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

MEMORANDUM IN SUPPORT OF DISMISSED PLAINTIFFS' MOTION TO INTERVENE

I. INTRODUCTION

The Blanchard Plaintiffs were dismissed from this action following a ruling by this Court that they lacked standing to enforce the 1978 Consent Decree that lies at the center of this case (the "Decree"). For the purposes of this Motion, the Blanchard Plaintiffs concede that as nonparties to the Decree, they have no standing for an action to enforce it. Thankfully, the enforcement action was impressively prosecuted by the the American Civil Liberties Union of Tennessee (the "ACLU"). But then, after the Court ruled against the City on the merits of the

enforcement action, the City moved to modify or vacate the Decree under the guise of a Motion for Relief from Judgment. By so moving, the City has now fundamentally changed the posture of this case and the questions before this Court.

By its own maneuvering, the City has raised new questions of law and fact. Because this Court's rulings on these questions are likely to affect the Blanchard Plaintiffs' interests, this Court should allow the Blanchard Plaintiffs to participate in the post-judgment litigation wherein those questions will be resolved.

II. ARGUMENT

To be clear, the Blanchard Plaintiffs do not seek to enforce the Decree *per se*. This Court has determined they lack the standing to do so. Instead, the Blanchard Plaintiffs seek to intervene in the post-trial litigation strictly for the purpose protecting their interests under this Court's October 26, 2018 Opinion and Order (ECF 151) and October 29, 2018 Order Memorialing Sanctions (ECF 152) (collectively, the "October Order"). They respectfully submit that as intended beneficiaries of the Decree, they have a protectable interest in the conservation and continuation of the October Order, because the stated purpose of the sanctions imposed by the October Order is ensuring the City's future compliance with the Decree. Because of the potential for the Motion to Modify to undercut the October Order, they have a protectable interest with respect to it.

The City has never argued, and this Court has never found, that the Blanchard Plaintiffs are *not* intended beneficiaries of the Decree. But since there has never been a factual finding on this point, an affirmative case is presented here.

As the City has frequently argued, the Decree did not have purpose or intent. But its parties surely did, and to determine the *Kendrick* parties' intent, the starting place is with the Decree's language itself. The language should be "construed as written." *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971). Like a contract, if the Decree's terms are unambiguous, these should control. *See Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 32 (2004) (citing *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90 (1823)); *see also Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) ("[T]he scope of a consent decree must be discerned within its four corners . . . .").

As the City repeatedly acknowledged in its early pleadings, the Decree speaks for itself. Def.'s Answer to ACLU Compl. ¶¶ 10–20 (ECF No. 44). And according to the authorities cited above, this Court should assume the Decree meant what it said—in which case the *Kendrick* plaintiffs intended that the promises they obtained from the City would benefit a class that includes the Blanchard Plaintiffs.

There is no ambiguity between the Decree's four corners. The City is expressly enjoined from harassing, intimidating, or collecting or maintaining "political intelligence" about "*any person* exercising First-Amendment rights." ¶¶ B–F (ECF No 3) (emphasis added). The *Kendrick* plaintiffs obviously sought to protect those persons whom they had good cause to think the City might otherwise

subject to the constitutional abuses that had prompted the suit.[1] And the City agreed to the wording that provided such protection.

The Decree's opening "Statement of General Principles" underscores this point; it identifies the Decree's central purpose being broad protection of First-Amendment rights. ¶ A (ECF No. 3). And no one could argue that these protections were not intended as benefits—that freedom from constitutionally-suspect surveillance were instead thought detrimental or neutral.

Since the Decree's protections were intended benefits, the question becomes whether the Blanchard Plaintiffs fall within the class for whom those benefits were intended. They do. Each Plaintiff is clearly a "person" under paragraph B.3 of the Decree. (ECF No. 3) And this Court has already determined the City subjected persons like the Blanchard Plaintiffs to "political intelligence" and "covert surveillance." This leaves only the question of whether, despite the Decree's expansive wording, its protections were not really intended to apply to *any* persons exercising First-Amendment rights. But even if the City were inclined to try, there is no room to argue that under the Decree, "any" meant something other than *any*. *See Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 31–32 (2004) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). By any reasonable standard, the Blanchard Plaintiffs are members of the specific class the Decree was intended to protect. And

[1] Legally speaking, "benefit" means "[t]he advantage or privilege something gives; the helpful or useful effect something has." *Black's Law Dictionary* 188 (10th ed. 2014).

it was clear from their testimony at trial that, at the hands of the City, they suffered the specific harm the Decree was intended to prevent.

If this Court accepts that the Blanchard Plaintiffs are intended beneficiaries of the Decree, it follows that they have a substantial and cognizable interest in the outcome of the City's Motion to Modify. As intended beneficiaries of the Decree, the Blanchard Plaintiffs have substantial and cognizable interests in the City's future compliance with the Decree's directives. It follows that since the express purpose of the October Order is to ensure the City's future compliance with the Decree's directives, the Blanchard Plaintiffs have a substantial and cognizable interest in the conservation and continuation of the October Order. And *this* implies a substantial and cognizable interest in the outcome of the Motion to Modify, because a modification of the Decree favorable to the City could quite possibly moot or otherwise undercut the October Order. The Blanchard Plaintiffs should be allowed to intervene to protect their interests.

III. CONCLUSION

The issue here is not whether the Blanchard Plaintiffs should be allowed to *enforce* the Decree, but whether they should be allowed to *defend* the October Order. For the reasons above, they should. Therefore, their Motion to Intervene should be GRANTED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum is being served via the Court's ECF system upon all counsel of record this the 14th day of December, 2018.

s/ Jacob Webster Brown