

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

ELAINE BLANCHARD, KEEDRAN)	
FRANKLIN, PAUL GARNER and BRADLEY)	
WATKINS, (Dismissed per Court Order))	
Plaintiffs,)	
)	
and)	
)	
ACLU OF TENNESSEE, Inc.)	
Intervening Plaintiff,)	
)	No. 2:17-cv-02120-jpm-DKV
v.)	
)	
THE CITY OF MEMPHIS,)	
Defendant.)	
)	

PLAINTIFF’S TRIAL MEMORANDUM

Pursuant to Local Rule 16.4 of the District Court of the Western District of Tennessee, the American Civil Liberties Union of Tennessee (“ACLU-TN” or “Plaintiff”) files its Trial Memorandum.

This is a contempt action arising out of the conduct of the City of Memphis through its police department (the “City” or “Defendant”). Defendant’s violations of the Consent Decree entered in *Kendrick v. Chandler*, Civil Action No. C76-449 (the “Decree”) are numerous. These violations, when viewed together as a whole, reveal a system designed to do exactly what the Decree was established to prevent — to gather, index, file, maintain, store, and disseminate information related to “beliefs, opinions, associations or other exercise of First Amendment rights.”

In its August 10, 2018 Order, the Court granted Plaintiff's Motion for Summary Judgment in part and denied its Motion in part. ECF No. 120. The Court held that the City violated Section C(1) of the Consent Decree by engaging in "political intelligence" by gathering and disseminating information relating to their associations protected by the First Amendment in at least the following ways: (1) Creating the AOA & Adding the AOA's list of names to the City Hall Escort List; (2) Creating and Circulating the JIBs; and (3) Deploying Plainclothes Police Officers to photograph and identify participants at protest events. Id. at PAGE ID 4880-82. The Court held that the City violated the Decree by failing 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." Id. at PAGE ID 4884-86.

Pursuant to Plaintiff's reading of the Court's Order, the following factual issues remain for trial:

1. Whether Plaintiff has standing to enforce the Consent Decree. Id. at PAGE ID 4887.
2. Whether the City learn about particular lawful events by monitoring social media?

The Court held that, if the City learned about lawful events by monitoring social media, then 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. Id. at PAGE ID 4881-82, fn. 15.

3. Whether any of the following activities were conducted for the purpose of political intelligence in violation of Sections C(2), E, or F(1) of the Decree:

- a. The operation of any MPD office, division bureau or any other unit; Id. at PAGE ID 4882.
 - b. The infiltration of any groups, Id. at PAGE ID 4883; or
 - c. The dissemination of any derogatory or false information about any individuals or groups. Id.
4. Whether any of the following were conducted for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights in violation of Section F of the Decree:
- a. Photographing participants at public protests “for the purpose of chilling the exercise of First Amendment rights or for the purpose of maintaining a record.” Id.
 - b. Contacting individual organizers about planned events, Id. at PAGE ID 4884; or
 - c. Application of a different standard for protests than other events. Id.
5. Whether the City has substantially complied with the requirement found at Section H(2) of the Decree not to disseminate 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. Id. at PAGE ID 4886.

I. INTRODUCTION

In 1976 a former University of Memphis (then Memphis State) student discovered from his roommate, an undercover police officer, that the Memphis Police Department maintained a dossier on him. This revelation initiated a flurry of requests to the City of Memphis and its Police

Department for confirmation that it was maintaining political intelligence files on those engaged in constitutionally protected activity.

As the controversy grew to a crescendo, the mayor of Memphis ordered the objectionable files burned. Chan Kendrick, then Executive Director of the ACLU of Tennessee, Inc., Mike Honey and the American Civil Liberties Union in West Tennessee filed suit to put a stop to the police practices. *Kendrick v. Chandler*, Civil Action No. C76-449. The end result of the suit was a September 14, 1978 Order, Judgement and Decree that “prohibit[s] 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.” The Decree has been in full force and effect since that time.

II. STANDING

ACLU-TN was an original party to the 1976 *Kendrick* case, operating through its West Tennessee Chapter. ACLU-TN was formed in 1968. It was formed specifically to absorb the operations of three previously chartered corporations which served as ACLU affiliates for the state’s three grand division. The West Tennessee Civil Liberties Union, Inc. was a separate legal entity incorporated in 1966. The entity not a chapter of the ACLU-TN nor was it a party to the Kendrick litigation. By 1976, the West Tennessee Civil Liberties Union, Inc. no longer operated. The West Tennessee Chapter of the ACLU-TN, however, has been formed and was operating in Memphis at the time. As is evidenced in the by-laws, chapters operated under the close supervision and control of the ACLU-TN, while simultaneously providing fundraising support and handling litigation and local education efforts. Because the West Tennessee Chapter was a part of ACLU-TN, and not a separate and distinct legal entity, ACLU-TN is the original party in interest and has standing to enforce the Decree.

Even if the original Kendrick Complaint were filed by the West Tennessee Civil Liberties Union, Inc. and not a chapter of ACLU-TN, ACLU-TN was a successor-in-interest to the West Tennessee Civil Liberties Union, Inc, because it was operating as a chapter to the ACLU-TN and because of their close relationship and common purpose.

III. VIOLATION OF THE DECREE

The evidence, consisting of the testimony of MPD officers, testimony of community members, and internal MPD communications, will prove at trial the existence of a system operated for the purpose of engaging in political intelligence.

A. Legal Standard

As is true with any consent decree, the purpose of the parties is evidenced by the language of their agreement. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). The Decree, here, evidences an agreement between Plaintiff and Defendant to prioritize and protect the rights of the people of Memphis 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. To this end: The parties agreed to stop the investigation and gathering of information about people's beliefs, opinions, and associations; to stop the indexing, filing, maintenance, and storage of that information; and to stop the trafficking of that information where not related to a lawful criminal investigation. The Decree provided protections beyond that which is provided by the Constitution alone.

Consent decrees “bear some of the earmarks of judgments entered after litigation” and “[a]t the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.” *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (citations omitted). As the Supreme Court opined:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. . . . Naturally, the agreement reached

normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.*

United States v. Armour & Co., 402 U.S. 673, 681 (1971) (first and second emphases in original; third emphasis added). “A consent decree . . . should be strictly construed to preserve the bargained for position of the parties.” *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.1983).

Subjective assessment in determining an individual’s “purpose” is “notoriously difficult to prove.” *See Kungys v. United States*, 485 U.S. 759, 798–99 (1988). Accordingly, an objective inquiry into “purpose” is favored.¹ *Michigan v. Bryant*, 562 U.S. 344, 359–60 (2011). In an objective analysis, “[t]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” *Michigan*, 562 U.S. at 359–60.

Likewise, Plaintiff respectfully submits that the Court should adopt an objective analysis here. The determination of whether MPD has acted “for the purpose” of engaging in political intelligence must be based upon, not the subjective or actual purpose of the individuals involved,

¹ *See, e.g., Michigan*, 562 U.S. at 359–60 (applying objective analysis to officer’s “primary purpose” in conducting interrogation); *Kungys*, 485 U.S. at 798–99 (adopting objective analysis regarding whether a false statement has been made “for the purpose of obtaining a benefit under the immigration and naturalization laws”); *Whren v. United States*, 517 U.S. 806, 813 (1996) (refusing to evaluate Fourth Amendment reasonableness subjectively in light of the officers’ actual motivations); *New York v. Quarles*, 467 U.S. 649, 655–656, and n. 6 (1984) (holding that an officer’s subjective motivation is irrelevant to determining the applicability of the public safety exception); *Rhode Island v. Innis*, 446 U.S. 291, 301–302 (1980) (holding that a police officer’s subjective intent to obtain incriminatory statements is not relevant to determining whether an interrogation has occurred).

but rather the purpose that can be ascertained objectively from the statements and actions of MPD and its individual officers.

B. Defendant's Violations of the Decree

Plaintiff will prove at trial that Defendant did not just violate the Decree, Defendant disregarded it entirely. Defendant created a system for gathering information about beliefs, opinions, and associations related to the exercise of First Amendment rights through a specialized unit dedicated to that purpose. That specialized unit gathered information, indexed and analyzed it, and used it to engage in further investigations of those exercising First Amendment rights.

The unit posed as members of free speech groups and events, and used covert and undercover means to collect names, photographs, and statements of individuals at free speech events. The unit then systematically shared that information within MPD, to outside law enforcement agencies throughout the region, and to community members. The information shared was personal in nature, at times was damaging or derogatory, and pertained to ongoing and completed investigations, some of which were related to allegations of criminal activity and some of which were not. The purpose of the dissemination of information was that it pertained to the beliefs, opinions, associations, and expression of First Amendment rights. All of the unit's activity was conducted without appropriate oversight, without an analysis of whether the methods were overbroad or intruded upon First Amendment rights, and without consideration of whether the requirements of the Decree were met.

Each individual incident or activity violated the Decree, but more than that, each individual incident was part of a system of violations that resulted in the magnification of harm.

1. Decree § C(2) — Prohibition of Political Intelligence Unit

Defendant violated Section C(2) of the Decree by operating the Office of Homeland Security (“OHS”) as a unit dedicated to the collection and dissemination of political intelligence.

OHS is a specialized unit within MPD “originally designed to deal with threats to the Memphis Police Department or Memphis in general”; it shifted its mission in recent years to focus on “local individuals or groups that were staging protests.” OHS functioned as a hub for gathering and disseminating intelligence between Command staff, RTCC, precincts where events were to take place, the permit’s office and other specialized units, such as the Organized Crime Unit and the Multiagency Gang Unit.

The Real Time Crime Center (“RTCC”) assisted OHS in investigating free speech activities through monitoring of live camera feeds, general and targeted social media account research, and application of powerful software analysis to map the relationships between individuals and events.

In pursuing its mission, OHS collected and disseminated intelligence regarding political activists and individuals who participated in protests, rallies, or other free speech activities in the City. OHS conducted research on individuals that “may have something to do with either Keedran Franklin or the CCC” and prepared the AOA for the Mayor’s residence and City Hall; OHS prepared and distributed dossiers on each of the members of the list. OHS prepared and circulated JIBs, created and maintained a database of protests, and conducted weekly power point presentations regarding activists and protest groups. MPD collected information for OHS through electronic surveillance and investigation of public and private social media accounts, through ground surveillance of public free speech events through uniformed and undercover officers, and through covert surveillance of private events. OHS aggressively contacted individuals who were

perceived to be organizing free speech events. Each of these acts constitutes its own violation of the Decree.

2. Decree § C(1) — Prohibition of Political Intelligence

As found by the Court, Defendant violated Section C(1) of the Decree by engaging in the systematic gathering, indexing, filing, maintenance, storage and dissemination of information, or any other investigative activity, relating to person's beliefs, associations or other exercise of First Amendment rights.

In addition to the specific findings of the Court, MPD, and specifically OHS and RTCC, violated Section C(1) by collecting information about political activists, protests, and groups through public and private sources. MPD collected information for OHS through electronic surveillance and investigation of public and private social media accounts and by using software to map associations between individuals based on their beliefs, opinions, and associations. Ground surveillance of private events was used when there was no threat of "potential social discord" and when the only purpose for surveillance could have been for the purpose of engaging in political intelligence. MPD covertly surveilled the memorial service of a young man who was killed by law enforcement which was held at a church, reporting back who was in attendance and details as minute as the fact that a tree was planted in his honor.

In addition to the violation of Section C, the dissemination of personal information also violates Section H of the Decree. The exchange of political intelligence with law enforcement agencies, not in the course of a lawful criminal investigation, also violates Section I of the Decree.

3. Decree § E — Prohibition of Covert Surveillance, Informants, and Undercover Work

Defendant violated Section E of the Decree by covertly surveilling groups engaged in free speech activities for the purpose of gathering and disseminating information relating to any

person's beliefs, opinions, associations or other exercise of First Amendment Rights.

Defendant engaged in covert electronic surveillance through the Facebook account under the pseudonym "Bob Smith." Defendant used the "Bob Smith" account to communicate with community members, to view private posts, to join private groups, and otherwise to pose as a member of the activist community.

In addition, Defendant employed undercover officers to gather intel on protestors. Defendant sent officers to public forums to gather intel, to "sit down and listen" and to try to find out "the intentions" of those in attendance. OHS used an undercover phone to gain access to private group communications and sent undercover officers to private meetings.

4. Decree § F — Prohibition of Harassment & Intimidation

Defendant violated Section F of the Decree by circulating personal and confidential information about individuals involved in the exercise of their free speech rights, including but not limited to arrest and mental health records and information regarding ongoing investigations. This information was circulated in the JIBs multiple times a day both within MPD, outside of MPD to regional law enforcement, and even to members of the community. JIBs also included information that was damaging, derogatory, and mere rumor. Defendant's purpose in disseminating this information related directly to the beliefs, opinions, associations or other exercise of First Amendment Rights expressed.

Defendant also violated Section F of the Decree by specifically engaging in conduct used as an example of a violation; as detailed above, Defendant regularly named and photographed individuals exercising their First Amendment rights by attending meetings and free speech events. Defendant engaged in this conduct "for the purpose of chilling the exercise of First Amendment rights" and "for the purpose of maintaining a record."

Defendant discouraged the exercise of First Amendment rights by enforcing different standards for obtaining a permit for protests than other types of events. And, Defendant chilled the exercise of First Amendment rights by aggressively contacting event organizers and questioning them regarding their agenda and their affiliations. These disparate standards and aggressive conduct were for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights.

IV. CONCLUSION

A Court has an “affirmative duty to protect the integrity of a [consent] decree.” *United States v. State of Mich.*, 62 F.3d 1418 (6th Cir. 1995) (quoting *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)). In doing so, the court enjoys broad discretion to determine how best to enforce a decree. “The measure of the court’s power in civil contempt proceedings is determined by the requirements of full remedial relief.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193, 69 S. Ct. 497, 500 (1949). The only limitation is that the Court’s remedy must not be punitive in nature. *N.L.R.B. v. Aquabrom, Div. of Great Lakes Chem. Corp.*, 855 F.2d 1174, 1187 (6th Cir.), *order amended and supplemented*, 862 F.2d 100 (6th Cir. 1988).

As set forth above, the Defendant has demonstrated an unwillingness to abide by the terms and restrictions of the Consent Decree and has engaged in pervasive and willful violations of almost every provision. To achieve “full remedial relief,” Plaintiff asks the Court to use its contempt powers to effectuate compliance with those provisions. Respectfully, Plaintiff requests that the Court order Defendant to conduct yearly training for all law enforcement personnel on the Decree. Personnel who work in departments that are engaged in activity that are more likely to implicate the decree, such as OHS and RTCC, should receive advanced training to ensure their understanding and compliance with the Decree.

Plaintiff also requests that the Court appoint a monitor to oversee compliance with the Decree's restrictions on gathering political intelligence. The monitor should have access to information necessary to determine whether Defendant continues violation of the Decree, including files and data associated with social media collators and police actions that involve free speech events. The monitor should also ensure that criminal investigations that implicate political intelligence are properly authorized by the Director of Police. The monitor should remain in place for a reasonable period to ensure continued compliance by Defendant with the Decree. The Defendant should be charged with paying the costs of the monitor, as well as the costs and attorneys' fees associated with this action.

V. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff propose the following findings if fact and conclusions of law

A. Findings of Facts

1. In 1976 American Civil Liberties Union of West Tennessee, Inc. was existing as a chapter of ACLU-TN.

2. Under the By-Laws in existence at the time, chapters were chartered under the Authority of ACLU-TN and who wholly

3. The West Tennessee chapter was not a separate legal entity but rather a local office of ACLU-TN operating its business in West Tennessee.

4. Its existence was entirely dependent on the ACLU-TN and it was required to report its activities to ACLU-TN.

5. In addition to the violations found by the Court in its August 10, 2018 Order, Defendant has also violated Section C(1) of the Decree in at least the following ways:

- a. recording the identity of “Key Members” involved in protests to track the “pattern” of who attended unpermitted events;
- b. using software to map associations between individuals based on their beliefs, opinions, and associations; and
- c. online monitoring of lawful events and information about the exercise of First Amendment rights on social media to use as underlying information for the Joint Intelligence Briefings.

6. Defendant operated Office of Homeland Security and the Real Time Crime Center for the purpose of accomplishing those acts of gathering political intelligence which have been found to violate the remaining provisions of the Decree, including the gathering, indexing, filing, maintenance, storage and dissemination of information, or any other investigative activity, relating to any person’s beliefs, opinions, associations or other exercise of First Amendment rights.

7. Defendant infiltrated community activist groups electronically through the Bob Smith account, through the employ of undercover phones, and through the placement of undercover officers for the purpose of gathering and disseminating information relating to any person’s beliefs, opinions, associations or other exercise of First Amendment rights.

8. Defendant harassed persons exercising their First Amendment rights.

9. Defendant disseminated damaging and derogatory information about any individuals or groups for the purpose of disseminating information relating to any person’s beliefs, opinions, associations or other exercise of First Amendment Rights.

10. Defendant photographed participants at public protests for the purpose of chilling the exercise of First Amendment rights and for the purpose of maintaining a record.

11. Defendant contacted individual organizers about planned events for the purpose of,

or reasonably having the effect of, deterring any person from exercising First Amendment rights.

12. Defendant applied different standard for protests than other events for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights.

13. The City continually 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. The practice was not inadvertent or quickly ended.

B. Conclusions of Law

14. Plaintiff has standing to enforce the Decree through this action.

15. In addition to the violations found by the Court in its August 10, 2018 Order, Defendant has also violated Section C(1) of the Decree by recording the identity of “Key Members” involved in protests, mapping protestors associations and beliefs and online monitoring of lawful events and information about the exercise of First Amendment rights on social media

16. Defendant violated Section C(2) of the Decree by operating the Office of Homeland Security and the Real Time Crime Center, at least in significant part, for the purpose of engaging in political intelligence.

17. Defendant violated Section E of the Decree by infiltrating groups for the purpose of political intelligence.

18. Defendant violated Section F(1) of the Decree by harassing persons exercising their First Amendment rights.

19. Defendant violated Section F(1) of the Decree by dissemination of damaging and derogatory information about any individuals or groups for the purpose of disseminating

information relating to any person's beliefs, opinions, associations or other exercise of First Amendment Rights.

20. Defendant violated Section F(2) of the Decree by photographing participants at public protests for the purpose of chilling the exercise of First Amendment rights and for the purpose of maintaining a record.

21. Defendant violated Section F(2) of the Decree by contacting individual organizers about planned events for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights.

22. Defendant violated Section F(2) of the Decree by applying different standard for protests than other events for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights.

23. Defendant has not substantially complied with the requirement found at Section H(2) of the Decree not to disseminate personal information.

24. Given the breadth of violations of the Decree, court-ordered monitoring of the Memphis Police Department is appropriate. to ensure compliance with the Decree and prevent future contempt of the Decree

25. Additional and robust training on the first amendment rights of individuals, particularly the right to protest and peacefully assemble, should be given to all MPD officers.

26. Officers involved in OHS and RTTC should receive more specific training on political intelligence and the prohibitions contained in the Decree.

27. Plaintiff is entitled to costs and attorneys' fees associated with this contempt action.

Respectfully submitted,

/s/ Thomas H. Castelli

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CERTIFICATE OF SERVICE

I certify that on August 15, 2018 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via electronic mail to:

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