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

ELAINE BLANCHARD, KEEDRAN FRANKLIN, PAUL GARNER and BRADLEY WATKINS, Plaintiffs, and ACLU OF TENNESSEE, Inc. Intervening Plaintiff, v. THE CITY OF MEMPHIS, Defendant.	)	No. 2:17-cv-02120-jpm-DKV

REPLY OF CITY OF MEMPHIS TO ACLU OF TENNESSEE, INC.'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The Response by ACLU of Tennessee, Inc. ("ACLU-TN") appears to concede the following key facts: (1) The actual named "ACLU" plaintiff in the *Kendrick* case --- "American Civil Liberties Union in West Tennessee, Inc." --- was and is not a legal entity at all; (2) the only plausible corporate legal entity described, repeatedly, in the *Kendrick* Complaint by the acronym "WTCLU" was West Tennessee Civil Liberties Union, Inc., a completely separate and distinct corporation from ACLU-TN; (3) as of the time frame of the *Kendrick* case, although ACLU-TN existed, and had formally "consolidated" the operations of its East Tennessee and Middle Tennessee "chapters", it had definitely not consolidated the operations of the separate corporate

entity going by the acronym "WTCLU" ---- and apparently never did. Instead, that entity dissolved in 1983 after failing to file annual reports.

In an apparent effort to cobble together a circumstantial case for the proposition that ACLU-TN nonetheless "controlled" or was responsible for ACLU operations in West Tennessee as of the date of the *Kendrick* case, the Response attached minutes of the Board of Directors of ACLU-TN from 1975. Nothing was presented which demonstrated active participation in, control of, or any responsibilities whatsoever concerning the *Kendrick* litigation itself.

Under the circumstances, ACLU-TN's claim that it was a "party" to the *Kendrick* litigation remains unsubstantiated and requires either dismissal for failure to carry its burden of demonstrating standing, or alternatively, further limited discovery to clarify the issue.

ACLU-TN's subject matter jurisdiction argument fails to identify any specific instance where the Court was requested to review specific actions or policies by the Memphis Police Department since 1978 as part of its alleged ongoing jurisdictional powers with respect to that department. The Sixth Circuit authority cited in the Response for the proposition that a Consent Order providing injunctive relief establishes "inherent jurisdiction", apparently forever, actually held that the Consent Order in question violated public policy. ACLU-TN fails to acknowledge more recent and specific United States Supreme Court authority specifically approving the concept of "reexamination of the original judgment" in cases providing injunctive relief against government institutions following "the passage of time." *Horne v. Flores*, 557 U.S. 433, 448 (2009).

A. ACLU-TN has not carried its burden of establishing standing to pursue remedies reflected in the *Kendrick* Order.

It is ACLU-TN's burden, not the City's burden, to establish standing. *Lujan v. Defenders of Wildlife, et. al.*, 504 US 555, 561 (1992). ACLU-TN cites *Lujan*, an Opinion authored by

Justice Scalia which found that the plaintiff failed to establish standing, for the misleading proposition that "[a]t this stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice' to establish standing." *Id.* at 561.

In point of fact, *Lujan* addressed a standing challenge made at the summary judgment stage of the case. The Court did not have the opportunity to consider the issue, as we do here, as a preliminary matter in response to a Rule 12(b)(1) Motion. The comment on what "may" suffice at this stage of the case is dicta, and not at all necessary for purposes of the reasoning employed to resolve the case.

There is more pertinent, and recent, United States Supreme Court authority addressing the burden of proof on intervening plaintiffs to establish standing, but ACLU-TN does not cite it. In *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), the Court held that "[a]n intervenor cannot step into the shoes of the original party (here, the Commonwealth) unless the intervenor independently fulfills the requirements of Article III." *Id.* at 1736 (citations and quotations omitted). The Court further reiterated that "the 'party invoking federal jurisdiction bears the burden of establishing' that he has suffered an injury by submitting 'affidavit[s] or other evidence.' When challenged by a court (or by an opposing party) concerned about standing, the party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more." *Id.* at 1737 (citing *Lujan*, 504 U.S. at 561).

B. West Tennessee Civil Liberties Union, Inc. (WTCLU) was the plaintiff in *Kendrick*, not ACLU-TN.

The fact that no entity by the name "American Civil Liberties Union in [or 'of'] West Tennessee, Inc." existed has created some confusion about the named plaintiff in the *Kendrick* case. This much, however, is clear: the corporate plaintiff in *Kendrick* was not ACLU-TN, and was not a subsidiary of ACLU-TN. ACLU-TN's Response disingenuously expresses

bewilderment that "[d]efendant believes that an entity known as the West Tennessee Civil Liberties Union, Inc. was the original party (in *Kendrick*)." Doc. 33, p. 4. The reason the City "believes" this, of course, is because this entity actually existed at the time of the *Kendrick* case. The repeated use of the acronym "WTCLU" as the plaintiff in the Complaint precisely fits the name of West Tennessee Civil Liberties Union, unlike "American Civil Liberties Union in West Tennessee, Inc."

Any doubt on this issue is erased when examining the exhibits ACLU-TN attached to its Response, which establishes that the "official" ACLU "affiliate" operating in West Tennessee at the time of the *Kendrick* case was indeed "West Tennessee Civil Liberties Union, Inc.":

> Before its formation, three other corporate entities had been created as affiliates of the ACLU. The East Tennessee Civil Liberties Union, Inc. was formed on May 23, 1966. The Middle Tennessee Civil Liberties Union, Inc. was formed on October 13, 1966. *The West Tennessee Civil Liberties Union, Inc.* was formed on April 18, 1967."
>
> (Doc. 33, p. 5) (emphasis added).

The Response acknowledges that ACLU-TN's Charter specifically "consolidate[ed]" the "affairs and activities" of the East and Middle Tennessee separately chartered ACLU corporations, but **did not consolidate** the activities of the West Tennessee entity, instead stating a vague intention to "…absorb at a future time, **if agreed to** by the membership and/or Board of Directors of **both corporations,** to assume and continue the operations of the West Tennessee Civil Liberties, Inc., a Tennessee corporation." (Doc. 33, p. 5)(ACLU-TN Charter p. 1, ¶ 2, Doc. 33-4, p. 2). (emphasis added). No evidence was submitted of that "contingency" occurring.

C. The minutes attached to ACLU-TN's Response are irrelevant to the issue of separate legal status, and indicate a lack of contemporaneous involvement in the *Kendrick* litigation.

ACLU-TN attached minutes to its Response (*see* Ex. Doc. 33-9) from 1975, the year preceding the filing of the *Kendrick* Complaint. The minutes were presumably provided in order to demonstrate that "[b]y 1975 ACLU-TN was operating with six chapters: Middle Tennessee, West Tennessee, Oak Ridge Area, Knoxville, Franklin County, and Chattanooga." (Doc. 33 at p. 8). These minutes do not reference any formal action by ACLU-TN or the West Tennessee Civil Liberties Union, Inc. to "absorb" WTCLU. To the contrary, ALCU-TN admits that WTCLU was not dissolved until 1983. (Doc. 33, p. 6).

The fact that minutes exist for this time frame, however, and that ACLU-TN selectively references them, is significant. ACLU-TN provided no minutes, agendas, or any documents whatsoever reflecting a discussion of the *Kendrick* litigation itself, ACLU-TN's role or responsibilities in connection with it, or ACLU-TN's connection with the WTCLU in that litigation. While such evidence would not resolve the standing issue, it would at least demonstrate that ACLU-TN was not a complete stranger to the *Kendrick* case.

On the ACLU-TN's website, there is a section referencing the "history" of the *Kendrick* case. A website link reproduces a copy of what purports to be a contemporaneous "summary" of the *Kendrick* case prepared by Mr. Kramer, the attorney for the individual named plaintiffs in the present litigation. *See* Exhibit 1 to this reply, Affidavit of Buckner Wellford. The summary, which appears to have been prepared on an old fashioned typewriter, appears on the website as a "stand alone" document under what is, according to the ACLU-TN's own records, a computer generated letterhead of ACLU-TN first unveiled in 2002, with Mr. Kramer listed below the letterhead as one of ACLU-TN's "Cooperating Attorneys".

The fact that nothing like this document, or anything reflecting an actual ACLU-TN contemporaneous involvement in the *Kendrick* case was referenced in any way in the Response

demonstrates that ACLU-TN's purported involvement in the *Kendrick* litigation is a present day public relations initiative demonstrating a desire to "rewrite history". It does not appear to be an actual historical fact.[1]

D. ACLU-TN cannot assert standing based upon the standing of a completely separate entity, or a nonexistent "affiliate".

The ACLU-TN's Response places great emphasis upon its By-Laws, and in particular, a section of the By-Laws giving the various "chapters" of the organization the "…authority to direct and govern activities of the ACLU of Tennessee, Inc. in their respective areas subject to the By-Laws and policies of the ACLU of Tennessee, Inc." *See* Doc. 33, p. 7, citing to Exhibits G and H. The primary problem with this argument is that there is absolutely no evidence that either "American Civil Liberties Union in West Tennessee" or WTCLU was a "chapter" of ACLU-TN at all. The former entity is identified nowhere in ACLU's governing documents, and clearly could not bind ACLU-TN by its actions even if it did exist in some form. (*Compare* Bylaws for West Tennessee Civil Liberties Union, Inc., Doc. 33-6, Ex. F, at p. 1, "The general powers of this corporation shall be…(1) To sue and be sued by the corporate name.") The latter entity was clearly a separate and distinct organization.

It is axiomatic that a plaintiff "generally must assert his own legal rights and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). *See also Diesel Sys., Ltd. v. Yip Shing Diesel Eng'g Co.*, 861 F.Supp. 179, 181

[1] Unless the Court is prepared to find that the existing submissions are not sufficient to confer standing, the City respectfully requests that the Court permit it the opportunity to conduct additional discovery on the issue of what contemporaneous documents exist, if any, which demonstrate the ACLU-TN's involvement in, awareness of, or control of the *Kendrick* litigation activities now, at the dismissal stage, not as part of a separate Motion for Summary Judgment on this issue. "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction-its very power to hear the case-there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). See also *Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S.Ct. 1009, 1011 n.4, 91 L.Ed. 1209 (1947) ("But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code s 37, 28 U.S.C. s 80, 28 U.S.C.A. s 80; Federal Rules Civil Procedure, rule 12(b), 28 U.S.C.A. following section 723c, the court may inquire by affidavits or otherwise, into the facts as they exist.").

(E.D.N.Y.1994) ("[a] corporation does not have standing to assert claims belonging to a related corporation, simply because their business is intertwined.").

E. There is no "inherent jurisdiction" which extends subject matter jurisdiction in perpetuity for Consent Orders providing injunctive relief.

ACLU-TN provides no guidance whatsoever on just how long, and under what circumstances this Court is supposed to provide "injunctive relief" in a case that has remained dormant (from the perspective of the Court) for almost forty years. It claims subject matter jurisdiction "…because it reserved its jurisdiction and even if it had not, the injunctive nature of the Decree would guarantee the Court inherent jurisdiction." Doc.33, p. 10. One case is cited for that proposition: *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

The citation extends *Williams* far beyond its intended reach. The case involved an interpretation of the impact and prospective application of a Consent Decree less than two years old, and actually held that the Decree was unenforceable because it violated "public policy." *Id.* at 925. It relied heavily on a line of employment discrimination cases, and as reflected in the holding, obviously did not consider the binding authority of such Decrees to be inviolate.

More importantly, ACLU-TN ignores more recent case law from the Supreme Court addressing the enforceability of consent orders in the context of "institutional reform" litigation. In one such case involving a public school system, the Supreme Court held that consent decrees "[a]re not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs." *Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okl. v. Dowell*, 498 U.S. 237, 248 (1991). *See also Horne v. Flores*, 557 U.S. 433, 448 (2009) (injunctions affecting governmental institutions "[o]ften remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the

underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." Furthermore, "[w]here state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials." *Id.* at 449 (approvingly quoting from Amici Brief submission).[2]

The City's subject matter jurisdiction argument, to the extent necessary to reach that issue, fundamentally rests upon principles of federalism and judicial restraint. Asking this Court to inject itself into ongoing public safety operations of a modern day police department by demanding that these activities pass scrutiny under a Consent Order entered in a long dormant lawsuit, which does not by its terms clearly express the intention to maintain jurisdiction indefinitely, does not advance those principles.

This does not mean, of course, that a properly pled case, with plaintiffs experiencing alleged injury in a "personal and individual way" (*see Lujan*, 504 U.S. 555, 561, n. 1) does not have a federal constitutional remedy. It simply means that remedy should not be fashioned on the basis of a dispute that has long ago outlived any continued relevance or meaning to the parties presently before the Court.

Conclusion

ACLU-TN's Response does not carry its burden of establishing standing in the same respect as "any other matter which the plaintiff bears the burden of proof." The Court should

[2] *Horne* addressed the obligation and parameters of a Court when confronting a Rule 60 (b) motion for relief from a final judgment --- in that case an injunction affecting a federal statute addressing school funding needs, and local/state funding support for it. In the present case, the City does not believe that the Consent Order in *Kendrick* by its terms was intended to last in perpetuity. In the event that the Court disagrees and finds that *Kendrick* is fully enforceable and applicable to the fact setting alleged in this lawsuit, the City does intend to seek relief from its provisions under Fed. R. Civ. P. 60 (b).

dismiss the Intervening Complaint naming this party. Alternatively, the Court should permit expedited and limited discovery on the standing issue with respect to ACLU-TN.

Regardless of the resolution of the standing issue, subject matter jurisdiction no longer exists, to the extent it did for any purpose other than the specific purposes identified in the "including" provisions of the *Kendrick* Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, the foregoing will be served by this Court's ECF system to:

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