

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

ACLU OF TENNESSEE, INC.,)	
)	
Plaintiff)	
v.)	Case No. 2:17-CV-2120-JPM-egb
)	
THE CITY OF MEMPHIS,)	
Defendant.)	
)	

MOTION FOR RELIEF FROM JUDGMENT OR ORDER

The defendant, City of Memphis, pursuant to Fed. R. Civ. P. 60 (b)(5) and (6), moves for relief from the September 14, 1978 Order, Judgment and Decree in the above referenced action (the "Consent Decree"). In support of this Motion, the defendant avers that:

- 1) The Consent Decree is a forty year old document rarely discussed or raised as a subject of concern during most of that time frame by the citizens of the City of Memphis or by the plaintiff;
- 2) The City has defended this litigation on the grounds that it has not violated the Consent Decree in any respect. (ECF Nos. 81, 106). As a part of that defense, the City has advocated for an interpretation of the Consent Decree which it considers reasonable and practical under the circumstances of that case, giving consideration to the difference between the factual circumstances underpinning the *Kendrick* case and the necessities of providing law enforcement professionals with the ability to engage in proactive, real time activities designed to protect the public, individuals involved in protest activity, and law enforcement officers themselves. (*See* ECF 120 - 22-23, at 4875-4876).

3) In an Order in the *ACLU* litigation dated August 10, 2018 (ECF 120) the Court granted summary judgment to the plaintiff on certain matters alleged by the plaintiff to violate Sections C (1) and (G) of the Consent Decree, concerning alleged violations of the provisions of the Consent Decree regarding "political intelligence" and establishing certain obligations on the part of the Memphis City Police Director. (ECF 120-2 at 4855).¹

4) The Order, despite seeking to clarify the interpretation of the forty year old Consent Decree on certain provisions raised in this litigation, and to make it relevant to modern law enforcement practices, unavoidably leaves uncertainty over the scope of and legality of key aspects of the daily activities of a modern, proactive, law enforcement agency in today's world.

5) The Order recognizes that under circumstances where the Consent Decree is demonstrated to be "outdated due to a change in legal or other circumstances, the City is free to file a motion to modify the Consent Decree." (ECF 120-24 at 4877). Such circumstances exist, as will be further demonstrated in the Memorandum in support of this Motion filed contemporaneously.

6) Under applicable Supreme Court and Sixth Circuit authority (*See Horne v. Flores*, 557 U.S. 433 (2009); *John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013)) absent a finding of a present violation of federal constitutional rights -- i.e. the First Amendment in this case -- upon which the Consent Decree is based, the Court is empowered to not only modify, but completely vacate the Consent Decree.

6) The record in the *ACLU* litigation does not demonstrate the present violation of federal constitutional rights. Indeed, the scope of the Court's summary judgment in the August

¹ The City is moving contemporaneously to revise certain aspects of this Order under Fed. R. Civ. P. 54 (b), but for purposes of the present Motion, assumes that the provisions of the Order finding violations of the Consent Decree are and will remain in full force and effect pending a final judgment.

10, 2018 Order focuses exclusively on the interpretation of provisions of the Consent Decree, which go well beyond the independent protections of the First Amendment.

7) At present, the uncertainty associated with the permissible guidelines for proactive law enforcement measures intended to protect the public, the protesters themselves, and law enforcement officers from acts of violence and unlawful activity, will have a detrimental effect on public safety in this community.

8) To the extent that the Consent Decree's viability and enforceability is considered necessary by the Court at the present time in at least some respects, certain aspects of the Consent Order are impractical, impose an unreasonable administrative burden, and are not suited to today's world of social media activity driving protest and counter-protest activity. These activities must be monitored and addressed for legitimate reasons relating to public safety and protection, including protection of those involved in protest activity, in real time.

It is effectively impossible and/or impractical, for example, for the Memphis Police Department to proactively plan for violent or clearly unlawful activity and conduct if its monitoring activities are limited to the actions approved by the Court in its Order.

It is similarly impossible and/or impractical for the Memphis Police Director to be expected to personally authorize, in writing, every activity within the Department relating to such proactive law enforcement measures which may rise to the level of a "criminal investigation."

It is literally impossible for the City of Memphis, much less the Memphis Police Department, to comply with the absolute prohibition against "maintain[ing] personal information about any person unless it is collected in the course of a lawful investigation of criminal conduct and is relevant to such investigation", as set forth in Section H of the Consent Decree.

The Consent Decree's apparent (as interpreted by the Court) prohibition against modern methods of surveillance, including periodic monitoring and disseminating information about the activities of individuals known to have been involved in unlawful assemblies or protest activities, for purposes of protecting the public, the protesters themselves, and law enforcement officers, unless it involves overt indications of criminal or clearly unlawful conduct, and unless personally authorized by the Memphis Police Director (ECF 120-26, 27, 32, at 4879, 4880, 4885) is dangerous and untenable in today's world. The Consent Decree's limitations upon the gathering and dissemination of information about such activity unless it involves a "criminal investigation" or clearly "unlawful" conduct in and of itself should be completely vacated or substantially modified.

The restrictions on "Joint Operations" set forth in Section I of the Consent Decree would call into question or unreasonably limit the longstanding cooperative involvement of the Memphis Police Department with federal and state law enforcement agencies tasked with combating and preventing acts of domestic and international terrorism and even investigations into conduct having alleged marginal First Amendment rights such as organized gang or child sex trafficking activity.

For the above-referenced reasons, and as more fully set forth in the Memorandum of Law submitted contemporaneously with this Motion, the defendant, City of Memphis, respectfully requests that the Court completely vacate the provisions of the Consent Decree entirely or alternatively, substantially modify its provisions so as to permit the Memphis Police Department to carry out its public safety responsibilities and provide a sunset clause.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

s/ Jennie Vee Silk

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CERTIFICATE OF CONSULTATION

Pursuant to Local Rule 7.2(a)(B), on August 15, 2018, Buckner Wellford personally communicated with counsel for Intervening Plaintiff, Thomas Castelli, regarding the relief sought in this motion. Mr. Castelli advised that the Intervening Plaintiff objects to the relief sought in this Motion.

s/ Jennie Vee Silk

Jennie Vee Silk

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August 2017, 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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s/ Buckner Wellford

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