

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

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

**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF
STANDING**

1. The *Kendrick* complaint (ECF No. 33-1) was filed on September 14, 1976, by plaintiffs, "Chan Kendrick, Mike Honey, John Doe, and the American Civil Liberties Union in Western Tennessee, Inc." (ECF No. 33-1, PageID 381) (emphasis added). They alleged that they were the subjects of unlawful surveillance by the City's Domestic Intelligence Unit. (ECF No. 33-1, PageID 381). The *Kendrick* plaintiffs further alleged that the City and the Memphis Police Department created the Domestic Intelligence Unit to investigate and maintain files on citizens who were thought to be "subversive." (ECF No. 33-1, PageIDs 385-87). The *Kendrick* Complaint alleged that upon discovery of the existence of the files and demands by individuals to access the files, as well as public officials, the defendants conspired to "destroy" the files by burning them. (ECF No. 33-1, Page Ids 387). The *Kendrick* plaintiffs sought to enjoin the City from the surveillance, collection, maintenance, storage, and distribution of information about the plaintiffs' constitutionally protected activities, and also sought class action certification, attorneys' fees, and damages. (ECF No. 33-1, PageID 390).

2. The *Kendrick* complaint explained the nature of each party and its relevance to the action in a section titled "PARTIES." Chan Kendrick was listed as "the Executive Director of the American Civil Liberties Union of Tennessee, Inc." who alleged that he was the subject of unlawful surveillance by the Memphis Police Department's Domestic Intelligence Unit. (ECF No. 33-1, PageID 382). Mike Honey was listed as the "Southern Director of the National Committee Against Repressive Legislation," and he, too, alleged that he was the subject of unlawful surveillance by the Domestic Intelligence Unit. (ECF No. 33-1, PageID 382).

3. The next party listed in the "PARTIES" section was "The American Civil Liberties Union of West Tennessee, Inc. ("WTCLU") ... a Chapter of the American Civil Liberties Union of Tennessee, Inc., which is an affiliate of the American Civil Liberties Union." (ECF No. 33-1, PageID 382). The American Civil Liberties Union of West Tennessee, Inc./WTCLU/West Tennessee Chapter of ACLU-TN was "comprised of approximately five hundred members residing in the Western District of Tennessee." (ECF No. 33-1, PageIDs 381-82). The *Kendrick* complaint states that the "corporate entity" of The American Civil Liberties Union of West Tennessee, Inc. was dedicated to and involved with constitutionally protected activities, and the corporate entity (referred to as "WTCLU") and its members "intend[ed] to continue such activities in the future." The WTCLU alleged that it was also the subject of unlawful surveillance by the MPD's Domestic Intelligence Unit. (ECF No. 33-1, PageIDs 382).

4. The *Kendrick* complaint did not allege that ACLU-TN was the subject of unlawful surveillance by the Memphis Police Department. (ECF No. 33-1).

5. The final party listed in the "PARTIES" section was "John Doe... a citizen of the United States whose true name and identity is unknown." (ECF No. 33-1, PageIDs 382). John Doe was said to represent "all those persons and/or organizations who were engaged in conduct

and activities protected by the First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution of the United States. John Doe intends to continue in such activity in the future." (ECF No. 33-1, PageIDs 382).

6. The *Kendrick* Complaint also attempted to bring suit on behalf of "all persons similarly situated pursuant to Rule 23(a) of the Federal Rules of Civil Procedure." (ECF No. 33-1, PageIDs 383). This proposed class of plaintiffs "represent[ed] a class of all individuals and organizations who have engaged in constitutionally protected activity and conduct, and who have been subjects of investigation by the Domestic Intelligence Unit of the Memphis Police Department." (ECF No. 33-1, PageIDs 383).

7. The *Kendrick* complaint referenced one other individual who allegedly suffered at the hands of the Domestic Intelligence Unit, Eric Carter. (ECF No. 33-1, PageIDs 386). In August 1976, Mr. Carter, who was president of the student body of Memphis State University and a member of the group Vietnam Veterans Against the War, requested the file the Domestic Intelligence Unit kept on him. Instead of producing the file, the defendants burned it rather than allowing Mr. Carter to review it. (ECF No. 33-1, PageID 386). Despite his status as an alleged victim of the defendants' conduct, Mr. Carter was not a plaintiff to the *Kendrick* complaint nor the *Kendrick* Consent Decree. (ECF No. 33-1).

8. The *Kendrick* complaint also explained that plaintiff Chan Kendrick, individually and in his "official capacity as Executive Director of the American Civil Liberties Union of Tennessee, and plaintiff WTCLU, requested that the defendants not destroy, alter or disseminate any of the files maintained by the Domestic Intelligence Unit." (ECF No. 33-1, PageIDs 387).

9. On September 14, 1978, the City and the plaintiffs, to which only a limited number of the plaintiffs were made parties, agreed upon a settlement memorialized in a consent

"Order, Judgment, and Decree." (ECF No. 9-1, PageID 48). The plaintiffs who were listed as parties on the *Kendrick* Consent Decree included the following: "Chan Kendrick, Mike Honey, and the American Civil Liberties Union in West Tennessee, Inc." *See id.* There is nothing in the Consent Decree that preserves the right of enforcement to any successors of the American Civil Liberties Union of West Tennessee, Inc. (ECF No. 9-1).

10. John Doe was not a party to the *Kendrick* Consent Decree. (ECF No. 9-1)

11. The "class of plaintiffs" listed in the *Kendrick* complaint were not parties to the Consent Decree. (ECF No. 9-1).

12. The National Committee Against Repressive Legislation was not a party to the Consent Decree. (ECF No. 9-1).

13. Chan Kendrick in his official capacity as Executive Director of American Civil Liberties Union of Tennessee, Inc., was not a party to the Consent Decree. (ECF No. 9-1).

14. Eric Carter was not a party to either the *Kendrick* complaint or the Consent Decree. (ECF No. 9-1).

15. The American Civil Liberties Union was not a party to the Consent Decree, and the Consent Decree does not mention the ACLU-TN. (ECF No. 9-1).

16. The ACLU-TN was not a party to the 1978 *Kendrick* Consent Decree. (ECF No. 9-1).

17. On April 18, 1967, West Tennessee Civil Liberties Union, Inc. ("WTCLU") filed formation papers with the State. (Doc. 22-2, PageID 299). According to its Charter, WTCLU was granted the power "[t]o sue and be sued by the corporate name." (Doc. 33-6, PageIDs 413-15). The Charter also states that the purpose of the WTCLU "shall be to further the objectives of the American Civil Liberties Union and to advance the cause of civil liberties in the State of

Tennessee." (Doc. 33-6, PageID 413). The WTCLU's charter does not say that its purpose was to further the objectives of the ACLU-TN. *See Id.*

18. ACLU-TN did not exist at the time WTCLU was chartered in 1967. (Doc. 22-3, PageIDs 300-01).

19. On September 18, 1968, ACLU-TN filed formation papers with the State. (Doc. 22-3, PageIDs 300-01). According to its Charter, ACLU-TN was formed, in relevant part, "for the purpose of (1) consolidating the affairs and activities of the previously existing East Tennessee Civil Liberties Union, Inc., and Middle Tennessee Civil Liberties Union, Inc., and continuing the previous operations of said corporations," and (2) [t]o also 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. 33-4, PageID 405) (emphasis added).

20. ACLU-TN admits that it has no evidence that ACLU-TN ever adopted by bylaws of the WTCLU. *See* Pl.'s Resp. to Req. for Admis., p. 6 (attached as Exhibit A); Dep. of ACLU-TN's Corporate Representative at 36:16-22 (April 30, 2018) (attached as Exhibit B).

21. Although its bylaws were never formally adopted by ACLU-TN, the WTCLU/West Tennessee Chapter that existed in the 1970s was affiliated with the ACLU-TN around the time of the *Kendrick* litigation, and attended an ACLU-TN Board of Directors Meetings in 1975 (Doc 33-9, PageID 428).

22. During the 1970s and 1980s, each chapter of the ACLU-TN was largely responsible for its own fundraising, including the WTCLU/West Tennessee Chapter. The Minutes from the WTCLU Board Meeting on January 10, 1983, explained that the WTCLU's fundraising efforts in the prior year were "insufficient to adequately support the Chapter. The

Memphis office depends on raising enough money to support it." (ACLU 000211-12, attached as Exhibit C).

23. Each chapter was entirely responsible for choosing, funding, and litigating whatever cases it chose to initiate. For example, the Minutes from the December 11, 1978 Meeting of the Board of Directors of WTCLU reported: "After due discussion, it was unanimously resolved that the Chapter should undertake representation of this individual in connection with her hearing before the Haywood County School Board." (ACLU 000143-45, attached as Exhibit D). To take another example, the Minutes from the May 12, 1980 WTCLU Board of Directors' Meeting reported that "[t]he consensus of the group was that we should not take the case because the damages were slight and the impact value would apparently be limited. A letter rejecting the case will be sent to the client." (ACLU 000167, attached as Exhibit E).

24. The decision of whether to seek enforcement of the *Kendrick* Consent Decree rested with the entity WTCLU/West Tennessee Chapter and not the ACLU-TN. Within a redacted portion of the Minutes of the January 15, 1979 Regular Meeting of Board of Directors of the WTCLU, the WTCLU discussed "whether to bring case for violating Kendrick Decree." (See ACLU 000146-47, attached as Exhibit F; ACLU's Privilege Log, Line No. 146, attached as Exhibit G).

25. ACLU-TN also admitted that it has no evidence that ACLU-TN was the entity that initiated, funded, or pursued the *Kendrick* case. See Dep. of ACLU-TN's Corporate Representative at 39:16-40:22 (April 30, 2018) (Exhibit H).

26. The last reported meeting of the WTCLU Board of Directors was held on March 3, 1983. (See ACLU 000215, attached as Exhibit I).

27. On March 17, 1983, the West Tennessee Civil Liberties Union, Inc. was dissolved as a corporate entity with the State of Tennessee. (Doc. 22-2, PageID 299).

28. On December 11, 1987, the "Memphis field Office" of ACLU of Tennessee was closed because the budget was inadequate to support it. (ACLU 000211-12, attached as Exhibit J); (ACLU 000302, attached as Exhibit K).

29. In 1988 there was some effort to "reorganize and revitalize" the West Tennessee Chapter. On February 1, 1988, ACLU-TN sent a letter to "Members and Friends" inviting them to the February 11, 1988 West Tennessee Chapter meeting stating: "The West Tennessee Chapter is at a crossroad.... Your chapter board of directors is in a state of reorganization and revitalization." (ACLU 000301, attached as Exhibit L). In a letter to "West Tennessee Chapter Board of Directors and Other Interested ACLU Members," the ACLU-TN invited the WTCLU Directors to a June 2 meeting. The purpose of the June 2 meeting was to discuss the "[e]xciting plans [that were] underway to revitalize the West Tennessee Chapter." (ACLU 000298-99, attached as Exhibit M). The ACLU-TN followed up to that June 2, 1988 meeting in a Memorandum that discussed the need to have a "successful annual meeting" as the "first step in the reorganization and revitalization of the West Tennessee Chapter." (ACLU 000296-97, attached as Exhibit N).

30. Around March 1991, another attempt was made to reorganize the West Tennessee Chapter. In a letter to Bruce Kramer from Hedy Weinberg dated March 11, 1991, Ms. Weinberg outlined the necessary steps to reinstate the West Tennessee Chapter. Those steps included identifying an interim chapter board, organizing a local legal committee, planning a public education forum, and designating a chapter president and chapter representatives. (ACLU 000276-77, attached as Exhibit O). On March 14, 1991, ACLU held a "West Tennessee Chapter

Reorganization Meeting." The Agenda for the meeting actually discussed the nature of the "National/State/Chapter Relationships." (ACLU 000278, attached as Exhibit P).

31. Hedy Weinberg made another attempt to revitalize the Memphis chapter from July 1994 - March 1995. On July 27, 1994, Ms. Weinberg sent a letter to a new member of ACLU-TN who lived in Memphis. In the letter, Ms. Weinberg stated: "I am delighted in your interest in becoming involved in the Memphis area. We hope to revitalize our Memphis Chapter in the fall and I will contact you when an organizing meeting is planned." (ACLU 000236, attached as Exhibit Q). On September 20, 1994, Ms. Weinberg received a letter from an attorney who stated: "I am excited to be a part of the coming together of what hopefully will be a new chapter of the ACLU for Memphis and greater West Tennessee." (ACLU 000239, attached as Exhibit R)(emphasis added). Throughout the remainder of 1994, Ms. Weinberg attempted to "revitalize" the Memphis Chapter of ACLU-TN. In several documents she stated that she wanted "to get things going again in Memphis" (ACLU 000241, attached as Exhibit S); wanted to "revitalize the Memphis chapter" (ACLU 000242, attached as Exhibit T; and she was looking forward to working "in the future with the Memphis Chapter of the ACLU." (ACLU 000243-44, attached as Exhibit U).

32. Other individuals also attempted to revitalize the Memphis chapter in 1995. but that effort failed. In January 1995, a group of individuals met "to organize our kick-off gathering" of the new West Tennessee Chapter of ACLU-TN. (ACLU 000245-46, attached as Exhibit V). In that letter, the honorable Sheri (now United States District Court Judge) Lipman explained that she was "extremely hopeful that we can get a core group of people, including those previously involved and new to the organization, who will serve as a base for the chapter for many years. There is no reason Memphis can't support a chapter." (ACLU 000246, Exhibit -

V). The planned kick-off event never took place. On March 9, 1995, Judge Lipman sent another letter explaining that the "kick-off event will not take place on March 12, 1995." (ACLU 000249, attached as Exhibit W). She urged the group "not [to] let the delay in getting this off the ground affect anyone's excitement. I am very hopeful that we will be able to build a strong chapter here in Memphis, with quality programming for the entire community." *See Id.*

33. In May 1996, a West Tennessee Chapter was re-formed. (See ACLU000252, attached as Exhibit X).

34. ACLU-TN currently has no chapters. (*See* Dep. of ACLU-TN's Corporate Representative at 39:5 (April 30, 2018) (Exhibit H).

35. Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (collectively, "the individual plaintiffs") filed suit on February 22, 2017 to enforce the provisions of the Order, Judgment and Decree entered by this Court in *Kendrick, et. al. v. Chandler et al*, No. C76-449 (W.D. Tenn. 1978) (hereafter the "Consent Decree"). (ECF No. 1).

36. ACLU-TN intervened in the action on March 3, 2017 (ECF No. 16), specifically seeking an order of contempt against the City for violating the Consent Decree, injunctive relief to ensure the City's future compliance with the Consent Decree, and an award of attorneys' fees (ECF No. 16, PageID 228).

37. The City filed a Motion to Dismiss the individual plaintiffs based on their lack of standing on March 1, 2017 (ECF No. 9). The City argued that the individual plaintiffs were not original parties to the *Kendrick* Consent Decree, and thus lacked standing to enforce it. (ECF No. 9, PageID 37).

38. The City then filed a Motion to Dismiss the intervening plaintiff, ACLU-TN on March 8, 2017 (ECF No. 22), on similar grounds. The City argued that the entity that was a

party to the 1978 *Kendrick* Consent Decree was not ACLU-TN, but rather the separately incorporated American Civil Liberties Union in West Tennessee, Inc., which was also known as the West Tennessee Civil Liberties Union, Inc. ("WTCLU") -- an acronym repeatedly used in the *Kendrick* Complaint to reference the Plaintiff in that action. Because the ACLU-TN was not a party to the Consent Decree, the City argued it lacked standing to enforce the provisions of the Consent Decree. (ECF No. 22, PageIDs 289-91).

39. In response, ACLU-TN argued that ACLU-TN was the actual party in the *Kendrick* litigation because the American Civil Liberties Union in West Tennessee, Inc./West Tennessee Civil Liberties Union, Inc. was functioning as a "chapter" of ACLU-TN at that time. (ECF No. 33, PageID 373-74). ACLU-TN relied on language in the original *Kendrick* Complaint and on ACLU-TN's bylaws in place at that time to support its claim that the American Civil Liberties Union of West Tennessee, Inc./West Tennessee Civil Liberties Union, Inc. was operating as part of ACLU-TN at the time of the *Kendrick* Consent Decree, and was essentially the same party for purposes of standing. See *Id.*

40. On June 30, 2017, the Court entered an Order (ECF 41) granting the City's Motion to Dismiss with respect to the individual plaintiffs, holding that they lacked standing because they were not original parties to the *Kendrick* Consent Decree. The Court explained that even if the individual plaintiffs were intended third-party beneficiaries of the Consent Decree, they still lacked standing to enforce its terms based on the clear law of the Sixth Circuit set forth in *Aiken v. City of Memphis*, 37 F.3d 1155, 1168 (6th Cir. 1994) (ECF 41 at PageIDs 520-21).

41. In the same Order (ECF 41), the Court denied the City's Motion to Dismiss the intervening plaintiff, ACLU-TN. (ECF 41, PageID 524). In the Order, the Court acknowledged that "ACLU-TN was not a named plaintiff in the *Kendrick* lawsuit," and that the named plaintiff

to the Consent Decree was "American Civil Liberties Union in West Tennessee, Inc."¹ (ECF 41, PageID 522) (emphasis added).

Respectfully submitted,

/s/ Jennie Silk

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, a copy of the foregoing was served via the Court's ECF system to the following counsel of record:

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/s/ Jennie Silk

¹ The Court also appears to agree with the City that the American Civil Liberties Union in West Tennessee, Inc. is the same entity as the West Tennessee Civil Liberties Union ("WTCLU"), and used the acronym "WTCLU" interchangeably with "American Civil Liberties Union in West Tennessee, Inc." (ECF No. 41, PageIDs 521-22).