the audits and compliance
9 of each one of those requirements.

10 Q. Okay. Now, Mr. McGriff, have you reviewed the audit
11 and compliance plans for any other cities, under Consent
12 Decrees?

13 A. I did, sir.

14 Q. What other cities?

15 A. I reviewed preliminarily the audit and compliance
16 reports of the City of New Orleans.

17 Q. What made you look at New Orleans?

18 A. It's a current Consent Decree city. And I asked
19 Dr. Bowman, who was affiliated with the City and that Consent
20 Decree, if he could possibly forward to me the audit and
21 compliance report and plan.

22 Q. How does the New Orleans audit and compliance plan
23 compare to the one that we have now?

24 A. The City of New Orleans is voluminous. They're
25 covering every single phase of police service. However, if

1 you look at their audit and compliance plan, it's similar to
2 the one that was prepared here for the Consent Decree. And
3 they compare favorably.

4 Q. You mentioned that the New Orleans plan is voluminous;
5 is that right?

6 A. That's correct, sir.

7 Q. In your view should the proposed plan for Memphis,
8 should it be expanded so that it's as large as the New
9 Orleans plan?

10 A. I don't think so. I think the plan, as it stands
11 right now, is -- it's on point. It may very well change,
12 depending on the outcome of this hearing and the orders of
13 the Court. We may have to revise it somewhat.

14 Q. Because the plan may change, based on the outcome of
15 this hearing and some other matters, is the plan ready to be
16 implemented right now?

17 A. No, sir.

18 Q. Okay. Are there any things that need to happen other
19 than the Court rulings in this hearing? Are there any other
20 things that need to happen before the auditing plan can be
21 implemented?

22 A. Well, the Court would have to approve any of the
23 revisions for the plan as it stands right now.

24 Q. Would you plan to have anyone vet the plan before we
25 implement it?

1 A. Yes, sir. We would have the ACLU take a look at the
2 new plan with the new revisions, if any.

3 Q. Thank you, Mr. McGriff. Once the plan has been
4 revised, that is, approved by the Court, explain to the Court
5 what you will need from the police department in order to
6 implement the plans.

7 A. Well, the first order of business, once the Court
8 approves this, would be to contact the command staff of the
9 Memphis Police Department and request that a member of the
10 command staff be appointed as a liaison to the monitoring
11 team so that we could then begin our audit approach to those
12 areas in the Consent Decree, the sections. And the liaison
13 could then act as a go-between for the monitoring team and
14 the commanders in the field of the Memphis Police Department
15 that we would have to have interaction with.

16 Q. And Mr. McGriff, are you aware that there already
17 exists a legal liaison to the Memphis Police Department,
18 that's Mr. Saleem, and the monitoring team has worked
19 frequently with Mr. Saleem and the rest of the City's legal
20 team? Is Mr. Saleem a sufficient person to serve as the
21 liaison that you were mentioning there?

22 A. Not in my judgment.

23 Q. Why is that?

24 A. Because I was a police officer, and I know what
25 happens when you go into a precinct if you don't have

1 someone, namely a commander to go with you, then you're not
2 going to get anything done quickly.

3 Q. So in your view, the liaison that you want to help
4 implement this audit plan would be someone on the command
5 staff?

6 A. That's correct, sir, yes.

7 Q. Will you need anything else from the MPD to
8 effectively implement the audit and compliance plan?

9 A. Yes, sir. And to explain a little further, the audit
10 and compliance plan deals with the monitoring team to review
11 files, review records and certainly computerized records.
12 And the plan at this point requires that these records be
13 reviewed on a quarterly basis. We would need credentials in
14 order to look at these computerized records on a quarterly
15 basis should we decide to do so.

16 Q. Why do you need access credentials? Why couldn't you
17 just sit with the MPD liaison and look at the records with
18 that person?

19 A. Because we want to conduct our audit when we want to
20 do it and not wait for someone to be assigned from the police
21 department.

22 Q. Why is it important that the monitoring team be able
23 to independently access the files and the databases in
24 implementation from the police department?

25 A. Continuing of the audit for compliance of the audit.

1 Q. Thank you, Mr. McGriff.

2 MR. PERRY: Your Honor, I have no further
3 questions at this time.

4 THE COURT: Cross examination? And that's, of
5 course, the City of Memphis.

6 MR. GLOVER: Thank you, Your Honor. This is Mark
7 Glover for the record. So the court reporter will
8 understand, we've changed counsel who's doing the
9 examination. That's G-L-O-V-E-R.

10 THE COURT: Thank you.

11 **CROSS EXAMINATION**

12 **QUESTIONS BY MR. GLOVER:**

13 Q. Mr. McGriff, just to follow up a little bit on the
14 comment that you made on the audit plan that has been
15 submitted, I take it that your indication that if this
16 hearing results in His Honor's decision to modify any portion
17 of the plan, you would need to submit -- excuse me -- any
18 portion of the Consent Decree you would need to submit
19 modifications to your plan, is that because your plan tracks
20 the various pertinent provisions of the Consent Decree?

21 A. That's correct, sir.

22 Q. And so you would submit a modified plan if there were
23 a modification of the Decree to reflect any changes in
24 procedure or areas of inquiry that might be brought about by
25 any modification of this decree; is that correct?

1 A. Yes, sir. Once approved by the Court.

2 Q. All right. You made some comments earlier about your
3 previous employment and one, of course, was your employment
4 with the department -- Tennessee Department of Safety &
5 Homeland Security. There has been other testimony in this
6 case, Mr. McGriff, about Exhibit 8, which was a situational
7 awareness bulletin example that was put on the screen for a
8 couple of other witnesses.

9 MR. GLOVER: And I would like to ask if our folks
10 can pull Exhibit 8 up onto the screen for you to review, if
11 the Court please.

12 THE COURT: Sure. Go right ahead.

13 BY MR. GLOVER:

14 Q. Mr. McGriff, when this comes up onto the screen, my
15 question to you is going to be whether this type of
16 situational awareness bulletin is something the format of
17 which you are familiar from your prior employment?

18 A. This is the Fusion Center comes under the Homeland
19 Security division of the Department of Safety.

20 Q. All right. So you saw -- you've seen these many times
21 while employed with the Tennessee Department of Safety &
22 Homeland Security; is that correct?

23 A. Yes, sir.

24 Q. Okay. And apropos of some of the other testimony and
25 questioning, my question to you is do you know how the

1 information that is in the situational awareness bulletins
2 was gathered and put into the bulletins that were sent out
3 during the time you were there?

4 A. From many, many sources. It could be public records
5 information. It could be legitimate information forwarded
6 via Teletype or Internet by other law enforcement agencies.
7 It could come from social media. Any variety ways of this
8 information is compiled and forwarded to the Fusion Center,
9 vetted and then sent out to law enforcement agencies across
10 the state. This information also comes from other states.

11 Q. Okay. So would it be accurate to say that even when
12 you were employed in a high position with the Tennessee
13 Safety & Homeland Security department, you would not have
14 been able to know exactly how every bit of information that
15 appears in this situational bulletin form was gathered; is
16 that fair to say?

17 A. Now, if I understand your question, you mean if I
18 happened to pick one of the bulletins up and look at it?

19 Q. Yes, sir.

20 A. I wouldn't know, no.

21 Q. Okay. So if the Memphis Police Department received a
22 situational awareness bulletin of the kind that we're looking
23 at as Exhibit 8 and wanted to call the Tennessee Department
24 of Safety & Homeland Security and inquire to try to vet and
25 understand how the information in here was assembled and

1 obtained, the Department of Safety & Homeland Security could
2 not necessarily give them all that information, could they?

3 A. Contrary. They could call the Fusion Center and speak
4 to one of the intel analysts that puts these bulletins
5 together and get the back story to it.

6 Q. Would they -- then those people would know how each
7 different state obtains their own information?

8 A. Well, they could get the information on how the Fusion
9 Center in Tennessee came about receiving the information. Of
10 course, if it was an instate from one of the police
11 departments within Tennessee, they would have a little bit
12 more information if it came via an instate law enforcement
13 agency versus one out of state.

14 Q. All right. Let's assume for a moment that some
15 information would be included on all these reports that did
16 come from out of state. Let's just say a police department
17 in Iowa. Would your folks at the Department of Safety &
18 Homeland Security have contact information to be able to
19 trace how that information was obtained in Iowa?

20 A. They could get ahold of the authorities in Iowa if
21 they had to. Yes, sir.

22 Q. Based on the volume of information that is funneled
23 through these situational awareness bulletins, would that be
24 an onerous task to vet each and every bit of information
25 that's in one?

1 A. Well, I guess to answer your question, if they had to
2 do that to each and every one, it would depend on how many
3 bulletins came in on a particular day or a particular week or
4 a particular month. The Fusion Center is a rather large law
5 enforcement operation, and it's serviced by the Tennessee
6 Bureau of Investigation as well as the Homeland Security
7 division. So I couldn't give you an accurate answer of how
8 onerous it would be. It would depend on how much work was
9 going on at the time.

10 Q. Is it true that on some days, multiple situational
11 awareness reports come out from the Department of Safety &
12 Homeland Security?

13 A. That's a fair statement.

14 Q. All right. Are you aware of any law enforcement
15 agency inquiries asking the Department of Safety & Homeland
16 Security to identify all of the sources of information and
17 how the information was obtained as a part of receiving
18 information from the Tennessee Department of Safety &
19 Homeland Security?

20 A. I couldn't answer that question. I had the director
21 of the Homeland Security division, it was -- had oversight
22 over that division. I didn't get that deep in the weeds, to
23 be quite honest with you.

24 Q. Okay. So you're not aware of that in your own
25 personal knowledge?

1 A. No, sir.

2 Q. Okay. You have indicated that it would be possible to
3 trace some information, although you didn't say how onerous
4 it would be to do all of it. My question to you next is
5 would any of the information that came into the situational
6 reports from any source other than Memphis Police Department
7 have been vetted by the director of the Memphis police in
8 order to ensure compliance with the Consent Decree before the
9 situational awareness report goes out?

10 A. I wouldn't have any knowledge about that, sir.

11 Q. Okay.

12 MR. GLOVER: That's all the questions I have,
13 Your Honor.

14 THE COURT: ACLU, any questions?

15 MR. CASTELLI: No questions, Your Honor.

16 THE COURT: Redirect for our witness?

17 MR. PERRY: None, Your Honor.

18 THE COURT: Probably need to check on a couple of
19 things. Mr. McGriff, I need a little background in terms of
20 are there clues that you would look for to determine the
21 reliability of the information that you received in a Fusion
22 bulletin?

23 THE WITNESS: Well, Your Honor, if it was coming
24 from a law enforcement agency, these bulletins will come out
25 with wanted parties, individuals wanted on arrest warrants,

1 descriptions of suspects involved in a burglary, let's say,
2 in East Tennessee, and witnesses saw a red car with a partial
3 license plate leaving the scene of a crime. A lot of times
4 they will put information out like that. And on a
5 be-on-the-lookout. Other departments across Tennessee would
6 have received that information and certainly use it in an
7 enforcement measure and should they see a car fitting a
8 description or having that kind of information come to them.

9 THE COURT: So is it typical -- and you may or
10 may not know -- but is it typical that these bulletins tend
11 to usually be ones that are specific as to facts such as the
12 ones you just described: Red car, two suspects, something of
13 that nature?

14 THE WITNESS: If that type of information becomes
15 available and is forwarded to the Fusion Center. Not every
16 department forwards all that information to them. But if it
17 is forwarded, they will then release that to agencies within
18 the state.

19 THE COURT: Right. But is the bulletin -- just
20 so we'll understand to some -- understand the scope of the
21 universe. Is the bulletin usually one -- usually one that
22 relies on specific facts such as the ones you described?
23 Event happens, you know, a robbery of whoever it is. Car
24 description. Time. You know, last seen at location. Armed
25 or not armed. I mean, is this typical or atypical? It could

1 be completely atypical. I just don't know.

2 THE WITNESS: I would say, Your Honor, that it's
3 far more typical for the Fusion Center to release general
4 information that it's received from agencies within the state
5 or from out of state about nonspecific type information other
6 than what I described a few minutes ago.

7 THE COURT: So is it sort of a rumor mill?

8 THE WITNESS: I would say it was a little higher
9 than that. It's coming from law enforcement agencies. And
10 they provide as much information that they have at the time.

11 THE COURT: Okay. I need someone to followup on
12 this to help us understand the nature of the information
13 that's typically received.

14 It sounds a little bit like a Hollywood gossip
15 column, but I'm not sure. Hopefully it's not that, but it
16 doesn't sound terribly specific. So I'm going to let the
17 counsel for the Monitor follow up. Let's just understand
18 what these typically are because we've gone to a particular
19 illustration, which may or may not be typical of what is
20 received.

21 MR. PERRY: I can follow up, Your Honor.

22 **REDIRECT EXAMINATION**

23 **QUESTIONS BY MR. PERRY:**

24 Q. Mr. McGriff, in your experience at the Department of
25 Safety & Homeland Security, when a situational awareness

1 report was being prepared by the Fusion Center, how were they
2 assembled?

3 A. An intel analyst would assemble it and take the
4 information they had received either via phone, Internet,
5 computer or what have you.

6 Q. Are there any parameters at the Fusion Center or at
7 the Department of Safety & Homeland Security that instruct
8 the analysts on what sort of information they can accept?

9 A. They receive training and instructions on how to put
10 together these bulletins. Yes, sir.

11 Q. All right. Does that training, to your knowledge,
12 include how to assess the veracity of information and whether
13 it's worth accepting and passing on or whether it should be
14 left out?

15 A. Yes, sir. They receive training on how to prepare
16 these bulletins and how to put this information on the
17 bulletins as they receive it.

18 Q. Is there any sort of publicly available like training
19 handbook or guidelines that we could get from the department
20 or maybe from the department's website and provide to the
21 Court as a supplement to the exhibits that already have been
22 presented?

23 A. I don't know if there's a handbook or not, but I can
24 certainly inquire with the department and give the Court as
25 much information that's available and have one of the intel

1 analysts or one of the supervisors appear in the Court if
2 that's what the Judge wants.

3 MR. PERRY: Your Honor, if it's all right with
4 you, we'll have Mr. McGriff follow up with the department,
5 gather what information we can about the situational
6 awareness reports, and we can present that information to the
7 Court and to the parties as a supplement to the information
8 that's already been provided.

9 THE COURT: Right. That might help us assess the
10 degree to which they rely on some type of Internet search
11 activity or something of that nature. I'm going to ask
12 Mr. McGriff, then we'll let the others cross.

13 Are you aware of situations where information has
14 been received and then subsequently very substantially
15 discredited?

16 THE WITNESS: I can't think of an example right
17 this minute, Your Honor. But I'm sure there has been.
18 There's a vetting process and to some degree at the center.
19 And I would have to say that there have been occasions when
20 information has been vetted in this county. Yes, sir.

21 THE COURT: Are there questions then from the
22 City?

23 MR. GLOVER: Thank you, Your Honor. Just a
24 couple of followups.

25 **FURTHER CROSS EXAMINATION**

QUESTIONS BY MR. GLOVER:

Q. Mr. McGriff, there is information in many of these situational awareness bulletins that it's not just reporting of crimes but is what we would call threat assessments or situational awareness reports; is that right?

A. Yes, sir.

Q. And in fact, the Exhibit 8 includes some discussion of what's being identified by whoever gathered it as violent opportunities likely to use the Juneteenth events to engage in civil unrest. So that was not reporting an event. That was a crime where we're looking for a particular suspect to solve the crime; is that right, if you know?

A. Frankly, I haven't read the bulletin. I've just heard some testimony about it. I don't know that I have enough information to answer the question.

Q. But I am correct in understanding correctly though that there are bits of information that are reported through the Fusion Center in these reports that have to do with potential threats or concerns, but they're not actually reporting a crime that has occurred; is that right?

A. That is absolutely correct. Yes, sir.

Q. Okay. But they also include things like FBI warrants that have been issued, right?

A. That's correct.

Q. Okay. So it's a mix of both of those things?

1 A. That's correct.

2 Q. What's the reason for sending these out to law
3 enforcement agencies? I assume that the Department of
4 Safety & Homeland Security believes there's some efficacy to
5 doing that; do you know their purpose? Why that department
6 sends them out?

7 A. Well, yes. It's to inform other law enforcement
8 agencies of this information in the event that they come
9 across a hostile group that has rifles in a particular truck,
10 and they're camped out in Downtown Memphis, as an example.

11 Q. Okay. Tell me that if this is beyond your knowledge,
12 but if you were a command staff officer with the Memphis
13 Police Department trying to look at one of these things and
14 comply with what you understand paragraph I of the Consent
15 Decree to require, in terms of ensuring that the department
16 not receive things that would otherwise be violative of the
17 Decree if they had done it themselves, how would you go about
18 trying to ensure that compliance?

19 A. I'm not going to speak for the Memphis Police
20 Department and how they would handle a situation on one of
21 these bulletins, to be quite honest with you. That comes
22 under the heading of their business.

23 Q. Well, I understand. But you have been a part of the
24 team that's in our business, if I may say so and with the
25 Court's blessing. And so what I'm asking is, do you have an

1 opinion on how you would go about trying to carry out that
2 process to vet this information?

3 A. You mean the information as it's contained in the
4 bulletin in front of us today?

5 Q. Yes. Let's use that for example. In order to ensure
6 that you're not receiving something that was gathered in a
7 way that would have violated the Consent Decree if we did it.

8 A. I don't think I can speak to and answer your question
9 as it relates to that.

10 Q. If you don't have an opinion on that or answer, that's
11 fine. I'm not going to press that. I'm just trying to
12 understand, since you worked there, whether there are
13 mechanisms that can be -- that you know about that can be
14 followed up in order to try to -- what we've called vet or
15 verify this information in a way that would ensure we don't
16 inadvertently violate Subsection I. And I hear you saying
17 you don't really have the knowledge or background to give
18 that opinion; is that right?

19 A. I don't, other than what I've testified to previously.
20 And that is the Fusion Center will be glad to answer any
21 inquiry from any law enforcement agency as it relates to a
22 particular bulletin. They're trying to gather the
23 verification on anything or additional information.

24 Q. Okay. But just this very one that we looked at is
25 30 pages long. To go through each and every item of that, I

1 know you declined to say it would be an onerous task, but it
2 would be time consuming to get each and every item in here
3 vetted in that way, would it not?

4 A. I would agree with that.

5 Q. Okay.

6 MR. GLOVER: I have no further questions unless
7 Your Honor wants me to follow up on something.

8 THE COURT: Well, let's see if the ACLU has some
9 additional information. The one that they're showing on the
10 screen, however, just looks like somebody watched TV and then
11 wrote something up, with all due respect. It doesn't look
12 very -- it's not specific. It just says obvious things and
13 looks like somebody could go to the calendar and figure out
14 what day it was. So it doesn't look very -- just it's kind
15 of odd. I hope all of them are not like that. Are most of
16 them like that, Mr. McGriff, or most of them this sort of --
17 that was certainly not bad information to get out but not
18 very specific and sort of gossipy.

19 THE WITNESS: I think some are a little bit
20 more -- have a little bit more information than others, Your
21 Honor. It just depends on the intel analyst that put that
22 together and how much information they had at the time.

23 THE COURT: All right. You remember when we were
24 both overseas and we got intelligence reports? I mean, I
25 don't know what you thought of them, but I kind of remember

1 what I thought of them.

2 THE WITNESS: Yes, sir. It did look like
3 something out of Hollywood.

4 THE COURT: All right. Well, we're just trying
5 to figure out what this material is.

6 Mr. Castelli, I don't know what we do with this.
7 This is kind of an issue. You want to ask -- we've got a
8 witness who knows a lot. There's time to ask him if you ever
9 want to ask him something.

10 MR. CASTELLI: Yeah. Thank you, Your Honor.
11 I've got a few questions for Mr. McGriff.

12 **CROSS EXAMINATION**

13 **QUESTIONS BY MR. CASTELLI:**

14 Q. Good afternoon. As far as the intention of the
15 information in these Fusion reports, I mean, how are law
16 enforcement agencies around Tennessee meant to be utilizing
17 this information?

18 A. Well, first of all, there's no legal requirement for
19 them to use the Fusion Center. When I was with the
20 department of homeland security and safety, we encouraged all
21 law enforcement to provide information to the Fusion Center
22 so that we could get it out to all the agencies in the state.
23 But there's no legal or statutory requirement that the law
24 enforcement agencies in Tennessee has to provide the Fusion
25 Center any information.

1 Q. And would it be fair to say that the idea here is that
2 to provide the information and let the law enforcement
3 agencies decide whether it's worth following up on or even
4 paying attention to after they read the report?

5 A. That's exactly correct.

6 Q. So any law enforcement agency would be free to look at
7 this, go well, this is not worth anything and not send it
8 around to any of their patrol officers or detectives or
9 anything, just kind of throw it in the trash or hit delete,
10 as it were?

11 A. It would depend on the agency and the department as to
12 what they wanted to do with it at the time. Yes, sir.

13 Q. And my understanding from your earlier testimony is
14 that there may be some and maybe not in the one, in the
15 example we're looking at, but there may be some times where
16 there's information like these suspects have been identified
17 committing a particular crime. Here's their description. Be
18 on the lookout in case they come into your jurisdiction.
19 There may be information like that?

20 A. Yes, sir. That's correct.

21 Q. And law enforcement in that case would be free to look
22 at that and say well, that's something maybe we need to let
23 our patrol officers and people on the street know so they'll
24 know who to look out for. They may have committed a crime
25 somewhere else or may be likely to commit a crime here?

1 A. That's correct, sir.

2 Q. Okay. But -- and then just to kind of circle back
3 around though. From your first answer to my first question,
4 it's not something where it's some directive from the
5 Department of Safety to the Tennessee individual law
6 enforcement agencies that they must assess this information
7 and act on it?

8 A. Generally speaking, that's correct, sir. This is
9 intelligence information.

10 Q. Okay.

11 MR. CASTELLI: I think those are my questions,
12 Your Honor.

13 THE COURT: Redirect?

14 MR. PERRY: None, Your Honor.

15 THE COURT: All right.

16 Anything else then for the City?

17 MR. GLOVER: No, thank you, Your Honor. Other
18 than we have no objection to the submission that Mr. Perry
19 suggested we might be able to get that would provide any
20 guidelines that are available.

21 THE COURT: That would probably be very helpful.
22 So we'll receive that as a late-marked exhibit. And we can
23 actually reserve a number for that if we think we can get
24 that recently soon. And we will reserve the Number 11 for
25 that. It will be a late-marked exhibit on the guidelines as

1 to actually what guides the preparation of this material.

2 Okay. Guidelines on Fusion bulletin preparation.

3 (WHEREUPON, the above-mentioned document was
4 marked as Late-Filed Exhibit Number 11.)

5 THE COURT: All right. Well, Mr. McGriff, always
6 good to see you, and we appreciate everything you've done.
7 And we're going to certainly let you be excused. You're
8 welcome to stay with us. You're also welcome to not,
9 whichever works best for you. Thank you very much.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Thank you. Absolutely.

12 And our next witness then?

13 MR. PERRY: Your Honor, our next witness will be
14 Dr. Sheila Peters. I will defer to Mr. Stanton.

15 THE COURT: Certainly. And Dr. Peters, hopefully
16 will show up in just a second. Mr. Stanton, you may call
17 your witness.

18 MR. STANTON: Thank you, Your Honor. Your Honor,
19 we call Dr. Sheila Peters' testimony.

20 THE COURT: And Dr. Peters, I've got to locate
21 you so we can have you sworn in. Okay. If you'll raise your
22 right hand then, Mr. Sample will administer the oath.

* * *

SHEILA PETERS,

**was called as a witness and having first been duly sworn
testified as follows:**

THE COURT: There you are. Okay. Good to see
you.

THE WITNESS: Yes, sir.

THE COURT: Absolutely.

Counsel may proceed.

MR. STANTON: Thank you, Your Honor.

DIRECT EXAMINATION

QUESTIONS BY MR. STANTON:

Q. Good afternoon. Would you please introduce yourself
to the Court and spell your first and last name.

A. Good afternoon. I am Sheila Peters. My first name,
S-H-E-I-L-A. And last name Peters, P-E-T-E-R-S.

Q. Thank you, Dr. Peters. And Dr. Peters, where do you
reside?

A. I reside in Nashville, Tennessee.

Q. Okay. And can you tell the Court and tell us what it
is that you do for a living?

A. I am associate professor of psychology at Fisk
University. I also have a part-time private practice because
I am a licensed psychologist in the state of Tennessee.

Q. Okay. I think most know this, but just for the

1 record, can you tell where Fisk University is located?

2 A. Fisk University is located in Nashville, Tennessee.

3 It is the oldest institution, founded in 1866. And founded
4 to educate newly freed slaves as well as others.

5 Q. Thank you, Dr. Peters. And how long have you been a
6 professor at Fisk?

7 A. This is my 22nd year at Fisk University.

8 Q. Okay. And I'd like you to take a moment, if you
9 would, Dr. Peters, and just describe your educational
10 background.

11 A. Certainly. My educational background, if I begin with
12 high school, I attended Garinger High School in Charlotte,
13 North Carolina. I then went on to the University of North
14 Carolina at Chapel Hill, where I received a bachelor's degree
15 in psychology. I came to Nashville and I received a master's
16 and a Ph.D. in clinical psychology, with a concentration in
17 community psychology at Vanderbilt.

18 Q. Okay. Thank you, Dr. Peters. You mentioned that you
19 -- did you have to write a dissertation for your doctorate?

20 A. Yes.

21 Q. Could you tell us what that was about.

22 A. My dissertation was focused on, as my early training,
23 on children and youth. And my particular dissertation was
24 focused on intentional functioning in learning disabled
25 educably mentally retarded children. We no longer use that

1 term. As well as children who are not in special education
2 classes.

3 Q. Thank you. And aside from your dissertation,
4 Dr. Peters, have you authored any publications?

5 A. Yes. Some of my initial research has been on
6 gender-specific programming for girls and boys entering the
7 juvenile justice system. I also, being at Fisk, have written
8 short articles around culture and a variety of different
9 encyclopedias related to African-American culture.

10 Q. And any of those articles and that background address
11 the issues about which you're here today to testify to?

12 A. Those specific articles do not, but in my training as
13 well as the work that I do, I am not only associate professor
14 of psychology, but I'm the director of graduate studies. We
15 have a master's program at Fisk University in clinical and
16 general psychology. And in that context, I teach and
17 supervise research conducted by both undergraduate and
18 graduate students. I have also served on doctoral committees
19 at other universities, particularly in Nashville.

20 Q. Thank you. Dr. Peters, at this point I'd like to turn
21 to the issues for which you're here today to testify. If you
22 would explain your role in this case.

23 A. I would be happy to. I am contracted by the
24 monitoring team to engage a component of the community
25 engagement plan. A portion of that and a significant portion

1 are the community forums. I have observed the second
2 community forum, and I participated in the third community
3 forum.

4 I was initially contacted by the monitoring team
5 because I, along with colleagues at Vanderbilt University,
6 along with the behavioral services unit of the Metropolitan
7 Nashville Police Department conducted a study called
8 Bias-Based Policing, in which we conducted a series of focus
9 groups. A subset of them were conducted at Fisk,
10 particularly so that persons of color would be comfortable in
11 that context. But a team of researchers at Fitz and at
12 Vanderbilt conducted that study. That study evaluation
13 report can be easily Googled and accessed online.

14 And so I was contacted about that study. I had a
15 interview and discussion with the monitoring team to explain
16 and to share my information about focus groups. Subsequent
17 to that, the monitoring team contacted me again, and we
18 discussed what would be the likelihood if Fisk were to take
19 on this project. And then subsequent to that discussion, the
20 monitoring team contacted me about the Fisk research team
21 actually conducting the study.

22 Q. Thank you, Dr. Peters. You've mentioned that there
23 were -- you attended multiple community forums that the
24 monitoring team sponsored here in Memphis. Can you share
25 your impressions that you gathered as it relates to community

1 sentiments regarding the Kendrick Consent Decree, your
2 personal observations in attending those forums?

3 A. I would say my personal observations are that people
4 that are aware of the Kendrick Consent Decree are often
5 passionate about it and are concerned. I believe the second
6 community forum, there were over 150 individuals who were in
7 attendance. And the monitoring team did a great job in
8 dividing up into subgroups to allow people to have the
9 opportunity to understand the process, to understand the
10 monitoring team's role and to ask questions and to hear from
11 the various experts on the monitoring team.

12 The second one that I attended, which was the third
13 one, which has already been alluded to was on March the 10th,
14 and we were preCOVID-19 as we now understand, which
15 potentially impacted the attendance level at that particular
16 forum. I participated within that and tried to be responsive
17 to individuals within the community who are -- I would say
18 the community and those who are most motivated want to be
19 heard, want to have a voice and has already been stated in
20 this hearing, many push for wanting to have a community
21 individual as a part of the monitoring team. I do believe
22 that the efforts are reasonable and are a great effort in
23 opening up an opportunity for the community to have a voice
24 and learn about the process.

25 Q. You mentioned your involvement obviously in Nashville

1 and focus groups as it relates to law enforcement and you
2 being engaged for similar work here in Memphis as it relates
3 to focus groups. Can you describe, Dr. Peters, to the Court
4 your efforts that you've made regarding the focus groups
5 since you've been engaged. Obviously, you've mentioned
6 attending the community forums but any additional information
7 you can share?

8 A. Yes. In addition to that, attending both of those
9 community forums, one as an observer and another as a
10 participant, I received information from the monitoring team
11 regarding individuals who were interested in the process and
12 wanted to know more and more about how the community could be
13 engaged. The City was helpful in also providing a list of
14 community partnerships that met on a specific day, usually
15 once a month, as well as other entities and organizations
16 within the Memphis area. Our research team took all of the
17 individuals on both lists, as well as other lists that we
18 were able to develop through our professional networks and
19 contacted many of those folks in regard to that.

20 In our -- what is now our first phase, the majority of
21 individuals who were willing to participate in the focus
22 group -- and Attorney Stanton, let me just share that the
23 focus group itself runs anywhere from 60 to 90 minutes.
24 Depending on what side of Memphis you're coming from,
25 ultimately an individual may give up to two and a half to

1 three hours of time travel to participate and return in that
2 regard. So these are highly motivated individuals who are
3 coming. The City was instrumental in helping us with --
4 along with the monitoring team to set up our focus groups in
5 community centers throughout the Memphis area.

6 Q. Thank you, Dr. Peters. I want to take this time now,
7 I want to pull up a document that's been marked MT trial
8 Exhibit 9. And I want to see if you -- for you to take a
9 look and see if you recognize this document, Dr. Peters.

10 A. I do.

11 Q. And did you prepare this document?

12 A. I did.

13 MR. STANTON: Your Honor, if there's no
14 objection, I'd like to move MT trial Exhibit 9 as the next
15 exhibit into evidence.

16 THE COURT: Without objection it'll be marked
17 as 12 in the case.

18 (WHEREUPON, the above-mentioned document was
19 marked as Exhibit Number 12.)

20 MR. STANTON: Thank you, Your Honor. With your
21 permission, I'd like to share on the screen with the Court
22 now so that all the viewers can see this next exhibit.

23 THE COURT: Certainly. Go right ahead.

24 MR. STANTON: Thank you, Your Honor.

25 BY MR. STANTON:

1 Q. Dr. Peters, again this is a document that you
2 prepared, correct?

3 A. Yes.

4 Q. Would you just take a moment and share what the basis
5 of this document and the synopsis of what it says.
6 Obviously, it's dated June 15th, but if you would just share
7 with the Court the contents of this letter, this document.

8 A. This document outlines how we were -- we utilized the
9 lists that were provided to us, as well as additional lists
10 that we were able to put together. And our research team
11 contacted various individuals. There were some individuals
12 who did not want to participate and were not as interested
13 within the process, and we understand that.

14 Right before the second community meeting that I
15 attended, we were in the process of continuing to complete
16 many of our focus groups. As COVID-19 has changed things for
17 all of us, certainly we had to suspend the last phase of our
18 data collection because of the sheltering-in order. And by
19 no means were we expecting people to participate in that
20 capacity.

21 I will certainly say being an academic, most of the
22 time I have used Zoom on occasion, but over the last two
23 months, I have had Zoom fatigue. I have done my share of
24 Zoom. However, we are now finding it is a useful tool, and
25 we are now in the process of collecting additional focus

1 groups through virtual meetings.

2 This cuts the time for individuals and in looking at
3 the first segment of our data, which is outlined in this
4 document, many of the people that were most likely to
5 participate in what we now call Phase 1 were more likely to
6 have serious concerns because they were associated in some
7 fashion or another with local community activist groups.

8 Our effort now is to continue to draw a broad stroke.
9 And we are recruiting individuals who do not know a great
10 deal necessarily about the Kendrick Consent Decree but are
11 willing to participate. As I outlined within this, in the
12 course of this brief research study, two unusual things have
13 occurred. COVID-19 as well as our national and global
14 protests in regard to police brutality.

15 So even as we collect this second phase of data, we do
16 ask questions in general about positive experiences as well
17 as negative experiences with the police. However, the
18 protocol focuses primarily on the Kendrick Consent Decree.
19 And so we realize that we may get individuals that are
20 responding to the current sentiment in our society right now,
21 and we will factor that in as we analyze the data.

22 Q. Thank you, Dr. Peters. You've mentioned some of the
23 challenges that you faced along the way with your work on the
24 focus group to your team, including COVID-19. As far as next
25 steps, can you share with the Court, you've mentioned some of

1 the items, Zoom and taking advantage of technology moving
2 forward. But could you share the plan to complete the work
3 and an estimated time frame for your final report to be
4 completed and submitted?

5 A. Yes. Our final report should be completed and
6 submitted by no later than the middle of July. We are
7 finalizing the data collection and are in a position to
8 analyze the new data and to provide what is the standard for
9 focus group research to provide an understanding of the broad
10 things across the focus group research, as well as a few
11 outliers. There are always individuals that may have a
12 viewpoint that is a little different from others.

13 Some focus groups are, as I initially talked to the
14 monitoring team, are set up as homogeneous groups, people
15 that are from same area, may have similar attitudes or
16 perceptions. Because our research team is located in
17 Nashville, we scheduled the focus groups in blocks of time.
18 We came down in early February. We spent a week at the end
19 of February. And so we were dealing with scheduling people.
20 Some people might miss a session, and we would add them on to
21 another session.

22 The handicap for us is because we are not located in
23 Memphis, and we are not a full-time research organization or
24 company, is that if someone missed a session and they could
25 not come in that block of time that we were in Memphis, we

1 were limited. We have followed up with some of those cases
2 and are able now to do individual interviews.

3 The beauty of the focus group is that a discussion
4 that is generated may encourage other people to share
5 additional information. However, our interviews that we are
6 also using are based upon the focus group and have the same
7 identical questions. The only thing they don't have is the
8 participant hearing from others, and their memory or their
9 thoughts or impressions might be enlightened by other
10 peoples' presence.

11 Q. Thank you, Dr. Peters. And I know that we've shared
12 this information on the monitoring team's website. But I
13 think this may be a good opportunity for yet another PSA. If
14 you don't mind, of those the Court mentioned, there are a
15 number of individuals throughout this community that are
16 observing and participating in this hearing. And if you
17 could share the information, your contact information for
18 those that may be listening and watching, may be interested
19 in participating in some of the upcoming focus groups that
20 you just referenced, would you just share your contact
21 information?

22 A. Yes. My contact information is Sheila Peters. My
23 e-mail is drsrpeters@gmail.com. I believe, though I have not
24 checked recently, that some of that information may be on the
25 website. I will ensure that that information is available.

1 And a direct phone number for anyone that is interested is
2 area code (615)497-2963.

3 MR. STANTON: Thank you so much, Dr. Peters.

4 Your Honor, I have no further questions for the
5 witness.

6 THE COURT: The City of Memphis, cross
7 examination?

8 MR. MCMULLEN: Yes, Your Honor. I have a few
9 questions.

10 **CROSS EXAMINATION**

11 **QUESTIONS BY MR. MCMULLEN:**

12 Q. Good afternoon, Dr. Peters.

13 A. Good afternoon.

14 Q. Just for clarification, you were conducting the focus
15 groups, and I see on your letter, they're small in size,
16 three to four. How many different groups had you done before
17 COVID came or before you had to discontinue them?

18 A. I believe we had conducted eight groups. Now, that
19 also, we had some individual sessions also. Individual
20 interviews.

21 Q. So would you say it's fair to say eight groups would
22 be, what, 32?

23 A. Yeah. We are around 40 to 50 participants. Yes, sir.

24 Q. Okay.

25 A. At this point. But we are still collecting data.

1 Q. Okay. And you're not seeking those people based on
2 any statistical analysis to represent the broader 650,000
3 people in the Memphis community, are you?

4 A. We did not utilize a statistical analysis. We are
5 seeing this as individuals who are interested and concerned
6 and want to participate, whether they know about the Kendrick
7 Consent Decree or not.

8 Q. And did I get this right? You said it was a
9 homogeneous group, pretty much people who felt that they were
10 negatively impacted by the Memphis police?

11 A. No. What I was trying to say is that our -- in my
12 initial discussion with the monitoring group in describing
13 different kind of focus groups, often they are homogeneous,
14 where one group from particular characteristic or setting is
15 brought together. Because of the way in which we had to
16 conduct them, coming from out of town, that meant that we had
17 different people coming in to the same group. In most of the
18 cases, people had some similar thoughts but not all the same
19 thoughts. So the groups were more heterogeneous than
20 homogeneous.

21 Q. Okay. And in reading your report, I understand that
22 there were some highly motivated individuals who felt they
23 had been negatively impacted. And I'm reading from your
24 report by potential political surveillance and were
25 knowledgeable about Consent Decree. That was one kind of

1 segment of the group?

2 A. Yes, sir.

3 Q. Okay. Those who wasn't that familiar, did you find
4 that they had a difficulty in really understanding the
5 Consent Decree as it was written?

6 A. Not really. Most persons, even the ones that didn't
7 know much, had a general awareness. Again, people have to be
8 motivated to take that time out of their schedule to
9 participate. And yet there were those who participated that
10 had an awareness but also have an appreciation for the police
11 role, particularly within Neighborhood Watch and keeping
12 their communities safe. So just because people might be
13 highly motivated, all of them were not anti, against the City
14 or the police.

15 MR. MCMULLEN: No further questions.

16 Thank you, Dr. Peters.

17 THE WITNESS: Thank you.

18 MR. MCMULLEN: Oh, one other question.

19 THE WITNESS: Yes, sir.

20 BY MR. MCMULLEN:

21 Q. I just want for the record, your report is not
22 complete at this time; is that fair?

23 A. Yes, sir.

24 Q. I think you stated that.

25 MR. MCMULLEN: Thank you very much for your time.

1 THE WITNESS: Thank you.

2 THE COURT: ACLU counsel?

3 MR. CASTELLI: No questions, Your Honor. Just
4 looking forward to reading Dr. Peters' report when it is
5 completed.

6 THE COURT: Certainly. Redirect?

7 MR. STANTON: Yes. Just one other question, Your
8 Honor, for Dr. Peters.

9 **REDIRECT EXAMINATION**

10 **QUESTIONS BY MR. STANTON:**

11 Q. And that is, Dr. Peters, did you provide an
12 opportunity for both parties to submit potential contacts of
13 their affiliates or members or individuals who may be
14 interested? Did you submit to both parties an opportunity
15 for them to give that information to you?

16 A. Yes, sir. Yes, sir. And that was facilitated through
17 the monitoring team.

18 MR. STANTON: No further questions, Your Honor.

19 THE COURT: All right.

20 Dr. Peters, we certainly appreciate your
21 participation and look forward to getting the final report.
22 And I know we have indicated all along that this is basically
23 identifying themes or issue spotting to some degree for us.

24 THE WITNESS: Yes, sir.

25 THE COURT: And it's not submitted as evidence,

1 as the City points out and everyone agrees. It's not a
2 statistical analysis, but it's very important. And we know
3 that, and we're looking forward to getting your report again.
4 So thanks so much.

5 THE WITNESS: Thank you, sir.

6 THE COURT: Certainly. We're going to let you be
7 excused.

8 Let me ask the Monitor, are we ready on our next
9 witness? I know we've moved pretty efficiently today.

10 MR. STANTON: We did, Your Honor. We have one
11 more -- one other witness, Your Honor, if you recall, that
12 witness due to -- he had another court --

13 THE COURT: Right.

14 MR. STANTON: -- matter is still in that
15 proceeding, I understand. So we had discussed perhaps taking
16 that individual, and that's Mr. John Henegan, our
17 constitutional law expert out of order.

18 THE COURT: Yes.

19 MR. STANTON: He'll be prepared first thing
20 tomorrow or whenever the Court deems fit to accommodate him
21 into the schedule, but otherwise, Your Honor, we have
22 completed our witnesses.

23 THE COURT: All right.

24 MR. STANTON: Presentation.

25 THE COURT: We certainly will hear from him

1 tomorrow, and we'll start here at 9:00.

2 The next question is, we're going to go to the
3 City. Obviously we have, for efficiency purposes, an
4 opportunity to hear from a witness from the City of Memphis
5 today. Is there someone who you're prepared to present at
6 this time? I understand that we've been quite efficient, and
7 it's actually worked pretty well, I hope. Anything else,
8 Mr. McMullen, that we can cover from the City's point of view
9 today?

10 MR. MCMULLEN: Your Honor, we would like to call
11 the Monitor, Ed Stanton. And we have some inquiries we want
12 to make with Mr. Stanton.

13 THE COURT: That is certainly fine. We've got a
14 request here for a short break. About 12 minutes, coming
15 back at ten after the hour.

16 And Mr. Stanton, at that time you'll be prepared,
17 if you don't mind, to be -- you're really an officer of the
18 Court, but we're going to let you be sworn in anyway --

19 MR. STANTON: Yes, Your Honor.

20 THE COURT: -- when we come back. So we will see
21 you at ten after 4:00. And we'll proceed in that way. So
22 thank you all very much. And of course, again, don't leave,
23 just mute and also disconnect your video for the time being.
24 Thank you.

25 (Short break.)

1 THE COURT: Time to resume and see who we've got.

2 MR. MCMULLEN: Your Honor, the City is on line.

3 THE COURT: Right. Now we have everyone. I
4 think we do. We're missing our witness. So Monitor?

5 MR. STANTON: Can you hear me, Your Honor, or can
6 you see me?

7 THE COURT: I will be able to in a minute,
8 hopefully.

9 MR. STANTON: Testing, testing, one, two.

10 THE COURT: Have we got the video on that?

11 MR. STANTON: Your Honor?

12 MR. MCMULLEN: Your Honor, I need some guidance
13 from the Court. Two exhibits we're going to talk about were
14 marked under seal.

15 THE COURT: Oh, sure. What do we need to do on
16 that?

17 MR. MCMULLEN: I think -- can we docket it as
18 under seal? I think Mr. Stanton is very familiar with it.
19 I'm very familiar with it. I think the Court is. If the
20 Court and Mr. Stanton could see it and the Court could decide
21 at another time to the extent it needs to be released.

22 THE COURT: Sure. What we'll do is -- I think
23 that's not a problem. If Mr. Stanton is familiar with the
24 document and you are, then we can mark it as an under-seal
25 document for now. Anticipating that the public version will

1 be made available as soon as any material that should not be
2 disclosed. We talked about that at the beginning. There may
3 be a few things that we know are not proper to disclose for
4 anybody. And we can clean that up and get that ready for
5 release. We want to do that quickly.

6 MR. PERRY: Your Honor, to which document are we
7 referring? I was getting Mr. Stanton's camera corrected.

8 MR. MCMULLEN: Defendant's 12 and Defendant's 13
9 -- no. Defendant's 12.

10 THE COURT: Okay. Well, we'll have it out here
11 in a second. That will be all set. So I think we are ready
12 though other than that.

13 So Mr. Stanton, you know, there's sort of an
14 argument about -- not argument -- question -- do we need to
15 swear you in? Of course, but we're going to do it so
16 everything is consistent, and if you'll raise your right
17 hand, Mr. Sample is going to administer the oath.

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* * *

EDWARD STANTON, III

was called as a witness and having first been duly sworn testified as follows:

THE COURT: Counsel may proceed.

MR. MCMULLEN: First of all, I don't want Mr. Stanton to feel left out, so I want to enter the first page of his bio and the issues we discussed with respect to redacting --

THE COURT: Yes. Yes. Absolutely.

MR. MCMULLEN: -- will not be visible.

THE COURT: Absolutely. We don't put out peoples' personal identifiers. Anybody's. And so we'll make sure that that's taken care of. And I think we're all set. I think you've got those materials.

DIRECT EXAMINATION

QUESTIONS BY MR. MCMULLEN:

Q. Mr. Stanton, I think you need -- I don't see Mr. Stanton.

A. I'm here.

THE COURT: He's probably hiding behind his picture. I mean, I think he -- you are there, right, Mr. Stanton?

THE WITNESS: I am here, Your Honor. Can you see and/or hear me?

1 THE COURT: We can see you.

2 MR. MCMULLEN: I can hear you.

3 THE COURT: -- your resume. I think that's the
4 issue, so...

5 MR. MCMULLEN: We could minimize that and move it
6 to the side.

7 THE COURT: That's fine.

8 THE WITNESS: Can you see me now, Your Honor?

9 THE COURT: Yes, we can. Thank you.

10 MR. MCMULLEN: Hold on, Your Honor. I still
11 can't see Mr. Stanton.

12 THE COURT: He's down here in box number, looks
13 like, ten.

14 MR. MCMULLEN: Your Honor, I see him now.

15 THE COURT: Okay.

16 BY MR. MCMULLEN:

17 Q. Mr. Stanton, I'm sure you need no introduction, but
18 would you briefly introduce yourself to the Court.

19 A. Sure. Edward L. Stanton the third. I am the Monitor
20 in this case. Was appointed back in December of 2018. I
21 have served in that capacity. I'm also an attorney with
22 Butler Snow law firm in the Memphis office and have been in
23 that role with this law firm since 2017, for a little over
24 three years.

25 And prior to that, I served as the presidentially

1 appointed United States attorney from 2010 through 2017 for
2 the Western District of Tennessee. And prior to then,
3 Mr. McMullen, I served nearly eight years as in-house counsel
4 on the commercial litigation team for Federal Express
5 Corporation or FedEx.

6 Prior to then, I served as an associate, training with
7 a law firm of Armstrong Allen here in Memphis. And before
8 then I'd served as an assistant city attorney for the City of
9 Memphis and began my legal career with law offices of Charles
10 Carpenter and Associates back in 1997.

11 Q. Okay. Mr. Stanton, as your role as the Monitor,
12 you've dealt a lot with the City with respect to RFAs,
13 requests for authorities and dealing with the issues that
14 have arisen; is that correct?

15 A. That's correct.

16 Q. And a lot of those involve situations where both the
17 City and you sometimes would debate back and forth what was
18 the proper course of action in light of the Consent Decree
19 and what was not the proper course of action in light of the
20 Consent Decree; is that correct?

21 A. I'm not sure I'd say debate. The City would send over
22 an RFA, request for authority or authorization, and I would
23 try to promptly turn around my response. Obviously, the City
24 would share their points, but I'm not sure there was a lot of
25 debate. More so in writing, I would provide my response to

1 the request.

2 Q. In doing that -- and I want to bring up a couple of
3 incidents to give the Court an indication of some type issues
4 that we would run into. You had recalled a citizen sent an
5 unsolicited document, where the citizen had photographed two
6 people and overheard them talking about causing disruption at
7 a -- at the Grizzlies. I think it may have been the opening
8 game or at a Grizzlies game. And that information was sent
9 to me, and I sent that information to you. Do you recall
10 that RFA?

11 A. I do have a recollection, Mr. McMullen. I can't
12 recall the exact details, but I do recall some of those
13 specifics that you just referenced.

14 Q. Okay. And with respect to that, I think my question
15 was to you because quite frankly, I wasn't sure after
16 reading -- looking through the Consent Decree, reading
17 through the Consent Decree, whether the City could act upon
18 that information, whether the Memphis police could act upon
19 that information. And the second question was whether MPD
20 could share that information with the Grizzlies' security
21 staff. Do you recall those two questions?

22 A. Sounds very familiar. But again, can you tell me
23 when, how long ago that was, Mr. McMullen, that RFA. It
24 seems like that was a while back.

25 Q. October 2018 -- 2019. October 2019.

1 A. Okay. Yeah. It's been some months, so that puts
2 somewhat in context. But yes, I have a -- some recollection.
3 I can't remember all of the details, but I do remember the
4 City reaching out. I believe you were the City attorney at
5 the time with questions with regard to that RFA, yes.

6 Q. In the document, some of it is sealed. I have a copy
7 of it and it has been filed under seal, Mr. Stanton. You
8 have access to it. It made reference to specific names, and
9 it had a photograph. So I think the Court wisely has it
10 under seal.

11 But the document was from a citizen that basically
12 said, "Would you happen to know anyone in security with the
13 Memphis Grizzlies?" That was sent to me. "I was eating
14 lunch today by myself in a T-shirt and shorts at a
15 restaurant, and I listened to two people discussing their
16 plan to shut down the Grizzlies game." And I've sent a RFA
17 to you.

18 A. I'm sorry. Can you give me just one second. I want
19 to make sure I'm with you on the same page. And if you don't
20 mind, I apologize. My -- someone is going to get my readers.
21 My eyes aren't what they used to be. So can you tell me
22 literally what page you're on and maybe just give me just a
23 moment to make sure I can see and read it exactly where you
24 are.

25 Q. It's under seal.

1 A. I have -- I believe I have the document in front of
2 me. I'm just trying to make sure if you can tell me where
3 you're reading from, which page, so I can...

4 MR. CASTELLI: I'm sorry. If I may, Your Honor,
5 is this a document that was filed and provided before the
6 hearing? Is there a reference number so I can follow along?

7 THE COURT: That's fair. Is this a document that
8 can be readily referenced by Mr. Castelli, and can you give
9 us the reference, the ID number.

10 MR. MCMULLEN: They're e-mailing it to
11 Mr. Castelli.

12 THE COURT: Okay. Do we have -- we want to make
13 sure that we have the document here, and I think we may.

14 MR. PERRY: I want to be clear. This is not one
15 of the exhibits that the City submitted?

16 THE COURT: Okay.

17 MR. MCMULLEN: No.

18 MR. PERRY: Would you copy us on that e-mail that
19 you're sending to Mr. Castelli?

20 MR. MCMULLEN: Yes.

21 THE COURT: Yeah. Just copy everybody on the
22 e-mail, and we'll have it almost instantly. We'll pull it
23 from the back. It will come in in a moment.

24 MR. MCMULLEN: Mr. Stanton, let me know when
25 you're able to see the document.

1 THE COURT: If we need to, we can take a short
2 break. Would that be useful?

3 MR. PERRY: If the Court would indulge, Your
4 Honor, I think that may be a good idea. I still don't have
5 the document.

6 THE COURT: I think it's often much easier for
7 you to find it than someone else. So what we'll do is we'll
8 take literally a five-minute break, and we'll resume in five
9 minutes and also let us get the document from the back. So
10 five minutes, I'm going to disconnect -- just not disconnect,
11 but I'm actually going to mute, and I'm going to go off on
12 video. Five minutes.

13 (Short break.)

14 THE COURT: All right. I see that Mr. Stanton is
15 back, so I assume everything is resolved.

16 THE WITNESS: Thank you, Your Honor, I -- we just
17 got -- there was additional e-mails that the City sent, so
18 we're downloading those. But I'm here, Your Honor, and ready
19 to move forward to the extent I can. I'm sure Mr. McMullen
20 will --

21 MR. PERRY: Your Honor, we have two e-mails and a
22 letter that the City just forwarded us. We are printing
23 those now, and we will have them shortly.

24 THE COURT: Okay. Just tell us when you're
25 ready, Mr. Stanton. There's no rush. We'll wait until we're

1 all set.

2 THE WITNESS: Yes, sir. Will do. Thank you,
3 Your Honor.

4 THE COURT: No problem.

5 (Short break.)

6 THE COURT: There is one thing about the
7 documents. It does contain the identity of some people and a
8 photograph that we would not disclose because it's a personal
9 identifier and many reasons that would typically not be
10 disclosed. And so a redacted version may be capable of being
11 prepared, and that will be our objective to do that. But we
12 will not be including certain individual -- any individuals'
13 names except, of course, the Monitor, which is -- and of
14 course, the counsel for the City, who was chief legal officer
15 for the City at the time. So I don't think there's any
16 problem in disclosing their identities. But that's how we
17 should probably proceed on that. And so we will proceed when
18 Mr. Stanton says that we're set.

19 THE WITNESS: Thank you, Your Honor. I believe
20 that we're set. I just received the documents, and they're
21 in front of me. They are e-mails from the City.

22 THE COURT: Do you want to take a minute to take
23 a quick look at them and then just tell me when you're set.

24 THE WITNESS: Yes, Your Honor.

25 MR. PERRY: Your Honor, I think we're ready to

1 go.

2 THE COURT: All right. Counsel may proceed with
3 the questions for the Monitor. I don't really want there to
4 be any --

5 MR. MCMULLEN: I'm sorry.

6 THE COURT: I don't want there to be any
7 confusion. We should not identify individuals other than
8 Mr. Stanton and, of course, Mr. McMullen in these -- from
9 these materials. And there are numerous reasons that we
10 should not do that. We certainly don't want to discourage
11 citizens from reporting information to the authorities under
12 any circumstance. And so we are not going to be disclosing
13 those -- that identity. All right.

14 Counsel may proceed.

15 BY MR. MCMULLEN:

16 Q. Mr. Stanton, you've had an opportunity to review the
17 documents?

18 A. A brief opportunity, Mr. McMullen, but yes, I have had
19 them printed, and they're in front of me.

20 Q. Yeah. And does that refresh your recollection of the
21 RFA conversation we had by e-mail?

22 A. It does, Mr. McMullen, yes.

23 Q. Okay. I'm going to just describe without reading in
24 detail the message that I got. And anything you want to add,
25 I don't want to misrepresent what it says. But essentially

1 someone contacted me and advised -- asked me if I knew
2 anybody who knew anybody in Memphis Grizzlies security. And
3 he indicated he was eating lunch, and he overheard two people
4 talking about going to the Grizzlies game and shutting it
5 down. They made some other references, and he took a picture
6 of the two individuals, and he sent it to me; is that a fair
7 description, Mr. Stanton?

8 A. That sounds fair, Mr. McMullen.

9 Q. Okay. And then --

10 THE COURT: Mr. McMullen, I think you need to
11 turn your camera on.

12 MR. MCMULLEN: Oh, I'm sorry.

13 THE COURT: It's all right.

14 MR. MCMULLEN: I'm sorry.

15 THE COURT: Perfect. Perfect. Thanks so much.

16 MR. MCMULLEN: All right.

17 BY MR. MCMULLEN:

18 Q. And then I sent an e-mail to you October 4th, and it
19 was addressed to you, Mr. Perry, and Mr. Letten. "I received
20 this tip from a personal friend tonight. Because of how the
21 information was acquired, I am requesting permission to pass
22 it along to MPD to provide safety for the fans at the game.
23 Please review and respond."

24 Do you see that document?

25 A. I do.

1 Q. And then I got an e-mail from you a few minutes later,
2 a little over 30 minutes later. "Received. Will review and
3 advise."

4 Do you see that document?

5 A. I do.

6 Q. And then about six days later, on October 10th, I sent
7 an e-mail to you, Will Perry and Jim Letten. "I'm following
8 up on the e-mail below. We're still waiting on your
9 determination. The information is not specific about which
10 Grizzlies game will be impacted. Thankfully, it does not
11 seem that anything happened during Sunday's game October 6th
12 or Tuesday's game October 8th. Below are the upcoming games:
13 October 14th, 25th, 27th, November 2nd, 4th, 6th. The season
14 opener is October 25th. I suspect that would have the
15 largest attendance. Again, please advise whether MPD can act
16 on this information and/or whether they can pass it along to
17 the Grizzlies security staff."

18 Is that pretty accurate as far as that e-mail sent to
19 you, Mr. Stanton?

20 A. Yes.

21 Q. And then you responded to me by letter, and in that
22 letter, I'm not going to read your entire letter, but
23 basically you responded, "The answer to both those questions
24 were no." And you cited to Section I of the Consent Decree.
25 And quoted, "We can't encourage, cooperate or delegate,

1 employ or contact with or act on behest of any local, state,
2 federal or private agency or any person to plan or conduct
3 activity prohibited by the Decree." And you went on to talk
4 about Section I.

5 Is that a fair depiction of your response to my
6 letter? You got several other paragraphs in it that I didn't
7 read, but is that a fair depiction of your response?

8 A. That's a fair depiction of that paragraph, yes.

9 Q. Okay. And I guess the point I'm trying to make, I
10 thought there was problems with Section I, and I went to you
11 for authority on it. And I think your letter outlines that
12 you also thought there was problems under Section I with us
13 receiving or sharing that information; is that fair to say?

14 A. That's fair to say at that time, and I'm looking at
15 the date of this letter, Mr. McMullen, that's October
16 the 11th of 2019.

17 Q. Right. And both -- you and I both have law degrees,
18 we're well educated, and eventually a similar issue or
19 analogous issue was brought to the Court, and the Court gave
20 us some further guidance on that; is that fair to say?

21 A. I'd have to see -- the Court did give further guidance
22 as it relates to Section I, that's correct.

23 Q. Right.

24 A. About a month later.

25 Q. About a month later. And I think it's fair to say the

1 Court guided different from the way I interpreted it and,
2 quite frankly, appear to be the way you interpreted
3 Section I; is that fair to say?

4 A. I think the Court's guidance speaks for itself.

5 Q. Okay. All right. Is it fair to say that in reading
6 this document, you can have two reasonably informed,
7 intelligent people come up with different opinions as to what
8 it means and what it doesn't mean?

9 A. I'm not sure I would say it's fair to say. I mean,
10 you can have two people that have multiple interpretations.
11 If that's what you're asking, sure.

12 Q. And we'll find the document of the head clerk from the
13 Court. But it is my understanding now that, based on what
14 the Court has ruled, forwarding this information would be
15 permissible; is that your understanding?

16 A. Under the guidelines of the Court's orders. I mean,
17 again, Mr. McMullen, if the Court --

18 THE COURT: Excuse me. You're allowed to put the
19 order up. It's fine. If you want to.

20 THE WITNESS: I think that would be a great idea.

21 MR. MCMULLEN: We're trying to get it up.

22 BY MR. MCMULLEN:

23 Q. And I think those are the Court's words. "And
24 therefore, reading the two sections of the Monitor's
25 August 21st -- August 2019 interpretation of I together, the

1 Court disagrees with the City's broad reading of the
2 Monitor's interpretation of Section I limitation. The better
3 reading of the Monitor's interpretation, which better
4 comports with the purpose and protection of the Kendrick
5 Consent Decree would require the City to reject outright only
6 information constituting political intelligence that is
7 unrelated to any legitimate law enforcement activity as
8 prohibited by Section 8 of the Consent Decree. Section I
9 further requires the City to vet only information that
10 implicates Section G of the Decree, that is, information
11 gathered as a part of a legitimate law enforcement
12 investigation that incidentally or may incidentally implicate
13 protected First Amendment rights."

14 So based on that guidance from the Court, you do agree
15 your response would have been different to me, provided this
16 information?

17 A. Sure. This is an order of the Court. And the Court
18 was clear in what you just read, Mr. McMullen.

19 Q. And my only point is you have two people who have been
20 living with this Consent Decree for a while, and they had a
21 different interpretation of what Section I said; is that a
22 fair assessment?

23 THE COURT: Well, I don't think it matters. I
24 think what matters is what the final ruling was on it. I
25 mean, I think it's obvious that there was a difference there.

1 MR. MCMULLEN: I agree, Your Honor.

2 THE COURT: Okay.

3 MR. MCMULLEN: And the point I was trying to
4 make --

5 THE COURT: Sure.

6 MR. MCMULLEN: -- for my modification is to make
7 the Consent Decree understandable and readable to a
8 layperson. And that's the point I'm trying to make, not that
9 either of us are right.

10 THE COURT: Right.

11 MR. MCMULLEN: The only interpretation that
12 matters was yours, Your Honor. Thank you.

13 THE COURT: Well, hopefully we get it right.

14 BY MR. MCMULLEN:

15 Q. All right. And so Mr. Stanton, do you think the
16 Consent Decree would be clearer if we were able to codify
17 some of the Court's language, which gave us guidance and put
18 it in the Consent Decree so that it's one document that
19 everybody can look to to know how they can operate under the
20 Consent Decree?

21 A. Well, I would tell you, Mr. McMullen, I think since
22 the Court's order has come down, it's pretty clear as to in
23 my mind how to interpret Section I. If this is incorporated
24 to your point about being codified, I don't know that there
25 is a downside to declaring purposes, but as I said to the

1 Monitor today, it's the Judge and the orders of the Court
2 that are very clear as to the purview of Section I of what's
3 allowed and what's not.

4 Q. Okay. And let me ask you about joint operations,
5 Section I. You were in law enforcement before you started
6 your career with Butler Snow. Were you involved in a lot of
7 joint operations as the US attorney?

8 A. I was. And obviously led an office of individuals
9 involved with joint operations, yes.

10 Q. Is that considered a best practice where agencies to
11 work together and engage in joint operations to achieve
12 crime-fighting public safety or determine due threat
13 assessment?

14 A. When you use the term "best practices," I will defer
15 to what we heard from Dr. Bowman earlier. I would say it was
16 a common practice. Best practices may mean a number of
17 different things, so I'm not sure that I would use that term.
18 As the expert mentioned earlier, that can mean a number of
19 different things. But I would say it was certainly common
20 for joint and collaborative efforts from a law enforcement
21 standpoint.

22 Q. Do you think it was effective practice?

23 A. For the most part, sure.

24 Q. Okay.

25 MR. MCMULLEN: And I want to also pull up our

1 Exhibit 12. 12 and 13. Both are under seal right now, and
2 we'll just publish it to the Court. I think they have it.

3 Mr. Perry, do you have that document?

4 MR. PERRY: Defense Exhibit 12, yes.

5 BY MR. MCMULLEN:

6 Q. And without reading through this, everything in this
7 document, are you familiar with this document, Mr. Stanton?

8 A. I am. Obviously, it's dated August 21st of 2019. So
9 not quite a year old, but yes, I'm familiar with it. It's
10 been a while since I've laid eyes on it.

11 Q. And this document was in part and parcel had another
12 RF request for authorization; is that correct?

13 A. Yes. There appears to be -- if you're talking about
14 Exhibit 12, there appears to be, yeah, three questions that I
15 responded to that were posed from the City.

16 Q. Right. And without reading through all of the
17 documents, it represented a 2019 PS Peace Symposium on
18 violent crime where there were going to be a number of
19 executives from the DOJ, FBI, DEA, ATF and USMS. Is that a
20 fair characterization to the RFA that I sent to you?

21 A. Yes.

22 Q. And I did a list behind the scenes. MPD will be
23 responsible for event security. Five to six officers each
24 day. And then --

25 A. And I'm sorry, Mr. McMullen. Can you tell me where

1 you're looking at.

2 Q. E-mail July 16, 2019, at 8:13.

3 A. Which exhibit is this, Mr. McMullen?

4 Q. A12.

5 A. Pardon me?

6 Q. Sub A on Exhibit 12. Page ID 10095.

7 A. Yes. I'm with you. Thank you.

8 Q. Okay. Is that a fair characterization of that
9 document?

10 A. Yes. What you just read, that's a fair depiction of
11 the statement that you just read and what's on this document.

12 Q. And I said later in the last paragraph, "We anticipate
13 the need for a lot of coordination with various agencies.
14 Because of those involved, we expect the FBI Secret Service
15 to have a security force on the ground (or the air. I don't
16 know the extent of their technology.) As you may expect, the
17 expectation is that the agencies will share intelligence with
18 MPD, and they will expect the same. The intel they share
19 with MPD may be obtained through methods that are prohibited
20 by the Consent Decree. We would like to know if we have your
21 approval to coordinate with the agencies and benefit from
22 intel they may have to share in planning for the symposium."

23 Is that an accurate reading of my request?

24 A. It appears to be.

25 Q. Okay. And in your response, page 84 -- no, I'm sorry.

1 Page 0089 Bates stamp.

2 A. Is this still a part of Exhibit 12 from the City?

3 Q. Yes. It's your letter dated August 21st. I'm sorry.

4 Page ID 10089.

5 MR. CASTELLI: Was that the first page of the
6 exhibit, Mr. McMullen, so I'm on the same page?

7 MR. MCMULLEN: Yes.

8 MR. CASTELLI: Okay. Thank you.

9 THE WITNESS: Okay. I'm with you.

10 BY MR. MCMULLEN:

11 Q. And in your response, your response to our question
12 was, "Basically we were limited in what we could do as far as
13 coordinating with them."

14 Is that a fair depiction?

15 A. I think that's right, yes.

16 Q. Okay. And ultimately both you and I sought guidance
17 where guidance should be sought when we have issues like
18 that. And we ultimately got a ruling on that; is that fair
19 to say?

20 A. That's a fact that the Court gave guidance and a
21 ruling. That's what we'd adhere to going forward, yes.

22 Q. And so my point to you is that reading the Consent
23 Decree without having the Court's guidance there, it is a
24 point where two knowledgeable, well-informed, educated
25 individuals can interpret it differently; is that a fair

1 statement?

2 A. I mean, I think if you have two individuals --
3 multiple individuals can certainly have multiple
4 interpretations of any document or...

5 Q. Have members of the monitoring team had different
6 interpretations of different documents or different of what
7 is meant by different things in the Consent Decree?

8 A. Sure. From time to time. Again, everyone has
9 different backgrounds, different expertise. You have some
10 lawyers, nonlawyers, law enforcement backgrounds.
11 Absolutely. There again, with multiple people looking at the
12 same documents, oftentimes or sometimes there could be
13 varying degrees of interpretations, yes.

14 Q. Do you feel that the public will benefit if the
15 Consent Decree is written in a manner that incorporates some
16 of the -- codified some of the Judge's interpretation in
17 different sections and written in a manner that is clear?

18 MR. PERRY: Objection, Your Honor. Mr. McMullen
19 has already asked Mr. Stanton that question, and he's already
20 answered it.

21 THE COURT: It has been asked and answered.

22 MR. MCMULLEN: I'll move on, Your Honor.

23 THE COURT: Sure, thank you.

24 BY MR. MCMULLEN:

25 Q. Let's -- since you've been monitoring, you have gotten

1 complaints or -- from the public about MPD since you have
2 been a monitor; is that correct?

3 A. I have received complaints since I've been the Monitor
4 regarding the Memphis Police Department, yes.

5 Q. Can you give an estimate how many complaints have you
6 received?

7 A. That is hard to say. If you're talking about in
8 writing, certainly you and your team, Mr. McMullen, have
9 attended the community forums. There are a number of
10 individuals who had complaints or concerns there. Others
11 have -- we've met with, and so some have been in writing;
12 others have been verbally one-on-ones, as well as at the
13 community forums. So are you talking in writing or just in
14 general?

15 Q. In general, in any form. In writing, in person, in
16 any form.

17 A. I would have to say certainly more than 50 and
18 somewhere between 50 and 150. It's somewhat hard to quantify
19 but maybe an average of a hundred since I've been the
20 Monitor.

21 Q. Would it be fair to say out of that hundred
22 complaints, there have only be two incidents where you feel
23 that warrant going to the Judge for a possible divergence
24 from his order or from the Consent Decree?

25 A. I think the record is clear that there were -- that's

1 part of our public filings or items that we've filed in our
2 pretrial reports. Yes. There have been two times that we
3 felt that the City ramified on the Consent Decree or
4 diverged, as you said, from the Consent Decree, yes.

5 Q. Or the Court ordered. One had to do with the Court's
6 order, right?

7 A. That's correct.

8 Q. And then one incident had to do with the Consent
9 Decree, and that had to do with the Labor Day parade; is that
10 correct?

11 A. That's correct.

12 Q. Do you find that largely most of the other
13 98 complaints are for things that really don't implicate the
14 Consent Decree?

15 A. I wouldn't say that, no.

16 Q. Well, there have only been two that you've raised
17 to -- well, two that you've raised to us that got to the
18 level that we had to go to court. That's all I know of.

19 A. Yeah. Well, let me give you an example. One of those
20 that you mentioned violated the Court's order. That wasn't a
21 complaint from a citizen. That was a review by the
22 monitoring team and basically a response from the City to
23 some questions that I had as the Monitor as it relates to
24 social media searches. So that's why again, you can't
25 quantify or qualify that it's solely two complaints out of a

1 hundred.

2 Q. You're right. You're absolutely right. That one
3 matter before the Court was from you, and so it was only one
4 complaint that arose related to the Consent Decree, not two?

5 A. No. Again, that's not correct. As an example, there
6 were multiple complaints as it relates to, you mentioned the
7 Labor Day parade. And so I would not walk down a path of
8 just assuming that because we didn't act or that something
9 was not brought to the Court's attention that those
10 complaints were not valid.

11 And I will tell you that there are a number of times
12 that we've received complaints and as I've shared this -- and
13 again, this is on record at the public forums, many of the
14 items or some of the items that we've heard from citizens
15 they were outside of, I would say, the purview of what the
16 Court has instructed itself and the monitoring team, our
17 scope and role.

18 So we heard complaints, but sometimes -- and you've
19 heard this yourself, Mr. McMullen, is outside the purview of
20 what the Court has instructed us to do.

21 Q. That's exactly my point. And you find a lot of that
22 was because it wasn't a really good understanding of the
23 Consent Decree and the prohibitions within the Consent
24 Decree; would you agree with that?

25 THE COURT: That's just simply calling for

1 speculation about why an individual who's not here may have
2 made a statement. So it probably wouldn't be beneficial to
3 the Court to simply speculate about why people did or did not
4 do something.

5 MR. MCMULLEN: Thank you. I'll withdraw.

6 THE COURT: Sure. That's fine. We are looking
7 at that time. And I said, we would stop very close to 5:00.
8 Would you prefer to try to wrap up in the next couple
9 minutes, which I'm not requiring at all or come back at
10 nine o'clock tomorrow and then wrap up as to Mr. Stanton, and
11 then we have a witness from Mr. Stanton's team who will be
12 ready to proceed at that time? Which is your preference,
13 Mr. McMullen?

14 MR. MCMULLEN: Your Honor, if I can come back at
15 nine o'clock in the morning.

16 THE COURT: That's fine. That's no problem at
17 all. And I think -- we will go then with Mr. Stanton.
18 Mr. Stanton, we'll let you finish tomorrow morning at 9:00.
19 Then I'm going to ask as I did on every other occasion, once
20 Mr. Stanton concludes his testimony and then once the last
21 witness for the Monitor's team concludes, who will the
22 witness -- who are the witnesses that the City will call? I
23 know we've gone over this, but I think it's always useful at
24 the end of the day to make sure we know the sequence of those
25 witnesses. Sometimes it changes a little bit and so --

1 MR. MCMULLEN: Your Honor, we will start off with
2 Director Rallings. Deputy Chief Don Crowe. Expert Eric
3 Daigle. And then Major Darren Goods. Zayid Saleem.
4 Jennifer Sink. That will be our lineup, Your Honor.

5 THE COURT: All right. And that's very, very
6 helpful. And that also allows Mr. Castelli to think about
7 whether he'll be able to conclude his case through the
8 witnesses that are presented. I won't ask him right now
9 because we have basically eight witnesses on for tomorrow.
10 And that's probably going to take us through the day, in all
11 likelihood.

12 All right. Well, thank you all very much, and
13 Mr. Sample will adjourn the Court for the day, and we'll
14 be --

15 MR. PERRY: Your Honor, may I raise one point
16 before we adjourn?

17 THE COURT: Absolutely. Yes, sir.

18 MR. PERRY: If the City intends to use any
19 documents that are not in the exhibits that have been
20 submitted, can they send those to us now so that we're not
21 scrambling tomorrow to print documents the way that we have
22 been the last few minutes?

23 THE COURT: Yes. That's okay. And I know,
24 Mr. McMullen, is that a problem? Can we go ahead and get any
25 documents?

1 MR. MCMULLEN: No, it's not, Your Honor.

2 THE COURT: Okay. Well, we'll look forward to
3 that. That will speed things along. All of you, thank you
4 all very much. And Mr. Sample.

5 THE CASE MANAGER: Yes, Your Honor, the Court
6 stands in adjournment.

7 (Adjournment.)

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C E R T I F I C A T E

I, CANDACE S. COVEY, do hereby certify that the foregoing 238 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the Zoom Modification Hearing on the 17th day of June, 2020, in the matter of:

ACLU OF TENNESSEE, INC.

vs.

CITY OF MEMPHIS

Dated this 24th day of June, 2020.

S/Candace S. Covey

CANDACE S. COVEY, LCR, RDR, CRR
Official Court Reporter
United States District Court
Western District of Tennessee