

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

ELAINE BLANCHARD, et al.)	
)	
Plaintiffs,)	No. 2:17-cv-02120-jpm-DKV
)	
v.)	
)	
CITY OF MEMPHIS)	
)	
Defendant.)	
_____)	

**MEMORANDUM IN SUPPORT OF ACLU OF TENNESSEE, INC.'S
MOTION TO INTERVENE AS PLAINTIFF**

Pursuant to Fed. R. Civ. P. 24(a),(b), Plaintiff-intervener applicant ACLU of Tennessee, Inc. submits this memorandum of law in support of its Motion to Intervene as Plaintiffs.

I. INTRODUCTION

In 1976 a former University of Memphis (then Memphis State) student discovered from his roommate, an undercover police officer, that the Memphis Police Department maintained a dossier on him. This revelation kicked off a flurry of requests to the City of Memphis and its Police Department for confirmation that it was maintaining political intelligence files on those engaged in constitutionally protected activity.

As the controversy grew to a crescendo, the mayor of Memphis ordered the objectionable files burned. Chan Kendrick, then Executive Director of the ACLU of Tennessee, Inc., Mike Honey and the American Civil Liberties Union in West Tennessee filed suit to put a stop to the police practices. *Kendrick v. Chandler*, Civil

Action No. C76-449. A copy of the complaint is attached as Exhibit A to this memorandum. The end result of the suit was a September 14, 1978 Order, Judgement and Decree that “prohibit[s] the defendants and the City of Memphis from engaging in law enforcement activities which interfere with any person’s rights protected by the First Amendment to the United States Constitution.” Order, Judgement & Decree, attached as Exhibit B [hereinafter, the “Decree”]. The Decree has been in full force and effect since.

II. APPLICANT

The ACLU of Tennessee, Inc. (ACLU-TN) is a statewide, nonprofit, nonpartisan organization with thousands of members dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws. It is the Tennessee affiliate of the American Civil Liberties Union. Since its founding in 1968, the ACLU-TN has been deeply committed to defending Tennesseans’ right to speak out without hindrance or pressure from government actions and to be free from unconstitutional police surveillance that chills that speech. ACLU-TN is dedicated to the principles of liberty and equality embodied in the United States Constitution and the Tennessee Constitution.

III. STATEMENT OF FACTS

A. Introduction

The ACLU-TN, through its then active West Tennessee chapter¹, brought suit in 1976 after discovering that the Memphis Police Department (“MPD”) had been gathering and maintaining political intelligence on individuals engaged in constitutionally protected activity. See Exhibit A. This suit culminated in a Decree in 1978 which, among other things, prohibits the “[t]he City of Memphis from engaging in law enforcement activities which interfere with any person’s rights protected by the First Amendment to the United States Constitution.” Decree § A.

On February 17, 2017, the Defendant released documents listing people who must be escorted by police when visiting City Hall. The list includes names of individuals who participated in protests, rallies or other free speech activities in the city. Many of those listed had no criminal record or history of causing disturbances at City Hall. Four of the listed individuals filed suit on February 22, 2017, in this Court alleging that the Defendant is in violation of the Decree. ACLU-TN now seeks to intervene as a plaintiff in this suit.

B. Background on the Preceding Lawsuit

In 1976, Eric Carter, a former student body president of Memphis State University, discovered that the MPD’s Domestic Intelligence Unit had compiled a

¹ At the time of the original suit, ACLU-TN operated as a confederation of chapters across the state, including the West Tennessee or Memphis Chapter, which was also known as the West Tennessee Civil Liberties Union. Chapters were chartered under the by-laws of the ACLU-TN. Over the years, the various regional chapters have lapsed in favor of more a centralized organization.

file on him. On August 15, 1976, Mr. Carter sent a letter requesting that he be allowed to view the file. His request was effectively denied when the file was incinerated. Statements made by those who had reviewed the file before its destruction indicated that it contained no information indicating criminal activity.

Subsequently, the existence of other files came to light. The existence of the MPD's Domestic Intelligence Unit and its files on individuals and organizations engaged in non-criminal activities became a matter of public concern. Local newspapers and elected officials called for an explanation and expressed concerns about the practice of political intelligence gathering by the police.

On September 10, 1976, the City of Memphis disbanded the Domestic Intelligence Unit and began to destroy the additional files and other documents related to the unit's activities. This Court issued a restraining order to halt the destruction of potential evidence, but not before some of the files had already been incinerated.

On September 14, 1976, the ACLU-TN's West Tennessee Chapter, along with ACLU-TN Executive Director Chan Kendrick and Mike Honey, filed a lawsuit in this court styled *Kenrick v. Chandler*, Case No. C 76-449. The complaint alleged that the City of Memphis and MPD:

gathered, maintained and held in their possession, custody and control, files, records and reports that contained unverified information and gossip which related exclusively to the exercise of lawful and peaceful activities. Such files are collected in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

After two years of discovery in the case, the parties came to an agreement approved by the court for the protection of the rights of privacy and speech. The Decree was entered by this Court on September 14, 1978.

C. Requirements of the 1978 Decree

The Decree generally forbids the Defendant from interfering with any person's right to free speech. Decree § A. More specifically, it prohibits the Defendant from engaging in "political intelligence," defined 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." *Id.* § B(4), C(1). The Decree includes the use of electronic and covert surveillance for the purpose of gathering political intelligence. *Id.* § D, F. Covert surveillance includes employing informants or undercover officers to "infiltrate or pose as a member of any group or organization exercising First Amendment rights." *Id.* § F.

In addition to the bans on political intelligence gathering, the Decree prevents harassing a person exercising First Amendment rights or engaging in any action which is intended to deter, or may have the effect of deterring, any person from engaging in free speech. *Id.* § F(1)(2). The Decree gives 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 numbers of any person in attendance.

Id. § F(2).

D. The Escort List and Allegations that Defendant has violated the Decree.

On February 17, 2017, the City of Memphis released documents listing people who must be escorted by police when visiting City Hall. (Complaint, Ex. 2.) Four of the listed individuals filed suit on February 22, 2017, in the Court alleging that the Defendant is in violation of the Decree.

The Complaint alleges that those included on the list had participated in protests, rallies or other free speech activities in the city. (Complaint ¶ 12.) On information and belief, many of those listed had no criminal record or history of causing disturbances at City Hall. The Complaint further alleges that the “Memphis Police Department has engaged in willful and wanton conduct violating the consent order:” (Complaint p. 1.)

Examples of the alleged conduct included video recording participants at lawful protests, including a protest the day before the Complaint was filed. (Complaint ¶ 12.) The Complaint also asserts that the Defendant employs software that surveils social media posts in violation of the Decree.

(Complaint ¶ 14). Use of such software to collect information on free speech activities would violate the Decree’s ban on electronic surveillance, as well as its more general prohibitions on gathering political intelligence and interfering with First Amendment activities.

IV. ARGUMENT

A. Plaintiff-intervener American Civil Liberties Union of Tennessee satisfies the requirements for intervention of right in Fed. R. Civ. P.24(a)(2).

Fed. R. Civ. P. 24(b)(a)(2) provides:

On a timely motion, the court must permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Sixth Circuit has established four criteria that must be met before an intervention of right is granted: (1) that the application to intervene is timely; (2) that the applicants have a substantial, legal interest in the subject matter of the pending litigation; (3) that the applicant's interest will be impaired if they are not permitted to intervene; and (4) that the present parties do not adequately represent the interest of the applicants. *See Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

1. Intervention at this juncture is timely.

When considering whether the motion to intervene is timely, the Court looks to several factors:

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs, 870 F.2d at 34.

In the present case, the Motion to Intervene is undoubtedly timely. The Plaintiffs filed their Complaint on February 22, 2017. This motion followed within eight days. There is no delay caused by the Motion to Intervene and no surprise or prejudice to the Plaintiffs or Defendant.

2. Applicant has a substantial, legal interest in the pending litigation.

The Sixth Circuit has adopted a “rather expansive notion of the interest sufficient to invoke intervention of right.” *Miller*, 103 F.3d at 1245. To meet this liberal standard for intervention, the applicant need not have the same standing as the plaintiffs necessary to initiate the lawsuit or a specific legal or equitable interest. *Id.*; see *Purnell v. City of Akron*, 925 F.2d 941, 947 (6th Cir. 1991).

In this case, ACLU-TN has both standing and a specific legal interest. As the original plaintiff in the underlying case, ACLU-TN certainly has standing to enforce its Decree against the Defendant. Likewise, as an original party, ACLU-TN possesses a unique interest in seeing the Decree enforced and in defending its scope and application.

In *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990), the subject matter of the litigation involved an interpretation of a consent decree originally negotiated by the proposed intervenors. In that case, a class of Black applicants and employees of the Cincinnati Fire Department sought to intervene in a case brought by white applicants, who were challenging aspects of the consent decree. *Id.* at 337-39. The court acknowledged that “as parties to the consent decree, the

proposed intervenors have a significant legal interest in its interpretation.” *Id.* at 342.

ACLU-TN filed suit in 1976, along with individual plaintiffs, to protect the rights of its members as well as all people subjected to the unconstitutional police intelligence gathering in Memphis. It once again stands in that role where there are allegations that the requirements of that Decree have been violated. The violations alleged in the Complaint not only affect those who are listed on the Police Escort List, but potentially all people residing in Memphis or who choose to exercise their right to Freedom of Speech in Memphis. Video recording participants at lawful protests and employing software that surveils social media posts to gather political intelligence would violate the Decree’s ban on electronic surveillance, as well as its more general prohibitions on gathering political intelligence and interfering with First Amendment Activities. The addition of individuals to the escort list who have no criminal record or no history of causing disturbances at City Hall suggests the gathering and maintenance of political intelligence files. For this reason, ACLU-TN has a significant interest which is more than sufficient to invoke intervention of right.

3. The interest of the applicant will be impaired if it is not permitted to intervene.

To illustrate that its interests would be impaired if it is not permitted to intervene, ACLU-TN must only establish that impairment of the legal interest is

possible. *Miller*, 103 F.3d at 1247. “This burden is minimal.” *Id.* This standard is clearly met in the present case. A decision that fails to enforce the Decree would remove one of the hard-fought protections ACLU-TN has established over its nearly fifty year history in Tennessee. The Decree has stood since 1978 and has been invoked on occasions when Defendant’s conduct, or that of its police department, has crossed the line. Were this case before this Court for dissolution or relief of the Decree instead of an enforcement action by its intended beneficiaries, ACLU-TN would undoubtedly be considered a necessary party. A negative decision in this case would effectively dissolve the Decree, and the protections it provides to ACLU-TN members, without its involvement.

The precedential effect of any ruling in this case would affect ACLU-TN’s ability to litigate other cases of police surveillance and political intelligence gathering. The Sixth Circuit has “acknowledged that potential stare decisis effects can be a sufficient basis for finding an impairment of interest.” *Miller*, 103 F.3d at 1247. ACLU-TN has a clear legal interest which will be impaired if it is not permitted to intervene.

4. The present parties may not adequately represent the interest of the applicant.

An applicant seeking intervention must show only that their interest *may* be inadequately represented by current parties. It is not necessary to show that they will be inadequately represented by current parties. *Miller*, 103 F.3d at 1247. “For example, it may be enough to show that the existing party who purports to seek the

same outcome will not make all of the prospective intervenor's arguments.” *Id.* The Supreme Court describes this burden as “minimal.” *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

In the current case, Plaintiffs may not adequately represent the interest of ACLU-TN. Plaintiffs are four individuals included on the “black list” that is a part of the subject matter of this case and are persons who are entitled to the protections of the Decree. In contrast, ACLU-TN, in arguing for any injunctive relief, represents the collective interest of its members who are protected under the Decree. This difference in position and motivation may lead to differences of opinion of what arguments should be made, what evidence sought and what remedy, ultimately, should prevail.

Individual plaintiffs may also be subjected to stronger personal pressure in choosing their arguments and in prosecuting their case. As an organizational plaintiff, ACLU-TN would not be affected by this same pressure. ACLU-TN is not an individual with a home to maintain or business to run, which may be affected by the time and effort required of plaintiffs in any civil actions. ACLU-TN may also have different motivations concerning the attractiveness and utility of any concessions offered. For these reasons, Plaintiffs’ arguments may differ from ACLU-TN’s arguments. ACLU-TN’s interests therefore may not be adequately represented by the present parties.

B. Alternatively, the American Civil Liberties Union of Tennessee satisfies the requirements for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)

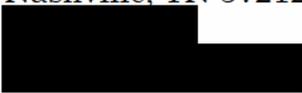
Fed. R. Civ. P. 24(b) establishes the circumstances under which an individual may be permitted to intervene in an action. Specifically, Fed. R. Civ. P. 24(b)(1)(B) provides that intervention may be permitted where the movant timely seeks intervention and “has a claim or defense that shares with the main action a common question of law or fact.” Thus, “[u]nder Rule 24(b), a court ruling on a motion for permissive intervention must assess three factors: (1) whether the request to intervene is timely; (2) whether the proposed intervenor “has a claim or defense that shares with the main action a common question of law or fact”; and (3) “whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013).

As mentioned above, ACLU-TN’s Motion is timely and shares common questions of law and fact with the Complaint. At this early stage in the proceedings, there would be no prejudice to any party or undue delay if invention is granted. ACLU-TN has therefore satisfied all three requirements necessary for permissive intervention. Because ACLU-TN would have standing to bring its own complaint to enforce its Decree, which would likely be consolidated with this case, judicial economy favors granting permissive intervention.

V. CONCLUSION

For the reasons presented above, ACLU-TN respectfully requests that the Court grant its Motion to Intervene as Plaintiff as of right, or alternatively, grant it permissive intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

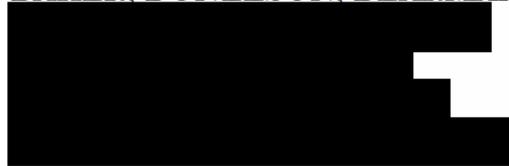
I hereby certify that on March 2, 2017, a true and correct copy of the foregoing document and the above-described exhibits has been served via ECF to:

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