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

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

DEFENDANT'S REPLY TO ACLU-TN'S POST-TRIAL BRIEF ON THE ISSUE OF STANDING

I. The burden of proof in a civil contempt proceeding is clear and convincing evidence.

It is well settled that actions for civil contempt are treated differently than other civil actions for money damages. ACLU-TN concedes this point; yet it simply asserts, citing to no authority, that the standard of review for standing in cases of civil contempt is governed by a preponderance of evidence standard. (ECF No. PageIDs 6160-63).

None of the cases cited by the Intervening Plaintiff were actions for civil contempt, nor did they involve contested issues of standing. Two of the cases cited involved Title VII sex discrimination allegations, in which neither standing nor civil contempt were at issue. (EFC No. 144, PageIDs 6160-61). *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989); *White v. Burlington N. & Santa Fe R. Co.*, 364 F.3d 789, 805 (6th Cir. 2004)). The other case cited by Intervening Plaintiff, *Burke v. Johnson*, 167 F.3d 276 (6th Cir. 1999), did not involve standing or contempt, instead addressing the burden of proof for establishing the voluntariness of a criminal defendant's agreement to be bound by a release/dismissal agreement. *Id.* at 280-85.

To the extent that the ACLU-TN is arguing that standing is a distinct issue always resolved under a preponderance of the evidence standard, this is demonstrably not the case. In the landmark case of *Griswold v. Connecticut*, 381 U.S. 479 (1965) the first issue the Court had to resolve focused on the standing of the plaintiffs, physicians seeking to avoid a criminal penalty for prescribing contraceptives to married couple patients. The Court, speaking through Justice Douglas, distinguished a case raising similar issues but where the standing of physicians was rejected, by applying a different standard for determining standing:

> We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston v. Ullman*, 318 U.S. 44…is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute.
>
> *Id.* at 481. (*See also Colyer v. Smith*, 50 F. Supp.2d 966, 971 (C.D. Cal. 1999), where the court, citing to a Delaware case, found that a 'clear and convincing' evidence standard was applicable to whether a non-client litigant had standing to move to disqualify counsel for a party to the litigation.)

Thus, when courts have applied a different standard for determining standing in comparison to the standard for proving the underlying merits of the case, the standard for standing is a heightened standard, not a relaxed one.

Intervening Plaintiff's analysis of the seminal case on standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is essentially nonexistent. ACLU-TN simply makes the *ad hominem* argument that:

> *Lujan* does not stand for the proposition that, because Plaintiff must prove some of its case by clear and convincing evidence, all elements of its case, including standing, are also elevated to that heightened standard of proof. The conventional rules of civil litigation should apply to the standing determination.
>
> (ECF No. 144, PageID 6161).

Lujan is, at its core, a case about the evidence required to establish Article III standing. *Id.* at 578. It stands for the proposition that a plaintiff must prove standing "with **the manner and degree of evidence** required at the successive stages of litigation." *Id.* at 561 (emphasis added). The Court's holding that the plaintiffs in that case did **not** demonstrate standing illustrates the importance the Court intended to place on "…the core component of standing [as] an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* at 558. *Lujan's* emphasis on the importance of standing tracks the Court's observation in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230 (1990) that "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the jurisdictional doctrines.'" (citing *Allen v. Wright*, 468 U.S. 737,750 (1984)). As observed by Professor Charles Alan Wright in his authoritative guide to federal practice, although "[t]he Court has vacillated on whether it is desirable to relax the requirement of standing…in general the recent cases have been more restrictive than those earlier in that period." *Wright: 20 Fed. Prac. & Proc. Deskbook*, Section 14 (2018 Ed.).

Here, Intervening Plaintiff sought an action for civil contempt against the City based on the City's alleged violations of a Consent Decree where the City's actions are alleged to have directly impacted, not the Intervening Plaintiff itself, but rather third parties. As the *Lujan* majority observed:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, **much more is needed**.

Id. at 561-62 (emphasis added).

While most of the relevant federal authorities address standing in the context of a specific constitutional or statutory framework, the restrictive approach taken by both the Supreme Court and the Sixth Circuit on standing to enforce consent decrees is noteworthy, because it runs contrary to a line of cases relaxing the concept of standing under the "prudential" doctrine of *"jus tertii"* when the case involves third parties seeking to assert the rights of others directly impacted by a governmental action. *See Wright: 20 Fed. Prac. & Procedure, Deskbook* Section 14, at p. 7. Consent Decrees are an exception to that general rule. A "well-settled line of authority ... establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597 (6th Cir.1992); *Aiken v. City of Memphis*, 37 F.3d 1155, 1167 (6th Cir.1994). *See also S.E.C. v. Dollar Gen. Corp.*, 378 Fed. Appx. 511, 515-516 (6th Cir. 2010) (unpublished). *Id.* at 515-16 (quoting *Sanders v. Republic Services of Ky.*, 113 Fed.Appx. 648, 650 (6th Cir.2004)).

Finally, to the extent that the Court considers the evidence produced at trial sufficient to establish clearly and convincingly that ACLU-TN is a successor in interest to the American Civil Liberties Union in West Tennessee, Inc., a successor in interest lacks standing to enforce a consent decree in the Sixth Circuit. See *Bauman v. City of Cleveland*, No. 1:04-CV-1757, 2015 WL 893285, at *4 (N.D. Ohio Mar. 3, 2015).

CONCLUSION

The City asserts that the evidentiary standard for proving standing should track the standard for proving the substantive elements of the case. This is an unremarkable proposition. The Intervening Plaintiff, citing no relevant authority, asks the Court to apply a different, more

relaxed evidentiary standard. This proposition runs contrary to well-established case law in both the Supreme Court and the Sixth Circuit on the issue of standing.

Because the Intervening Plaintiff failed to produce evidence of a clear and convincing nature that it was a party to the *Kendrick* Consent Decree, it lacks standing to enforce it.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018 the foregoing will be served by this Court's ECF system to:

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