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

ACLU of TENNESSEE, INC.

PLAINTIFF,

v. Case No. 2:17-CV-02120-JPM-egb

THE CITY OF MEMPHIS,

DEFENDANT.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO MODIFY AND/OR VACATE JUDGMENT

INTRODUCTION

On September 14, 1978, the Court entered a Consent Order and Decree (the "Consent Decree") in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). (*See* Consent Decree, ECF 9-1). The provisions of the Consent Decree are directly at issue in this litigation. This Court has assumed jurisdiction over the Consent Decree.

In an Order entered August 10, 2018 (ECF 120) the Court granted summary judgment in part to the plaintiff, stating that the City had violated Sections C(1) and G of the Decree in several enumerated respects. (ECF 120 at 4880-4882, 4886). The Court also, however, observed that in the event that the Consent Decree "…is outdated due to a change in legal or other circumstances, the City is free to file a motion to modify the Consent Decree." *Id*. at 4877. The Court noted that the City intimated its intention, if necessary, to file a Motion under Fed. R. Civ. P. 60(b) to do just that. *Id.* at 4877. The City now pursues this remedy.[1]

[1] In an Order entered June 30, 2017 (ECF 41) the Court dismissed four individual plaintiffs who were not parties to *Kendrick* on the grounds they lacked standing to enforce the Consent Decree. Even before that dismissal, on April

LEGAL DISCUSSION

Applicable Legal Standard

In *John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013) a panel of the Court of Appeals for the Sixth Circuit discussed the propriety of using Fed. R. Civ. P. 60(b)(5) to terminate a consent decree under circumstances where the record...."does not provide us with any lawful basis to continue enforcement of the decree." *Id*. at 413. In taking this action, the court pointedly noted that "[c]onsent decrees are not "entitlements." Instead, a decree may remain in force only so long as it continues to remedy a violation of federal law." *Id.* at 398.

The court, after examining the details of a series of rulings and findings made by lower courts in a long-running consent decree involving TennCare, affirmed the district court's decision to terminate the decree.

> TennCare argued that its program had 'complie[d]' fully with governing provisions of the Medicaid statute[,] 'and that the district court should vacate the decree on that basis. In support, TennCare cited the Supreme Court's decision in *Horne v. Flores*, 557 U.S. 433…(2009). There, the Court held, in determining whether to grant a Rule 60(b)(5) motion in institutional litigation, that the district court and court of appeals alike must determine whether 'ongoing enforcement of the original order [is] supported by an ongoing violation of federal law[.]' [page citations omitted]. Thus, we think it fair to construe TennCare's alternative argument as one for relief under Rule 60(b)(5) on the ground that ongoing enforcement of the Decree would not remedy an ongoing violation of federal law….so we consider whether the Supreme Court's decision in *Horne* requires affirmance here.
>
> *Id*. at 411.

Emkes, citing Sixth Circuit authority, stated that "[a] party can ask a court to vacate a consent decree 'if a significant change…in factual conditions…renders [its] continued

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4, 2017, during a conference with the attorneys, counsel for the four dismissed plaintiffs advised that an original party to the *Kendrick* case, Mike Honey, would be seeking to join the litigation. (ECF 31). The Court granted permission for this joinder, providing a time limit for doing so. Mr. Honey, who, counsel advised has not lived in Memphis for many years, did not seek to join the lawsuit. Other than one other *Kendrick* plaintiff -- Mr. Kendrick himself, who on information and belief has also not lived in Memphis for many years, the ACLU corporate entity which intervened in this case is the only other potential party entitled to assert rights or seek enforcement of the Consent Decree. For that reason, this Motion is being filed in the present litigation.

enforcement detrimental.'" *Id*. at 412 (citing *Northridge Church v. Charter TWP of Plymouth*, 647 F.3d 606, 613 (6th Cir. 2011). Citing further from the United States Supreme Court's *Horne* decision, the court noted that "we must take a 'flexible approach' to these motions so that responsibility for discharging the state's obligations is returned promptly to the State and its officials when the circumstances warrant. [Citation omitted.]" *Id*.

The court established the following two-prong test in applying "this flexible approach":

> First, whether the State has achieved compliance with the federal-law provisions whose violation the decree sought to remedy and second, whether the State would continue that compliance in the absence of continued judicial supervision. [Citing cases].

The Court in *Emkes* emphasized the importance of determining, in the context of a motion such as this, whether "ongoing enforcement of the original order [is] supported by an ongoing violation of federal law[.]" *Id*. at 413 [citing to *Horne*]. Based on these principles, the *Horne* Court emphasized the "flexible" approach to Rule 60(b)(5) motions addressing consent decrees as adopted in the *Rufo* case. *Id.* at 449. As noted by the *Emkes* court, *Horne* stands for the principle that "…courts must remain attentive to the fact that 'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation.'" (citing *Milliken v. Bradle*, 433 U.S. 267 (1977) *Id.* at 450.

Previous Sixth Circuit authority, including authority distinguished in the *Emkes* case, (*see Gonzales v. Galvin*, 151 F.3d 526 (6th Cir. 1998)), *Emkes*, 710 F.3d at 414, implied a more restrictive standard for modifying or vacating consent decrees. But as the *Emkes* panel noted, "*Horne* trumps *Gonzales*…." *Id. Horne* similarly trumps any pre-existing authority purporting to establish a more cumbersome and restrictive methodology when determining whether to vacate, or for that matter, modify, a consent decree. *See also Inmates of the Suffolk County Jail*

v. Rapone, 502 U.S. 367, 384 (1992)(modification of a consent decree may be warranted when changed factual circumstances make compliance with the decree substantially more onerous).

Horne v. Flores, 557 U.S. 433 (2009) reversed lower courts which declined to set aside or modify a long-running institutional consent decree. In *Horne*, the Supreme Court emphasized the language in Fed. R. Civ. P. 60(b)(5) permitting a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." *Id*. at 447. Citing *Rufo v. Inmates of Suffolk County Jail,supra*, the Court stated that the Rule provides "…a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or law' renders continued enforcement 'detrimental to public interest.'" *Id*. The party seeking such relief bears the burden of establishing the change of circumstances warranting the relief, but once a party carries this burden, a court abuses its discretion when 'it refuses to modify an injunction or consent decree in the light of such changes.'" *Id*. (citing *Agostini v. Felton*, 521 U.S. 203 (1997)).

During the course of its analysis, the *Horne* Court also made the following observation:

> Rule 60(b)(5) serves a particularly important function in what we have termed 'institutional reform litigation.' [omitting citation] For one thing, injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances - changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights, that warrant re-examination of the original judgment.

Id. at 447-448. The Court also noted that "…institutional reform injunctions often raise sensitive federalism concerns." *Id*.

In the course of providing guidance to the Court of Appeals on remand, the *Horne* Court stated that its "flexible approach" "allows a court to recognize that the longer an injunction or

consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic process." *Id*. at 453.

Evidence in the Record Justifying Modification or Vacating Consent Decree

The City has noted in its summary judgment pleadings (ECF 106-1 at 2720) and in its contentions section of the Pre-Trial Order that the record in this case does not establish that the City has violated the constitutional rights of anyone, particularly with respect to its proactive efforts to balance the interests of individuals lawfully participating in protest activities with the rights of the public to be free from violent, unlawful, and disruptive protest activities falling outside the confines of First Amendment protection. *See also* Memorandum in Support of the City's Motion for Summary Judgment (ECF 106-1 at 2733-2734)(summarizing clarification of law since entry of Consent Decree requiring objective evidence of the chilling of First Amendment rights in order to establish an independent constitutional violation).

The practices which are the subject of the Court's present finding of a violation of the Consent Decree do not constitute independent federal constitutional violations, and are similar to measures used by other municipalities throughout the country. In other words, while the Court has found certain specific violations of the Consent Decree itself, absent a finding of independent constitutional violations, the "flexible" approach outlined in *Horne* and *Emkes* justify consideration of either a substantial modification of, or vacating entirely, the Consent Decree.

The uncontroverted evidence in the case includes the expert witness report of former Assistant U.S. Attorney and Memphis Police Officer Fred Godwin (ECF 67-1). Mr. Godwin, whose service in the U.S. Attorney's office for the Western District of Tennessee included supervising the National Security Unit within that office, which itself through the FBI's Joint Terrorism Task Force, had a Memphis Police liaison. Throughout this period of time and still,

after retiring from federal government service, Mr. Godwin has first- hand personal knowledge of the Memphis Police Department including the difference between the culture and level of training on protection of constitutional rights between the Memphis Police Department as of the date of the entry of the Consent Order, and now (ECF 67-1 at 635-636), the shift in law enforcement "best practices" from a "reactive" to "proactive" approach to community policing (ECF 67-1 at 636,641,644), and the pervasive impact of increasing use of social media in today's world, including its utility -- as well as its necessity -- as a proactive law enforcement tool. (ECF 67-1 at 637-642).

Sections of the Decree Requiring Modification

In the event that the Court modifies rather than vacates the Consent Decree, the City asserts that the following Sections of the Consent Decree require significant modification:

Section C(1)'s Prohibition of "Political Intelligence"

This definition (Section B) is too broad and ambiguous.[2] The prohibition against "engaging" in this activity, particularly without requiring an improper motivation on the part of law enforcement officials, runs contrary to well established "best practices" across the country and is a key element of proper planning for events in which large crowds may gather, such as high profile protest events where protesters and counter protesters are expected to come into contact with each other or so called "flash mobs." *See, e.g.*, Godwin Report (ECF 67-1 at 640-641, 646); *see also* Independent Review Report on 2017 Protest Events in Charlottesville, Virginia (ECF 109-3, 4007-4119) (the aggressive monitoring of social media before the protest and counter-protest events in Charlottesville were acknowledged to be of great utility to law enforcement officials.) The Police Director in Charlottesville, in fact, lamented the lack of

[2] The ambiguity is furthered because the terms as defined by the consent decree are inconsistent with the plain and ordinary meanings of “political” and “intelligence”.

"advanced capabilities" for even more aggressive monitoring of social media "…that might have helped the Department anticipate these events." (ECF 109-3 at 4049).

A substantial modification of, or elimination entirely of the existing definition of "political intelligence" would impact several other sections of the Consent Decree, some of which are at issue presently in this litigation, regarding law enforcement actions done for "the purpose of political intelligence." For this reason, resolving the overly broad and restrictive nature of what the Court has termed an "absolute" prohibition (ECF 120 at 4879) is the key to any significant modification of the Consent Decree.[3]

Sections D and E Prohibitions on "Electronic" and "Covert" Surveillance

In addition to the necessity to significantly revamp or eliminate entirely the existing definition of "political intelligence", the language and terminology employed in this section of the Consent Decree is outdated and unduly restrictive in the world of social media. Particularly with reference to social media monitoring, any prohibition upon or restriction on monitoring social media posts should be made consistent with existing protections and limitations associated with the First and Fourth Amendments to the United States Constitution, nothing more or less.

Overly Broad and Ambiguous Language in Section F

This Section addresses "harassment and intimidation" of individuals asserting First Amendment rights. As an initial matter, of course the City does not believe it should harass or intimidate persons for exercising their First Amendment rights. To do so would be tantamount to violations of constitutional rights regardless of whether the Consent Decree existed. The language in the Consent Decree, however, is extremely broad and ambiguous in several respects as to what might constitute such behavior. Responding to an inaccurate social media post might

[3] Changing or eliminating the definition of "political intelligence" would also necessarily impact the prohibition in Section C(2) from the City "operating" or "maintaining" any "office" for the purpose of engaging in this activity.

be considered by some "disruption" or "discrediting" individuals making public statements (often on social media) on different issues. Such statements made by or on behalf of a City representative might also be considered an attempt to provoke "disagreement" or "dissention" between individuals interested in that issue. Is the City prohibited from enforcing, or required to ignore or vacate its local ordinance requiring a permit for public assemblies (as defined therein) or risk being considered to "disrupt" free speech? Is the City prohibited from seeking additional information from persons who have applied for a public assembly permit?

The blanket prohibition against "record[ing] a name" or license plate number of anyone attending a "lawful meeting or demonstration" -- "for the purpose of making a record", is similarly broad and subject to misinterpretation. Some of the modern tools of law enforcement, including but not limited to "body cams", record what they record in a variety of law enforcement related encounters. Are police required to turn off their body cameras when present at a protest? Is taking a drivers' license or checking a vehicle registration at a protest for a car parked in a handicap zone, or pulled into the middle of a public intersection, a violation of this section of the Decree? Does a body cam or "Sky Cop" image of someone attending such an event, stored for a period of time or made available through the Cloud by the City's computer systems, a violation of the Consent Decree? Are SkyCop cameras and vehicle license reader technology placed at the request of businesses and residential neighborhoods, but connected to city wifi and which store images for a period of time, violations of the Consent Decree?

Section G: Requirement of Written Authorization of the Police Director

This Section, read literally, appears to limit the ability of the Memphis Police Department to investigate potential threats to public safety, including very real threats to protesters and

counter-protesters in certain cases, to a "lawful investigation of criminal conduct."[4] It is completely untenable in today's world to so restrict law enforcement officers from monitoring and disseminating information about, and putting themselves in position to plan for violent or disruptive events except where there is a formal investigation -- authorized by no less than the Director of Police in writing -- of the activity in question.

Unless the Court is prepared to differentiate between investigations of "unlawful" speech or conduct and a "criminal investigation", the requirement that the Director personally issue such written directives, after engaging in the soul-searching process presently set forth in Section G (2)(a-c), is, as observed by the City in its pretrial submissions, impossible. If, that is, the Director is expected to do anything else.

Section H's Prohibition Against "Maintenance and Dissemination of Information"

The pervasive nature of the collection of data by private entities such as Facebook and Google is certainly an issue in today's world. The City agrees that its citizens should not have to provide personal information about themselves to any governmental entity except as reasonably necessary for those entities to efficiently operate. But this Section of the Consent Decree, read literally, would preclude any city official from obtaining any personal information for any reason. It is not limited to "political intelligence" or First Amendment activity.

Read literally, as one presumes must now be the case, this Section would preclude the City's Department of Human Resources from maintaining records of city employees, preclude requiring "personal information" on all applications for any type of city permit, even preclude the recordings of names and addresses in the City's tax and other administrative office records. It would make the video recording of City Council meetings, where people provide public

[4] Read literally, this section requires the Director to provide written approval each time an officer needs to enter driver's license information during a traffic stop or record personal information on an accident report.

comments after providing their names and addresses, unlawful. It would preclude the scanning of drivers' licenses for persons visiting City Hall so that a name tag can be generated, and keeping a sign-in log for all visitors. The Consent Decree at present only allows the "maintenance and dissemination" of such "personal information (a term not defined in the Consent Decree) "in the course of a lawful investigation of criminal conduct," which excludes all the aforementioned examples.

As is the case with Section G's onerous obligations on the Director, as a practical matter, Section H's restrictions make it impossible for the City to operate as a modern form of government.[5]

Section I's Restriction on "Joint Operations"

One would think it is a good thing for law enforcement agencies to cooperate with each other. Certainly in today's world this is not only advisable, but necessary. The City has participated for many years in a federal directed Joint Terrorism Task Force. The Memphis Police Department works closely with the Shelby County Sheriff's Department in a variety of ways, including coordination of activities between City and County drug and gang related investigations.

The Consent Decree, however, "restricts" such operations, in ways that are not entirely clear.[6] Since the Consent Decree will not even allow the Memphis Police Department to "cooperate with" other law enforcement agencies on anything "prohibited by this Decree", it would appear that the Police Department would not be able to do such things as cooperate in a

[5] The City anticipates a response from the plaintiff on this and other specific problems with the language of the Consent Decree to be "of course we would never interpret this provision in such an absurd fashion." But the City can't assume any such thing. The Decree says what it says. With the exception of criminal investigations, the Section's prohibition on the "maintenance of personal information" is, as the Court observed with respect to the prohibition of engagement in "political intelligence", "absolute."(ECF 120 at 4879).

[6] Although an alleged violation of Section I of the Consent Decree is not referenced in the Pre Trial Order, the Intervening Plaintiff slips in a reference to an alleged violation of this section in its Trial Memorandum. *See* Intervening Plaintiff's Trial Memorandum, ECF 121 at 4897.

federal or state directed investigation -- short of an actual "criminal investigation" -- into such things as suspected online attempts by networks of pedophiles to establish contact with children for unlawful purposes, or suspected gang activity closely associated with unlawful behavior. Being a member of a gang, after all, is not in and of itself unlawful. Nor is expressing the (reprehensible) opinion that laws prohibiting sex between adults and minors are unjust. Without more, these rights of association and opinion are protected First Amendment rights, and the Consent Decree restricts the Police Department's own "investigatory" activities into anything arguably related to First Amendment conduct to "criminal investigations" -- an unnecessarily stringent standard for investigative activity relating to potentially dangerous, harmful, and unlawful behavior.[7]

Sunset Clause

If this Consent Decree is not vacated, it needs a sunset provision. The present Consent Decree, in the view of the City, was never intended to apply prospectively this long.[8] The City asks that the Court provide a reasonable sunset provision or other provision clearly establishing that it is not intended to remain in effect in perpetuity.

CONCLUSION

For the reasons set forth above, and subject to further proposed modifications or revisions as considered reasonable or necessary by the City, the City respectfully moves to vacate, or substantially modify, the Consent Decree.

[7] The City respectfully asserts that the permissible scope of social media monitoring under the Consent Decree reflected in fn. 15 of the Court's August 10 Order (ECF 120 at 4881-4882) does not (and really, cannot) provide a workable set of guidelines for law enforcement officers responsible for monitoring social media for public safety and protection purposes.

[8] The City acknowledges that the Court disagreed with this position, (ECF 41 at 520). To the extent the Court takes the position that it has already ruled on this issue, the City requests that the Court reconsider and revisit the issue.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018 the foregoing will be served by this Court's ECF system to:

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/s Jennie Vee Silk
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