

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

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

**ANSWER OF DEFENDANT CITY OF MEMPHIS TO INTERVENING COMPLAINT
OF ACLU OF TENNESSEE**

The above-referenced defendant answers the Intervening Complaint filed against it as follows:

I. PARTIES

1. Admitted, on information and belief.
2. Admitted.

II. JURISDICTION

3. Admitted that a separate corporate entity, the American Civil Liberties Union of West Tennessee, Inc. was involved in litigation styled *Kendrick, et al v. Chandler*, Civil Action

No. C-76-449, which action resulted in a Consent Order dated September 14, 1978 (1978 *Kendrick* Consent Order). Denied that the 1978 *Kendrick* Consent Order is applicable to the present plaintiffs or this case and denied that the Order continues "in perpetuity." Denied that the 1978 *Kendrick* Consent Order provides a jurisdictional basis for this action. The remaining allegations contained in Paragraph 3 of the Intervening Complaint are denied.

4. Admitted that the *Kendrick* litigation was brought under 42 U.S.C. § 1983. Admitted that 28 U.S.C. § 1331 is a federal statute providing for original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States, but denied that the Court has such jurisdiction in this case over these parties. It is further denied that the intervening plaintiff has standing to obtain the relief requested.

5. Admitted that the language quoted in this numbered paragraph of the Intervening Complaint taken from the 1978 *Kendrick* Consent Order does exist. Denied that the language quoted in this numbered paragraph of the Intervening Complaint is sufficient to confer standing on this plaintiff and further denied that this quoted language is sufficient to establish an indefinite ongoing basis for federal jurisdiction even for prospective plaintiffs who might have standing under the 1978 *Kendrick* Consent Order.

6. Admitted that venue is proper in this judicial district.

III. STATEMENT OF THE CASE

7. Allegations concerning the plaintiff's commitment to "defending Tennesseans' right to speak out without hindrance or pressure from governmental actions..." are neither

admitted nor denied, this defendant demanding strict proof if its interests are to be affected. The remaining allegations contained in Paragraph 7 of the Intervening Complaint are denied.

8. Denied that the plaintiff in the *Kendrick* action, the American Civil Liberties Union in West Tennessee, Inc. was the ACLU-TN's "then active West Tennessee Chapter" and it is averred to the contrary that the American Civil Liberties Union in West Tennessee, Inc. was a separately chartered entity whose corporate charter has long since lapsed and neither was nor is formally associated with the present plaintiff, the ACLU-TN. Admitted that the American Civil Liberties Union in West Tennessee, Inc. in 1976 was a party to an action styled *Kendrick et al v. Chandler*, Civil Action No. C 76-449, alleging certain illegal actions on the part of the Memphis Police Department.

9. Admitted that the *Kendrick* litigation resulted in a Consent Order dated September 14, 1978 and that the language quoted in this numbered paragraph of the Intervening Complaint is an excerpt of the 1978 *Kendrick* Consent Order. However, it is denied that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

10. The defendant neither admits nor denies the allegation of what the 1978 *Kendrick* Consent Order "generally forbids" and avers that the 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

11. Admitted only that the quoted language in this numbered paragraph of the Intervening Complaint exists in the 1978 *Kendrick* Consent Order and avers that the 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

12. Admitted that the 1978 *Kendrick* Consent Order contains a provision addressing electronic surveillance. The summary of this provision set forth in this numbered paragraph of the Intervening Complaint is denied for lack of completeness. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and misleading because the 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

13. Admitted that the 1978 *Kendrick* Consent Order contains a provision addressing the term of "covert surveillance". The attempted summary of this provision set forth in Paragraph 13 of the Intervening Complaint is denied for lack of completeness. Moreover, the 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

14. Admitted that Section F(1) and (2) of the 1978 *Kendrick* Consent Order is entitled "Harassment and Intimidation Prohibited." Denied that this numbered paragraph of the Intervening Complaint fully incorporates or accurately describes those provisions. Moreover, the intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

15. Admitted only that Paragraph F(2) of the 1978 *Kendrick* Consent Order contains the statement referenced in this numbered paragraph of the Intervening Complaint. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for

itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

16. Admitted that the 1978 *Kendrick* Consent Order contains a paragraph Section G(1) which is entitled "Criminal Investigations Which May Interfere With the Exercise of First Amendment Rights." Denied that this numbered paragraph of the Intervening Complaint fully incorporates or accurately describes the information contained in that section of the 1978 *Kendrick* Consent Order. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

17. Admitted that the 1978 *Kendrick* Consent Order contains a paragraph Section G(1) which includes a reference to certain aspects of police conduct that is subject to "review and authorization" by the Director of Police. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

18. Admitted that, among other sections and provisions set forth in this section of the 1978 *Kendrick* Consent Order, there is language addressing written authorizations for investigation, but denied that the summary contained in the Intervening Complaint fully incorporates or describes that language. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for itself. Moreover, it is specifically denied that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

19. Admitted that Section G(2)(a-d) of the 1978 *Kendrick* Consent Order referenced in this numbered paragraph of the Intervening Complaint contains the quoted language and addresses the subject of collection of information about First Amendment rights. However, it is denied that this numbered paragraph of the Intervening Complaint fully incorporates or describes that referenced language. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

20. Admitted that the 1978 *Kendrick* Consent Order contains a section H(1) which refers to "maintenance and dissemination of information" and includes the language quoted in this numbered paragraph of the Intervening Complaint but denied that this numbered paragraph of the Intervening Complaint fully incorporates or describes the referenced section in the 1978 *Kendrick* Consent Order. The intervening plaintiff's attempts to summarize isolated provisions of the 1978 *Kendrick* Consent Order are unnecessary and taken out of context. The 1978 *Kendrick* Consent Order speaks for itself. Defendant specifically denies that the 1978 *Kendrick* Consent Order should be considered in full force and effect.

21. Admitted that on or about February 17, 2017, pursuant to a public records request, Defendant released documents containing the contents of a security book which has been maintained at the security desk at the front desk of City Hall. The contents included a list of individuals identified in an Authorization of Agency (AOA) form initially prepared in an effort to prevent certain individuals from trespassing upon the personal property of the Mayor of the City of Memphis, and that said AOA was mistakenly, for a period of time, included with a security book which has been kept at the security desk at the front desk of City Hall. The

security book also contains the names and other information of individuals who, by virtue of their actions and conduct, were considered by law enforcement authorities as persons who warranted possible escort while in City Hall. The security book, which was kept in paper form for use of the police officers operating within City Hall only and was not circulated throughout the police department, consists of identifying information regarding individuals known or observed by law enforcement or city employees to have engaged in violent, harassing, or intimidating conduct or who have expressed a willingness to commit violent, harassing, or intimidating acts or engage in unlawful activity having nothing to do with the peaceful and non-violent expression of political opinion within the confines of City Hall. Such individuals have included individuals attempting to carry weapons or other contraband through metal detectors or physical pat downs, individuals threatening to set fire to, kill or physically harm individuals working within City Hall, individuals observed to act in an erratic or mentally unstable manner, terminated City Hall or police employees, individuals engaging in inappropriate and harassing behavior toward female City employees, and individuals subject to Court issued protective orders protecting City of Memphis employees working in City Hall. Additionally, while conducting lawful investigations, the Police Department, including the Office of Homeland Security, has determined that other individuals pose security concerns. Such a security book is necessary in order to protect employees of the City at all levels and visitors to City Hall from threatening and/or physically intimidating conduct. It is averred that since that date the City and the Police Department have removed the names of the individuals on the AOA forms from the security book and it is averred that none of these individuals presently are the subject of an escort list at City Hall. It is further averred that some of the individuals on the AOA have entered City

Hall on multiple occasions since the creation of the AOA. They were neither escorted nor were they the subject of law enforcement supervision or attention.

22. Admitted that some of the individuals on the AOA document have participated in protests and rallies. Admitted that some of these individuals have participated in lawfully permitted or conducted events, but denied that the individuals in all instances have engaged in lawful conduct with respect to the referenced protests, rallies and other alleged "free speech activities in the city."

23. Admitted, but it is averred that the individuals listed were considered in good faith by law enforcement authorities to either have participated in or aided and abetted in the participation of unlawful protest activities at the Mayor's personal residence and/or other public assemblies.

24. Admitted that the AOA form was prepared in an effort to prevent certain individuals from trespassing upon the personal property of the Mayor of the City of Memphis and that those individuals whose names appeared on the AOA form signed by the Mayor would be considered trespassing if they entered the Mayor's privately owned property.

25. Admitted that the Mayor signed the AOA on January 4, 2017, following an illegal trespass and unlicensed protest at his home before dawn on December 19, 2016.

26. Admitted that in January, 2017 the AOA form was prepared following the illegal trespass and unlicensed protest on December 19, 2016 at the Mayor's personal residence. Denied that "certain protestors allegedly trespassed on the property." It is averred to the contrary that "certain protestors" clearly trespassed on the Mayor's property, in some instances peering into or seeking to peer into the windows of his home. The December 19, 2016 incident involved individuals, most of whom were wearing masks or scarves covering their faces, seeking to peer

into the windows of the Mayor's personal residence and who conducted a "die in" in his front yard, while the Mayor and his family were inside. Following this unlawful gathering, public statements by participants and others following the incident confirmed their intention to conduct similar "protests" at the Mayor's home in the future. The AOA form was initially intended to identify and prevent these individuals from conducting or facilitating further illegal activities at the Mayor's residence. An AOA is a process that can be requested by any citizen or business, in which the property owner authorizes the police to remove the persons listed on the form from their property. An AOA does not, and cannot, interfere with a person lawfully exercising his/her constitutional rights. In an erroneous, but good faith attempt to protect the Mayor's office at City Hall from similar unlawful protests, the AOA form was included with the security book containing information regarding individuals potentially subject to escort at City Hall described in Paragraph 21. The AOA has since been removed from the security book. None of the individuals listed on the AOA are on an "escort" or other "list" at City Hall. Defendant avers that the specific processes and mechanisms used or available to be used to provide a safe and secure facility for City business and for City employees, including the Mayor, are and will remain confidential under state law and are not subject to public disclosure.

27. Upon information and belief, admitted that the list described in the previous paragraph (Paragraph 26) consists of forty two (42) names.

28. Due to lack of information, it is neither admitted nor denied that "many" of the individuals on the AOA form did not participate in the December 19, 2016 trespass and protest at the Mayor's personal property. Thus, the defendant demands strict proof if its interests are to be affected.

29. Admitted that the Memphis police security officer responsible for the safety and protection of the Mayor made a handwritten notation at the top of the AOA forms containing the words "also have to be escorted while in City Hall," which, it is averred, was a mistake in judgment and which action was not authorized by or endorsed by the Mayor or the Police Director. It is averred that no person listed on the referenced AOA form who came to City Hall ever received individualized attention of any kind or was ever escorted or prohibited from entering City Hall.

30. Admitted.

31. Denied. Denied further that it is inherently illegal or improper for the police to obtain a photograph or video recordings of persons in public places, where there is no reasonable expectation of privacy. The Memphis Police Department does utilize technology such as fixed video cameras, such as pole cameras and those known as "Skycop" and traffic cameras which are mounted at various publicly accessible locations including the area adjacent to the entrance of City Hall on Main Street. Memphis police officers are also equipped with body cameras which record the observations of officers in the field. Thus, it is possible that the police department or police officers may have obtained photographs or video recordings of certain individuals participating in protest activities in public places. Participants in lawful and unlawful protests video often record the police officers who are sometimes present at these events, which include recordings of protesters and bystanders, and sometimes post these videos on social media. It is specifically denied that any such recordings by the police department or police officers violate the 1978 *Kendrick* Consent Decree. Denied that the City or Police Department have conducted "political intelligence" or intentionally made video recordings for unlawful purposes during any lawfully permitted protest activity. To the extent any such recording exists, it is specifically

denied that they were unlawful or done as part of any intentional or planned "intelligence" or "surveillance" activity. As to the allegations of "new reports", the intervening plaintiff has provided no factual predicate upon which Defendant can respond, and therefore, denies this allegation and demands strict proof thereof.

32. The allegations concerning the details of any software program capable of collecting information concerning public social media postings, for the purposes of monitoring or responding to indications of potential illegal, criminal or terrorist activity and/or security risks to city employees, property and members of the public, concern matters which impact upon the confidential processes used by the Memphis Police Department, often in conjunction with law enforcement agencies at the county, state and federal level, which processes are entitled to confidentiality for those purposes. Without waiving the confidentiality associated with such processes, the City denies that the use of such software violates the 1978 *Kendrick* Consent Order or any applicable laws.

33. The allegations concerning the details of any software program capable of collecting information concerning public social media postings, for the purposes of monitoring or responding to indications of potential illegal, criminal or terrorist activity and/or security risks to city employees, property and members of the public, is a matter which impacts upon the confidential processes used by the Memphis Police Department, often in conjunction with law enforcement agencies at the county, state and federal level, which processes are entitled to confidentiality for those purposes. Without waiving the confidentiality associated with such processes, the City denies that the use of such a program violates the Consent Order or any other applicable laws.

COUNT I
VIOLATION OF THE ORDER, JUDGMENT AND DECREE

- 34. Denied.
- 35. Denied.
- 36. Denied.
- 37. Denied.
- 38. Denied.
- 39. Denied.
- 40. Denied.
- 41. Denied.

AND NOW, having fully answered the Intervening Complaint, the defendant City of Memphis asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

The Intervening Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The intervening plaintiff lacks standing to pursue the relief requested in the Intervening Complaint.

THIRD AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over the lawsuit.

FOURTH AFFIRMATIVE DEFENSE

There is no presently justiciable controversy necessitating Court intervention or oversight between the parties.

FIFTH AFFIRMATIVE DEFENSE

Pleading in the alternative, in the event that the intervening plaintiffs are found to have legal standing, the City and its Police Department at all times relevant to the alleged unlawful activities identified in the Intervening Complaint, and on information and belief in the past, have maintained a good faith effort to carry out a common sense interpretation of the provisions of the 1978 *Kendrick* Consent Order, and have committed through policies and procedures to protect the First Amendment rights and privileges of its citizens regardless of whether the 1978 *Kendrick* Consent Order is legally enforceable. The defendant maintains that the provisions of the 1978 *Kendrick* Consent Order, entered almost 39 years ago, under completely different facts and circumstances, does not warrant the continued enforcement powers of this Court.

SIXTH AFFIRMATIVE DEFENSE

Pleading in the alternative, in the event the intervening plaintiff is found to have legal standing for any purpose, the terms of the 1978 *Kendrick* Consent Order constitute a full and final adjudication of the matters raised in that action warranting injunctive relief as to the named plaintiffs, with the Court retaining jurisdiction for the limited purposes of addressing the issue of attorneys' fees and "effectuating", not maintaining "in perpetuity" as alleged by the plaintiffs, the provisions of the 1978 *Kendrick* Consent Order. The alleged retention of federal court jurisdiction under the 1978 *Kendrick* Consent Order, under facts and circumstances having little to no resemblance to the alleged concerted, longstanding, and institutionalized practices of the Memphis Police Department almost four decades ago, including the alleged deliberate destruction by burning of documents describing the scope of such activities, should not be considered a necessary component of "effectuating" the measures referenced in the 1978 *Kendrick* Consent Order.

AND NOW, having fully answered the Intervening Complaint, the defendant, City of Memphis, denies that this plaintiff is entitled to any relief whatsoever, asks that this action be dismissed, with the costs assessed against the plaintiff, and reserves the right to further supplement or amend its pleadings, and to seek such further relief, including but not limited to relief under the provisions of Fed. R. Civ. P. 60 (b)(5), as may be appropriate under the circumstances.

Respectfully submitted,

s/ Buckner Wellford

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, the foregoing will be served by this Court's ECF system to:

Thomas H. Castelli
Legal Director
ACLU Foundation of Tennessee
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Nashville, TN 37212
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s/ Buckner Wellford_____