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

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

ACLU OF TENNESSEE, INC.'S RESPONSE IN OPPOSITION TO THE CITY'S SEALED MOTION FOR IMMEDIATE MODIFICATION OF THE KENDRICK CONSENT DECREE

ACLU of Tennessee, Inc. ("ACLU-TN") files its response in opposition to the City of Memphis's Sealed Motion for Immediate Modification of the Kendrick Consent Decree ("Motion")[1], which seeks relief from § I of the September 14, 1978 Order, Judgement, and Decree entered into by the consent of the parties ("Consent Decree" or the "Decree"). (Trial Ex. 6).

Defendant City of Memphis (the "City") has not met its burden to justify a modification of § I of the Consent Decree based on either a change in law or fact. The City argues that the law has changed since 1978 and that it is "now plainly legal to engage in much of the

[1] The City's Motion was filed under seal, therefore this Response is likewise filed under seal. The City did not provide a rationale for filing the Motion under seal. ACLU-TN presumes this was done because of references to the August 27, 2019 hearing conducted by the Court in chambers. The Court has issued a show cause order on why the transcript from those proceedings should remain under seal by October 15, 2019. Should the Court elect to unseal those proceedings, ACLU-TN will ask the Court to unseal the Motion and Response as well. ACLU-TN plans to submit a motion to ask the Court for that relief at the appropriate time.

surveillance activity the Decree was designed to prevent." This conclusion does not follow from the case law in existence at the time of the decree or since the City agreed to the terms. The City's argument fundamentally misunderstands the nature and purpose of consent decrees in general and the Kendrick Consent Decree specifically. The City also argues that there has been a change in facts which makes enforcement of § I unequitable. The City provides little in the way of specific evidence of the burden it claims to be suffering due to restrictions on joint operations and provides no alternate interpretation or proposed modifications. Accordingly, ACLU-TN respectfully requests that the City's Motion be denied without further proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

On September 14, 1976, the Kenrick plaintiffs filed suit against the City, alleging that the Domestic Intelligence Unit of the Memphis Police Department was unlawfully investigating, surveilling, and maintaining files on them and on other citizens engaging in "non-criminal, constitutionally protected activities which were thought to be "subversive" and/or advocating unpopular or controversial political issues." (*Kendrick* Compl.¶ 6, Trial Ex. 5). The plaintiffs claimed that this behavior violated their First, Fourth, Fifth and Fourteenth Amendment rights. (*Id.* at ¶ 16). After two years of litigation, the parties agreed to settle the case.

The Court entered the Consent Decree on September 14, 1978, which prohibited the City from "engaging in law enforcement activities which interfere with any person's rights protected by the First Amendment." (Consent Decree § A, Trial Ex. 6). The Consent Decree detailed the prohibition on gathering, maintaining, and disseminating political intelligence, and it provided for an exception for criminal investigations when authorized by the Director of Police. (*Id.* at §§ C-I.).

On February 17, 2017, the documents listing people who must be escorted by police when visiting City Hall came to light. (Trial Ex. 145.) Four of the listed individuals filed suit on February 22, 2017 alleging that the Defendant was in violation of the Decree. (ECF No. 1). ACLU-TN moved to intervene as a plaintiff and filed its intervening complaint on March 3, 2017. (ECF No. 16).

On August 10, 2018, the Court granted partial summary judgement to ACLU-TN, finding that the City had violated the Consent Decree in several respects through its collection of political intelligence. (ECF No. 120). On October 26, 2018, after a trial on the merits, the Court found the City to be in violation of several additional provisions of the Consent Decree. (ECF No. 151). The Court imposed sanctions against the City to ensure its future compliance with the Consent Decree and appointed an independent monitor. *Id*. at Page ID 6272.

On August 16, 2018, a week before trial, the City filed a Motion for Relief from Judgement or Order seeking the modification of the Consent Decree. ("Motion to Modify") (ECF No. 124). ACLU-TN opposed the City's motion and requested discovery on the issue. (ECF No. 149). Following the Court's November 14, 2018 Order Setting Consent Decree Modification Schedule and Setting Public Comment Period (ECF No. 159), the City concluded that its Motion to Modify was premature and the City and the ACLU-TN filed a Joint Motion to Stay the City's Motion. (ECF No. 175) The Court granted the joint motion, staying proceedings on the Motion to Modify until January 2, 2020. (ECF No. 178). On September 25, 2019, the City filed this Motion for immediate modification of § I.

II. LEGAL STANDARD

A consent decree is "essentially a settlement agreement subject to continued judicial policing." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). Consent decrees are indeed

"a strange hybrid in the law." *Brown v. Neeb*, 644 F.2d 551, 557 (6th Cir. 1981). They are at once "a voluntary settlement agreement which could be fully effective without judicial intervention" and "a final judicial order . . . placing the power and prestige of the court behind the compromise struck by the parties." *Williams*, 720 F.2d at 920. Consent decrees "should be strictly construed to preserve the bargained for position of the parties." *Id.* Courts have an affirmative duty to protect the integrity of its decree and ensure that the terms are effectuated. *See Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 557 (6th Cir. 1982), *rev'd on other grounds sub nom.*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

While a consent decree "embodies an agreement of the parties and thus in some respects is contractual in nature," it is nonetheless subject to Rule 60(b) because it is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). Accordingly, a district court may grant relief under Rule 60(b)(5) if "[1] the judgment has been satisfied, released or discharged; [2] it is based on an earlier judgment that has been reversed or vacated; or [3] applying it prospectively is no longer equitable." *Horne v. Flores*, 557 U.S. 433, 447 (2009).

With a consent decree, the important consideration is whether the district court is acting according to the scope and intention of what was bargained for by the parties. *See Lorain N.A.A.C.P. v. Lorain Bd. of Educ.,* 979 F.2d 1141, 1152 (6th Cir. 1992). Moreover, the Supreme Court has explicitly stated that where specific provisions of a decree require a higher standard than that required by law, courts should not "rewrite a consent decree so that it conforms to a constitutional floor." *Rufo*, 502 U.S. at 391.

III. ARGUMENT

The City relies on two bases for its assertion that the Court should modify the language of § I of the Consent Decree. The City argues that a change or clarification in the law warrants modification of § I. In doing so, the City attempts to limit the scope of the Decree solely to its regulations of surveillance of First Amendment activities and draws incorrect conclusions from a line of cases that both pre-date and postdate the entry of the Decree.

The City then argues that § I is "unworkable for a modern police force," because it limits sharing information with other governmental agencies and private entities that would violate the Decree. The City's arguments are broad-based and draw conclusions without providing necessary evidence. The Motion provides brief outlines of the operation of several programs where information is shared, but fails to adequately explain, and provide evidence for, the actual burden on the City to participate in information sharing while holding true to the Decree's conditions.

A. There has been no change in the law that warrants modification of § I.

The City has failed to establish a change in the law underlying the Decree that would warrant modification. Instead, the City argues that, because the Decree requires it to go above the constitutional floor, it should be relieved from the obligations to which it has agreed. This, however, is not the standard for modification or relief from a consent decree. "[T]he Supreme Court has rejected the notion that a court may enforce a consent decree only to the point of ordering relief to which the parties would have been entitled after a trial on the merits." *United States v. Michigan,* 1995 WL 469430, at *14 (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522-23 (1986)).

For a change in the law to authorize a modification of a consent decree, the City must demonstrate that "the statutory or decisional law has changed to make legal what the decree was

designed to prevent." *Rufo*, 502 U.S. at 388. While a decree should be modified if it requires a party to violate federal law, modification is not authorized simply because the parties agreed to obligations that would not necessarily be required had the case been adjudicated by the court. *See id*. at 391; see also *United States v. Michigan,* 1995 WL 469430, at *14. In fact, the *Rufo* Court acknowledges that agreeing to obligations that exist above the constitutional floor are often the result of a mutually agreed to settlement. *Id.*

> To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation.

Rufo, 502 at 389.

A clarification in the law provides a basis for modification where it creates a change in circumstances such that the parties based their agreement on a misunderstanding of the governing law. *Id at 390*. In *Rufo,* the consent decree at issue required the county sheriff to address overcrowding issues in the county jail. The decree required that any new or renovated facility provide inmates with single occupancy cells to remedy the unconstitutional overcrowding conditions. *Id.* 374-75. One week after the decree was signed, the Supreme Court issued its ruling in *Bell v. Wolfish*, 441 U.S. 520 (1979), which held that double cell occupancy did not violate the Constitution. *See Rufo*, 502 at 376. The defendants asserted that the new case law authorized modification of the consent decree to remove the single occupancy requirement. The Court rejected the defendants claim that a clarification in the law, by itself, justified the modification:

> Bell made clear what the Court had not before announced: that double celling is not in all cases unconstitutional. But it surely did not cast doubt on the legality of single celling, and petitioners were undoubtedly aware that Bell was pending when they signed the decree. Thus, the case must be judged on the basis that it was immaterial to petitioners that double celling might be ruled constitutional.

Id. at 388. The Court remanded the case for further proceedings on whether there was an actual misunderstanding of the law at the time the consent decree was signed. *Rufo, 502 U.S.* at 390.

1. The *Laird* line of cases upon which the City relies do not establish a change in the law.

The City cites a line of cases in the Sixth Circuit and others which deal with when a party has standing to bring a free speech challenge against a government agency for conducting surveillance. Although these opinions conclude that the plaintiffs in those cases lacked an injury in fact, and therefore standing, the City erroneously concludes that "it is now plainly legal to engage in much of the surveillance activity the Decree was designed to prevent." There are several major problems with this argument.

The seminal Supreme Court case on the issue cited by the City is *Laird v. Tatum*, 408 U.S. 1 (1972). In *Laird*, plaintiffs brought a class action lawsuit complaining that surveillance by the U.S. military on individuals and groups engaged in political activity violated the Constitution. The Court defined the issue as follows:

> whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by **the mere existence, without more, of a governmental investigative and data-gathering activity** that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

Id. at 10 (emphasis added). In essence, the Court sought to determine whether the plaintiffs had alleged a sufficient injury in fact to meet the standing threshold to invoke the jurisdiction of the courts. *Id*. at 13. The Court concluded that that plaintiffs had failed, holding that "allegations of subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id*. at 13-14.

However, *Laird* and its progeny should not be read to absolve the government for the ill effects that surveillance may have on free speech activity. As the Court in *Laird* explained:

> We, of course, intimate no view with respect to the propriety or desirability, from a policy standpoint, of the challenged activities of the Department of the Army; our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts.

Id. at 15. Nothing in the decision stands for the proposition that government action may not be challenged when it has an indirect or chilling effect on speech. See *Id*. at 12. If fact, the Court went so far as to suggest that "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." *Id*. at 17.

2. There was no misunderstanding of the law between the parties when the Consent Decree was negotiated in 1978.

The *Laird* case was decided in 1972, six years before the City entered into the Consent Decree. The Court may assume that the parties, in negotiating the Decree, and the Court, when approving it, were aware of its holding and the standing threshold it set. Nevertheless, the parties agreed to the provisions of the Consent Decree to settle the Plaintiffs' claims and avoid further litigation. Simply put, *Laird* does not clarify or change the law because it was the law governing the Kendrick case when it was filed.

The City points to *Gordon v. Warren Consol. Bd. of Educ*., 706 F.2d 778, 781 (6th Cir. 1983) as the Sixth Circuit's first interpretation of *Laird* as a reason why the *Laird* line of cases should be considered new, despite predating the Consent Decree by six years. Even if the City could be excused for being unaware of *Laird* and it's holding, *Gordon* adds little to the jurisprudence which would carry the City's burden of establishing a change in the law.

The plaintiffs in *Gordon* filed their claims based on the placement of covert operatives in two classrooms to investigate drug trafficking. *Id.* at 779. The plaintiffs based their complaint on allegations that the target classrooms were chosen based on the political views of the students and teachers.[2] *Id.* The complaint claimed that, upon discovering the surveillance, their free speech rights were chilled. *Id.* Like *Laird,* the case was dismissed for failing to allege an injury in fact and not on the merits of any decision. The court held that this constituted a subjective chilling and that the plaintiffs failed to allege that the operation "resulted in tangible consequences" or "had any tangible and concrete inhibitory effect on the expression of particular social-political views in these classrooms." *Id.* at 781.

3. After *Laird* the substantive law regarding the potential for surveillance to infringe on First Amendment rights remained the same.

After the *Laird* decision, courts have continued to acknowledge that government surveillance may be employed to the detriment of free speech rights. In *Presbyterian Church v. U.S.,* 870 F.2d 518 (9th Cir. 1989), the Ninth Circuit found that a church had alleged a sufficient injury from covert government surveillance to survive a standing challenge. *Id*. at 521. In that case, undercover INS agents wearing recording devices participated in covert surveillance of several Arizona churches. *Id*. at 520. The plaintiffs alleged that the covert surveillance and surreptitious recording caused members to withdraw from their congregations and a loss of support. The court determined that the allegations presented more than a "mere subjective chill on their worship activities," and would survive the *Laird* standing analysis. *See also Socialist Workers Party v. Attorney Gen. of U. S.*, 419 U.S. 1314, 1314–15, (1974) (refusing to dismiss under *Laird* because plaintiffs alleged that covert surveillance would discourage participation at

[2] Section G of the Decree would likely authorize the conduct of a similar investigation into drug trafficking in the schools. *See* Consent Decree, Trial Ex. 6.

a convention and lead to loss of employment for those identified by law enforcement as attending, but denying a stay based on the merits of the claims).

Laird and *Gordon* do not create new law, or clarify old law, to allow the City to use whatever surveillance it chooses without concern for the First Amendment rights of its targets. The cases merely set the threshold which a plaintiff must meet to bring a challenge based on the chilling effect of government surveillance. This threshold was in place when the Kendrick case was filed and when the City negotiated and entered into the Decree. It cannot now ask the Court to relitigate the Kendirck case and relieve it from its agreed to obligations because it does not like the bargain that was struck.

4. The Consent Decree is not based solely on surveillance but designed to protect against "law enforcement activities that interfere with any person's rights protected by the First Amendment."

The City attempts to recast the Consent Decree as an agreement solely limiting surveillance of free speech activity. In fact, the Decree was aimed at the harms which grow from such surveillance and the gathering, maintaining and dissemination of political intelligence, including the use of such intelligence to harass or retaliate against those engaged in free speech and violations of the privacy of individuals whose personal information was being catalogued. *See* (Consent Decree, at § F, H, Trial Ex. 6). The Decree did not ban the City's use of surveillance, it sought to prevent its abuse to the detriment of protected constitutional rights.

In *Bloch v. Ribar,* 156 F.3d 673, 681 (6th Cir. 1998), the court recognized the validity of a retaliation claim against a law enforcement agency which revealed sensitive, personal information about plaintiffs in retaliation for criticism. This is precisely the type of injury which

the Decree's bans on gathering, maintaining and sharing information are designed to discourage and prevent.

Courts have also continued to acknowledge that plaintiffs who are personally subjected to surveillance that is unlawful in and of itself have standing to challenge the surveillance. *See Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1053 (N.D. Ill. 1985); *Jabara v. Kelley*, 476 F. Supp. 561, 568-69 (E.D. Mich. 1979), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976). Likewise, plaintiffs subjected to surveillance undertaken for illegitimate reasons or used to damage the target's reputation also have standing to bring constitutional claims. *See Berlin Democratic Club*, 410 F. Supp. at 151 (stating the general rule); *Lowenstein v. Rooney*, 401 F. Supp. 952, 958-59 (E.D.N.Y. 1975) (finding justiciable controversy where a political candidate claimed a rival politician conspired with the FBI to investigate the plaintiff and use the information collected against the plaintiff in an election campaign); *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770 (S.D.N.Y. 1972) (finding justiciable controversy where law enforcement "systematically engage[d] in ... excesses and abusive tactics and activities with the purpose and effect of sowing distrust and suspicion among plaintiffs"). Plaintiffs whose surveillance files are disclosed by the government have standing to challenge the disclosure. *See, e.g., Phila. Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338-39 (3d Cir. 1975) (finding justiciable a claim against local law enforcement for the maintenance of publicly available intelligence files about surveilled individuals and for the disclosure on national television of identities of surveillance targets); *Berlin Democratic Club*, 410 F. Supp. at 149-51 (finding justiciable a claim for surveillance and related activities that included the dissemination of intelligence information.).

Moreover, the record in this case produced information regarding situations that may have been constitutionally viable cases, had they been the focus of litigation. For example, the existence of the City Hall Escort List raised grave constitutional concerns. (Tr. Ex. 145). As the Court found, the list was compiled by Sgt. Reynolds using "associates in fact" of Mr. Keedran Franklin and the Coalition of Concerned Citizens. (ECF 120, Page ID 4861). Including individuals on this escort list because of their protected speech activities and denying them access to City Hall without the ignominy of a police escort could be unconstitutional retaliation and a violation of the First Amendment. *See N.A.A.C.P. v. Claiborne Hardware, Inc.*, 458 U.S. 886, 913 (1982); *American–Arab Anti–Discrimination Committee v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995); *Healy v. James*, 408 U.S. 169, 186 (1972); *see also United States v. Robel*, 389 U.S. 258, 264–65 (1967).

The Consent Decree created a set of rules and regulations to avoid these possible unconstitutional actions. The City agreed to provisions which, while not the constitutional floor, were tailored towards ensuring that law enforcement activities would not "interfere with any person's rights." (Consent Decree § A, Trial. Ex. 6). The parties were under no misunderstanding about the state of the law when they executed the Decree, and the statutory and decisional law governing government interference with free speech has not changed so substantially over the ensuing years to justify modification of the decree.

B. The City has failed to meet its burden to prove that there has been a change in the facts that make § I unworkable or detrimental to public safety.

Next the City argues that a change in facts warrants modification of the Decree. Modification of a consent decree is appropriate: (1) "when changed factual conditions make compliance with the decree substantially more onerous," (2) "when a decree proves to be

unworkable because of unforeseen obstacles," or (3) "when enforcement of the decree without modification would be detrimental to the public interest." But "modification should not be granted where a party relied upon events that actually were anticipated at the time it entered into a decree." *United States v. State of Mich.*, 62 F.3d 1418 (6th Cir. 1995).

Rule 60(b)(5) "does not allow modification simply 'when it is no longer convenient to live with the terms of a consent decree,' but solely when there is 'a significant change either in factual conditions or in law.'" *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 613-14 (6th Cir. 2011) (quoting *Rufo*, 502 U.S. at 383–84). The party seeking to show such a change "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id*. If that party carries its burden, then the district court "should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id*. "'[M]odification of a consent decree is an extraordinary remedy that should not be undertaken lightly.'" *East Brooks Books, Inc. v. City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011) (quoting *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1147 (6th Cir. 1997) (Jones, J., concurring)).

The City argues the Decree is "unworkable for a modern police force." In support of this proposition, the City cites to *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001), which modified a decree affecting the Chicago police's investigations related to ideological groups. The court in that case found that the decree "comprises a dizzying array of highly specific restrictions on investigations of potential terrorist and the politically or ideologically motivated criminals." The Chicago decree limited investigations to those "unavoidably necessary" and where the police already had "reasonable suspicion" of criminal conduct. *Id*. at 800.

The City also cites *Alliance to End Repression* for the proposition that the Court should not punish law enforcement of today for the misdeeds of the past. *Id.* at 802. An important distinction, in that case was the Chicago police had been in compliance with the decree for over two decades. *Id.* at 800. That is not the case with the City.

The City has not put forth any facts that support its assertion that § I is so draconian in its restrictions that it should be compared to provisions of the decree at issue in *Alliance*. Section I of the Consent Decree states:

> The defendants and the City of Memphis shall not encourage, cooperate with, delegate, employ or contract with, or act at the behest of, any local, state, federal or private agency, or any person, to plan or conduct any investigation, activity or conduct *prohibited by this decree.*

(Consent Decree § I, Trial Ex. 6 (emphasis added)). The joint operations prohibited by § I are those that engage in political intelligence and that chill the exercise of First Amendment rights. (*Id.* at §§C-F; H-I). The obvious purpose of § I was to close any loophole whereby the City might farm out the gathering of political intelligence or other conduct prohibited by the Consent Decree. Section I does not prohibit all joint operations or require a total ban on the exchange of information with other law enforcement agencies.

The City's Motion identifies joint operations that are hampered by the Consent Decree, including information exchanged with federal agencies, participation in the Joint Terrorism Task Force, receipt of information from the Tennessee Fusion Center, participation in the Multi-Agency Gang Unit, participation in CrimeStoppers, and information sharing with the Shelby County Sherriff's Department. (ECF 227-1, p. 15). The City claims that the court-appointed Monitor has interpreted the Decree to require that the City verify that any shared information "was not acquired in any way that the consent decree prohibits" and that criminal intelligence,

which the City receives from other agencies, may be subject to § G authorization requirements. The City alleges that these requirements are so burdensome as to jeopardize public safety.

Joint operations and information sharing among law enforcement agencies no doubt existed in some form before the entry of the Consent Decree. The concept that the City might want to exchange information with other law enforcement agencies or private entities is not a recent development unique to modern law enforcement. Any burden that the City claims exists was within the original understanding of the Consent Decree and was entered into voluntarily by the City. The Court acknowledged this regarding the entire Decree in its Order and Opinion in this case:

> While certain terms of the Consent Decree may be outdated, the concepts are not, and the dilemma faced by the City is not new. Every community must determine how much of its citizens' privacy it is willing to sacrifice in the name of public safety. The idea that police should be limited in their powers predates 2018 and 1978. The Court's duty is to preserve the Consent Decree's central bargain. In this case, the compromise struck by the ACLU-TN and the City was a specific limitation on the subject matter for police investigations. The Court recognizes that the City granted its residents privacy rights above and beyond those guaranteed by the Constitution, but that may be the Consent Decree's intended purpose.

(ECF 151, Page ID 6276 (citations omitted)). The City cannot now rely on the existence of such programs alone to justify modification of § I. It must present evidence that there has been a change in circumstances that makes compliance with § I substantially more onerous than what was originally contemplated.

The City complains that compliance with the Monitor's interpretation of § I would require it "to expend scarce resources to assure compliance with the restrictions;" that it "impedes" the City's "ability to 'cope with the problems of today,'" that it would delay "transmission of an urgent price of intelligence that could stop a mass shooting," and the time it would take to vet received information would be impractical or impossible. (ECF 227-1 at pg.

13-18). However, the City has not provided evidence that bear out these claims. The City provides no information about what information it now receives from other agencies about the source of information offered. It provides no estimates, based in facts or speculation, about how long vetting information would take. It does not provide any insight into what policies, procedures or practices that the City uses now to vet shared information from third parties, either for compliance with the Decree or generally for accuracy and usefulness. While the City posits hypotheticals of dire threats to public safety, it provides no actual examples of circumstances where information not received or delayed would have been helpful in solving or deterring crime, much less examples where the public safety was placed at risk because of § I.

The City's Motion is also unclear on exactly what information is affected by § I. Presumedly, only a portion of the information which is exchanged would be affected. Because the Consent Decree prohibits the City from gathering and maintaining political intelligence outside the confines of an approved criminal investigation, we can assume that the City's complaint is not with information that it is sharing with other law enforcement agencies. That leaves information received from these agencies.

In interpreting the Consent Decree in its October 26, 2018 opinion, this court noted:

> The Consent Decree also has an action requirement. Gathering, for example, requires affirmative acts, but simply receiving or inadvertently finding information does not. A police officer does not have to cover his body camera every time he passes someone with a political t-shirt, because the information received by the camera about political activities was not affirmatively sought out by the officer. Similarly, a police officer who queries a social media collator for the phrase "kill police," is not going out of her way to "gather" information related to First Amendment rights, even though her action is definitely investigative in nature. If her search returns information related to a lawful assembly titled "Do Not Kill Police," her action does not become political intelligence because First Amendment rights were not the focus or subject of her investigative activity. In other words, she inadvertently discovered information related to First Amendment rights, but she was not "gathering" it.

(ECF 151, Page ID 6257). Applying the Court's interpretation to § I, it would not appear to require that the City eschew receipt of all information offered by other law enforcement agencies.

Information that is not political intelligence would be outside the scope of the Consent Decree and would require no or little vetting. The City cites, as an example of information that it may not be able to acquire, information that could stop a mass shooting. It does not, however, identify how receipt of such information would potentially violate the Decree. Intelligence related to a true threat of violence or plans to commit a shooting, or any other criminal activity for that matter, would not be political intelligence and not fall within the prohibitions of the Decree.

Information that is political intelligence or related to free speech activities, but that is part of a criminal investigation, may be subject to § I and require more vetting on the part of the City. Section G would allow the City to collect such information so long as the procedures are followed, and an investigation is authorized.[3] Only political intelligence that is given to the MPD, but which has no connection to a criminal investigation, would need to be outright refused. Notably, the Criminal Intelligence Operating Policies attached to the City's Motion as Exhibit G contain their own restraints on the collection of political intelligence, banning the collection of intelligence on "political, religious or social views, associations or activities . . . unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity." 28 CFR § 23.20(b); ECF 227-8.

[3] The City argues that §§ I and G would require it to authorize another law enforcement agency's investigation before accepting intelligence. The better reading is that § G would require the City to authorize its own investigations if it intended to use information that would be implicated by § G.

It is impossible to tell from the City's Motion how much information would fall into these categories and what resources vetting such information would require. Therefore, it is impossible to determine whether and what extent § I places a burden on the City. Presumedly, some form of review and vetting would be required of any information received from any source, to ensure its accuracy and utility to the City's law enforcement goals and to determine whether its roots may have been extra-constitutional — like a coerced confession or warrantless search that would be subject to the exclusionary rule. For example, one would assume that a tip received from CrimeStoppers would not be catalogued and acted upon without some level of review as to the content of the tip, whether it relates to a law enforcement function and its general reliability. Again, the City has not produced evidence of what additional burden would be added to vet information for compliance with the Consent Decree in addition to any normal procedures conducted with shared information. It also fails to provide any information about what delays might occur. Instead, the City claims that these burdens exist and that they are insurmountable.

Finally, the City has offered no alternative interpretation of § I from the one it argues is the position of the Monitor. It has also failed to propose any modification to the language of § I which would be "suitably tailored" to the change in circumstances for which it complains. *See Northridge Church*, 647 F.3d at 613-14. Without any proposed language or interpretation, it is impossible to determine whether the modification which the City seeks would comport with the scope and intention of what was bargained for by the parties while addressing any unforeseen circumstances which warrant modification. *See Lorain N.A.A.C.P.,* 979 F.2d at 1152.

Because of the lack of evidence to verify the City's claims, if the Court determines that the City has met the threshold requirements to trigger an inquiry into whether modification or

termination is warranted, then ACLU-TN should be afforded discovery and an evidentiary hearing. The termination or modification of a consent decree "without the consent of all parties to the agreement is indeed a signal event that requires a material change in circumstances that only a formal hearing and appropriate findings of fact can demonstrate." *U.S. v. Wayne County, Michigan*, 369 F.3d 508, 511 (6th Cir. 2004); *Heath v. DeCourcy*, 992 F.2d 630, 634 (6th Cir. 1993). There are rare exceptions to the need for a full evidentiary hearing. The Court is free to deny a motion to modify or vacate a consent decree without a formal hearing. *Wayne County*, 369 F.3d at 512. A hearing may also be unnecessary if the "parties' briefs clearly set forth the relevant facts and arguments of a case such that a hearing would not add anything to the briefs, and where the court has sufficient evidence before it to make detailed factual findings." *Gonzales v. Galvin*, 151 F.3d 526, 534–35 (6th Cir. 1998). Neither of these exceptions apply in this case.

C. Immediate Review and Modification

The City has asked the Court for immediate review of its Motion and interim relief from the Consent Decree while the Court considers whether to modify or remove § I from the Decree altogether. As stated above, modification of a consent decree requires discovery and a full evidentiary hearing. In effect, the City is asking that the Court enjoin or stay a provision of the Decree without the benefits of a full investigation and argument on the merits. It has not, however, articulated a standard for such extraordinary relief or provided any proof justifying emergency action by the Court.

The City's request could be analogized to the standard applied by a court in exercising its discretion under Rule 62(c) to stay an injunctive order on appeal. Such motions are similar to the criteria underlying a court's decision to grant or deny preliminary injunctive relief. *See Sentry Ins. v. Pearl,* 662 F.Supp 1171, 1173 (E.D. Pa. 1987*).* "The party seeking relief must show that

it is likely to succeed on appeal, that irreparable injury will flow from a failure to grant the relief sought, and that other parties and the public will not be substantially injured if the relief is granted." Id.; *see*, *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (setting forth standard for preliminary injunction).

The City has provided no argument or evidence on why it should be granted such extraordinary relief as an immediate stay of the Consent Decree or an expedited determination by the Court. To the extent an emergency does exist, it is one of the City's own making. All the programs which the City points to as vital to public safety appear to have been commenced during the time period the Decree has been in effect. Yet the City has at no time asked the Court to modify the Decree to allow it to participate in these programs or ask the Court for an interpretation of the Decree to determine whether it may participate and to what degree. Only after the Court found the City in contempt and appointed a monitor to ensure the City's compliance with the Decree did the issue arise. The Court should not reward the City's own failure to assess its conduct against the confines of the agreement it made at the expense of a full and fair determination of the City's request for modification after ACLU-TN has been afforded an opportunity to investigate the City's claims and present its case.

IV. CONCLUSION

For the foregoing reasons, ACLU-TN asks that the Court deny the City's motion. Alternatively, ACLU-TN asks that the Court set a scheduling conference where the parties can submit a proposed scheduling order providing for discovery on the newly raised issue or that this motion be combined with the City's original Motion for Relief and a discovery schedule be set on all issues related to modification that are before the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 09, 2018, a true and correct copy of the foregoing document has been served via email to:

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