EXHIBIT TWO

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

ORDER GRANTING IN PART AND DENYING IN PART THE ACLU-TN'S MOTION FOR SUMMARY JUDGMENT

AND

ORDER DENYING THE CITY'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF CONTEMPT

Before the Court is the Motion for Summary Judgment filed by Intervening Plaintiff ACLU of Tennessee, Inc. (the "ACLU-TN") on June 18, 2018. (ECF Nos. 79, 107.) Also before the Court is the Motion for Summary Judgment on the Issue of Contempt filed by Defendant City of Memphis, Tennessee (the "City") on June 18, 2018. (ECF Nos. 81, 106.)

For the reasons discussed below, the Consent Decree's definition of "political intelligence" does not depend on whether the conduct being investigated was "lawful" in the sense of being allowed under the City's ordinances and does not depend on whether the City's

investigative acts were taken "for the purpose of intimidation or harassment." Therefore, the City engaged in "political intelligence" as defined and prohibited by the Consent Decree. There is a genuine dispute, however, as to whether the City operated any offices, infiltrated any groups, or disseminated any derogatory or false information about any individuals or groups for the *purpose* of "political intelligence." There is also a genuine dispute as to whether the City engaged in any action "for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights."

The record shows that, in violation of the Consent Decree, the City failed to review and issue written authorizations for at least some lawful investigations of criminal conduct that "may result in the collection of information about" or "interfere in any way with" the "exercise of First Amendment rights." There is a genuine dispute, however, as to whether the City has substantially complied with the requirement not to disseminate personal information "collected in the course of a lawful investigation of criminal conduct" to persons outside law enforcement agencies.

Accordingly, the ACLU-TN's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART, and the City's Motion for Summary Judgment is DENIED. The City has violated at least some provisions of the Consent Decree, and therefore, if the ACLU-TN succeeds in establishing standing at trial, the Court will determine the appropriate contempt sanction. That sanction will depend, in part, on how many of the Consent Decree's provisions the City is determined to have violated and the details of the City's specific violations.

I. BACKGROUND

A. The Consent Decree

On September 14, 1976, Chan Kendrick and several other plaintiffs filed a legal action in this Court (the "Kendrick Action") alleging that they were the subjects of unlawful surveillance by the Domestic Intelligence Unit of the Memphis Police Department ("MPD"). (ACLU-TN's Resp. to the City's Statement of Undisputed Material Facts ("Pl.'s Resp. Facts"), ECF No. 108-1 ¶ 1; Complaint in the Kendrick Action, ECF No. 33-1 at 381-83.[1]) See also Kendrick, et al. v. Chandler, et al., No. 2:76-cv-00449 (W.D. Tenn. 1978). The plaintiffs in the Kendrick Action alleged that the City and the MPD created the Domestic Intelligence Unit in 1965 to investigate and maintain files on citizens engaging in "non-criminal, constitutionally protected activities which were thought to be 'subversive' and/or advocating unpopular or controversial political issues." (Complaint in the Kendrick Action at 385.) The plaintiffs in the Kendrick Action also alleged that the City and the MPD, after their activities were discovered, burned the Domestic Intelligence Unit's files rather than turning them over to this Court. (See Complaint in the Kendrick Action at 387; Pl.'s Resp. Facts ¶ 1.)

Two years later, on September 14, 1978, this Court entered a consent Order, Judgment and Decree (the "Consent Decree") in the Kendrick Action. (See Consent Decree, ECF No. 9-1.) In pertinent part, the Consent Decree's "Statement of General Principles" provides as follows:

> The provisions of this Decree prohibit the defendants and the City of Memphis from engaging in law enforcement activities which interfere with any person's rights protected by the First Amendment to the United States Constitution including, but not limited to, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose.

[1] All citations to page numbers in docket entries are to the CM/ECF PageID number.

> Furthermore, even in connection with the investigation of criminal conduct, the defendants and the City of Memphis must appropriately limit all law enforcement activities so as not to infringe on any person's First Amendment rights.

(Consent Decree § A.) Accordingly, the Consent Decree (1) prohibits the City from engaging in certain conduct that would impermissibly interfere with the exercise of First Amendment rights,[2] (2) regulates the manner in which the City is *permitted* to interfere with the exercise of First Amendment rights, and (3) requires the City to publicize the Consent Decree and familiarize law enforcement personnel with its requirements. (See id. §§ C-J.)

Specifically, in a section titled "Political Intelligence," the Consent Decree provides that the City (1) "shall not engage in political intelligence" and (2) "shall not operate or maintain any office, division, bureau or any other unit for the purpose of engaging in political intelligence." (Consent Decree § C.) The Consent Decree defines "political intelligence" to mean "the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, opinions, associations or other exercise of First Amendment rights." (Id. § B(4).) The Consent Decree defines "First Amendment rights" to mean "rights protected by the First Amendment to the Constitution of the United States including, but not limited to, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose." (Id. § B(1).) The Consent Decree defines "person" to mean "any individual, group, or organization." (Id. § B(2).)

[2] The Consent Decree addresses four categories of prohibited conduct: (1) political intelligence, (2) electronic surveillance for political intelligence, (3) covert surveillance for political intelligence, and (4) harassment and intimidation. (See Consent Decree §§ C-F.)

In a section titled "Prohibition Against Electronic Surveillance for Political Intelligence," the Consent Decree provides that the City "shall not intercept, record, transcribe or otherwise interfere with any communication by means of electronic surveillance for the purpose of political intelligence." (Consent Decree § D.)

In a section titled "Prohibition Against Covert Surveillance for Political Intelligence," the Consent Decree provides that the City "shall not recruit, solicit, place, maintain or employ an informant for political intelligence; nor shall any officer, employee or agent of the City of Memphis, for the purpose of political intelligence, infiltrate or pose as a member of any group or organization exercising First Amendment rights." (Consent Decree § E.)

In a section titled "Harassment and Intimidation Prohibited," the Consent Decree provides that the City "shall not disrupt, discredit, interfere with or otherwise harass any person exercising First Amendment rights." (Consent Decree § F(1).) Specifically, the Consent Decree provides that the City "shall not disseminate damaging, derogatory, false or anonymous information about any person for the purpose of political intelligence, or attempt to provoke disagreement, dissention or violence between persons." (Id.) The Consent Decree also provides that the City "shall not engage in any action for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights." (Consent Decree § F(2).) "As an example," the Consent Decree provides that the City "shall not, at any lawful meeting or demonstration, for the purpose of chilling the exercise of First Amendment rights or for the purpose of maintaining a record, record the name of or photograph any person in attendance, or record the automobile license plate numbers of any person in attendance." (Id.)

After prohibiting political intelligence, intimidation, and the other conduct discussed above, the Consent Decree regulates the manner in which the City is permitted to conduct investigations that might interfere with the exercise of First Amendment rights. (See id. §§ G-I.) The Consent Decree also requires the City to publicize the Consent Decree and familiarize law enforcement personnel with its requirements. (See id. § J.)

Specifically, in a section titled "Criminal Investigations Which May Interfere With the Exercise of First Amendment Rights," the Consent Decree provides as follows:

> 1. Any police officer conducting or supervising a lawful investigation of criminal conduct which investigation may result in the collection of information about the exercise of First Amendment rights, or interfere in any way with the exercise of such First Amendment rights, must immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization.
>
> 2. The Director of Police shall review the factual basis for the investigation and the investigative techniques employed. The Director of Police shall issue a written authorization for an investigation for a period not to exceed ninety (90) days only if the Director of Police makes written findings that:
>
> a. The investigation does not violate the provisions of this Decree; and
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> b. [T]he expected collection of information about, or interference with, First Amendment rights is unavoidably necessary for the proper conduct of the investigation; and
>
> c. Every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights; and
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> d. [T]he investigation employs the least intrusive technique necessary to obtain the information.
>
> 3. The Director of Police may authorize an extension of such investigation for an additional period specified by the Director of Police not to exceed ninety (90) days. The Director of Police shall authorize each such extension only if the Director of Police re-evaluates the factual basis for the investigation and the investigative techniques to be employed, and makes current written findings as required in Paragraph 2, above.

(Consent Decree § G.)

In a section titled "Maintenance and Dissemination of Information," the Consent Decree provides that the City "shall not maintain 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." (Consent Decree § H(1).) The Consent Decree further provides that the City "shall not disseminate personal information about any person collected in the course of a lawful investigation of criminal conduct to any other person, except that such information may be disseminated to another governmental law enforcement agency then engaged in a lawful investigation of criminal conduct." (Id. § H(2).)

In a section titled "Restriction on Joint Operations," the Consent Decree provides that the City "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.)

Finally, in a section titled "Dissemination and Posting of this Decree," the Consent Decree provides that the City "shall familiarize each of its law enforcement personnel with the contents of this Decree in the same manner in which those personnel are instructed about other rules of conduct governing such personnel." (Consent Decree § J.) The Consent Decree further provides that the City "shall disseminate and make known the contents of this Decree through publication, public posting and other means." (Id.)

B. The City's Recent Conduct

1. Expanding the City Hall Escort List

On December 19, 2016, Keedran Franklin and the Coalition of Concerned Citizens ("CCC") staged a "Die-In" protest on the front lawn of Mayor Jim Strickland's personal residence.[3] (Pl.'s Resp. Facts ¶ 23; City's Resp. to the ACLU-TN's Undisputed Statement of Material Facts ("Def.'s Resp. Facts"), ECF No. 110 ¶ 1.) On January 4, 2017, in response to the Die-In protest, Mayor Strickland executed an Authorization of Agency (the "AOA")[4] for his personal residence. (See Pl.'s Resp. Facts ¶ 24, 26.) The AOA empowered the Memphis Police Department ("MPD") to arrest the persons listed on the AOA should they trespass at Mayor Strickland's home in the future, without first notifying the mayor. (See id. ¶ 25.) The AOA's list of names was "populated" by Sergeant Timothy Reynolds of the MPD's Office of Homeland Security ("OHS") using Keedran Franklin's and the CCC's "associates in fact," as determined by social media contacts, arrest records, and/or sightings at unlawful assemblies. (See id. ¶ 26; Reynolds Dep., ECF No. 107-54 at 3527.[5]) Accordingly, the AOA was not limited to individuals who participated in the Die-In at the mayor's home. (Def.'s Resp. Facts ¶ 5.)

[3] For purposes of this Order, the Court assumes that the Die-In protest was, as the City contends, "an act of criminal trespass on private property by masked persons 'playing dead' on the Mayor's lawn, and peering through the Mayor's windows." (See ECF No. 110 ¶ 1.)

[4] An AOA is an internal police form that (1) notifies officers of known criminal trespassers on a particular property, and (2) empowers the police, without notifying the property owner, to arrest the persons listed on the AOA should they trespass on that property again. (Pl.'s Resp. Facts ¶ 25.) A person included on an AOA should receive notice of that fact. (Id.)

[5] Sergeant Reynolds testified that he developed a list of "associates in fact," meaning "we have articulable places we can go to [confirm] that these people may have something to do with either Keedran Franklin or the CCC. . . . Social media contacts. Previously arrested with. Often seen at unlawful assemblies with[.] [T]hat kind of thing."

After Mayor Strickland executed the AOA, Lieutenant Albert Bonner of the MPD added the persons listed on the AOA to a pre-existing City Hall Escort List (the "Escort List"). (Pl.'s Resp. Facts ¶ 28.) The Escort List predated the Strickland administration and contained the identifying information of individuals who were known to have engaged in disruptive conduct or to have expressed a willingness to commit disruptive acts at City Hall.[6] (Id. ¶ 27.) Individuals whose names are on the Escort List are allowed to enter City Hall, but they are required to identify where they are going and who they intend to see. (Id.) They might also require an escort while in City Hall. (Id.) The parties dispute whether any of the individuals listed on the mayor's AOA were actually subjected to an escort through City Hall. (See id. ¶ 31, 33.)

2. Monitoring and Tracking Protest Activity

The MPD participates in the federal Joint Terrorism Task Force. (Pl.'s Resp. Facts ¶ 35.) Related to that participation, the MPD monitors social media accounts through the OHS. (See id. ¶ 36.) Prior to 2016, the OHS's main focus was to address "isometric threats to the public" after the September 11 attacks. (See id. ¶ 37.) As early as 2016, however, the OHS began to monitor social media accounts related to certain high-profile protest activities. (See id. ¶ 38, 39.)

Sergeant Reynolds has provided a sworn affidavit stating that he joined the OHS in 2015. (Reynolds Aff., ECF No. 115-2 ¶ 11.[7]) Sergeant Reynolds asserts that, as part of his earlier work at the MPD's Organized Crime Unit, he created an online alias to aid in undercover

[6] Sergeant Reynolds "compiled and sent the driver's license photos of the persons recently added to the Escort List to Lt. Bonner for inclusion in the City Hall Security Book." (Def.'s Resp. Facts, ECF No. 110 ¶ 8.)

[7] Sergeant Reynolds's affidavit was initially submitted to the Court for *in camera* review, but following an agreement by the parties, the affidavit was filed unsealed with some redactions. (See ECF Nos. 95, 105, 115.)

investigations. (Id. ¶ 12.) Sergeant Reynolds asserts that, after joining the OHS in 2015, he used his preexisting online alias "to monitor social media commentary on the subject of law enforcement shootings and public reaction to them." (Id. ¶ 13.) Sergeant Reynolds asserts that, beginning in 2016, "after an eruption of violent protests around the country in response to several officer-involved shootings in other jurisdictions" and after "a large group of protestors shut down the I-40 bridge to Arkansas," Sergeant Reynolds "increasingly focused his intelligence gathering and investigations on potentially large protests that might occur in the Memphis region." (Id. ¶¶ 15, 16.) Sergeant Reynolds asserts that, through his online alias, he was eventually "accepted as a friend" by several activists in the Memphis area and "invited into a private [Facebook] group" consisting of activists who discussed disruptive and/or unlawful acts against the Memphis Zoo. (See id. ¶¶ 17-19.)

In addition to investigating activists through social media, the OHS created and maintained a database of protests, demonstrations, and flash mobs that took place in the Memphis area during 2016 and 2017 (the "Database"). (See Def.'s Resp. Facts ¶ 26; Database, ECF No. 107-18.) The Database tracked the date, time, location, and approximate crowd size of various events, as well as whether each event had received a permit, implicated critical infrastructure, or resulted in any damage. (See id.) The Database also tracked the "Protest Group" and/or "Cause" associated with each event, as well as the "Key Personnel" who organized the event. (See id.) Director Rallings testified that he directed the OHS to create the Database for budgetary purposes related to overtime spending on protests. (See Rallings Dep., ECF No. 106-5 at 2759-60.)

At least "occasionally," OHS officers were physically present at protest events. (See Def.'s Resp. Facts ¶ 48.) Major Stephen Chandler testified that, whether from the OHS or

another office, the MPD "would always have somebody there, be it a uniform presence or somebody that was in a plain clothes presence." (See Chandler Dep., ECF No. 107-50 at 3435.) Major Chandler testified that the MPD's plainclothes officers "would take photographs of what was going on to give people an idea of the size of the crowd, what the crowd was doing" and would also "identify participants that were there." (See id.)

The OHS prepared PowerPoint presentations about certain protest events. (Def.'s Resp. Facts ¶ 31.) For example, the *Blue Suede Shoes* PowerPoint discussed three 2016 protests at which individuals were arrested, and the *All Shook Up* PowerPoint laid out a "Plan of Action" to prevent the CCC from disrupting Elvis Presley's birthday celebration at Graceland. (See ECF Nos. 107-19, 107-20.) Both PowerPoints included photographs of Keedran Franklin and individuals "closely associated with" him, including Paul Garner. (See id.) The *Blue Suede Shoes* PowerPoint included several other activists' photographs and arrest information. (See ECF No. 107-19 at 3213-26.) The *All Shook Up* PowerPoint included a list of the "causes" the CCC was known to protest, including "Free Palestine," "Fight for $15," "Solidarity March," and "Mayor's house." (See ECF No. 107-20 at 3237.) The *Blue Suede Shoes* PowerPoint stated that the MPD's "goal is to provide public safety for those individuals that wish to voice their opinions and concerns." (ECF No. 107-19 at 3208.)

On some occasions, the OHS requested assistance from the MPD's Real Time Crime Center ("RTCC") in OHS investigations. (See Wilburn Dep., ECF No. 107-55 at 3542.) The RTCC monitors a live feed from a network of over one thousand fixed and mobile cameras around Memphis. (See Def.'s Resp. Facts ¶ 36.) Accordingly, the OHS sometimes requested the RTCC's assistance in "doing camera monitoring" during various public events. (See Wilburn Dep., ECF No. 107-55 at 3543.) The RTCC has monitored its network of cameras in

connection with protest activities in Memphis, but it also monitors its cameras in circumstances unrelated to protests. (See Def.'s Resp. Facts ¶ 36.)

In addition to monitoring its network of cameras, the RTCC uses computer software applications known as "social media collators"—including two applications called "Geofeedia" and "NC4"—to monitor publicly available online "chatter" across social media platforms. (See Def.'s Resp. Facts ¶ 37.) The RTCC has used social media collators to monitor online chatter about protest activities in Memphis, but it has also used social media collators in circumstances unrelated to protests. (See id.) The RTCC has collected and circulated social media posts related to Black Lives Matter as well as other groups, including the Ku Klux Klan. (See id. ¶ 41.) The RTCC has reported the results of its social media monitoring to the OHS. (Id. ¶ 39.)

Between June 2016 and March 2017, the MPD circulated Joint Intelligence Briefings ("JIBs") within and outside the MPD. (See Def.'s Resp. Facts ¶¶ 25, 16-17.) The JIBs focused on four categories of information: (1) "police shootings/deaths," (2) "riots/protests," (3) "Black Lives Matter," and (4) "officer safety." (See Def.'s Resp. Facts ¶ 25; Chandler Dep., ECF No. 110-4 at 4272.) Within the MPD, the JIBs were circulated to police leadership, communication supervisors, and several internal MPD offices, including the RTCC. (Def.'s Resp. Facts ¶ 16.) Outside the MPD, the JIBs were circulated to regional law enforcement officials and certain members of the Memphis community, including employees of the U.S. Department of Justice, Tennessee Department of Homeland Security, Tennessee Valley Authority, Shelby County Sherriff's Office, Shelby County Schools, FedEx, AutoZone, and St. Jude. (See id. ¶ 17.)

With respect to "police shootings/deaths," the JIBs circulated news articles reporting on violent attacks against police. For example, one JIB contained a link to a news article under the

heading: "Saturday, July 9, 2016—Five Dallas, Texas Officers killed by sniper type attack during a BLM protest." (ECF No. 107-12 at 3176.) Another JIB contained a link to a news article under the description: "Wednesday, August 3, 2016 Thurmont, Maryland—Someone detonated a pipe bomb on the hood of a Thurmont Police Department (TPD) cruiser." (ECF No. 107-9 at 3157.) A third JIB circulated information about a murdered police officer's funeral. (See ECF No. 107-15 at 3194.)

With respect to "officer safety," the JIBs circulated information relating to potential threats against police. For example, the JIBs summarized "specific threats to law enforcement on social media" that had been discovered using social media collators. (See, e.g., ECF No. 107-10 at 3171, ECF No. 107-12 at 3179.) The JIBs also discussed threats to law enforcement discovered through other means, such as a partially-corroborated "tip that [a certain individual] was trying to recruit people in Memphis to recreate a Dallas, Texas style shooting in Memphis." (ECF No. 110-5 at 4283.)

With respect to "riots/protests" and/or "Black Lives Matter," the JIBs circulated information about various planned events in the Memphis area. (See, e.g., ECF No. 107-10 at 3162-69.) For example, the July 8, 2016 "Post Dallas Sniper" JIB circulated information about several protests scheduled during July 2016. (See id.) That JIB included images of social media pages. (See id.) For each event, the JIB stated whether a permit had been requested and/or approved. (See id.)

Some JIBs included the names and photographs of individual activists. (See, e.g., ECF Nos. 107-9, 107-16.) For example, the August 5, 2016 JIB stated: "The following individuals have a rally or demonstration planned in the area of Graceland during Elvis Week" and listed the

names, photographs, and links to the Facebook pages of Aaron Lewis, Frank Gibson, and Keedran Franklin. (See ECF No. 107-9 at 3158-59.) That JIB further stated that the "MPD/OHS" contacted Frank Gibson and Keedran Franklin and "reminded [them] that [they] would need to apply for a permit if [they were] planning an upcoming rally for over 25 participants." (Id. at 3159.)

Some JIBs circulated information about gatherings on private property, including churches. For example, the July 8, 2016 JIB disseminated information about a panel discussion at the Abyssinian Missionary Baptist Church.[8] (See ECF No. 107-10 at 3168.) Similarly, the February 8, 2017 JIB circulated information about a "Black Lives Matter Memphis Chapter . . . meeting at Pilgrim Rest Baptist Church." (See ECF No. 107-14 at 3190.)

Finally, some JIBs circulated information about events that do not appear to be related to "Black Lives Matter" or to qualify as "riots/protests." For example, the August 5, 2016 JIB circulated information about an event "to hand out back packs and school supplies" and the February 8, 2017 JIB circulated information about an event called "Black Owned Food Truck Sunday." (See ECF No. 107-9 at 3160; ECF No.107-14 at 3191.)

3. "Review and Authorization" of Criminal Investigations

In 2010, the MPD posted the Consent Decree on its internal website, which is known as the "Kiosk." (Pl.'s Resp. Facts ¶ 5; Def.'s Resp. Facts ¶ 67; see also Kiosk Screenshot, ECF

[8] The relevant JIB contains an image of a social media page describing an event titled "Reshaping the Narrative: The Social Construction of Violence in Black Communities." (ECF No. 107-10 at 3168.) The social media page listed the names of one "Moderator" and several "Panelists." (Id.) Below the image of the social media page, the relevant JIB stated that "[t]he official #BlackLivesMatterMemphis is staging an event at Abyssinian Missionary Baptist Church . . . on Saturday, July 16, 2016 from 2:00-4:00. . . ." (Id.)

No. 107-45 at 3366-67.) On December 20, 2010, the provisions of the Consent Decree were also adopted as MPD Department Regulation 138. (Pl.'s Resp. Facts ¶ 5.) That regulation provides:

> **DR 138 POLITICAL INTELLIGENCE**
>
> The Memphis Police Department and the City of Memphis do not engage in political intelligence. No member shall intercept, record, transcribe or otherwise interfere with any communications by means of electronic or covert surveillance for the purpose of political intelligence gathering.
>
> No member shall engage in any action or disseminate damaging, derogatory, false or anonymous information about any person which will deprive any individual of their First Amendment Rights; nor will any member encourage, cooperate with, or contract with any local, state, federal or private agency to plan or conduct any investigation involving political intelligence.
>
> Any member conducting or supervising a lawful investigation of criminal conduct . . . in which the investigation may result in the collection of information about the exercise of First Amendment Rights, or interfere in any way with the exercise of such First Amendment Rights must immediately bring such information to the attention of the Director of Police Services for review and authorization. If approved, the investigation will not exceed more than ninety (90) calendar days. An extension may be granted by the Director for an additional ninety (90) days if necessary.
>
> The regulations for this DR are in accordance with the judgment and decree for Civil Case 76-449 (which can be found on the opening page of the MPD Kiosk website).

(ECF No. 107-46 at 3376.)

Director Rallings testified that he does not recall issuing any written authorizations for any criminal investigations. (See Rallings Dep., ECF No. 107-53 at 3489 ("Q: Do you know whether or not you've ever issued a written authorization for an investigation as described in [Section G of the Consent Decree]? . . . THE WITNESS: "I don't recall . . . getting any written authorization for a criminal investigation.").) "It is undisputed that Director Rallings does not recall personally conducting reviews and authorizations under DR 138." (Def.'s Resp. Facts ¶ 69.)

C. This Action

On February 22, 2017, Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (collectively, the "Blanchard Plaintiffs") brought this action to enforce the Consent Decree against the City. (ECF No. 1.) The Blanchard Plaintiffs alleged that the City violated the Consent Decree in a number of ways, including (1) by creating the Escort List, and (2) using social media collators to surveil citizens' social media postings. (See id. ¶¶ 14, 17.)

On March 1, 2017, the City filed a Motion to Dismiss the Blanchard Plaintiffs' Complaint, arguing that the Blanchard Plaintiffs lacked standing to enforce the Consent Decree because they were not parties to it. (ECF No. 8.) On March 3, 2017, the ACLU-TN intervened in this action as a plaintiff. (ECF No. 16.) Like the Blanchard Plaintiffs, the ACLU-TN alleged that the City violated the Consent Decree by creating the Escort List and using social media collators. (See ECF No. 16 at 225-26.) The ACLU-TN also alleged that it was an original party to the Consent Decree. (ECF No. 16 ¶ 8.)

On March 8, 2017, the City filed a Motion to Dismiss Plaintiff's Complaint, arguing that, like the Blanchard Plaintiffs, the ACLU-TN was not a party to the Consent Decree. (ECF No. 22.) On June 30, 2017, the Court dismissed the Blanchard Plaintiffs from this action after determining that, as non-parties to the Consent Decree, they lacked standing to enforce it. (ECF No. 41.) The Court determined, however, that the ACLU-TN had standing to enforce the Consent Decree as the likely successor in interest to an original party to the Consent Decree. (See id.)

On June 18, 2018, the ACLU-TN filed the instant Motion for Summary Judgment. (ECF No. 79.) The same day, the City filed a Motion for Summary Judgment on the Issue of Standing

and the instant Motion for Summary Judgment on the Issue of Contempt. (ECF Nos. 80, 81.) On July 24, 2018, after reaching an agreement to unseal their motions and related documents, the parties filed unsealed versions of their motions for summary judgment on the issue of contempt.[9] (ECF No. 106, 107.) On July 25, 2018, the parties filed unsealed responses and replies. (ECF Nos. 108-11, 113, 114.)

On July 30, 2018, the Court denied the City's Motion for Summary Judgment on the Issue of Standing. (ECF No. 117.) The Court denied that motion after determining that the there is a genuine factual dispute as to whether the ACLU-TN is an original party to the Consent Decree, and if not, whether the ACLU-TN is the successor in interest to an original party to the Consent Decree. (See id.)

II. LEGAL STANDARD

A. Summary Judgment

A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 776 (6th Cir. 2012). When considering a motion for summary judgment, a court is "required to view the facts in the light most favorable to the non-moving party, and to draw all reasonable inferences in their favor." Gillis v. Miller, 845 F.3d 677, 694 (6th Cir. 2017); see also United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("On

[9] On July 23, 2018, after requiring the parties to file unsealed versions of certain documents, the Court granted the parties' joint oral motion to unseal their remaining documents and terminated their motions to seal those documents as moot. (See ECF Nos. 101, 105; see also ECF Nos. 77, 78, 83, 89, 94, 98, 103.)

summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.")

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are to be done at trial, not on a motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The decisive "question is whether 'the evidence presents a sufficient disagreement to require [a trial] or whether it is so one-sided that one party must prevail as a matter of law.'" See Johnson v. Memphis Light Gas & Water Div., 777 F.3d 838, 843 (6th Cir. 2015) (quoting Liberty Lobby, 477 U.S. at 251-52).

"The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." Mosholder v. Barnhardt, 679 F.3d 443, 448 (6th Cir. 2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "To support its motion, the moving party may show 'that there is an absence of evidence to support the nonmoving party's case.'" Id. (quoting Celotex, 477 U.S. at 325.)

"Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." Mosholder, 679 F.3d at 448-49; see also Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "When the non-moving party fails to make a sufficient showing of an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper." Chapman v. UAW Local 1005, 670 F.3d 677, 680 (6th Cir. 2012). Conclusory allegations, unsupported by specific evidence, cannot establish a genuine factual dispute sufficient to defeat a motion for summary judgment. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 902 (1990); see also Fed. R. Civ. P.

56(e). Similarly, statements contained in an affidavit that are "nothing more than rumors, conclusory allegations and subjective beliefs" are insufficient. See Mitchell, 964 F.2d at 584-85. Additionally, "a mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable [trier of fact] could find in her favor." Tingle v. Arbors at Hilliard, 692 F.3d 523, 529 (6th Cir. 2012) (quoting Liberty Lobby, 477 U.S. at 251).

To show that a fact "cannot be or is genuinely disputed," each party must cite to "particular parts of materials in the record" or show that the other party's cited materials do not establish the presence or absence of a genuine factual dispute. Fed. R. Civ. P. 56(c)(1); see also Bruederle, 687 F.3d at 776. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). "[I]t is not the district court's duty 'to search the entire record to establish that it is bereft of a genuine issue of material fact.'" Wimbush v. Wyeth, 619 F.3d 632, 639 (6th Cir. 2010) (quoting St. v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)).

B. Civil Contempt

"A court's ability to issue injunctions, and then enforce those injunctions with a finding of contempt, springs from the court's inherent equitable powers." Innovation Ventures, LLC v. N2G Distrib., Inc., 763 F.3d 524, 544 (6th Cir. 2014) (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)). Civil contempt sanctions serve two purposes: "to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." United States v. United Mine Workers of Am., 330 U.S. 258, 303-04, (1947); see also Skyros, Inc. v. Mud Pie, LLC, No. 16-cv-2255-STA-tmp, 2016 WL 4031366, at *4 (W.D. Tenn. July 26,

2016). "The district court has inherent authority to fashion the remedy for contumacious conduct." Liberte Capital Grp., LLC v. Capwill, 462 F.3d 543, 557 (6th Cir. 2006).

The plaintiff in a civil contempt proceeding bears the burden of proving by clear and convincing evidence that the defendant "violated a definite and specific order of the court requiring [the defendant] to perform or refrain from performing a particular act or acts with knowledge of the court's order." Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716, 720 (6th Cir. 1996) (quoting N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585, 591 (6th Cir. 1987)). "There is no requirement to show intent beyond knowledge of the order." CFE Racing Prod., Inc. v. BMF Wheels, Inc., 793 F.3d 571, 598 (6th Cir. 2015) (citing In re Jaques, 761 F.2d 302, 306 (6th Cir. 1985)).

To support a finding of contempt, a court's order must be "clear and unambiguous." Liberte Capital, 462 F.3d at 550-51 (quoting Grace v. Ctr. for Auto Safety, 72 F.3d 1236, 1241 (6th Cir. 1996)). "Ambiguities must be resolved in favor of the party charged with contempt." Id. at 551. "Good faith, however, is no defense for failure to comply with a court order enjoining certain conduct." Peppers v. Barry, 873 F.2d 967, 968 (6th Cir. 1989) (citing TWM Mfg. Co. v. Dura Corp., 722 F.2d 1261 (6th Cir. 1983); In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987)).

If the plaintiff in a civil contempt proceeding shows that the defendant violated an unambiguous court order with knowledge of the order's existence, "the burden shifts to the contemnor who may defend by coming forward with evidence showing that he is presently unable to comply with the court's order." Elec. Workers Pension Tr. Fund of Local Union #58 v. Gary's Elec. Serv. Co., 340 F.3d 373, 379 (6th Cir. 2003) (citing United States v. Rylander,

460 U.S. 752, 757 (1983)). Although good faith "is no defense for failure to comply with a court order enjoining certain conduct," a defendant can defend against a contempt claim by showing that it "took all reasonable steps within [its] power to comply with the court's order." See Peppers, 873 F.2d at 968-69; see also Glover v. Johnson, 934 F.2d 703, 708 (6th Cir. 1991).

Additionally, some courts have held that "substantial compliance with a court order is a defense to an action for civil contempt." See, e.g., Gen. Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986). Other courts, however, have held that "[s]ubstantial compliance is not a defense to a contempt motion." See, e.g., Wyndham Vacation Resorts, Inc. v. TOA, LLC, No. 3:09-CV-0899, 2013 WL 146087, at *3 (M.D. Tenn. Jan. 11, 2013) (citing Roslies-Perez v. Superior Forestry Serv., Inc., 652 F. Supp. 2d 887, 897 (M.D. Tenn. 2009)).

In Peppers,[10] the Sixth Circuit seemed to endorse the view that compliance with a court order need only be "substantial,"[11] noting that "the record shows that the defendants took all reasonable steps to achieve substantial compliance with the district court's injunction." 873 F.2d at 969. Indeed, the dissent in Peppers, which agreed with the majority's contempt analysis but not its "improper appellate factual determination," specifically mentioned a "'substantial compliance' or 'all reasonable means to comply' legal standard." 873 F.2d at 969 (Ryan, J., dissenting). Accordingly, the better view appears to be that, if the plaintiff in a civil contempt proceeding shows that the defendant violated a court order with knowledge of the order, it is the

[10] The Sixth Circuit affirmed the district court's finding that the defendants were not in contempt, but "not for the reasons given in [the district court's] conclusion," which were based on the district court's finding that the defendants made a good faith effort to comply with the relevant court order. See Peppers, 873 F.2d at 969.

[11] Moreover, the ACLU-TN and the City agree that a defendant's compliance with a court order must only be "substantial." (See ECF No. 107-1 at 3066; ECF No. 112 at 4523.)

defendant's burden to show that it "took all reasonable steps to achieve substantial compliance" with the court order. See Peppers, 873 F.2d at 969.

III. ANALYSIS

A. The Consent Decree's definition of "political intelligence" does not depend on whether the conduct being investigated was "lawful" in the sense of being allowed under the City's ordinances and does not depend on whether the City's investigative acts were taken "for the purpose of intimidation or harassment."

The City argues that the Consent Decree's prohibition against "political intelligence" should be narrowly interpreted to apply only to actions the City took "for the purpose of intimidation or harassment" of a person or group engaging in the "lawful exercise" of First Amendment rights. (See ECF No. 106-1 at 2730.) In support of this position, the City points to (1) the context of the Kendrick Action, in which the plaintiffs alleged that the purpose of the Domestic Intelligence Unit's collection, maintenance, and dissemination of information about citizens' political activities was to "harass and intimidate" them; (2) the Consent Decree's definition of "First Amendment rights," which ends with the phrase "for any lawful purpose"; and (3) a case from the Southern District of New York in which the district court interpreted a consent decree's prohibition against the "investigation of political activity"[12] to apply only to police actions "undertaken for the purpose of learning about citizens' exercise of rights," especially through "surreptitious methods." (See id. at 2728-31; ECF No. 112 at 4524-25.) See

[12] The term "investigation" was defined as "police activity undertaken to obtain information or evidence." Handschu v. Special Servs. Div., 737 F. Supp. 1289, 1301 (S.D.N.Y.), amended, 838 F. Supp. 81 (S.D.N.Y. 1989). The term "political activity" was defined as the "exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions." Handschu, 737 F. Supp. at 1301.

also Handschu v. Special Servs. Div., 737 F. Supp. 1289, 1301 (S.D.N.Y.), amended, 838 F. Supp. 81 (S.D.N.Y. 1989).

Accordingly, the City argues that "[i]nvestigations into criminal conduct do not violate the Consent Decree, nor does law enforcement's viewing of social media posts":

> Despite the uncontroverted fact that MPD has not and does not engage in 'political intelligence' for the purpose of harassment or intimidation, it has, and will continue, to gather intelligence on potentially unlawful activities. The OHS primarily focused its efforts during the time relevant to this matter on unlawful, unpermitted protests. The vast majority of events for which OHS attempted to gather intelligence were events being staged without the benefit and protections of a permit. It was, therefore, incumbent on OHS to gather enough information about these events for MPD to staff and support accordingly. In an effort to identify future events with the potential for unlawful conduct, OHS understandably investigated persons present at protests at which unlawful conduct occurred and arrests were made . . . .

(ECF No. 106-1 at 2731 (internal citations omitted).) Moreover, according to the City, if the Consent Decree is *not* read narrowly, its definition of "political intelligence" is permitted in the Sixth Circuit:

> When the Sixth Circuit finally interpreted *Laird* in 1983, it essentially foreclosed the possibility that a plaintiff could allege a First Amendment violation based upon law enforcement's good faith investigation or surveillance against him absent something more. Thus, the 1978 Kendrick Consent Decree's prohibition against "political intelligence" is, in essence, preempted by this change in federal law. Stated another way, the implementation of "political intelligence" as it is defined in the Consent Decree is permitted under Sixth Circuit law so long as the investigation or surveillance is done in good faith.
>
> Because of this change in law, the Consent Decree must be interpreted in light of the current federal law, i.e., that government surveillance of First Amendment activities must have an objective chilling effect on a person's speech to be actionable. Because there is no evidence that the City conducted its surveillance of the groups relevant to this action in bad faith, or that the City's surveillance of First Amendment activities had an objective chilling effect on anyone's speech, the City should not be found in contempt of the Consent Decree.

(ECF No. 106-1 at 2735.)

Even if the law in the Sixth Circuit has changed since the entry of the Consent Decree, however, it does not follow that the Consent Decree is "preempted" by that change in law. If the Consent Decree is outdated due to a change in legal or other circumstances, the City is free to file a motion to modify the Consent Decree. Prior to any such modification, however, the City is required to comply with the Consent Decree as written. See Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 392 (1992) ("Although state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation, a court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree."). Indeed, the City appears to recognize as much, stating that "the *Kendrick* Consent Decree must be modified in light of the Sixth Circuit precedent that substantially diluted, if not completely eliminated, the federal claims that support the Consent Decree. The City will be filing a Rule 60(b) Motion to set aside the Consent Decree separately." (ECF No. 106-1 at 2735 n. 3.) The question, therefore, is whether the City's narrow interpretation of the Consent Decree is at least reasonable. See Liberte Capital, 462 F.3d at 551 ("Ambiguities must be resolved in favor of the party charged with contempt.").

The Consent Decree's definition of "First Amendment rights" is not limited to the exercise of the relevant rights in a manner that is "lawful" in the sense of being allowed under the City's ordinances. (See Consent Decree § B(1).) Instead, the Consent Decree defines "First Amendment rights" to mean "rights protected by the First Amendment to the Constitution of the United States including, *but not limited to*, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose." (Id. § B(1) (emphasis added).) Therefore, the Consent Decree clearly defines "First

Amendment rights" to mean *all* "rights protected under the First Amendment," then proceeds to provide a list of examples. (See id.) The phrase "for any lawful purpose" does not modify the scope of the relevant First Amendment rights; it simply clarifies that certain speech-related conduct falls outside the First Amendment's protections if it has an unlawful purpose.

For example, a public gathering might be technically "unlawful" because its participants did not secure a government permit prior to gathering, or it might be "unlawful" because it shuts down an interstate bridge. Only the second gathering is categorically outside the protections of the First Amendment. See Cox v. State of La., 379 U.S. 536, 554-55 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.") The First Amendment protects a merely *unpermitted* gathering, assuming the gathering "does not trigger the [government's] interest in safety and traffic control." See Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 608 (6th Cir. 2005).

Indeed, as the City recognizes, this case "is based upon several sections of the Consent Decree which focus heavily upon the underlying motivations of both the individuals purportedly exercising First Amendment rights . . . as well as the MPD." (ECF No. 112 at 4524.) For example, the City argues that it did not employ an informant "for the purpose of political intelligence" because "[t]here is no evidence that the motivations of those involved had anything to do with the content of the communications between individuals or that it interfered in any manner with the right of the individuals involved to freely associate and express opinions in an unhindered manner." (Id. at 4532 (emphasis in original).) For the same reason, however, speech-related conduct does not automatically acquire an unlawful purpose when it is carried out

in a manner that is technically forbidden under the City's ordinances. Instead, just as the motivations behind the City's actions are "critical" to certain provisions of the Consent Decree,[13] so too are the motivations of protestors, activists, and others who wish to exercise their First Amendment rights "for any lawful purpose." (Consent Decree § B(1).)

Additionally, the fact that the Consent Decree was entered in a case involving allegations of intimidation and harassment does not automatically insert the phrase "for the purpose of intimidation or harassment" into the Consent Decree's definition of "political intelligence." This comports with the City's cited Handschu case, in which the district court noted that "surreptitious methods" were the "primary focus" of the relevant consent decree but did *not* insert the phrase "through surreptitious methods" into the decree's prohibition against "investigation of political activity." See Handschu, 737 F. Supp. 1289, 1301. In fact, the Handschu court determined that the police violated the relevant consent decree because "the monitoring of a radio program for the expression of political or social views, followed by the preparation of summaries and their retention in intelligence files, constitutes . . . 'police activity undertaken to obtain information or evidence' about the exercise of the right of expression for political ends." Id. at 1304. This finding of a violation was not based on whether the police employed "surreptitious methods." See id. Instead, it was based squarely on the consent decree's definitions of the terms "investigation" and "political activity." See id. at 1301 (reciting the relevant definitions).

In the instant case, the Consent Decree's prohibition against "political intelligence" is absolute: it states that "the City of Memphis shall not engage in political intelligence." (Id.

[13] The City correctly argues that "the MPD's motivation in conducting undercover or covert surveillance of events or monitoring of social media is critical." (ECF No. 112 at 4532.)

§ C(1).) Therefore, combining the relevant definitions, the Consent Decree prohibits the City from engaging in "any . . . investigative activity . . . relating to . . . [the] exercise of First Amendment rights," including—but not limited to—the rights to communicate, speak, dissent, write, publish, and associate privately or publicly "for any lawful purpose." (Consent Decree §§ B(1), B(4), C(1).) Whether the City engaged in "political intelligence" does not depend on whether the City acted "for the purpose of intimidation or harassment" or whether the conduct the City investigated was "lawful" in the sense of being allowed under the City's ordinances. Instead, under a plain reading of the Consent Decree, the City engaged in "political intelligence" if it investigated any "exercise of First Amendment rights," with the important reminder that speech-related conduct may not be an "exercise of First Amendment rights" if the conduct has an unlawful purpose. (See Consent Decree §§ B(1), B(4).)

B. The City engaged in "political intelligence" as defined and prohibited by the Consent Decree.

The Consent Decree provides that "the City of Memphis shall not engage in political intelligence." (Consent Decree § C(1).) Therefore, combining the relevant definitions, the Consent Decree prohibits the City from gathering, indexing, filing, maintaining, storing, or disseminating information—or from engaging in "any other investigative activity"— "relating to any person's beliefs, opinions, associations or other exercise of First Amendment rights," including—but not limited to—the rights to communicate, speak, dissent, write, publish, and associate privately or publicly "for any lawful purpose." (Consent Decree §§ B(1), B(4), C(1).)

Even viewed in the light most favorable to the City, the record establishes, by clear and convincing evidence, that the City violated Section C(1) of the Consent Decree by engaging in "political intelligence" in at least the following ways:

1. The City engaged in "political intelligence" when it created the AOA for Mayor Strickland's house and added the AOA's list of names to the City Hall Escort List. The AOA included individuals who did not participate in the Die-In at the mayor's house. (See Def.'s Resp. Facts ¶ 5.) Moreover, the City included individuals in the AOA at least in part based on their associations with Keedran Franklin and/or the CCC on social media. (See Pl.'s Resp. Facts ¶ 26; Reynolds Dep., ECF No. 107-54 at 3527.) There is no indication in the record that the "purpose" of these individuals' social media associations with Keedran Franklin and/or the CCC was unlawful.[14] Therefore, even if none of the AOA's listed individuals were actually escorted at City Hall (which the parties dispute), the record shows that the City gathered and disseminated information relating to their associations protected by the First Amendment.

2. The City engaged in "political intelligence" when it created and circulated Joint Intelligence Briefings to individuals within and outside the MPD. The City's JIBs included information about events on private property. For example, one JIB included information about a "Black Lives Matter Memphis Chapter . . . meeting at Pilgrim Rest Baptist Church." (ECF No. 107-14 at 3190.) The JIBs also included information about events whose purpose appears to be undeniably lawful. For example, one JIB included information about an event called "Black Owned Food Truck Sunday." (Id. at 3191.) Therefore, the City gathered and disseminated information relating to persons' associations protected by the First Amendment.[15]

[14] Even if an individual had previously committed an unlawful act with Keedran Franklin or other members of the CCC, it does not follow that the purpose of that individual's social media associations with Keedran Franklin and/or the CCC was unlawful.

[15] It is not clear how the City learned about particular lawful events, but the City may have learned about them by using social media collators to monitor online "chatter." (See Def.'s Resp. Facts, ECF No. 110 ¶ 37.) In that case, the City engaged in "political intelligence" not only in creating and circulating the JIBs, but in the online monitoring itself, which constituted the gathering of information about the exercise of First Amendment rights. The City's use of

3. The City engaged in "political intelligence" when it deployed plainclothes police officers to photograph and identify participants at protest events. Major Chandler testified that the MPD's plainclothes officers "would take photographs of what was going on to give people an idea of the size of the crowd, what the crowd was doing" and also "identify participants that were there." (See Chandler Dep., ECF No. 107-50 at 3435.) Therefore, the City gathered information relating to persons' associations and assemblies protected by the First Amendment.

C. There is a genuine dispute as to whether the City operated any offices, infiltrated any groups, or disseminated any derogatory or false information about any individuals or groups "for the purpose of political intelligence."

Although the City *engaged* in "political intelligence," it does not follow that it acted for the *purpose* of "political intelligence." As discussed earlier in the Court's analysis, the City is correct that this case "is based upon several sections of the Consent Decree which focus heavily upon the underlying motivations of both the individuals purportedly exercising First Amendment rights . . . as well as the MPD." (ECF No. 112 at 4524; see also Consent Decree §§ C(2), E, F(1).) With respect to those sections of the Consent Decree, the distinction between methods and motivations is critical. Just as a protest organizer might violate an ordinance without doing so for an unlawful purpose, a police department might gather and disseminate information about citizens' speech-related activities without acting "for the purpose of political intelligence."

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social media collators to search for specific threats to police and public safety, however—and the City's circulation of information about any specific threats it discovered—was *not* "political intelligence" because the purpose of such threats is unlawful and they are not protected under the First Amendment. The Consent Decree does not prohibit the City from monitoring social media altogether; it simply prohibits the City from casting too wide a net. Additionally, if the City casts an appropriately narrow net but inadvertently gathers information about the exercise of rights protected under the First Amendment, the Consent Decree prohibits the City from disseminating that information.

Accordingly, viewed in the light most favorable to the City, the record does not establish that the City operated any offices for "the purpose of engaging in political intelligence." (See Consent Decree § C(2).) Similarly, the record does not establish that the City infiltrated any groups "for the purpose of political intelligence" or disseminated any derogatory or false information about individuals or groups "for the purpose of political intelligence." (See Consent Decree §§ E, F(1).) Instead, viewed in the light most favorable to the City, the *purpose* behind the City's actions was to promote public and police safety, not to gather or disseminate information relating to the exercise of First Amendment rights.

D. There is a genuine dispute as to whether the City engaged in any action "for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights."

The ACLU-TN argues that the City "violated Section F of the Decree by specifically engaging [in] conduct used as an example of a violation, by regularly naming and photographing individuals exercising their First Amendment rights by attending meetings and events." (ECF No. 107-1 at 3067.) Section F(2) of the Consent Decree, however, does not prohibit the City from photographing participants at public protests.[16] Instead, it prohibits the City from doing so "for the purpose of chilling the exercise of First Amendment rights or for the purpose of maintaining a record." (Consent Decree § F(2).) For the reasons discussed earlier in the Court's analysis, there is a genuine dispute as to the "purpose" of the City's actions.

In addition to photographing protesters, the City appears to have contacted individual organizers and "reminded [them] that [they] would need to apply for a permit if [they were]

[16] Whether such photographs are permitted under Section C(1)'s prohibition against "political intelligence" is another question, addressed earlier in the Court's analysis.

planning an upcoming rally for over 25 participants." (See ECF No. 107 9 at 3159.) The City likely did this in order to discourage those organizers from holding large rallies without first obtaining permits, but even so, the City's "purpose" was not necessarily to discourage the organizers from exercising their rights. Instead, the City might have been concerned that the organizers were planning disruptive and/or dangerous events that were not protected by the First Amendment. There is a genuine dispute as to whether the City acted "for the purpose of . . . deterring any person from exercising First Amendment rights."

Similarly, there is a genuine dispute as to whether the City "engage[d] in any action . . . reasonably having the effect of . . . deterring any person from exercising First Amendment rights." (See Consent Decree § F(2).) The parties dispute whether the City enforced different standards for obtaining permits for protests than for other types of events. (See Def.'s Resp. Facts ¶ 63.) It is undisputed that the MPD contacted certain event organizers, but whether this reasonably had the effect of deterring the exercise of First Amendment rights depends on the details of the MPD's contacts with the organizers and the nature of the events the organizers were planning.[17] These are factual issues to be examined at trial.

E. The City did not review and issue written authorizations for at least some lawful investigations of criminal conduct that "may result in the collection of information about" or "interfere in any way with" the "exercise of First Amendment rights."

Sergeant Reynolds submitted a sworn affidavit stating that, "[i]n the fall of 2016, the Memphis Police Department started an investigation into a social media platform where someone

[17] For example, the City contends that "Major Chandler spoke with the organizer of [an] event for [the] purpose of determining the nature of the event and to ensure that MPD was adequately prepared to protect public safety in light of the fact that this event was being held just three days after the I-40 bridge shut-down." (Def.'s Resp. Facts, ECF No. 110 ¶ 59.)

posed as MPD Director Michael Railings. The Economic Crimes Bureau started the criminal investigation into this event under Case Number 1609004302ME." (Reynolds Aff., ECF No. 115-2 ¶ 16.) Sergeant Reynolds asserts that, in connection with this criminal investigation, he used a relationship developed by his online alias. (Id.) Similarly, Sergeant Reynolds asserts that he used his online alias to investigate a suspected hacking into the Memphis Zoo's computer system. (See id. ¶ 19.) With respect to that investigation,[18] Sergeant Reynolds asserts that he gained access to a private Facebook group called "Kessler Associates" and viewed individuals' posts in the private group. (See id.)

A police officer's use of an alias to develop online relationships with individuals and gain access to their private online groups may be perfectly appropriate as part of a criminal investigation, but it nevertheless "may result in the collection of information about the exercise of First Amendment rights, or interfere in any way with the exercise of such First Amendment rights." (Consent Decree § G(1).) Therefore, the Consent Decree requires such criminal investigations to be "immediately [brought] . . . to the attention of the Memphis Director of Police for review and authorization." (Id.)

Director Rallings testified that he does not recall issuing any written authorizations for any criminal investigations. (See Rallings Dep., ECF No. 107-53 at 3489.) The City argues that "[t]he absence of any testimony concerning the Director's involvement in a 'criminal investigation[']' under Section G by no means establishes a violation of this section." (ECF No. 112 at 4537 (emphasis in original).) The ACLU-TN does not point, however, to an *absence* of testimony about reviews and authorizations. Instead, the ACLU-TN points to specific testimony

[18] The investigation appears to have been a "lawful investigation of criminal conduct." (See Consent Decree § G(1).)

that Director Rallings does not recall conducting any reviews or authorizations for criminal investigations. (See Rallings Dep., ECF No. 107-53 at 3489.) It is impossible to definitively prove a negative, and such testimony is sufficient to shift the burden to the City "to set forth specific facts showing a triable issue of material fact." See Mosholder, 679 F.3d at 448-49; see also Fed. R. Civ. P. 56(e). The City has not done so. Accordingly, the record shows, by clear and convincing evidence, that the City did not review and issue written authorizations for at least some lawful investigations of criminal conduct that "may result in the collection of information about" or "interfere in any way with" the "exercise of First Amendment rights." (See Consent Decree § G.)

F. There is a genuine dispute as to whether the City has substantially complied with the requirement not to disseminate personal information "collected in the course of a lawful investigation of criminal conduct" to persons outside law enforcement agencies.

With respect to Section H of the Consent Decree, the City "admits that it inadvertently disseminated personal information about a few persons in several early JIBs to a limited number of non-law-enforcement persons." (ECF No. 112 at 4536.) The City explains, however, that the "MPD stopped circulating the JIB to non-law enforcement persons shortly after the practice started." (ECF No. 112 at 4536.)

There does not appear to be any dispute that the MPD disseminated personal information "collected in the course of a lawful investigation of criminal conduct" to persons outside "another governmental law enforcement agency then engaged in a lawful investigation of criminal conduct." (See Consent Decree § H(2).) If this practice was truly inadvertent and ended quickly, however, the City may be in substantial compliance with Section H of the Consent Decree. This is a factual issue to be examined at trial.

IV. CONCLUSION

For the foregoing reasons, the Consent Decree's definition of "political intelligence" does not depend on whether the conduct being investigated was "lawful" in the sense of being allowed under the City's ordinances and does not depend on whether the City's investigative acts were taken "for the purpose of intimidation or harassment." Therefore, the City engaged in "political intelligence" as defined and prohibited by the Consent Decree. There is a genuine dispute, however, as to whether the City operated any offices, infiltrated any groups, or disseminated any derogatory or false information about any individuals or groups for the *purpose* of "political intelligence." There is also a genuine dispute as to whether the City engaged in any action "for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights."

The record shows that, in violation of the Consent Decree, the City failed to review and issue written authorizations for at least some lawful investigations of criminal conduct that "may result in the collection of information about" or "interfere in any way with" the "exercise of First Amendment rights." There is a genuine dispute, however, as to whether the City has substantially complied with the requirement not to disseminate personal information "collected in the course of a lawful investigation of criminal conduct" to persons outside law enforcement agencies.

Accordingly, the ACLU-TN's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART, and the City's Motion for Summary Judgment is DENIED. The City has violated at least some provisions of the Consent Decree, and therefore, if the ACLU-TN succeeds in establishing standing at trial, the Court will determine the appropriate contempt

sanction. That sanction will depend, in part, on how many of the Consent Decree's provisions the City is determined to have violated and the details of the City's specific violations.

IT IS SO ORDERED, this 10th day of August, 2018.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE