

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

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

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**JOINT NOTICE OF FILING PROPOSED MODIFIED CONSENT DECREE**

The parties, the City of Memphis (“the City”), and the Intervening Plaintiff, American Civil Liberties Union of Tennessee (“ACLU-TN”), have agreed to certain modifications of the consent decree entered on September 14, 1978, in the case styled *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978) (hereafter, “Consent Decree”) (Consent Decree, ECF 9-1.)

In August 2018, the City filed its Motion for Relief from Judgment or Order (ECF No. 124). Since that time, the parties have worked together in an attempt to come to an agreement on certain areas of conduct both parties deem permissible under the Consent Decree. The parties were unable to come to an agreement on the exact language for a modification to the Consent Decree which would memorialize those understandings before the Court’s deadline for filing jointly-proposed modifications. (*See* Defendant’s Notice of Filing Pleading Regarding Jointly-Proposed Modifications to the Consent Decree, ECF No. 309.)

The City asked the Court to order the parties to mediation in an effort to develop language for the Consent Decree that clarifies those areas of permissible conduct under the Consent Decree. (*Id.*) On April 28, 2020, the Court granted the City’s request for mediation with the Independent Monitor “in order to aid in the resolution of outstanding issues between the Parties and to narrow

the issues in advance of the Modification Hearing.” (ECF No. 311, PageID 9293.)

After several sessions of mediation with the Independent Monitor, the parties have agreed to the modified language of the Proposed Modified Consent Decree, which is attached hereto as Exhibit A. For the ease of the Court, the parties also attach a document that shows the proposed changes to the original Consent Decree in redline. That document is attached as Exhibit B.

The parties note that they were unable to reach an agreement on modified language for Section I: Restriction on Joint Operations, but they are continuing to work together and with the Monitor to that end.

Additionally, the parties note that they resolved sixteen out of the seventeen areas of possible agreement as outlined in Defendant’s Notice of Filing Pleading Regarding Jointly-Proposed Modifications to the Consent Decree (ECF No. 309, PageID 9287-90), and incorporated them into the Proposed Modified Consent Decree. For ease of reference, the seventeen items are listed below, along with the corresponding section of the Proposed Modified Consent Decree in which each is incorporated. In some instances, the parties agreed to omit the issue from the Proposed Modified Consent Decree.

1. There are situations where MPD has a legitimate need to view information on social media. There are further situations where MPD may inadvertently stumble upon “political intelligence,” as defined by the Consent Decree, because of the nature of today’s technology. MPD should be allowed to view information on social media as long as it does not improperly catalog and disseminate that information, and as long it is not targeted at persons or groups exercising their First Amendment rights.

**SECTION D.2.**

2. MPD may gather intelligence about an upcoming event on social media and otherwise, but if there is no criminal law reason to keep the intelligence, once any threat has passed, the data should be destroyed or removed.

**SECTION D.3.**

3. MPD may participate in the receiving and sharing of information with other law enforcement agencies, as long as the MPD does not use another law enforcement agency

to do what it is not allowed to do under the Consent Decree. In other words, the City may not enlist another agency to act as its surrogate to violate the Consent Decree.

**SECTION I. – The parties seem agree in principle, but they were unable to agree to language memorializing any agreement within the Proposed Modified Consent Decree.**

4. MPD may employ “undercover accounts” to solve crimes. MPD may not, however, employ accounts like the “Bob Smith” account, which was used largely to gather information about protests and protestors. MPD will institute tighter regulation and controls over all undercover accounts.

**SECTION E.2.**

5. MPD may use the “pan/tilt/zoom” functions on its Blue Crush cameras. MPD may not, however, save and catalog images of persons peacefully protesting.

**SECTION H.3.**

6. MPD may have officers present at gatherings of persons engaged in First Amendment activity for the purpose of public safety, as long as MPD’s presence is not for the purpose of harassment or intimidation.

**SECTION F.3.**

7. MPD may accept tips from CrimeStoppers. The receipt of that information does not implicate the Consent Decree, as long as MPD does not retain tips that have no criminal nexus and are solely related to First Amendment activity.

**SECTION I. – The parties agree that accepting tips from CrimeStoppers does not necessarily violate the decree, but they were unable to agree to language memorializing any agreement within the Proposed Modified Consent Decree.**

8. MPD may use Body Worn Cameras at protests and assemblies, and MPD may utilize the pre-event recording function on the cameras. The use of Body Worn Cameras at First Amendment activity is subject to MPD’s standard policy and procedures for the use of Body Worn Cameras. MPD may not retain footage of such protests or assemblies unless it contains evidence of criminal activity or officer misconduct.

**SECTION H.4.**

9. There are certain types of crimes that occur exclusively on the internet that are purely criminal. While these crimes may in some instances tangentially implicate the First Amendment, Director authorization under § G is not required. Examples of such cybercrimes include child pornography; identity theft; unauthorized intrusions into private networks; deployment of computer viruses; and cyberbullying. Such investigations will be subject to Director audit annually.

**SECTION G.8.**

10. MPD may obtain standing authorization from the Director for certain long-running investigations that could intersect with First Amendment activity, including those that require online undercover presence of MPD, such as the Internet Crimes Against Children division of MPD. Such investigations will be subject to audit by the Director annually.

**This point was subsumed by other modifications to the Proposed Modified Consent Decree. Accordingly, the parties agreed to omit this from the Decree.**

11. MPD may utilize undercover social media accounts for purposes of investigations. The Consent Decree does not prohibit the use of undercover social media accounts. These undercover accounts have legitimate law enforcement purposes, but there is some opportunity for abuse. If First Amendment-protected information is gathered through the use of an MPD undercover social media account, such information shall not be retained unless necessary to further a legitimate law enforcement purpose. MPD will implement supervisory controls to ensure all undercover social media accounts are not being used or created to infiltrate groups expressing their First Amendment rights.

#### **SECTION E**

12. MPD may gather intelligence on social media for legitimate law enforcement purposes such as public safety. This intelligence-gathering includes doing threat assessments using social media. MPD may not, however, surveil groups or persons involved in the exercise of their First Amendment rights if no threat to public safety is present or thought to be present.

#### **SECTION D.2.**

13. The Consent Decree does not necessarily require Director authorization to run searches on social media. If the search term is directly related to a person or group exercising their First Amendment rights, however, Director authorization would be required. For example, if there is a criminal investigation of the leader of the local Black Lives Matter chapter, then Director approval would be required to run those searches. If, on the other hand, MPD is investigating a murder suspect, Director authorization under § G would not be required to search social media for information about that suspect.

#### **SECTION G.2.**

14. MPD may continue its current practice of storing video from Blue Crush cameras on the DVRs of each camera as long as the footage automatically deletes as new footage is recorded. The City will implement a retention policy for camera footage that is downloaded from the cameras.

#### **SECTION H.3.**

15. MPD may use the State's interstate cameras, as long as it does not use them in such a way that violates the Consent Decree. The City will implement the same retention policy for camera footage that is downloaded from the TDOT cameras that it adopts for its Blue Crush cameras.

**SECTION I. – The parties agree that this is permissible, but they were unable to agree to language memorializing any agreement within the Proposed Modified Consent Decree.**

16. Gang activity is not protected by the First Amendment or the Consent Decree.

**The parties agreed to omit this from the Decree.**

17. The structure of the Multi-Agency Gang Unit does not necessarily violate the Consent Decree.

**The parties have not been able to agree on this point. This point arguably implicates Section I, and the parties were unable to finalize language for Section I that was agreeable to both parties.**

**I. CONCLUSION**

The parties intend to continue to negotiate on Section I, and they are hopeful that they will come to an agreement on a proposed modified Section I by the time of trial.

Respectfully Submitted,

ACLU OF TENNESSEE, INC.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of June 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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