

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

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

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Defendant, the City of Memphis ("the City") responds to Plaintiff's Motion for Summary Judgment.¹

I. INTRODUCTION

Throughout the Intervening Plaintiff's Memorandum there is an undertone of skepticism over the right of the Memphis Police Department ("MPD") to conduct legitimate law enforcement activities to protect the public if those activities intersect in any manner with "free speech." *See* Pl.'s Memorandum in Support of Motion for Summary Judgment (ECF No. 79-1) (hereafter, "Pl.'s Memo."), at p. 4 ("The City Hall Escort List was typical of the practices of MPD and OHS with respect to the collection and dissemination of information regarding those who communicated their ideas and beliefs and who spoke and dissented freely."); p. 5 (criticism of OHS for focusing upon "local individuals or groups that were staging protests"); p. 10 ("These cameras, which include fixed, mobile, drone, covert and overt types, have been used to surveil

¹ The City filed its own Motion for Summary Judgment on the Issue of Contempt (ECF No. 81). The City incorporates and references the Memorandum in Support of that Motion ("Def.'s Memo. in Supp.") as well as its Statement of Undisputed Material Facts in some instances in this brief. The City's documents were filed under seal, so no PageIds are available.

protest activity in the City."); p. 11 ("As part of their duties RTCC officers conducted social media monitoring of protests or potential protests and reported the results of their monitoring to OHS"). The Intervening Plaintiff's Memorandum also takes issue with the concept of surveillance or monitoring of activities occurring on private property, (Pl.'s Memo. at pp. 7, 12-13), and the possibility of the MPD accessing private social media accounts as a part of its undercover activities. (*Id.* at p 12.)

As a matter of constitutional law, the First Amendment does not provide the "absolute" right to free speech. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *Brandenburg* established the principles of limited protection of speech that constitutes "incitement." *Id.* at 447. Other cases have extended the principle to "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973) and limited protection for libelous statements against public officials, *New York Times Co. v. L.B. Sullivan, et al.*, 376 U.S. 254, 279-80 (1964). In actuality, under traditional constitutional principles, litigants who challenge government actions based upon an alleged chilling of First Amendment activities face a significant hurdle in establishing the presence of concrete harm. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *ACLU v. National Security Agency*, 493 F.3d 644, 663, 665 (6th Cir. 2007). *Philadelphia Yearly Meeting v. Tate*, 519 F.2d 1335, 1337-39 (3rd Cir. 1975) (dismissing claim that the practice of police photographing and data gathering at public meetings constituted anything more than "subjective chill" of First Amendment rights). In the Sixth Circuit, it is clear that the good faith investigation/surveillance activities of a governmental entity does not implicate the First Amendment even though it may be directed at associative or communicative activities. *National Security Agency*, 493 F.3d at 657. Police surveillance is not necessarily constitutionally suspect even if the focus of an investigation was directed at

particular socio-political groups exercising First Amendment rights. *Gordon v. Warren Consol. Bd. of Education*, 706 F.2d 778, 781 (6th Cir. 1983).

The First Amendment, it must be noted, does not directly protect privacy rights. There is nothing inherently constitutionally suspect about government or police observation of events occurring on private property in full public view, or attending a meeting open to the public. "[P]ersons cannot reasonably maintain an expectation of privacy in that which they display openly." *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 181 (1st Cir. 1997). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)). Consequently, no legitimate expectation of privacy exists in objects exposed to plain view as long as the viewer's presence at the vantage point is lawful." *Id.*; see *Horton v. California*, 496 U.S. 128, 133 (1990). Although the Fourth Amendment provides a privacy based level of protection against governmental activity involving warrantless "seizures" of private communications - see *Katz*, 389 U.S. at 353, an individual has no Fourth Amendment claim when the government acquires information that has been given voluntarily to a third party. *California v Greenwood*, 486 U.S. 35, 40-41 (1988) (no reasonable expectation of privacy in garbage bags left for collection); *United States v. Miller*, 425 U.S. 435, 442 (1976) (upholding subpoena based upon absence of legitimate expectation of privacy because financial information was voluntarily conveyed to banks and exposed their employees in the ordinary course of business); see also *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (applying third party doctrines to subscriber information for internet bulletin board and noting that "computer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person - the system operator"). No one has a protected privacy right in

social media posts to "friends" on Facebook or similar platforms, since those "friends" are free to share the information given with anyone including the government. *United States v. Meregildo*, 883 F. Supp. 3d 523, 525 (S.D.N.Y. 2012); *Palmeri v. United States*, 72 F. Supp. 3d 191, 209 (D.D.C. 2014).

There would be no cognizable First Amendment-based claim in this case, at least not one purporting to be demonstrated on a summary judgment motion, under presently existing case law. Instead, the Intervening Plaintiff focuses on the *Kendrick* Consent Decree (hereafter, "the Consent Decree") as a contract-based expansion of the rights provided under constitutional principles. Read properly, however, the Defendant urges the Court to hold that the Decree is best interpreted as a cautionary reminder to the City and its police division of the importance of protecting First Amendment principles, and not taking action with the express purpose of infringing on those rights. The Consent Decree was not intended to, and should not, override existing First Amendment rights and limitations, nor should it prevent the Memphis Police Department from utilizing current law enforcement best practices to protect the public.

II. EVIDENTIARY STANDARD OF CONTEMPT FINDING

The evidentiary standard applicable to a contempt finding is applicable to this motion for Summary Judgment. The plaintiff has the burden of providing "clear and convincing evidence" of a violation of the Consent Decree which forms the basis for this lawsuit and motion. *See, e.g., NLRB v. Cincinnati Bonds, Inc.*, 829 F. 2d 585, 590 (6th Cir. 1987). "Only if the plaintiff establishes a prima facie case for contempt does the burden shift to the defendant to produce evidence sufficient to overcome the motion." *Electric Workers Pension Trust Fund of Local Union 58 IBEW v. Gary's Elec. Co.*, 340 F.3d 373, 382 (6th Cir. 2003). This is "not a light burden and should not be confused with the less stringent proof by a preponderance of the

evidence." *Id.* at 379. Each violation of the Order must be supported by clear and convincing evidence. *See Glover v. Johnson*, 934 F.2d 703, 710-713 (6th Cir. 1991).

The heightened evidentiary standard for making a finding of contempt is applicable at the summary judgment stage of proceedings. *Anderson v Liberty Lobby*, 477 U.S. 242, 255-256 (1986); *see also St. v. J.C. Bradford & Co.*, 886 F.2d 1472,1479 (6th Cir. 1989); *Harvey v. Brewster*, No. 1:14-CV-00124, 2016 WL 1246082, at *5 (M.D. Tenn. March 24, 2016) ("[H]as the moving party 'clearly and convincingly' established the absence of material facts?"). To the extent that the Intervening Plaintiff in this case is found to have met that standard (a contested proposition here), the burden would shift to the City to demonstrate that it took "all reasonable steps within [its] power to comply with the court's order." *In re Chrystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987); *Peppers v. Barry*, 873 F. 2d 967, 969 (6th Cir. 1989). Precisely what such "reasonable steps" might be varies from case to case according to the requirements of the order and the circumstances of each case. *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1948). The ultimate test is not complete but "substantial compliance" with the order. *Peppers*, 873 F. 2d at 968.

In the present case, the issue of substantial compliance should be viewed against the backdrop of significant modern day threats to the public in the aftermath of 9-11. The advent of social media requires the review of the facts of this case to be viewed through a lens which recognizes historical context and current needs of police forces in protecting the public.

III. THE PLAINTIFF HAS NOT ESTABLISHED "CLEAR AND CONVINCING EVIDENCE" OF A FAILURE TO SUBSTANTIALLY COMPLY WITH THE *KENDRICK* CONSENT DECREE.

The Intervening Plaintiff's 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 which the plaintiff seeks to protect, as well as the MPD.

For example, the City is precluded from operating any office, division, bureau or unit "for the purpose of engaging in political intelligence." (Consent Decree at p. 16) (emphasis added). The Consent Decree further prohibits the City from covert surveillance and electronic surveillance "for the purpose of political intelligence." (*Id.*) (emphasis added).

"Political Intelligence" is defined in the decree as "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." (Consent Decree at p. 16.)

What the Intervening Plaintiff omits from its discussion of the *Kendrick* Decree is critical. The definition of "political intelligence" in the Decree itself focuses upon the definition of "First Amendment Rights", clearly defined in the Decree as follows:

...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 publish, and to associate privately and publicly for any lawful purpose

(*See* Consent Decree at p. 16) (emphasis added).

The Consent Decree's reminder, which is consistent with applicable substantive law, that only lawful conduct is protected by the First Amendment is critical to an understanding of and application to each of the sections of the Consent Decree relied upon by the Intervening Plaintiff.

The absence of any evidence whatsoever of actions or conduct on the part of the Defendant indicating a desire, intention, or effect of preventing anyone from lawfully expressing political opinions or beliefs is completely absent from this record. Contrast this to the well-established record underlying the *Kendrick* case itself, where the plaintiff correctly notes that "[t]he Decree was made necessary by the trampling of the right to speak, the right to dissent, and the right to associate both privately and publicly." (*See* Pl.'s Memo. at p. 17.)

Here, no one within the Memphis Police Department, during the period of time referenced as being relevant to the enforcement of this forty-year-old Consent Decree, targeted opinions or the right to express opinions on the part of anyone because of the opinions themselves. The "monitoring" and "surveillance" activities of concern to the Intervening Plaintiff instead arose from a desire - whether or not the Intervening Plaintiff considers that desire to have been well-founded or misguided - to protect the public from a well-documented pattern of violent, disruptive, and unlawful behavior which has been associated with some of the groups at the forefront of political activity in Memphis and nationwide. These actions are also taken for the protection of protestors and demonstrators themselves. Tragic events such as those in Charlottesville, Virginia underscore the necessity of intelligence gathering in order to protect persons engaged in free speech.

IV. THE EVIDENCE RELIED UPON BY PLAINTIFF DOES NOT CONSIST OF MATERIAL, UNDISPUTED FACTS DEMONSTRATING A VIOLATION OF THE CONSENT DECREE BY CLEAR AND CONVINCING EVIDENCE.

The Intervening Plaintiff outlines a number of practices on the part of the MPD and particularly its Office of Homeland Security ("OHS") throughout its Memorandum. The core of the Intervening Plaintiff's case, however, is set forth at pages 17-19, where the Intervening Plaintiff makes the following specific allegations of violations of specific sections of the decree.

A. Alleged Violations of Section C.1:

The Intervening Plaintiff alleges that the City violated Section C.1 of the Decree "by engaging in political intelligence through its collection and dissemination of information about individuals' beliefs, opinions, associations, and exercise of First Amendment rights in the creation and dissemination of the AOA's, the daily JIBs, and the weekly PowerPoint presentations described above." (*See* Pl.'s Memo. at p. 17.)

Section C of the Consent Decree addresses "Political Intelligence" as follows:

1. The defendants and the City of Memphis shall not engage in political intelligence.
2. The defendants and the City of Memphis shall not operate or maintain any office, division, bureau or any other unit for the purpose of engaging in political intelligence. (emphasis added)²

(*See* Consent Decree at p. 17) (emphasis added).

(1) AOA List

The creation of the Authorization of Agency ("AOA") for the Mayor's personal residence and its extension to City Hall had nothing to do with political opinions or associations but instead had everything to do with protection of the Mayor and his family. *See* Defendant's Response No. 3 to Plaintiff's Undisputed Statement of Material Facts ("Def.'s Resp. to Pl.'s Facts"). Its purpose was to make it easier for police to exercise the law enforcement remedy of arresting individuals guilty of criminal trespass if they returned to the Mayor's private property. (*See* Def.'s Resp. to Pl.'s Facts No. 3; Def.'s Memo. in Supp. at p. 9.) Its inclusion with a pre-existing City Hall

² "Political Intelligence" is defined in the decree as "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." The definition of "First Amendment Rights" is "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."

Escort List having nothing to do with the expression of First Amendment opinions was designed so that "the City Hall security team would be on notice of the potential for disruption" if the individuals on the list came into City Hall, and without escort, proceeded to the Mayor's office. (*Id.*)

The Intervening Plaintiff acknowledges that one of the individuals on the AOA list, Keedran Franklin, and an organization with which he was affiliated, the Coalition of Concerned Citizens ("CCC") participated in the illegal trespass at the Mayor's home which led to the creation of the AOA in the first place. (*See* Pl.'s Facts No. 1.) The AOA list was initially populated by Sgt. Reynolds of the OHS with individuals considered to "have something to do with either Keedran Franklin or the CCC" as determined by "social media contacts" or who had a known association and participation in unlawful (unpermitted) assemblies. (*See* Def.'s Resp. to Pl.'s Facts No. 6; Def.'s Memo. in Supp. at p. 9.)

The Intervening Plaintiff has not come forward with clear and convincing evidence that Sgt. Reynolds, in preparing this list, intended to, or in fact targeted, the individuals on it because of the content of their speech or their associations with "lawful" activities on the part of either Franklin or the CCC.

Finally, there is absolutely no evidence that any of the individuals placed on the City Hall "escort list" through the inclusion of the AOA in that list for a period of approximately a month and a half actually resulted in anyone being escorted while in City Hall. *See* Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment Nos. 32-33. In short, no one's right to freedom of association or speech was in actuality curtailed. *See National Security Agency*, 493 F.3d at 661 ("[T]o allege a sufficient injury under the First Amendment, a Intervening Plaintiff must establish that he or she is

regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill.")

(2) JIBs Creation and Implementation

The MPD's creation of and implementation, in June 2016, of the Joint Intelligence Briefings ("JIBs") was not created to "keep tabs" on individuals because of their political beliefs or opinions, but was instead created after a series of events creating threats to public safety as well as to the lives of law enforcement officers. (*See* Def.'s Resp. to Pl.'s Facts Nos. 10-14; Def.'s Memo. in Supp. at pp. 5-7.) These concerns proved prescient as shortly after the creation of the JIBs, five police officers were shot and killed at a Black Lives Matter rally in Dallas, two more were shot and killed in Baton Rouge by an individual upset at law enforcement shootings of an African American suspect, and hundreds of activists shut down interstate traffic on the I-40 Bridge in an incendiary and extremely dangerous and unlawful protest in Downtown Memphis. *See generally*, Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment Nos. 7-17.

Plaintiff focuses upon the lack of "direct threats" in Memphis at the time the JIBs were created. The record actually does contain evidence of direct threats. (*See e.g.*, Email regarding "The Day of Rage" at 02333; July 8, 2016 JIB at 05021; Snags from 7-1-2016 at 02462, attached as Collective Exhibit A.) More importantly, the Intervening Plaintiff has produced no evidence that creation of the JIBs was motivated by anything other than a legitimate concern over public safety and the safety of law enforcement officers. It cannot seriously be disputed that the incendiary actions on the part of protestors on July 10, 2016, which resulted in several hundred protestors shutting down the Interstate 40 bridge over the Mississippi River for approximately four hours, constituted a direct and imminent threat to public safety as well as to the safety of

law enforcement officers which warranted the dissemination of information contained in the JIBs. (*See* Def.'s Resp. to Pl.'s Facts No. 15; Def.'s Memo. in Supp. at p. 7.) Neither can it be seriously disputed that national coverage of police involved shootings of African American men, resultant violence against law enforcement officers in other cities, and the use of social media as the platform of choice to promote agendas relating to the first two issues, made the concerns expressed in the JIBs quite tangible. (*See generally*, Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment ("Def.'s SUF") Nos. 7-17, 20-22.)

While it is true that the JIBs, at one point in time, were circulated outside of the MPD, the recipients of the JIBs included law enforcement personnel and private businesses, particularly downtown Memphis businesses, which were at risk from unpermitted protest activity that involved threats to public safety and disruption of traffic and access to businesses. (*See* Def.'s Resp. to Pl.'s Facts Nos. 16-18.)

(3) Database for Large Gatherings and Protest Activities:

There is absolutely no evidence that the creation of a database for budgetary purposes in order to provide the necessary level of support for large events (permitted or unpermitted) had anything to do with the intention to curb the expression of First Amendment rights. (*See* Def.'s Resp. to Pl.'s Facts No. 26; Def.'s Memo. in Supp. at p. 10.) A vast majority of the protest activity events summarized in the database were unpermitted events, meaning they were unlawful gatherings. (*See* Def.'s Resp. to Pl.'s Facts Nos. 26, 28.) In yet a further indication that the creation of the database had nothing to do with attempts to "chill" or interfere with First Amendment activities, or with the content of protestors' speech, the MPD allowed all these

individuals to exercise their "right to protest" even if the events were unpermitted. (*See* Def.'s Resp. to Pl.'s Facts No. 30.)

(4) PowerPoint Presentations:

The preparation and presentation of PowerPoint presentations were focused on unlawful activity (often resulting in arrests), and not the content or nature of the opinions expressed.³ (*See* Def.'s Resp. to Pl.'s Facts Nos. 31-32, 34-35; Def.'s Memo. in Supp. at pp. 12-13.) The presentations also contained reminders of the importance of respecting protester's legitimate First Amendment rights. *See See* Def.'s Resp. to Pl.'s Facts Nos. 31, Pl.'s Exh. Q at 22801 and Def.'s Ex. 7 at 20884-20886.

(5) Social Media Collator:

At page 15 of the Intervening Plaintiff's Memorandum (ECF 79-1), the Intervening Plaintiff's also alleged that the use of a proprietary social media collating tool constituted "predictive police modeling" which violated Section C1 of the Consent Decree. The evidence in the record reflects that this notebook was not actually used by the Real Time Crime Center, and that the example of what the notebook could do, which is attached to the Plaintiff's Memorandum as Exhibit PP, resulted from "playing around with i2 Analysis Notebook." (*See generally*, Def.'s Resp. to Pl.'s Facts Nos. 65-66; Def.'s Memo. in Supp. at p. 24.) There is simply no evidence of any widespread or specific use of this analytic tool beyond the one example cited by the Intervening Plaintiff.

³ The Plaintiff claims that there were "weekly" PowerPoint presentations, but quotes from only three. While the evidence is that there were indeed "weekly" Command Staff meetings where OHS was involved, there is no evidence that OHS presented PowerPoint presentations at each one.

B. Alleged Violations of Section C.2:

The Intervening Plaintiff alleges violations of Section C.2 of the Consent Decree, which section requires that the challenged action be "for the purpose of engaging in political intelligence," as follows:

Defendant violated Section C.2 of the Decree by operating OHS as an office dedicated to collecting and disseminating the information described above. Its mission included a focus on 'local individuals or groups that were staging protests'"

(*See* Pl.'s Memo at p. 18.)

The fact that the OHS, for good reason, focused upon a number of local activists regularly associated with unpermitted (meaning unlawful) public gatherings and who in some instances disrupted public thoroughfares so as to justify and necessitate arrest, does not mean that OHS converted itself into an office "for the purpose of engaging in political intelligence." The most obvious indication that this was not the Office's purpose can be found in the fact that repeated violations of the City's permit ordinance which could have justified arrest were tolerated as long as the individuals involved did not disrupt public thoroughfares or otherwise engage in openly disruptive activity which necessitated arrest. The same PowerPoint demonstrations Intervening Plaintiff relies upon to assume an improper motive for the office's functioning often emphasize the importance of permitting protestors to exercise First Amendment rights. *See* Def.'s Resp. to Pl.'s Facts Nos. 31, Pl.'s Exh. Q at 22801.

The OHS, beginning in March of 2016, was "retooled" to focus on threats to law enforcement safety. There is no evidence that its mission is anything other than what it is purported to be which is to "identify threats and try to help mitigate those threats." As Director Rallings testified, "the concern is now Law Vegas style police shootings, vehicle being driven into crowds, people carrying illegal bombs, whether domestic terrorism or part of a larger

conspiracy." *See* Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment No. 37.

C. Alleged Violations of Section E:

The Intervening Plaintiff also alleges a violation of Section E of the Consent Decree, which is entitled "Prohibition against Covert Surveillance for Political Intelligence," and which reads as follows:

The Defendants and the City of Memphis 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.

(*See* Consent Decree, ECF No.3 PageID 16-17) (emphasis added).

The Intervening Plaintiff alleges that the MPD "violated Section E of the Decree by covertly surveilling groups engaged in free speech activities electronically through the [confidential informant] account, through the [confidential informant] account by use of an undercover phone to gain access to private group communications, and on the ground by placing plainclothes and undercover officers at meetings and free speech events." (*See* Pl.'s Memo. at p. 18.)

As is the case with several of the provisions of the Decree, the MPD's motivation in conducting undercover or covert surveillance of events or monitoring of social media is critical. There 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. The purpose was public safety, for legitimate and very real reasons. The U.S. Department of Justice reported on the importance of social media in policing in May 2013 ("Report"). The Report is

attached hereto as Exhibit B. The report recommends that law enforcement agencies "should actively view Facebook posts, Tweets, and other social media communications to develop actionable intelligence for preventing violent or otherwise illegal flash mob events." (*See* Report at p. 21.) It also recommends that police departments monitor social media to obtain information about possible threats related to spontaneous events such as riots. (*Id.* at 22.) The Report also stated that according to a 2012 survey, most law enforcement agencies use social media in investigations and intelligence gathering. (*Id.* at 39.)

To take a real-life example of the police's use of social media related to a protest event, a report on the highly publicized 2017 series of events in Charlottesville involving confrontations between groups of self-avowed white supremacists and counter-protesters, commissioned by the City of Charlottesville, detailed the importance of social media in planning protests and counter-protests ("Charlottesville Report") (*See* Charlottesville Report at pp. 30, 50, 70, 152, attached hereto as Exhibit C.)

D. Alleged Violations of Section F:

The Intervening Plaintiff alleges violations of Section F of the Consent Decree as well, which reads in pertinent part as follows:

Harassment and Intimidation Prohibited.

1. The Defendants and the City of Memphis shall not disrupt, discredit, interfere with or otherwise harass any person exercising First Amendment rights. Among other things, the City of Memphis shall not disseminate damaging, derogatory, false or anonymous information about any person for the purpose of political intelligence, or attempt to provoke disagreement, dissension or violence between persons.
2. The Defendants and the City of Memphis shall not engage in any action for the purpose of, or reasonably having the effect of, deterring any person for exercising First Amendment rights. As an example, the City of Memphis 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 number of any person in attendance.

(See Consent Decree, ECF No. 3, PageIDs 16-17) (emphasis added).

The Intervening Plaintiff alleges violations of this section 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 medical health records and information regarding ongoing investigations." (See Pl.'s Memo at p. 18.) The Intervening Plaintiff alleges that the MPD violated this provision through circulating this information in JIBs internally and externally which included information that was "incorrect, unconfirmed and mere rumor." (*Id.*) It also alleges violations of Section F "by regularly naming and photographing individuals exercising their First Amendment rights by attending meetings and events," and "by enforcing different standards for obtaining a permit for protests than other types of events." (*Id.*) Finally, the Intervening Plaintiff alleges that "defendants chilled the exercise of First Amendment rights by aggressively contacting event organizers and questioning them regarding their agenda and affiliations." (*Id.* at pp. 18-19.)

As is the case with other provisions in the Consent Decree, there is no evidence that the MPD maintained or circulated any information about the individuals referenced in the JIB or photographed at a protest event, "for the purpose of political intelligence," as opposed to attempts to protect and maintain public safety. There is also not evidence of any person being "deterred from exercising First Amendment rights" as a result of the MPD's actions. In addition, the cited exhibits supporting the proposition that "sensitive/classified" information was included in JIBs is disputed. (See Def.'s Resp. to Pl.'s Facts No. 23.)

E. Photographs of Protest Activities:

Photographing or even videotaping individuals in public places does not violate the Constitution; "the police may record what they normally may view with the naked eye." *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991). The *Commercial Appeal* protest referenced by the Intervening Plaintiff was an unpermitted, and therefore unlawful event. (See Def.'s Resp. to Pl.'s Facts No. 49.) The evidence is that the purpose of photographs of other protests were made for "situational awareness" and not because of the content or nature of political opinions expressed at the events. (See Def.'s Resp. Pl.'s Facts No. 51.)

F. Presence of Undercover Officers at Protest Events;

There is no evidence that the presence of plainclothes officers at events open to the public were there "for purposes of political intelligence." To the contrary the purpose was to "find out what were their intentions . . . because after the bridge shut down there were many...discussions across town with various groups on what their next move was going to be...and we just wanted to make sure that this was not another move to shut down the bridge, as attempts have been conveyed thereafter to do so." (See Def.'s Resp. to Pl.'s Facts Nos. 15, 52, 54-56.)

G. Contacting Individuals Associated with Protest Activities:

Although there is an allegation that MPD officers "regularly" contacted individuals organizing free speech events, the evidence cited to support it is thin at best. (See Def.'s Resp. to Pl.'s Facts No. 59.) The one instance in the record of someone with the MPD contacting the organizer of an event focused on determining the nature of the event and ensuring that the MPD was adequately prepared to protect public safety. It should be noted that the event referenced occurred only three days after the I-40 bridge shutdown. (*Id.*) There is no evidence that the encounter between Major Chandler of the OHS and Bishop Willis at the New Life in Christ

Church as described in Plaintiff's Statement of Undisputed Facts No. 61 had anything to do with attempts on the part of Major Chandler to gather political intelligence or to interfere in any manner with the exercise of First Amendment rights. (*See* Def.'s Resp. to Pl.'s Facts No. 61.)

H. Different Standards for Protest Events for Permitting:

The Intervening Plaintiff's allegations of a different standard applied to protest events under the City's fourteen day parade ordinance is disputed, (*See* Def.'s Resp. to Pl.'s Facts No. 63), as is the allegation that "protest permit applications were circulated to command staff or OHS, while non-protest permit applications were circulated only to Special Events." (*See* Def.'s Resp. to Pl.'s Facts No. 64.)

I. Alleged Violations of Section H:

The Intervening Plaintiff makes a single allegation in a footnote of a violation of Section H of the Consent Decree, which states in pertinent part that the Defendants "shall not disseminate personal information about any person collected in the course of a lawful investigation of criminal conduct to any other person" except where another agency is also engaged in a criminal investigation. (*See* Pl.'s Memo. at p. 18, n. 26.) The Intervening Plaintiff alleges that the dissemination of information about certain individuals' arrest records or ongoing investigations violated this section of the decree.

The Defendant admits that it inadvertently disseminated personal information about a few persons in several early JIBs to a limited number of non-law-enforcement persons. MPD stopped circulating the JIB to non-law enforcement persons shortly after the practice started. (*See* Def.'s Resp. to Pl.'s Facts No. 17.)

J. Alleged Violations of Section G:

Finally, Intervening Plaintiff alleges a violation of Section G of the Consent Decree, which covers "criminal investigations which may interfere with the exercise of First Amendment rights." (Pl.'s Memo. at p. 15.) This Section obligates an MPD officer involved in a "lawful investigation of criminal conduct which investigation may result in the collection of information about the exercise of First Amendment rights...." to "immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization." (Consent Decree at p. 17.) It then requires the Director to take certain action with respect to the investigation. (*Id.*)

Plaintiff's memorandum alleges that while MPD Director Rallings had been informed of the Decree in the course of his employment, "Rallings testified that he does not recall conducting reviews and authorizations for criminal investigations as specified in Section G of the Decree or D.R. 138, as implementing policy." (*See* Pl.'s Memo. at p. 16.) It is the Intervening Plaintiff's obligation to produce clear and convincing evidence of violations of the Decree. The 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.

V. CONCLUSION

The City of Memphis and its Police Department wholeheartedly endorse and support the right of citizens to speak freely, to protest, and to express their opinions and grievances openly and without interference. The police have the responsibility to protect the protestors and the rest of the public as these activities occur.

In 2018, we live in a world where counter-protestors drive automobiles into crowds of people exercising their constitutional rights. We live in a society where deadly violence is visited upon unsuspecting and non-violent citizens as well as police officers and public officials.

We live, unfortunately, in an age where both foreign and domestic terrorism poses all-too-real threats to innocent members of our society. In this day, and in this polarized and sometimes violent society, law enforcement faces a tremendous challenge in conducting information gathering in a manner which protects the public while protecting their crucial constitutional rights. We respectfully ask the Court to carefully consider the community caretaking mission that police must address when ruling on this Motion.

There is no evidence in this case of police tactics aimed at preventing the exercise of constitutional rights. There is substantial evidence that law enforcement officers are striving instead to use 21st century policing methods to protect the public. It is admittedly a delicate balance, but the City earnestly believes that its activities are, and have been, within the spirit of the Consent Decree and in line with the Constitutional values we all cherish.

The Defendant respectfully urges the Court to deny the Plaintiff's Motion for Summary Judgment on the allegations of violating the Consent Decree.

Respectfully submitted,

/s/ Jennie Silk

Buckner Wellford (#TN 9687)
R. Mark Glover (#TN 6807)
Jennie Vee Silk (#TN 35319)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Telephone: 901.577.2152
Fax: 901.577.0786
Email: bwellford@bakerdonelson.com
mglover@bakerdonelson.com
jsilk@bakerdonelson.com

Attorneys for Defendant, The City of Memphis

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2018, a copy of the foregoing will be served via the Court's ECF system to:

Thomas H. Castelli
Mandy Floyd
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212

/s/ Jennie Silk