

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

ELAINE BLANCHARD, KEEDRAN)	
FRANKLIN, PAUL GARNER and BRADLEY)	
WATKINS, (Dismissed per Court Order))	
Plaintiffs,)	
)	
and)	
)	
ACLU OF TENNESSEE, Inc.)	
Intervening Plaintiff,)	
)	No. 2:17-cv-02120-jpm-DKV
v.)	
)	
THE CITY OF MEMPHIS,)	
Defendant.)	
)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56, Plaintiff ACLU of Tennessee (“ACLU-TN”), submits this memorandum of law in support of its Motion for Summary Judgment against Defendant, City of Memphis (“Defendant”).

The City of Memphis through its Police Department (“MPD”) has as a matter of law violated the consent decree entered in *Kendrick v. Chandler*, Civil Action No. C76-449 (the “Decree”). MPD’s violations, both wide-ranging and pervasive, constitute a pattern of political intelligence collection, electronic and covert surveillance, harassment of those exercising their First Amendment rights, and attempts to deter the free exercise of First Amendment rights. Due to the repeated and willful violation of the Decree of the Court — and Defendant’s inability to justify its failure to comply — Plaintiff respectfully requests that summary judgment be granted against

Defendant and a finding of contempt of court be entered as a matter of law.

- I. **“The provisions of this Decree prohibit . . . 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 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.” *Decree, Statement of General Principles***

On February 17, 2017, the City of Memphis released documents listing people who must be escorted by police when visiting City Hall. (Complaint, Exh. 2, ECF No. 1.) Four of the listed individuals (the “Blanchard Plaintiffs”) filed suit on February 22, 2017, alleging violations of the Decree by Defendant. (*Id.*) ACLU-TN intervened as a Plaintiff of right; the Blanchard Plaintiffs were later dismissed by the Court. (ECF No.41.)

The list that served as the catalyst for this lawsuit — sometimes referred to as the City Hall Escort List — is symptomatic of the broader practices within MPD with respect to surveillance, investigation, targeting, and dissemination of information regarding protestors and activists, and its creation arises out of the intersection of multiple abusive practices.

- A. **“‘Political Intelligence’ means 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.” *Decree, Definition of Political Intelligence***

The City Hall Escort List was a creation of MPD’s Office of Homeland Security (“OHS”) with approval at the highest levels, including from Director of Police Michael Rallings. (Reynolds Dep. 120-23; Rallings Dep. 64.) Individuals were included on this list due to their political associations and their participation in free speech activities.

On December 19, 2016, the Coalition of Concerned Citizens (“CCC”) and Keedran Franklin, staged a protest, known as a die-in, on the front lawn of Mayor Strickland’s residence. (Bonner Dep. 24; Rallings Dep. 65, 75; Reynolds Dep. 117.) There were no arrests at the protest.

(Bonner Dep. 22.)

Following the protest, Director Rallings instructed his “team” to respond; this command resulted in the creation of the City Hall Escort List, which was, more precisely, an Authorization of Agency (“AOA”). (Rallings Dep. 64-66; Exh. A: Bonner Dep., Exh. 1¹.) An AOA is a MPD internal form that designates a list of individuals who may not enter a particular property. (Reynolds Dep. 118-19.) Individuals on an AOA are to be notified of their presence on the list and that, if they then return to the property, they are subject to arrest for criminal trespass. (*Id.*)

When Sergeant Tim Reynolds of OHS drafted the AOA, he did not limit it to individuals who were present at the Mayor’s residence on December 19, 2016. (Reynolds Dep. 125-26.) Instead, Reynolds built a list of what he termed “associates in fact,” who were individuals that “may have something to do with either Keedran Franklin or the CCC” as determined by “social media contacts,”² “previously arrested with,” “often seen at unlawful assemblies with,”³ and “that kind of thing.” (Reynolds Dep. 122, 125-26.) Director Rallings confirmed that the list was populated by individuals who had “affiliations with the die-in group and . . . protests.” (Rallings Dep. 67-68.)

AOAs were issued for the Mayor’s residence and City Hall on January 4, 2017 and January 17, 2017, respectively.⁴ (Exh. A.) The AOA for the Mayor’s residence specified that the

¹ Where deposition exhibits experienced degraded quality upon scanning, clean copies have been substituted. Deposition exhibit numbers have been included as a cross-reference.

² See Section (I)(B)(2)(a) for a discussion of the use of undercover social media accounts.

³ Reynolds’ use of the term “unlawful assembly” refers to any assembly of more than 25 people without a permit; accordingly, many of the assemblies to which he refers are not in fact in violation of any law or ordinance. Rather, Reynolds has designated them as unlawful due to an incorrect understanding of the city ordinance in question. (Reynolds Dep. 37.) See *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (statute requiring small groups to get permit before walking on a public right of way is overly broad and not narrowly tailored because it would apply to circumstances that “do[] not trigger the [city’s] interest in safety and traffic control.”).

⁴ In an e-mail sent to OHS on December 28, 2016, Rallings ordered “all protest leaders” be identified and that Authorizations of Agency be prepared for Graceland, the Zoo, and the Mayor’s residence. (Exh. B: Rallings Dep. Exh. 53.)

individuals included on that list also were required to be escorted while inside of City Hall. (*Id.*) In support of the AOAs, Reynolds prepared dossiers for the listed individuals and sent them to Albert Bonner, the head of the dignitary protection team for Mayor Strickland.⁵ (Bonner Dep. 9, 33-35; Exh. C: Bonner Dep. Exhs. 2-3; Reynolds Dep. 25.) These dossiers included driver's license profiles and photos for all individuals and, for some, included social media profile links, arrest and mental health histories, and alleged gang affiliation. (*Id.*) Bonner forwarded the dossiers to one of his officers, instructing her to print them off, "keep [in] a folder," and "[m]ake sure everyone familiarize themselves with the people on the list." (Exh. C, at 20796.)

After the AOA list became public, Reynolds was instructed to "make sure the strength of the associates in fact to CCC were explained" and "to pare the list down." (Reynolds 128.) As a result, Reynolds generated an additional list that provided explanations for individuals who were to remain on the list; fifteen individuals were removed. (Exh. D: Bonner Dep. Exh. 4.)

B. "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." *Decree, Prohibition against Political Intelligence*

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.⁶

Steven Chandler, acting-Lieutenant of OHS in July of 2016, testified that OHS was "originally designed to deal with threats to the Memphis Police Department or Memphis in

⁵ In his capacity as head of the Mayor's dignitary team, Lt. Albert Bonner handled security of City Hall and the Mayor's residence. (Bonner Dep. 9.)

⁶ OHS is a specialized unit within MPD that is structurally housed within MPD Special Operations. The OHS unit is staffed with two officers who report to an acting Lieutenant. During the period in question, Tim Reynolds reported to Lt. Steven Chandler. The second officer position was filled first by Phillip Penny and then by Ed Cornwell. (Chandler Dep. 11-14; Reynolds Dep. 17.) Chandler, in turn, reported to Eddie Bass, who supervised several specialized units within Special Operations, including OHS. (Bass Dep. 13-15.)

general,” but that it had to “retool due to recent events” such as “protests against the police” and threats against the police. (Chandler 14-15.) According to Chandler, in shifting its mission, OHS began to focus on “local individuals or groups that were staging protests.”⁷ (*Id.*)

To assist in their information gathering work, OHS enlisted the help of the Real Time Crime Center (“RTCC”).⁸ (Bass Dep. 58-59; *see also* Exh. E: Chandler Dep. Exh. 59.) Through this collaboration, OHS was able to expand its capability to incorporate review of the more than 3,000 live cameras throughout the City, review of social media accounts, and application of powerful software analysis to the relationships between individuals and events. As described more fully below, OHS functioned as a hub for gathering and disseminating intelligence between Command staff, RTCC, precincts where events were to take place, the permit’s office and other specialized units, such as the Organized Crime Unit and the Multiagency Gang Unit.

1. The City of Memphis “shall not disseminate damaging, derogatory, false or anonymous information about any person for the purpose of political intelligence.” *Decree, Harassment and Intimidation Prohibited*

The Office of Homeland Security collected and disseminated intelligence regarding political activists and individuals who participated in protests, rallies, or other free speech activities in the City. In addition to the AOA discussed above, OHS prepared daily Joint Intelligence Briefings, regularly maintained a Database of Protests and other free speech events, and conducted weekly Power Point presentations regarding activists and protest movements.

a. Joint Intelligence Briefings

One of the most wide-reaching distribution channels for the intelligence gathered by OHS was the Joint Intelligence Briefing (“JIB”). These briefings, which OHS circulated between one

⁷ Plaintiff acknowledges that Chandler testified that this “retooling” was due to concern for protestor safety; review of the more than 25,000 pages of documents in this case does not support that assertion.

⁸ For more about RTCC, see Section B(2)(a)

and three times per day, were reports prepared by OHS wherein national news stories regarding police involved shootings were presented alongside local criminal activities, photographs and profiles of activists and individuals, and lists of movement meetings and events.⁹ (Exh. E: Chandler Dep. Exh. 59.)

JIBs, according to Major Bass, served as “a regional guide to area law enforcement for current and historical intel in reference to the BLM encounters” that law enforcement had been “challenged to mitigate.” (Exh. F: Bass Dep. Exh. 80; Bass Dep. 55-56.) Chandler testified that JIBs initially focused on “what protests we know that were popping up around the city.” (Chandler Dep. 23-24.) “As time progressed, we started looking at more national events as opposed to anything else, how it had implications for Memphis Police Department.” According to Chandler, the groups targeted by the JIB were “any of the organizations that arose out of Ferguson,” and specifically named, “Black Lives Matter” and “Take them Down 911 [sic].” (*Id.*) Chandler testified that these groups had “made no direct threat” in Memphis. (Chandler Dep. 23-24.)

The audience for the JIB “grew exponentially over time.” (Chandler Dep. 24.) Within MPD, the JIB was circulated to Executive and Command Staff, Colonels, Special Ops, Special Services, Lt. Colonels, Investigative Services Command, Precinct – Traffic COs, RTCC, MPD Training Academy, Communications Supervisors, and the Public Information Office. (Exh. G: Reynolds, Exh. 14.) The JIBs were also circulated outside of MPD to employees of: Shelby County Sheriff, U.S. Military, U.S. Department of Justice, Tennessee Department of Homeland Security, Arkansas Fusion Centers, Shelby County, Germantown, West Memphis, Memphis Light, Gas, & Water, Tennessee Valley Authority, Shelby County Schools, FedEx, Autozone, and St. Jude. (Exh. G; Exh. H: Reynolds Dep. Exh. 18; Exh. I: Oct. 4, 2016 E-mail; Reynolds Dep. 54-55, 63.) Nothing

⁹ Chandler described the four categories of information that were to be incorporated into the brief as: (1) Police Shootings/deaths; (2) Riots/protests; (3) Black Lives Matter (BLM); (4) Officer Safety. (Exh. E.)

prevented JIBs from being forwarded beyond this initial circulation list, and indeed, they were. (*See e.g.* Exh. I; Exh. J; Reynolds Dep. Exh. 12.)

The JIBs included rumored protests, reports on past protests, and information about private events. The JIB from July 15, 2016 1600 hours is representative of the types of information included in JIBs. (Exh. H.) It contained a report on the rumored “Day of Rage” protests,¹⁰ and information regarding public protests, copies of permits filed for protest events, and the status of those permits. (*Id.*) The JIB included information about an event on private property — a panel discussion hosted by the Black Lives Matter Memphis Chapter at Abyssian Missionary Baptist Church.¹¹ It also included a social media post about an individual’s interest in possibly holding a protest at Wolfchase Mall and an update that he had “agreed” to post a retraction about “this demonstration” on his social media. (*Id.*) It included a report about a complaint filed by Frank Gibson about harassment by MPD officers and photos of Gibson and another man who joined him in making the complaint. (*Id.*) The JIB concluded by stating that from July 9 to July 15, there were “no specific threats to law enforcement on social media.” (*Id.*)

As illustrated by the JIB above, the JIBs regularly included information about meetings on private property; these included panel discussions, townhalls, BLM Meetings for adults and those for youth, and even “Black Owned Food Truck Sunday.” (*See, e.g.* Exhs. G, H; Exh. L: February 8, 2017 0800 JIB.) They regularly included photographs of and information about those involved in protest movements and those who posted about the possibility of protest action. (*See, e.g.* Exh. G, Exh. M: August 11 2016 1600 JIB; Exh. N: Reynolds Dep. Exh. 15.) In disregard of the breadth

¹⁰ This JIB included a link to the extreme far-right news site Fury News and a propaganda photograph from the Organic Prepper. When presented with an article about the “Day of Rage” written by the Organic Prepper, Reynolds testified that it would not be reliable news source. (Reynolds Dep. 186-87; Exh. K: Reynolds Dep. Exh. 39.)

¹¹ This JIB notes that “[n]o permit has been applied for or approved for this event”; however, a permit would not have been required.

of circulation, the JIBs included “Sensitive/Classified” information,¹² such as drivers’ license profiles, juvenile arrest records, photographs, dates of birth, addresses, mental health histories, and information from police databases. (Exhs. G, H, I, J, K, L, M.)

JIBs were regularly circulated between June 2016 and March 2017.¹³

b. Database of Memphis Protests, Demonstrations, & Flash Mobs

Dir. Rallings also instructed OHS to create and maintain a database of protests, demonstrations, and flash mobs (the “Database”). (Rallings Dep. 54; Exh. P: Reynolds Dep. Exh. 8.) The Database spanned 2016 and 2017, and OHS began keeping the Database in the course of its work in December 2016. (Reynolds Dep. 27-28.)

The Database tracked the name, date, and crowd size of events. (Exh. P.) It tracked the “Group” responsible, “Key Personnel,” Arrests, “Techniques,” “Critical Infrastructure,” and “Damage.” (*Id.*) Reynolds testified:

Key personnel means our observations. These are the people that on social media that are on for these events. And they are unpermitted. So we thought this needs to, these people keep coming to these unpermitted events. And there’s a pattern, so if there’s not a pattern why not put it down.

(Reynolds Dep. 30-31.) The Database tracked gatherings as small as four individuals. (Exh. P.) According to the Database, only two events resulted in any arrests and no events resulted in damage. (*Id.*)

Dir. Rallings testified that it was “very rare” that “any of those protests, permitted or unpermitted, or gatherings that responded in any issue where law enforcement had to do anything

¹² Information that is personal in nature (address, social security numbers, driver’s license information, etc.) or taken from police databases is defined as “Sensitive/Classified Media” pursuant to the CJIS Media Policy. (Exh. O.)

¹³ The parties stipulated that ESI discovery would be limited in time to this period; accordingly, Plaintiff has but a snapshot of Defendant’s conduct.

other than just kind of be there to keep everybody safe.” (Rallings Dep. 54-56.)

c. Weekly Power Point Presentations

In addition to the daily JIBs and the regular maintenance of the Database, OHS prepared and presented Power Point presentations regarding activists and protest groups. (Bass Dep. 21.) These presentations were given at the training academy and at weekly meetings for Command Staff. (Bass Dep. 21; Reynolds Dep. 98-99.)

Blue Suede Shoes was one such presentation. (Exh. Q: Reynolds Dep. Exh. 25.) The presentation included activist photographs and arrest information; it describes alleged associations and personal relationships between protestors, including individuals who were not arrested at the protests in question.¹⁴ (Exh. Q.) The presentation alleges that the activists profiled sought to use “legitimate community organizations^[15] to advance a radical agenda.”¹⁶ (*Id.*) The presentation incorporates private social media posts, admits to the use of undercover officers during protests, and provides Reynolds’ assessment regarding the beliefs, opinions, and goals of the individuals and groups profiled. (*Id.*) The presentation concludes by stating that “[a]n expressed goal of one of these smaller radical groups^[17] is to embarrass law enforcement in order to undermine the bond between law enforcement and the community.”¹⁸ (*Id.*)

All Shook Up is another representative presentation, dated January 8, 2017. (Exh. R:

¹⁴ When asked the purpose of the slide showing associates, Reynolds testified: “It’s showing that . . . even though he is in with the unlawfuls, leader of unlawful assembly, there are other people that he has been, is friends with basically, or associated with, associates in chief in fact.” (Reynolds Dep. 104.)

¹⁵ Reynolds testified that “legitimate” means “widely supported.” (Reynolds Dep. 112.)

¹⁶ Reynolds testified that the radical agenda referenced in the presentation was to “close the Zoo.” (Reynolds Dep. 108-09.)

¹⁷ Reynolds testified that “radical groups” means “the core group of unlawful assembly, people that want to use a legitimate expression through the public as a vehicle to make the police department or the city, or somebody else, look bad or advance their own agenda.” (Reynolds Dep. 113.)

¹⁸ Reynolds’ also states that “reliable sources” indicate that the groups “intend to use violence and destroy property using these public venues.” (Exh. Q.) Discovery in this matter has not supported that assessment, however.

Reynolds Dep. Exh. 26.) It outlines individuals who had been previously arrested, associates of those individuals, and a summary of the beliefs of the organization. (Exh. R.) The presentation concludes with a plan of action that states: “Through reliable sources, OHS has identified 43 individuals that may cause problems during the birthday celebration; OHS has worked with Raines Station and forwarded the 43 names of individuals for possible inclusion on an Authorization of Agency.” (Exh. R.)

2. “The defendants and the City of Memphis shall not engage in political intelligence.” Decree, Prohibition against Political Intelligence

The collection of political intelligence was also an essential function of OHS in collaboration with other units. MPD collected this information through a network of overt and covert sources, including social media, live video feeds, and officer surveillance and investigation. These were the sources for the information contained in the briefings and presentations disseminated by OHS.

a. Electronic Surveillance/Investigation

MPD, and specifically OHS and RTCC, collected information about political activists, protests, and groups through public and private sources. Where RTCC was assigned to broadly focus on collection of social media posts, OHS focused more narrowly on specific investigations. (Reynolds Dep. 43.)

The Real Time Crime Center houses a bank of computers manned by officers 24 hours per day. (Chandler Dep. 28-29; Wilburn Dep. 13.) The officers monitor live feeds of cameras located throughout the City. (Chandler Dep. 29.) These cameras, which include fixed, mobile, drone, covert, and overt types, have been used to surveil protest activity in the City. (Patty Dep. 6-26, 34; Wilburn Dep. 25.)

Another tool available to officers is software referred to as a social media collator,¹⁹ which enables monitoring of open source data²⁰ or “chatter” regarding protest events across social media platforms. (Wilburn Dep. 24-25.) RTCC officers also conducted manual searches of social media accounts such as Facebook. (Wilburn Dep. 27-28.) 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. (Bass Dep. 58-59; *see also* Exh. S: Ross Dep. Exh. 65.)

In a representative example, Bradley Wilburn, an officer with RTCC reported to the OHS team regarding a “particular feed” he “set up to monitor MemphisPD.” (Exh. T: Wilburn Dep. Exh. 82.) Wilburn included a link to an article with the commentary: “This link is also showing up with friends of Frank Gotti and other protestors. This digital publication has a history of publishing old articles that sometimes becomes a flashpoint adding fuel to a current fire.” (*Id.*) In another such example, Wilburn circulated a document entitled “7/10/16 Monitoring.” (Exh. U: Reynolds Dep. Exh. 47.) Wilburn included screenshots of various social media posts related to a potential Black Lives Matter protest. (*Id.*) Wilburn also included a post from Tami Sawyer’s Instagram account with the comment, “And Tami Sawyer is active with Steve Cohen, post below.” (*Id.* at 1780.) When asked why he included that post, Wilburn testified: “Probably because of the mention of Black Lives Matter.”²¹ (Wilburn Dep. 40-41.)

Wilburn testified that he documented his work by creating a folder on the server for each investigation (named by subject), that he referenced previous investigations, and that he used JIBs as a basis to initiate investigations into background information. (Wilburn Dep. 21, 24-25)

¹⁹ MPD used two different social media collators: Geofeedia and NC4 Signal. (Wilburn Dep. 25-26.)

²⁰ “Open source” denotes a social media account with privacy settings set to public. (Reynolds Dep. 45.)

²¹ This resulted in the collection and circulation of a broad swath of social media posts related to Black Lives Matter — e.g. a Block Party flyer, because it included the phrase “Black Lives Matter” and was posted to Frank Gibson’s Facebook page (Exh. V: Memphis 3701-02); and a Twitter post about Black Lives Matter hosting a “Vegan Soul Food Cookout.” (Exh. W: Memphis 4376-77.)

While many of the electronic investigations used publicly available sources, MPD has accessed private social media accounts through at least one covert social media account using the pseudonym “Bob Smith.” While the content and exact nature of the Bob Smith account has been withheld under a claim of investigative privilege, the documents that were not withheld indicate that someone within MPD not only had access to the Bob Smith account, but used it to communicate with individuals, to view private posts, join private groups, and otherwise to pose as a member of the activist community.²² (See Reynolds Dep. 90-98; Exh. X: Bonner Exh. 6; Exh. Y: Reynolds Exh. 24; Exh. Z: ACLU 562-91; Exh. AA: Memphis 9442-44; Exh. BB: Memphis 10457-59; Exh. CC: Memphis 9316-20.) From publicly available information, the “Bob Smith” Facebook account has been actively adding friends from the Memphis community from July 2015 to April 2018. (Exh. Z at 577, 591.)

b. Ground Surveillance of Public Events

For protest events, MPD established a highly visible presence through deployment of officers and resources. MPD utilized Sky Cam cameras for “live feed and documentation” during protests, Aviation monitored “movement of protestors” from above, and clearly marked mobile surveillance vans were placed in location prior to protest events.²³ (Exh. DD: July 13, 2016 E-mails; Exh. FF: Aug. 15, 2016 E-mail.) OHS disseminated information to precinct commanders who typically developed the operational response to events occurring within their precincts. (Chandler Dep. 38.) Chandler testified, however, that OHS “always had somebody there” “be it a uniform presence or somebody that was in a plain clothes presence.” (Chandler Dep. 48-49.)

²² If the Bob Smith account is not controlled by MPD, then it is certainly managed by a confidential source cultivated for the purpose of collecting political intelligence — both of which violate the Decree.

²³ In one example, Chandler reported to Bass that he heard “unconfirmed reports” that there was a protest in Collierville. In response Chandler, with Bass’ approval, flew to the location at 1430 and 1600 hours to take aerial photographs of the protests. (Chandler Dep. 49-50; Exh. EE: Chandler Dep. Exh. 64.) No protest materialized. (*Id.*)

Illustrative of MPD's ground surveillance is the Commercial Appeal protest that occurred on July 13, 2016. (Exh. SS: Bass Dep. Exh. 77.) Keith Watson, Acting-Lieutenant Colonel of Uniform Division II, North Main Station, reported out the staffing and positions of personnel and provided regular updates to MPD Executive Staff, Command Staff, Colonels, and Lt. Colonels throughout the event regarding the identities of those in attendance, crowd size, content of the announcements made, and photographs of the event. (*Id.*) Bass testified that this was typical or regular communication of information from commanders back to OHS. (Bass Dep. 47-50.) During the same event, Chandler sent photographs that were taken from within the crowd to Reynolds. (Exh. GG: Chandler Dep. Exh. 63.)

Chandler testified that, generally, officers providing a plain clothes presence would "take photographs of what was going on to give people an idea of the size of the crowd, what the crowd was doing" and that "[o]bviously, based on the e-mail [Exh. 63], we did identify participants that were there." (Chandler Dep. 47-48.)

Plain clothes officers were also used to gather intel on protestors. (Exh. DD at 2394.) Bass testified that he sent officers to public forums to gather intel, to "sit down and listen" and to try find out "the intentions" of those in attendance. (Bass Dep. 52; Exh. HH: Bass Dep. Exh. 78.)

c. Ground Surveillance of Private Events

MPD also regularly conducted ground surveillance of private events. For example, in response to a Facebook post by Frank Gibson,²⁴ Bass e-mailed regional commanders that the Gibson's post "DID NOT indicate or suggest the potential social discord [sic]." (Exh. JJ: Bass Dep. Exh. 76 (emphasis in original).) Nonetheless, Col. Mickey Williams, the Raines Station Commander, responded that "Raines Station will be monitoring the situation"; he surveilled the

²⁴ On July 16, 2016, Frank Gibson posted on his Facebook page an invitation to meet him at church the next morning and "watch a brother get saved." (Exh. II: Memphis 39030-33.)

church the next morning and reported back the number of vehicles present and information about the church's pastor. (*Id.*) Bass testified that this was a typical type of communication he would have with precinct commanders and their response to it. (Bass Dep. 46-47.)

MPD also surveilled a memorial service for Darrius Stewart at New Direction Church. Col. Marcus Worthy, the commander of Ridgeway Station, surveilled the memorial from across the street, specifying, "they do not know I'm watching them." (Exh. KK: Chandler Dep. Exh. 60.) Worthy provided status reports, including identifying individuals in the crowd.²⁵ (*Id.*)

Reynolds obtained an undercover cell phone from the Organized Crime Unit to contact activists. (Exh. LL: Reynolds Dep. Exh. 32.) He used the number to contact Spencer Kaaz and to enter it into an online form for updates on an Elvis Week protest. (*Id.*) The next week, Reynolds requested that an OCU officer be sent to a civil disobedience training that he had been invited to attend through the undercover phone number. (Exh. MM: Reynolds Dep. Exh. 33.)

3. "The defendants and the City of Memphis shall not disrupt, discredit, interfere with or otherwise harass any person exercising First Amendment Rights." *Decree, Harassment and Intimidation Prohibited*

MPD officers aggressively contacted individuals who were perceived to be organizing protest events. For example, in the case of the Community Meeting at New Life in Christ Church, entitled "Community and Police Working Together Forum," Bass instructed OHS officers to "[m]ake inquiries and find out the event organizer, contact number and what is on the agenda. (Exh. HH.) Chandler responded that he spoke with a Bishop of the church who assured him that the purpose of the event was not to disparage law enforcement, that it would be a "pro-police dialogue," and that "events like what occurred at Greater Imani will not be tolerated." (*Id.*) The

²⁵ Before leaving, Worthy reported that he confirmed that the group "had permission from New Direction to plant a tree." (*Id.*)

record is replete with examples of MPD officers contacting event organizers only to report back similar pro-police sentiments and assurances or event cancellations.

A disparity also emerged between the treatment of permit applications for protest events and those for non-protest events. Staff of the Permit Office were instructed to record all anonymous calls asking about protest permits. (Exh. NN: Howard Dep. Exh. 71.) Protest events were held to a strict adherence to the 14-day notice requirement, that requirement was not enforced for non-protest events. (Exh. OO: Jan. 19, 2017 E-mail.) Where protest permit applications were circulated to Command Staff or OHS, non-protest permit applications were circulated to Special Events. (Howard Dep. 24-25, 39-40.)

One of the tools available to RTCC officers and analysts is the i2 Analyst's Notebook. (Wilburn Dep. 46-47.) This tool is a powerful "program that can help correlate certain events" and, upon inputting large amounts of data can help a user "determine correlations." (*Id.*) In 2016, a RTCC officer applied this tool, along with social media data and a police database, to create a map of associations between individuals and events entitled "Black Lives Matter." (Exh. PP: Sept. 19, 2017 E-mail.) The map included certain members of the AOA, a BLM Bridge Protest, Town Hall Meeting, and Protest, and a Back to School Community Carnival. (*Id.*) This predictive policing model, applied not to criminal activity, but to free speech activities, represents the type of violation and harassment the original decree sought to prevent.

C. "Any police officer conducting or supervising a lawful investigation of criminal conduct which investigation may result in the collection of information about the exercise of such First Amendment rights . . . must immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization." *Decree, Criminal Investigations Which May Interfere with the Exercise of First Amendment Rights*

The Decree is located on the MPD's Kiosk, which is a forms and links page available to

officers online. (Rallings Dep. 26-28; Exh. QQ: Rallings Dep. Exh. 49.) Rallings and Reynolds both testified that they were informed about the Decree in the course of their employment. (Rallings Dep. 28-29; Reynolds Dep. 139-40.) Rallings testified that he does not recall conducting reviews and authorizations for criminal investigations as specified in Section G of the Decree or DR 138, its implementing policy. (Rallings Dep. 92-93; Exh. RR: Reynolds Exh. 30.)

II. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A fact is ‘material’ for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense.” *Bruederle v. Louisville Metro Gov’t*, 687 F.3d 771, 776 (6th Cir. 2012).

III. DEFENDANT HAS VIOLATED THE DECREE AS A MATTER OF LAW

A Consent decree is both a contract between the parties and an order of the Court. *Rufo v. Inmates of Suffolk Cnty Jail*, 502 U.S. 367, 378 (1992). Thus, as with any order, the parties have a duty to take “. . . all reasonable steps within their power to comply with the court’s order.” *Glover v. Johnson*, 934 F.2d 703, 708 (6th Cir. 1991). The Court retains its inherent power to “protect the integrity of the decree with its contempt powers.” *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994).

To prove a case of civil contempt, a plaintiff must provide clear and convincing evidence that the defendant violated the Court’s prior order. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987). Once a plaintiff establishes a *prima facie* case for contempt, the burden shifts to the defendant to produce evidence that it is “presently unable to comply with the court’s order.” *Elec. Workers Pension Tr. Fund of Local Union 58, IBEW v. Gary's Elec. Serv. Co.*, 340

F.3d 373, 382 (6th Cir. 2003). The Sixth Circuit demands substantial compliance with the Court's Order and demands that a party must show they took "all reasonable steps within their power to comply with the court's Order." *Peppers v. Barry*, 873 F.2d 967 (6th Cir.1989). It is not enough for a party to claim that they made an effort to comply; the law demands substantial compliance with the Court's Order.

The Statement of General Principals contained in the Decree make clear that it is designed to serve as a protective shield for First Amendment rights against the City of Memphis and the Memphis Police Department. The 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. The necessity of protecting those rights is made obvious by the record in this case.

Defendant has indicated through its conduct that it does not see itself bound by the Decree or the authority of the Court and that it believes that it is vested with discretion to disregard the Decree at will. The law provides a strong rebuke to this position. Defendant's violations of the Decree are myriad, it is not in substantial compliance with the Decree, and it cannot meet its burden of demonstrating that it took all reasonable steps within its power to comply. Indeed, it took no steps.

Defendant 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 AOAs, the daily JIBs, and the weekly Power Point presentations described above. Individuals were targeted for investigation based on their "associations-in-fact," their affiliations with protest groups, and their participation in free speech activities. JIBs and the Power Points were similarly populated with "current and historical intel" with respect to protest groups, associations, and beliefs and free

speech activities of individuals. Defendant likewise engaged in political intelligence by recording “Key Members” involved in protests to track the “pattern” of who attended unpermitted events, by undertaking broad-based investigations of individuals (both in person and electronically), and by using software to map associations between individuals based on their beliefs, opinions, and associations.

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.”

Defendant violated Section E of the Decree by covertly surveilling groups engaged in free speech activities electronically through the Bob Smith account, by use of an undercover phone to gain access to private group communications, and on the ground by placing plain clothes and undercover officers at meetings and free speech events.

Defendant violated Section F 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 mental health records and information regarding ongoing investigations.²⁶ This information was circulated in the JIBs multiple times a day to both within MPD and outside of MPD to regional law enforcement and even to members of the community. JIBs also included information that was incorrect, unconfirmed, and mere rumor.

Defendant violated Section F of the Decree by specifically engaging conduct used as an example of a violation, by regularly naming and photographing individuals exercising their First Amendment rights by attending meetings and events. Defendant discouraged the exercise of First

²⁶ The Decree expressly states that 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. (ECF No. 1-2, (H).)

Amendment rights by enforcing different standards for obtaining a permit for protests than other types of events. And, Defendants chilled the exercise of First Amendment rights by aggressively contacting event organizers and questioning them regarding their agenda and their affiliations.

While the Decree allows for collection of information about the exercise of First Amendment rights and even interference with those rights under certain circumstances during the course of a criminal investigation pursuant to Section G of the Decree, Defendant did not even attempt to comply with the Decree's requirements. Defendant disregarded those procedures entirely as it did the remainder of the Decree.

IV. CONCLUSION

A Court has an “affirmative duty to protect the integrity of a [consent] decree.” *United States v. State of Mich.*, 62 F.3d 1418 (6th Cir. 1995) (quoting *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)). In doing so, the court enjoys broad discretion to determine how best to enforce a decree. “The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193, 69 S. Ct. 497, 500, 93 L. Ed. 599 (1949). The only limitation is that the Court's remedy must not be punitive in nature. *N.L.R.B. v. Aquabrom, Div. of Great Lakes Chem. Corp.*, 855 F.2d 1174, 1187 (6th Cir.), *order amended and supplemented*, 862 F.2d 100 (6th Cir. 1988)

As set forth above, the Defendant has demonstrated an unwillingness to abide by the terms and restrictions of the Consent Decree and engaged in pervasive and willful violations of almost every provision. To achieve “full remedial relief,” Plaintiff asks the court to use its contempt powers to effectuate compliance with those provisions. The Court should order Defendant to conduct yearly training for all law enforcement personnel on the Decree. Personnel who work in departments that are engaged in activity that are more likely to implicate the decree, such as OHS

and RTCC, should receive advanced training to ensure their understanding and compliance with the Decree.

The Court should appoint a monitor to oversee compliance with the Decree's restrictions on gathering political intelligence. The monitor should have access to information necessary to determine whether Defendant continues violation of the Decree, including files and data associated with social media collators and police actions that involve free speech events. The monitor should also ensure that criminal investigations that implicate political intelligence are properly authorized by the Director of Police. The monitor should remain in place for a reasonable period to ensure continued compliance by Defendant with the Decree. The Defendant should be charged with paying the costs of the monitor, as well as the costs and attorneys' fees associated with this action.

Respectfully submitted,

/s/ Thomas H. Castelli

Mandy Strickland Floyd (BPR# 31123)

Thomas H. Castelli (BPR#24849)

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P.O. Box 120160

Nashville, Tennessee 37212

Phone: (615) 320-7142

Fax: (615) 691-7219



Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on June 18, 2018 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via electronic mail to:

Buckner Wellford, Esq.
Mark Glover, Esq.
Jennie Vee Silk, Esq.
BAKER, DONELSON, BEARMAN,
CALDWELL, & BERKOWITZ, P.C.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103

Attorneys for Defendant

/s/ Thomas H. Castelli

Thomas H. Castelli