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

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

CITY OF MEMPHIS'S REPLY IN SUPPORT OF ITS POST-TRIAL BRIEF

The City of Memphis ("the City"), respectfully submits this Reply in Support of its Post-Trial Brief, ECF No. 348.

I. INTRODUCTION

The City and the Intervening Plaintiff, American Civil Liberties Union of Tennessee ("ACLU-TN"), agreed to several proposed modifications to the Consent Decree. (*See* Proposed Modified Consent Decree, Trial Ex. 6.) The proposed modifications are suitably tailored to the circumstances and factual conditions that have changed since 1978.

The only area of the Consent Decree in which the parties were unable to agree on modified language prior to the June 2020 hearing was Section I: Restriction on Joint Operations. The City seeks modification of Section I to clarify some of the latent ambiguity contained therein, while essentially "codifying" the Court's Order interpreting the provision. (*See* Section I proposed by City, Trial Ex. 25.)

During the course of the hearing, particularly in light of the testimony presented, it became evident to the City that an additional modification to the Consent Decree was necessary under Section H: Maintenance and Dissemination of Information. In addition to the jointly proposed

modifications to Section H, the City also proposes modifying Section H to allow for the sharing of some personal information collected during a criminal investigation with private entities for the purpose of public safety under certain circumstances.

In its Post-Trial Brief, the ACLU-TN argues that the City failed to meet its burden of proof to justify these two modifications, and it asks that those sections of the Consent Decree remain as originally written. (*See* ECF No. 349.) The City, however, believes it successfully established that changed circumstances make compliance with Section I substantially more onerous if Section I is left unmodified. The City also showed that enforcement of Section H's absolute prohibition on the sharing of any personal information with non-law enforcement would be detrimental to the public interest.

II. The City established that modification of Section H to allow for the sharing of personal information with non-law enforcement agencies in certain situations is necessary to protect public safety.

Section H.2. of the Consent Decree states:

> The defendants and the City of Memphis shall not disseminate personal information about any person collected in the course of a lawful investigation of criminal conduct to any other person, except that such information may be disseminated to another government law enforcement agency then engaged in a lawful investigation of criminal conduct.

(ECF No. 151, Page ID 6284.)

The ACLU-TN correctly notes that the Court confirmed that Section H.2. prevents the City from sharing personal information with non-governmental private entities. (ECF No. 349, PageID 11418). Indeed, the Court found that the City violated Section H by sharing personal information in the JIB with AutoZone. (*See* ECF No. 151, PageID 6269.) However, what the City seeks as a modification now is not a workaround to allow the City to do that which the Court had previously found as violative of Section H. Instead, the City seeks modification of Section H to allow for the sharing of personal information with non-governmental entities so that it may fully alert a private

entity of a known security threat that could be devastating, not just to the private entity and the persons employed there, but also to the critical infrastructure of the nation.

The ACLU-TN erroneously asserts that the City failed to meet its burden to demonstrate that Section H requires modification to allow the City to share personal information collected in the course of a lawful criminal investigation with private companies because "the City points to no change in factual circumstance from 1978 which now makes this sharing of personal information in limited situations unworkable or substantially more onerous than it was when the City entered into the Consent Decree. (ECF No. 349, PageID 11418.) But, establishing a change in factual conditions is only one of three factors courts consider when evaluating whether modification of a consent decree is appropriate. "Modification of a consent decree is appropriate" under Rule 60(b)(5) when any of the following three conditions exist: 1) "when changed factual conditions make compliance with the decree substantially more onerous;" 2) "when a decree proves to be unworkable because of unforeseen obstacles;" **or** 3) "when enforcement of the decree without modification would be detrimental to the public interest." *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994) (quoting *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384 (1992)) (emphasis added).

Here, the City established the third *Vanguards* condition, *i.e.* that without modification of Section H to allow for sharing of certain personal information collected in lawful criminal investigations with non-law enforcement entities, it would be detrimental to the public interest. As the City noted in its Post-Trial Brief, the police director, Michael Rallings, testified that there are non-governmental entities within the city that have certain articles on their property that could be "catastrophic" if found in the wrong hands. (ECF No. 348, PageID 348.) Yet, it is undisputed that if the City learned of a tip that a specific person was planning to access that item or breach

that private entity's property for nefarious purposes, Section H prohibits the City from sharing ***any*** personal information about that criminal suspect with the private entity, which would necessarily include that person's name and photograph. This strict prohibition against sharing of any personal information about a person suspected of planning a crime on the property of a private entity with that entity's personnel would render that private institution powerless to identify the suspect. If unable to identify the criminal suspect, the private entity might not prevent the crime, and public safety is at risk. Thus, if Section H is left unmodified, Section H could be detrimental to the public interest. *See Vanguards*, 23 F.3d at 1018.

Moreover, the City believes that it also established the first *Vanguards* condition regarding changed factual conditions that make compliance with Section H more onerous. *See id.* Director Michael Rallings explained how certain private institutions that are critical to the infrastructure of the nation are now included in the Joint Terrorism Task Force, and the importance of sharing information with those institutions:

> Q. When we left off, Director Rallings, and I don't want you to name the institutions or businesses, but there are some institutions in this city, which if they were compromised by terrorists or someone wanted to do destruction to the city, it would be dire consequences for the City overall. Can you talk about the importance of sharing intelligence with those institutions?
>
> A. Well, so not only is there a full-time JTTF, there is a part-time.
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> Q. When you say JTTF?
>
> A. Joint Terrorism Task Force.
>
> Q. Okay.
>
> A. And a number of the major corporations are part of the part-time. So there is one particular corporation headquartered in Memphis that is critical to shipping all over the world. They are providing coronavirus relief, medical equipment. And so if you talk about critical infrastructure, they are one of those companies. So you know, if we go back to 9/11 when all these planes were grounded, not only do they ship -- they ship hearts going to a heart patient. Other organs and so, you know, there's critical infrastructure that's used by the United States Government that is in private industry.

> We know that there are a number of critical infrastructures when we talk about in rail, in air, in waterborne that just cannot stop moving. And so any threat to those infrastructures, in utilities. If we lost MLG&W. If we lost Valero, that does -- and I didn't mean to call a particular name, but –
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> But critical infrastructure that is vital to the City, not only supporting a local effort, but is vital and critical to supporting a national level of the ability to ship goods and services. So you know, since March, we've been talking about essential services and businesses. And other people are just recognizing those, but they've been essential throughout them becoming a business and are woven into the fabric of the United States of America.

(Trial Tr., ECF No. 345, PageID 11018-20.)

Clearly, 9/11 was a significant changed circumstance from the time the Consent Decree was entered in 1978, not only for the Memphis Police Department, but also for the entire country. Accordingly, the City believes that it established two of the *Vanguards* conditions through evidence and testimony at trial.

Importantly, again, the City does not seek modification of Section H.2. to reinstate the practice for which it was found in violation by the Court. To the contrary, the City and the ACLU-TN agreed that adding the phrase "for the purpose of First Amendment-Related Intelligence" to Section H.1. and H.2 is an important and necessary modification. The City merely seeks to further clarify Section H.2. to eliminate the strict prohibition of sharing *any* personal information with non-governmental entities.

Accordingly, the City proposes the following modification to Section H.2., which it believes to be narrowly tailored to remedy the potential harm to the public:

> The defendants and the City of Memphis shall not disseminate personal information for the purpose of First Amendment-Related Intelligence about any person collected in the course of a lawful investigation of criminal conduct to any other person, except that such information may be disseminated ~~to another government law enforcement agency then engaged in a lawful investigation of criminal conduct~~

for a legitimate law enforcement purpose. [1]

III. The City met its burden of establishing that modification of Section I as proposed by the City is warranted based on changed circumstances and unforeseen obstacles.

The parties agree that Section I should be updated; however, the extent to which it should be updated has not been resolved. The parties agree that the City may participate in the receiving and sharing of information from and with other law enforcement agencies, as long as the City does not direct another law enforcement agency to do what it is not allowed to do under the Consent Decree. In other words, the City may not direct another agency to act as its surrogate to violate the Consent Decree. The parties disagree over the extent to which they may receive information from other law enforcement agencies that are not bound by the Consent Decree, *i.e.* every other law enforcement agency in the world.

The ACLU-TN asserts that the City provided no concrete examples of how Section I, as currently worded, is unworkable. But the ACLU-TN disregards the concrete examples in the record and the additional evidence presented at the hearing. The ACLU-TN correctly reminds the Court that the City filed, and the Court denied, a Motion for Immediate Modification of Section I. (ECF No. 227.) The very reason the City filed that Motion was because of the Monitor's overly broad and "cautious interpretation" of Section I which left the City in an operational quandary with regards to joint operations and receiving information. (*See* ECF No. 250, PageID 8424.) If the Monitor's interpretation of Section I was ultimately found to be too broad, certainly it is conceivable that the interpretation of an officer reading the Consent Decree years from now could be overly broad or overly narrow. This is just one "concrete example" of how Section I, if left unmodified, is unworkable and should be modified.

[1] The strikethrough and red highlights in this paragraph are intentional. The strikethrough language is the original language of the Consent Decree that the City proposes be removed. The red language is the City's proposed additional modified language.

Director Rallings gave another concrete example of how Section I is unworkable for him and his officers. He testified as to his ongoing confusion regarding Section I and what information he is able to receive from other agencies. When directed to reference the Court's Order interpreting Section I (ECF No. 250), Director Rallings explained that Section I remained confusing to him, even with the benefit of the Court's Order:

> Well, based on the Court Order, it says, Decree only prohibits the City from receiving information from outside law enforcement or private interests that would otherwise violate the Decree. Section I only outright prohibits the City's receipt of political intelligence. And I think I've been very clear in my testimony that it is the issue of what is political intelligence that I still lack complete clarity on. So I just -- And I apologize, Your Honor, I just can't say that I'm 100 percent clear. Because if I'm not clear on political intelligence, then that kind of muddies the water. And I think there was mention throughout on doctrine of some possible gray areas. And that's my concern. I don't want to be in a gray area that places us in violation, because I am the one that pretty much is responsible for making sure that we maintain compliance with a team of lawyers and a monitor. So, again, excuse my ignorance, but I'm just trying to do the best I can and make sure I understand this completely. And I think that's why the modification is necessary to just help me out. Again, I'm not a lawyer. And, you know, this is somewhat confusing. And I think the clarity would definitely benefit the next chief that comes in who has to make these decisions. Because I have to make these decisions at 3:00 in the morning, and I don't have a lawyer to talk to.

(Trial Tr., ECF No. 346, PageID 11230-31.) The Director further testified that having some of the Court's Order incorporated into the Consent Decree itself would be helpful in avoiding some confusion so officers would not have to flip through two different documents. (Trial Tr., ECF No. 345, PageID 11045.)

To that end, the Monitor, Ed Stanton, also agreed that Section I would be clearer if it contained the language from the Court's Order.

> Q. All right. And so Mr. Stanton, do you think the Consent Decree would be clearer if we were able to codify some of the Court's language, which gave us guidance and put it in the Consent Decree so that it's one document that everybody can look to to know how they can operate under the Consent Decree?

> A. Well, I would tell you, Mr. McMullen, I think since the Court's order has come down, it's pretty clear as to in my mind how to interpret Section I. If this is incorporated to your point about being codified, I don't know that there is a downside to declaring purposes, but as I said to the Monitor today, it's the Judge and the orders of the Court that are very clear as to the purview of Section I of what's allowed and what's not.

(Trial Tr., ECF No. 343, PageID 10917-18.)

The City feels that even if the Court were to incorporate its own language from the Order Denying the City's Motion for Immediate Modification of Section I, additional clarification to Section I is necessary. The Court's Order states:

> The better reading of the Monitor's interpretation, which better comports with the purposes and protections of the Kendrick Consent Decree, would require the City to reject outright *only* information constituting political intelligence that is unrelated to any legitimate law enforcement activities, as is prohibited by § H of the Decree. Section I further requires the City to vet only information that implicates § G of the Decree, that is, information gathered as part of a legitimate law enforcement investigation that incidentally, or may incidentally, implicate protected First Amendment activities.

(ECF No. 250, PageID 8417) (emphasis added.)

Here, in interpreting the requirements of Section I, the Court referred to "legitimate law enforcement activities" and "legitimate law enforcement investigations," but those terms are undefined in the Consent Decree. Additionally, the Court notes that only information gathered that "incidentally, or may incidentally, implicate protected First Amendment activities" must be vetted for compliance with the Consent Decree, but it is unclear from the Consent Decree and the Court's Order what constitutes "incidental implication of First Amendment activities." Because social media is a platform for speech, a broad reading of the Order would mean any social media post arguably "incidentally implicates" the First Amendment. Thus, the City is arguably required to vet all social media posts it receives from third parties because they incidentally implicate the First Amendment. If, however, the City is not required to vet all social media information it receives from third parties, then, respectfully, Section I should say so.

> The City proposed the following paragraph to Section I to remedy that ambiguity:
>
> > Under this section, the City may receive information from other entities that does constitute First Amendment-Related intelligence for a legitimate law enforcement purpose provided that the City may not act upon such information without obtaining an Authorization pursuant to Section G. The City may not act upon or catalog information from other agencies constituting First Amendment-Related intelligence that is unrelated to any legitimate law enforcement purpose. Nothing in this Section precludes the City from receiving tips from non-law enforcement agencies or individuals.
>
> (Trial Ex. 25.)

This modification clarifies what types of information MPD can and cannot receive without first vetting it for compliance with the Consent Decree. The proposed modified Section I incorporates the parties' agreed-upon replacement for the term and definition of "political intelligence," *i.e.* "First Amendment Related Intelligence," which incorporates an intent element that was missing from the original definition of the term "political intelligence." If accepted, the definition of First Amendment Related Intelligence would become:

> … the gathering, indexing, filing, maintenance, storage, or dissemination of information or any other investigative activity <u>which is undertaken due to or on the basis</u> of a person's beliefs, opinions, associations or the content of the speech or expression protected by the First Amendment.

(*See* Proposed Modified Consent Decree, Trial Ex. 6.)

By incorporating an intent element into the definition of First Amendment Related Intelligence — and by extension, into Section I — the City would then be able to receive tips, information, and social media posts from third parties without vetting them for compliance with the Consent Decree and without Director authorization under Section G, if the information-sharing is for a legitimate law enforcement purpose <u>and</u> the original investigation was not undertaken <u>due to or on the basis</u> of a person's beliefs, opinions, associations or the content of the speech or expression protected by the First Amendment. Such modification would allow MPD to receive information from other agencies that is clearly unrelated to investigations into First Amendment

activity such as protestors, political activists, etc., without first confirming that the information was obtained in a manner not violative of the Consent Decree. The practical application of this modification would be to codify within the Consent Decree that the City need not vet every social media post shared with it by a third party.

The ACLU-TN also relies on the testimony of Dr. Theron Bowman in support of its assertion that Section I, as written, does not, present an unworkable obstacle to law enforcement. When questioned on cross examination, however, Dr. Bowman admitted the constraints of Section I.

> Q. But -- well, let's talk about law enforcement and criminal value. What if they receive information that identified threats or situation awareness bulletins in which another organization obtained by doing social media searches and doing certain searches and operations that are prohibited by this Consent Decree? Is it your reading that MPD can receive that information and potentially act on it?
>
> A.The police department cannot receive, they can't encourage, they can't cooperate with any information that's derived from a process that is not consistent with Consent Decree requirements.

(Trial Tr., ECF No. 344, PageID 10824-25.)

When questioned specifically about whether MPD could receive a report from the Tennessee Fusion Center regarding an anti-government extremist group, Dr. Bowman admitted that the information must be vetted, but was unable to articulate how MPD could vet the information to ensure it was not obtained in a manner that violates the Consent Decree.

> Q. Okay. This is a situation awareness document that comes in from the Tennessee -- from the Fusion Center, Tennessee Fusion Center, which is under the Tennessee Safety & Homeland Security. Okay.
>
> ***
>
> Well, let's start at the top. I'll read the first part. Under scope, "The Tennessee Fusion Center, TFC, is releasing this situation awareness bulletin to inform law enforcement and public safety personnel about the possible risk of violence to COVID-19 demonstrations by individuals supporting boogaloo, a term referencing a second US civil war." And I want to toggle down to details. And it referenced the FBI arrested two members charged -- and if you go down.

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> According to open source media, it's reportedly a member of an anti-government/anti-authority violent extremist group, supports boogaloo and boasts on social media that he would bring high-powered weapons to and cause trouble at a rally. Now -- and then after that, you can go to the last page. And I'm skipping around just to save time. And they'll talk about -- when you go to under U, they talk about the hashtags that are emerging on line. And those hash tags are used with social media posts, not like Google search or anything of that nature. And at the end of the note, they list the hashtags.
>
> ***
>
> Now, you're saying your reading of the Consent Decree, we can or cannot accept this information and act on it?
>
> I have not evaluated that information, but what I believe, Mr. McMullen, is that it's incumbent upon the Memphis Police Department to review, to review, to vet the information, to ascertain whether or not it's restricted under the Consent Decree. Any information that goes out to the Memphis PD or that is circulated through the Memphis PD should be vetted before it's circulated. And so I'm not the one to tell Memphis PD how they should vet that. I'm not the one to tell them what resources they should apply to that process or who in the agency should have that responsibility. That's not my role as the law enforcement expert. But I am saying that this information should be vetted before it's accepted or viewed by the MPD, regardless of how that process is designed and undertaken.

(Trial Tr., ECF No. 344, PageID 10827-29.)

Moreover, when questioned about the fact that other law enforcement agencies would not be subject to the Director authorization requirement found in Section G of the Consent Decree, Dr. Bowman, again, admitted, that he did not know how MPD would effectuate that in practice.

> Q. Well, okay. Let me pose this to you. The Tennessee Fusion Center doesn't have a director authorization, and they don't get authorization from Director Rallings here before they do their social media searches, which is required by the Consent Decree. So assuming that is correct, then we couldn't accept that information.
>
> A. That sounds like a statement to me. And I won't refute that statement if that's your opinion.
>
> Q. Well, let me ask you this. This is a question. Hypothetically, if the Tennessee Fusion Center did not get authorization from Director Rallings from MPD to do a social media search and the Tennessee Fusion doesn't have a director authorization process that we know of, is it your opinion that we could not accept this information?

> A. Mr. McMullen, I'm trying to be as concise in responding to your question as I can be. I think that the best way that I can, the most concise response is to say that those fewer than 20 police agencies who currently fall under Consent Decrees in the US all have restrictions and conditions placed upon them that are unique to the circumstances addressed in their Consent Decree. And they are required to prescribe solutions that will bring them into compliance. Sometimes the solutions are multimillion dollar technology systems. Sometimes the solutions are personnel systems. But it's incumbent upon the Plaintiff to prescribe those solutions.

(Trial Tr., ECF No. 344, PageID 10829-30.)

In sum, Dr. Bowman, the Monitor's law enforcement expert, could not articulate how MPD could vet information it receives from the Tennessee Fusion Center nor how it could require the Tennessee Fusion Center to get MPD director authorization to view information implicated by the Consent Decree when the Tennessee Fusion Center and the law enforcement agencies reporting to the Tennessee Fusion Center are not bound by the Consent Decree — and that is because it is literally impossible.

For these reasons, and the reasons presented in its Post-Trial Brief (ECF No. 348), the City submits that it has met its burden of showing changed factual conditions related to interagency sharing of information, particularly since 9/11, and it has further established how Section I's requirements pose an unworkable obstacle to the efficient operation of a law enforcement agency. Accordingly, the City respectfully requests a modification to Section I as proposed in Trial Exhibit 25.

IV. CONCLUSION

Because the City has met its burden with regard to the City's proposed modifications to Sections H and I, it respectfully requests that the Court adopt its proposed modifications.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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