

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

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

POST-TRIAL BRIEF OF THE INDEPENDENT MONITOR

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Independent Monitor

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I.
INTRODUCTION

The trial of this matter, which took place from June 17, 2020, to June 22, 2020, was the culmination of a process that began nearly two years ago. After finding in August and October 2018 that Defendant City of Memphis, Tennessee, had violated the *Kendrick* Consent Decree,¹ this Court imposed five sanctions on the City “[t]o ensure compliance with the Consent Decree generally, and especially with the requirement that the City familiarize its officers with the content of the Decree.” (Order, ECF No. 152, PageID # 6287.) The Court also appointed the Independent Monitor “to supervise the implementation of the sanctions” “and to provide closer guidance on what constitutes political intelligence.” (*Id.* at PageID # 6290; *see also generally* Order, ECF No. 176.)

Five days after the Court issued its August 2018 ruling, the City moved the Court to “completely vacate . . . or . . . substantially modify” the Consent Decree. (Motion, ECF No. 124, PageID # 5013.) According to the motion, the Memphis Police Department (MPD) could not “carry out its public safety responsibilities” because the Consent Decree, which was signed in 1978, is not “relevant to modern law enforcement practices.” (*Id.* at PageID # 5011, 5013.) Instead, the City claimed, the Consent Decree creates “uncertainty over the scope of and legality of key aspects of the daily activities of a modern, proactive law enforcement agency in today’s world.” (*Id.* at PageID # 5011.)

Eighteen months later and one week before the start of the trial, the City partially withdrew its request, explaining that it “no longer [sought] to vacate the Consent Decree.”² (Motion, ECF

¹ (See Orders, ECF Nos. 120 & 151.)

² Not long after filing its motion to vacate or modify the Consent Decree, the City joined Intervening Plaintiff ACLU of Tennessee, Inc., in asking the Court to suspend the motion to allow for “a period of operation under the supervision and oversight associated with the soon-to-be

No. 332, PageID # 10207.) That change was driven partly by the City’s successful effort to persuade Intervening Plaintiff ACLU of Tennessee, Inc., to agree on 17 proposed modifications to the Consent Decree.³ (*Ibid.*) But the City’s withdrawal of its request to vacate the Consent Decree also followed more than two dozen requests to the Independent Monitor to authorize conduct that potentially violated the decree,⁴ as well as the Court’s denial of a later motion by the City to “vacat[e] or significantly modify[] Section I of the Decree, as interpreted by the Monitor.” (Order, ECF No. 250, PageID # 8392.) Section I was the only provision of the Consent Decree on which the City and the ACLU-TN could not agree.

Thus, at the start of the trial, two issues were before the Court: (1) the propriety of the parties’ 17 proposed modifications to the Consent Decree; and (2) whether to modify § I.⁵

II. **GROUNDS FOR MODIFICATION**

Through its pre-trial briefing (ECF No. 324) and proof at trial, and again in its post-trial briefing (ECF No. 348), the City has advanced five grounds for modifying the Consent Decree:

- to resolve or clarify ambiguities;⁶

Court-appointed [M]onitor.” (Joint Motion to Stay, ECF No. 175, PageID # 6522.) The parties felt that they “w[ould] make significant progress on proposed joint modifications to the Consent Decree if they ha[d] more time to collaborate with each other and with the Court-appointed Monitor.” (*Id.* at PageID # 6523.) The Court granted the parties’ request. (Order, ECF No. 178.)

³ (See Joint Notice, ECF No. 327; **Tr. Ex. 21** (ECF No. 327-2).) The Independent Monitor facilitated discussions between the parties through mediation. (See, e.g., Order, ECF No. 311.)

⁴ (See Independent Monitor’s Pretrial Brief, ECF No. 330, PageID # 9990.)

⁵ Two related issues also are pending before the Court: The first issue, which of two competing proposed social-media policies should be adopted by the City, may be subsumed by the issues presented at trial and is being held in abeyance until those issues are resolved. (Order, ECF No. 322.) The second issue, whether the City has failed to comply with Sanction 5, was taken up by the Court prior to trial. (See Orders, ECF Nos. 310, 316.)

⁶ (ECF No. 324, PageID # 9933; *accord* ECF No. 348, PageID # 11376 (“[I]nterpretation of the Consent Decree has varied from person to person.”).)

- to produce “a document, that is easily understandable by those trying to abide by it, *i.e.* its police officers, as well as the public”;⁷
- to “update” the decree “to account for the significant developments in technology and law enforcement best practices”;⁸
- to produce “a document that speaks for itself, without the need to continually seek or reference Orders of the Court and interpretations of the Monitor”;⁹ and
- “to incorporate the Court’s interpretations into the document.”¹⁰

The Independent Monitor leaves it to the ACLU-TN to address, and defers to the Court to decide, whether “a significant change in circumstances” is, as the City claims,¹¹ the appropriate standard for determining whether to modify the *Kendrick* Consent Decree and, if so, whether any of the City’s proffered grounds satisfies that standard. Regarding those grounds, however, the Independent Monitor offers some observations to aid the Court’s deliberations.

A. Resolving or Clarifying Ambiguities.

First, no modification of the Consent Decree is likely to resolve all possible differences in interpretation. Everyone agrees, for example, that the Consent Decree as written not only expressly permits the MPD to investigate crimes but also specifies a procedure for police officers

⁷ (ECF No. 324, PageID # 9934.)

⁸ (ECF No. 324, PageID # 9933; *accord* ECF No. 348, PageID # 11376 (“The City now seeks modification of the Consent Decree . . . to directly address some of the technologies and their uses that simply did not exist in 1978.”))

⁹ (ECF No. 324, PageID # 9934.)

¹⁰ (ECF No. 348, PageID # 11376.)

¹¹ (ECF No. 348, PageID # 11379 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992).) On that subject, the Supreme Court and this Court have noted that “a party may obtain relief from a court order when it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with the terms of the decree.” (Order, ECF No. 250, PageID # 8392 (quoting *Rufo*, 502 U.S. at 383).) This Court has noted further that “[t]he purpose of the parties as memorialized in the [*Kendrick*] Consent Decree to forbid affirmative investigative acts has not changed, even if what exactly is active and passive has changed with the state of technology.” (Order, ECF No. 151, PageID # 6258.)

to follow when investigating crimes that may implicate First Amendment rights.¹² But every fact witness offered by the City in favor of modification testified about crimes, which suggests a misapprehension that the Consent Decree inhibits criminal investigations.¹³ One witness appeared to believe, despite testifying that every investigation in which he participates has a “criminal nexus,” that people “involved in political activities” categorically cannot be investigated.¹⁴ Thus, the challenge appears to be, as the Court recognized from the outset, more about training officers on the Consent Decree rather than ambiguity in the decree itself.¹⁵

B. Making the Consent Decree Easy to Understand for Officers and the Public.

Second and similarly, helping officers and the public better understand the Consent Decree seems less a matter of the Consent Decree’s language and more about proper education regarding the decree. The City admitted in questioning Deputy Chief Don Crowe that at issue in this case is

¹² (See, e.g., Testimony of D. Crowe, ECF No. 345, PageID #11127: 13-19 (admitting that the Consent Decree as written does not prevent the MPD from investigating crimes); PageID #11129: 12-17 (admitting that the Consent Decree as written “laid out a procedure for police to follow when there was a criminal investigation that might incidentally implicate First Amendment rights”).)

¹³ (See, e.g., Testimony of M. Rallings, ECF No. 345, PageID # 10987 (describing Memphis as “one of the most challenged cities in the nation, just due to the volume, the frequency, the rate and severity of violent crime”); Testimony of D. Crowe, ECF No. 345, PageID #11115-18: 13-19 (discussing a murder investigation); Testimony of D. Goods, ECF No. 346, PageID # 11246: 13-16 (“As a matter of fact, every—any complaint, any type of investigation that [MGU] [is] involved in, there is some type of criminal nexus involvement.”).

¹⁴ (See, e.g., Testimony of D. Goods, ECF No. 346, PageID # 11245: 7-13 (“**Q:** Tell me your understanding of the limitations that MPD has pursuant to the Consent Decree. **A:** Basically if there’s any type of investigation that involves any people or persons or groups that are involved in political activities, then we are precluded from conducting any kind of investigation on them as it relates to First Amendment issues.”)

¹⁵ (See, e.g., Order, ECF No. 151, PageID # 6272 (“The Court notes that the violations in this case appear to stem from a shared misunderstanding of the Decree’s requirements, rather than political favoritism by individual officers . . . former Director Godwin issued a Departmental Regulation about the Consent Decree that did not define its central phrase, ‘political intelligence.’”).)

not the clarity necessary for officers to interpret the Consent Decree themselves, but rather the clarity necessary for the City “to instruct [MPD] officers to make sure they’re in compliance.”¹⁶ MPD officers faithfully apply the United States and Tennessee Constitutions, which are older and longer than the Consent Decree, every day.¹⁷ As none of the officers are lawyers,¹⁸ they must be trained to do so. It is difficult to understand why the training required by the Court’s Sanctions Order (ECF No. 152) would not render officers equally capable of applying the *Kendrick* Consent Decree—whether the decree is modified or not. As the Court observed in imposing the sanctions, “[the] balance [between public safety and protecting personal rights] is determined not only by the text of the policies, but also by the actions taken to enforce them.” (Order, ECF No. 151, PageID # 6278.)

C. Updating the Consent Decree to Account for New Technologies.

Third, if the Court determines that modification of the Consent Decree is warranted, then adding mentions of specific technologies that have arisen since 1978 makes sense. Public Policy & Social Media Subject-Matter Expert Rachel Levinson-Waldman testified about advising the Independent Monitor “on policies around use of body-worn cameras at First Amendment-protected events or First Amendment events” and “[r]esearch on social media policies used by police departments around the country.”¹⁹ Similarly, Police Director Rallings testified that the MPD “at one time was the largest—we had the largest deployment of the Axon 2 Flex [sic] body-worn

¹⁶ (Testimony of D. Crowe, ECF No. 345, PageID # 11078: 22-25.)

¹⁷ (*See* Testimony of E. Daigle, ECF No. 343, PageID # 10661: 8-10 (admitting that “police officers in Tennessee are constrained by the US constitution and the Tennessee constitution”).)

¹⁸ (*See* Testimony of J. Sink, ECF No. 346, PageID # 11136: 22-11137:2 (“**Q:** Now, I want you to explain to the Court part of your challenge. While you and Mr. Saleem are trained lawyers, the people who have to execute within this Consent Decree, how many lawyers are actually police officers that you’re aware of? **A:** I’m not aware of any.”).)

¹⁹ (Trial Tr. of June 17, 2020, at 44:7-11.)

camera. We're still a very large deployment. I think we've deployed 2,000 cameras[.]”²⁰ And Deputy Chief Don Crowe testified that “the use of a video system or video systems” is “a crucial part of the Memphis Police Department’s public safety protocol and mission.”²¹

Still, “[t]he purpose of the parties as memorialized in the [*Kendrick*] Consent Decree to forbid affirmative investigative acts has not changed, even if what exactly is active and passive has changed with the state of technology.” (Order, ECF No. 151, PageID # 6258.) As a result, contrary to testimony offered by the City’s police practices expert, the fact that the Consent Decree is 42 years old does not mean that “in 2020, there is no need for a decree to protect citizens’ rights.”²² “[T]he City [has] granted its residents privacy rights above and beyond those guaranteed by the Constitution.” (Order, ECF No. 151, PageID # 6276.) The City “may obtain relief from [that grant] when it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with the terms of the decree.” (Order, ECF No. 250, PageID # 8392 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992)).)

D. Producing a Document that Speaks for Itself / Incorporating the Court’s Orders into the Consent Decree.

Fourth and fifth, for reasons already explained, the impact of the proposed modifications appears to be to provide sufficient clarity to enable the City to properly instruct officers on the Consent Decree. The City offered proof through the testimony of Police Legal Advisor Zayid Saleem that having “some clarifications from the Court actually incorporated into the body of the Decree that is posted” would “be a great benefit . . . as [Mr. Saleem] attempt[s] to instruct the

²⁰ (Trial Tr., ECF No. 345, PageID # 10996: 4-7.)

²¹ (Trial Tr., ECF No. 345, PageID # 11069: 2-6.)

²² (Testimony of E. Daigle, ECF No. 343, PageID # 10651:25-10652:1.)

department on the Consent Decree.”²³ Similarly, the City maintains that “having some of the Court’s Order [ECF No. 250] incorporated into the Consent Decree itself would be helpful in avoiding some confusion so officers would not have to flip through two different documents.”²⁴

The Monitoring Team has no objection to codifying the Court’s Orders within the text of the Consent Decree. But adding to the Consent Decree, which already is complex, may increase, rather than diminish, the need for appropriate training.²⁵

III. PROPOSED MODIFICATIONS 1-17

As with the standard for modifying the Consent Decree and whether the City’s asserted grounds for modification satisfy that standard, the Independent Monitor largely defers to the parties’ positions and the Court’s ultimate determination regarding the propriety of the parties’ 17 proposed modifications. At trial, Ms. Levinson-Waldman and Law Enforcement & Police Practices Subject-Matter Expert Dr. Theron T. Bowman suggested alternatives to (1) the parties’ new proposed definitions of “legitimate law enforcement purpose” and “political intelligence”;²⁶ (2) proposed new Paragraph D(2);²⁷ and (3) proposed new Paragraph G(8).²⁸

²³ (Trial Tr., ECF No. 346, PageID # 11301:23-11302:7.)

²⁴ (Post-Trial Brief, ECF No. 348, PageID # 11402 (citing testimony of Director Rallings).)

²⁵ (*See, e.g.*, Testimony of Z. Saleem, ECF No. 346, PageID # 11323: “The Consent Decree is not something that I can shoot an email out and say, hey, look, these are the new changes, let’s follow these rules. It’s much more complex than that. And so sending out bulletins wouldn’t cover that, I don’t think. But we would find a way to get the material out so the officers are aware of the development in the Consent Decree.”)

²⁶ (Testimony of R. Levinson-Waldman, Trial Tr. of June 17, 2020, at 77: 10-24 & 96:18-99:6; Testimony of T. Bowman, Trial Tr. of June 17, 2020, at 121:13-124:5.)

²⁷ (Testimony of R. Levinson-Waldman, Trial Tr. of June 17, 2020, at 71:25-72:6.) One way to address this concern would be to replace the term “threat assessments” with “**criminal** threat assessments.”

²⁸ (Testimony of R. Levinson-Waldman, Trial Tr. of June 17, 2020, at 72:7-72:16.) Striking the term “cyberbullying” from the new paragraph would address this concern.

One additional change that the Monitoring Team would suggest is as follows:

- Proposed new Paragraph F(4) states the following:
 - “Nothing in this provision prohibits the City from implementing reasonable time, place, and manner restrictions on First Amendment activities.”
 - The Monitoring Team would revise this paragraph as follows:
 - “Nothing in this provision prohibits the City from implementing reasonable time, place, **and or** manner restrictions on First Amendment activities, **as long as those restrictions are justified without reference to the content of the regulated speech.**”

IV. SECTION I

As mentioned above (*see* § II(D)), the Monitoring Team has no objection to codifying the Court’s Orders within the text of the Consent Decree to the extent that such codification will facilitate the training of MPD officers. With respect to § I, specifically, however, the Independent Monitor notes that since the Court’s Order of November 13, 2019 (ECF No. 250) was issued, the City has “submitted 11 or more requests for authorizations to the Monitor Team,” and there have been no “varied” interpretations of the Consent Decree.²⁹ Instead, the requests have been, as Ms. Sink testified for the City, “to either assure ourselves that we were correct in what we thought we were allowed to do and not allowed to do, or because we really needed clarification because we were unclear.” (*Ibid.*)

In any event, if codification of the November 13, 2019, Order will resolve the parties’ current impasse as to § I, then the Independent Monitor supports codification and is amenable to

²⁹ (Testimony of J. Sink, ECF No. 346, PageID # 11337:20-11338:1.) *Contra supra* note 6 and accompanying text.

working with the parties to revise the new proposed language offered by the City to the ACLU-TN's satisfaction. (*See Tr. Ex. 25.*)

V.
CONCLUSION

The Independent Monitor and the Monitoring Team look forward to the Court's resolution of the issues that remain before it in this matter and are prepared to transition to the audit and compliance phase of their responsibilities once the Court's decision is final.³⁰ The Independent Monitor also looks forward to sharing the findings of focus group expert, Dr. Sheila Peters, with the Court and the parties no later than August 7, 2020.³¹

RESPECTFULLY SUBMITTED, this 10th day of July 2020,

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³⁰ (*See* Testimony of D. McGriff, Trial Tr. of June 17, 2020, at 161-92.)

³¹ (*See* Testimony of S. Peters, Trial Tr. of June 17, 2020, at 193-211.)

APPENDIX OF DOCUMENTS REFERENCED IN THIS BRIEF

Doc.	Description	Pages
Tr. Ex. 21	Redlined Proposed Modified Consent Decree (ECF No. 327-2)	2
Tr. Ex. 25	City's Proposed Section I – vRED	8
ECF No. 3, Case No. 2:76-cv- 000449	<i>Kendrick</i> Consent Decree	1, 3, 5, 6
ECF No. 120	Order Granting in Part and Denying in Part the ACLU-TN's Motion for Summary Judgment and Order Denying the City's Motion for Summary Judgment on the Issue of Contempt (August 10, 2018)	1
ECF No. 124	Motion for Relief from Judgment or Order	1
ECF No. 151	Opinion & Order Holding the City in Contempt (October 26, 2018)	<i>passim</i>
ECF No. 152	Order Memorializing Sanctions (October 29, 2018)	1, 5
ECF No. 175	Joint Motion to Stay City's Motion to Modify and/or Vacate Judgment	2
ECF No. 176	Order Appointing Edward L. Stanton III as Monitor	1
ECF No. 178	Order Granting Joint Motion Modifying Discovery Schedule	2
ECF No. 250	Order Denying the City's Motion for Immediate Modification of the Consent Decree.	<i>passim</i>

Doc.	Description	Pages
ECF No. 310	Order Setting Video Hearing	2
ECF No. 311	Order Denying Request for Mediator	2
ECF No. 316	Order Following Video Hearing	2
ECF No. 322	Order Holding in Abeyance Decision on the City of Memphis's Proposed Social Media Policy	2
ECF No. 324	City of Memphis's Trial Memorandum	2, 3
ECF No. 327	Joint Notice of Filing Proposed Modified Consent Decree	2
ECF No. 330	Independent Monitor's Pretrial Brief	2
ECF No. 332	The City's Motion to Partially Withdraw its Motion for Relief from Judgment or Order	1
ECF No. 343	Trial Transcript of June 22, 2020	5, 6
ECF No. 345	Trial Transcript of June 18, 2020	4, 5, 6
ECF No. 346	Trial Transcript of June 19, 2020	4, 5, 7, 8
Transcript	Trial Transcript of June 17, 2020	5, 7, 9
ECF No. 348	City of Memphis Post-Trial Brief	2, 3, 7

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