Memorandum

Subject:	Remedial Memorandum Concerning Proposed Injunction Order DJ #166-62-22	Date:	May 6, 2009

To: Loretta King
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Summary

This memorandum will discuss whether, under the applicable law and defenses, we believe that an injunction, in the form attached, is appropriate against each of the named defendants in United States v. New Black Panther Party for Self-Defense, No. 09-0065 (E.D. Pa. filed Jan. 7, 2009). In sum, we believe that the attached proposed injunction order is appropriate.

The facts of this case are set out in the Complaint in this action and the j-memo, and in detail in the discussion below where appropriate. In brief, Defendants King Samir Shabazz and Jerry Jackson stood side by side at a polling location at 1221 Fairmount Street in Philadelphia, Pennsylvania, on election day, November 4, 2008. Shabazz brandished a nightstick, or billy club, and pointed it at observers. Shabazz and Jackson uttered racial slurs and taunts in the presence of voters and those aiding voters. When one person aiding voters sought to enter the polling location, Shabazz and Jackson moved to block his path.

On election day, Shabazz and Jackson were members of the New Black Panther Party for Self-Defense, and Shabazz was the head of its Philadelphia chapter. The national chairman is Defendant Malik Zulu Shabazz. The plan to post party members at polling places was announced in advance by the party. After the events at 1221 Fairmount Street on November 4 made national news, Malik Zulu Shabazz defended the conduct of the two men, on television and to Department attorneys. However, the party, on its website, later disclaimed the conduct of the two men, and announced the suspension of the Philadelphia chapter.

The violent and racist views of the New Black Panther Party for Self-Defense are well-documented. The Southern Poverty Law Center has described the party as an active black-separatist group "[e]schewing the health clinics and free breakfast programs of the original [Black] Panthers . . . to focus almost exclusively on hate rhetoric about Jews and whites." S. Poverty Law Ctr., Intelligence Report: Snarling at the White Man (2000), http://www.splcenter.org/intel/intelreport/

article.jsp?aid=214 (last visited Nov. 10, 2008). In 1993, Khalid Muhammad, then a member of the Nation of Islam, gave a speech at Kean College New Jersey, in which he referred to Jews as "bloodsuckers," labeled Pope John Paul II a "no-good cracker" and advocated the murder of white South Africans. In the ensuing controversy he was dismissed from the Nation of Islam by Minister Louis Farraakhan, who found the statements too extreme. Muhammad then joined the New Black Panther Party for Self-Defense. See J. Blair, K.A. Muhammad, 53, Dies; Ex-Official of Nation of Islam, N.Y. Times, Feb. 21, 2001.

The party's current chairman, Defendant Malik Zulu Shabazz, has made many anti-Semitic statements, duly catalogued by the Anti-Defamation League. See Anti-Defamation League, http://www.adl.org/learn/ext_us/malik_zulu_shabazz/ (follow link to "In His Own Words"; see also link to party) (last visited Dec. 19, 2008). As one of many examples, during a protest in front of B'nai B'rith, a Jewish service organization, in Washington, D.C. (April 20, 2002), he led chants of "death to Israel," "the white man is the devil," and "Kill every goddamn Zionist in Israel! Goddamn little babies, goddamn old ladies! Blow up Zionist supermarkets!" Id.

Defendant King Samir Shabazz "is one of the most recognizable black militants in a city known, since the days of MOVE, for its vocal black-extremism community." Dana DiFilippo, New Panthers' War on Whites, Phila. Daily News, Oct. 29, 2008, at 4, available at http://www.philly.com/philly/news/20081029_New_Panthers__war_on_whites.html. Statements attributed to Samir Shabazz and published in the article include: "the only thing the cracker understands is violence"; "the only thing the cracker understands is gunpowder"; and "I'm about the total destruction of white people. I'm about the total liberation of black people. I hate white people. I hate my enemy." Id.

Our Complaint alleging violations of Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), was filed on January 7, 2009. Defendants have defaulted. We now propose seeking a default judgment and the following injunctive relief (see attached proposed order):

> Defendants, their agents, and successors in office, and all persons acting in concert with them who receive actual notice of this order, by personal service or otherwise, are permanently enjoined and restrained from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons, and from otherwise engaging in coercing, threatening, or intimidating behavior in violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b).

After discussing the propriety of the foregoing relief with respect to each class of defendant in turn, this memorandum will analyze two potential defenses: (1) whether certain defendants' post-complaint renunciation of the conduct of those at the Philadelphia polling station at issue is sufficient to convince the Court not to issue an injunction, and (2) whether First Amendment concerns counsel against an injunction for any of the defendants.

I. The behavior of Defendants King Samir Shabazz and Jerry Jackson warrants the proposed remedy.

A permanent injunction barring the armed presence at polling places clearly may be issued against Defendants King Samir Shabazz and Jerry Jackson. The United States, even without the benefit of discovery, has voluminous evidence that the Defendants King Samir Shabazz and Jackson

violated or attempted to violate Section 11(b). Most obviously, while brandishing a weapon they physically interfered with the lawful ingress of a person aiding voters. The two Defendants were positioned at the entrance to a polling location. Upon observing the approach of Christopher Hill, they formed ranks, that is, stood in a line with the widest point blocking the approach of Hill. Hill would testify that they intentionally blocked his path and sought to intimidate him.

Defendant King Samir Shabazz brandished a weapon and this action alone constitutes intimidation or coercion. The Third Circuit has noted that brandishing a weapon, even without accompanying verbal threats, is an intimidating act because of the potential for violence. "We agree with the [First Circuit] . . . that a person may brandish a weapon to advise those concerned that he possesses the general ability to do violence, and that violence is imminently or immediately available." United States v. Johnson, 199 F.3d 123, 127 (3d Cir. 1999). In fact, Shabazz may have gone beyond merely brandishing the weapon. "Pointing a weapon at a specific person or group of people, in a manner that is explicitly threatening, is sufficient to make out 'otherwise use' of that weapon. We hold this is true when any dangerous weapon is employed: It need not be a firearm." Id. Differentiating the pointing of a stick from mere brandishment allowed the use of sentencing enhancements because the weapon was "otherwise used." Similarly, witness statements demonstrate that Shabazz pointed the weapon and tapped it in his hand while engaging various individuals protected by Section 11(b) in a menacing fashion.

In addition to attempting to physically interfere with the rights of protected voters and the brandishing or use of a weapon, Defendants King Samir Shabazz and Jerry Jackson violated Section 11(b) because a reasonable person would find their actions to be an objective attempt to intimidate voters or those aiding voters. The use of a recognizable uniform of a hate group known to advocate racially-motivated murder, whether or not constitutionally protected, bolsters this finding. Moreover, the Defendants shouted racial slurs at voters and assistors protected by Section 11(b).

The Department should seek a remedy that prevents this behavior from recurring. The Defendants should be prohibited from possessing weapons in proximity to a polling location. The District Court has broad powers to fashion such a remedy. See Local 28 of Sheet Metal Workers' Intern. Assn. v. EEOC, 478 U.S. 421, 482 (1986) (appointment of administrator to oversee union policies upheld.); see also United States v. Brown, 561 F.3d 420, 435-437 (5th Cir. 2009).

II. The behavior of the Defendant Malik Zulu Shabazz warrants the proposed remedy.

Defendant New Black Panther Party for Self-Defense chairman Malik Zulu Shabazz should be enjoined from organizing and participating in future deployment of an intimidating party presence at the polls. His culpability in this case is not simply because he is chairman of the New Black Panther Party for Self-Defense or that he made statements about the matter. Instead, a remedy against Malik Zulu Shabazz is warranted not only because he oversaw and helped organize the deployment, but also because he endorsed and ratified the events in Philadelphia.

Prior to the election, the New Black Panther Party for Self-Defense announced a polling place deployment of party members. "We will be at the polls in the cities and counties in many states to ensure that the enemy does not sabotage the black vote, which was won through the blood of the martyrs of our people," said one party official. Statements by the New Black Panther Party on election day confirm this intention. A "Statement by Dr. Malik Shabazz, Esq, leader of Black Lawyers For Justice and attorney for the New Black Panther Party for Self-Defense" was published on

November 4, 2008. It said: "The NBPP will also patrol election sites nationwide to counter voter intimidation & other threats of violence against Blacks. . . . ON ELECTION DAY, TUESDAY, NOVEMBER 4th, We will be at the polls in the cities and counties in many states."

On November 7, 2008 Defendant Malik Zulu Shabazz endorsed the behavior by the two Philadelphia defendants, simultaneously and continuously identifying them as party members. He said "one of the members of the party" was in Philadelphia at the polls. "Those men were there to stop something, not start something." See FOXNews.com, The Strategy Room, http://www.foxnews.com/story/0,2933,65535,00.html (last visited May 4, 2009). "We were there to counter" skinhead activity. Id. (emphasis added). "There were members of the party not only in Pennsylvania but in many areas. Obviously we don't condone bringing billy clubs to polling sites. But when we found out this was an emergency response to some other skinheads . . . there was some explanation for that. That's not something that we normally do, but it was an emergency response."[1] Id. (emphasis added). When asked how many members are in the party, Malik Zulu Shabazz said on November 7, 2008, "there are thousands. There are thousands of us and our supporters all around the country." Id.

Aside from these public statements, Malik Zulu Shabazz admitted to us directly his involvement in the events in Philadelphia and stated that they were part of a nationwide effort. We interviewed Shabazz by telephone on December 4, 2008. He told us, "there were members of the party in many areas [on election day]." He also endorsed the use of the nightstick. Zulu Shabazz's statements constitute evidence of his involvement with the deployment of party members both in Philadelphia and around the nation.

Malik Zulu Shabazz admitted that he was involved in the polling place deployment plan, and subsequently endorsed and ratified the behavior in Philadelphia, defending the actions in Philadelphia even after the full extent of the behavior was known. "[U]nder general rules of agency law, principals are liable when their agents act with apparent authority." American Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982). The Supreme Court in the antitrust case of American Society of Mechanical Engineers, Inc. noted that liability could be imparted to a principal for statements of an agent. "The apparent authority theory has long been the settled rule in the federal system." Id. at 567. While these cases usually involve torts, contracts or commercial transactions, "[i]n a wide variety of areas, the federal courts, . . ., have imposed liability upon principals for the misdeeds of agents acting with apparent authority." Id. Other cases noted by the Supreme Court where apparent authority applies range from common law fraud to statutory securities fraud. Id. The Voting Rights Act, with Congress' broad remedial protections, should not be interpreted more narrowly than these other areas of law.

Therefore, Defendant Malik Zulu Shabazz should be subject to an injunction for two reasons. First, he is liable because of his admitted involvement and supervision as chairman of a plan to deploy party members to polling locations, and, in the case in Philadelphia, armed party members. Second,

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[1] Based on our interviews we did not find merit to the claims that there were white supremacists active at the polling location at 1221 Fairmount Street or anywhere else in the City of Philadelphia on November 4, 2008. There are also no press or police reports, or reports to the Voting Section, indicating that any such activity took place.

he is liable because he ratified and endorsed the illegal behavior of his agents in Philadelphia and well-settled principals of agency justify an injunction lying against him.

III. The New Black Panther Party for Self-Defense is properly enjoined by the proposed remedy.

Under Rule 17(b)(3)(A) of the Federal Rules of Civil Procedure, the New Black Panther Party for Self-Defense, an unincorporated association, is a jural entity subject to suit and injunctive relief based upon the relief sought in this case under federal law.[2] See Underwood v. Maloney, 256 F.2d 334, 337-38 (3d Cir. 1958) ("It follows, therefore, that under Rule 17(b) an unincorporated association must sue or be sued as an entity in the United States District Court for the Eastern District of Pennsylvania."); see also Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 431 (E.D. Pa. 1998). "Unincorporated associations are generally formed by the voluntary action of a number of individuals or corporations who associate themselves together under a common name for the accomplishment of some lawful purpose."[3] 6 Am. Jur. 2d Associations and Clubs § 5 (2008); see also United States v. The Rainbow Family, 695 F. Supp. 294 (E.D. Tex. 1988) (order determining the Rainbow Family, although informal and loosely-knit, had sufficiently tangible structure to render it subject to suit under Rule 17(b)).

The scope of the injunctive relief the United States seeks is proper because the United States is not seeking to hold members or individuals associated with the New Black Panther Party for Self-Defense liable for mere membership in the party. In other words, the injunctive relief the United States seeks is a prospective remedy, and would only be enforced against members of the party not named in the Complaint in the circumstance of future violations.[4] Cf. Town of W. Hartford v. Operation Rescue, 792 F. Supp. 161, 170 (D. Conn. 1992) (issuing a permanent injunction against, inter alia, Operation Rescue, named members involved in the actions in the case, and "officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them, or any one or more of them who receive actual notice of this order by personal service or otherwise."); see also Ne. Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1347-48 (3d Cir. 1989) (finding a district court's determination that it could not enjoin concerted conduct under Pennsylvania law in error and remanding for further consideration).

In any future effort to enforce this injunction, the United States would likely be required to establish its case by demonstrating that such persons had notice and were acting in concert with, or in

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[2] The law was designed to permit an unincorporated association to be dealt with as an entity or as a class. See United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922).

[3] "Historically, labor unions, political parties, social clubs, religious organizations, environmental societies, athletic organizations, condominium owners, lodges, stock exchanges, and veterans have all been recognized as unincorporated associations." Scott E. Atkinson, The Outer Limits of Gang Injunctions, 59 Vand. L. Rev. 1693, 1700-01 (2006).

[4] Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction is binding upon "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

support of, the party.[5] Such evidence would likely be similar in many respects to the evidence the United States has collected in the case at bar regarding the activities of Defendants King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz. Instructive is Aradia Women's Health Center v. Operation Rescue, 929 F.2d 530, 531 (9th Cir. 1991), in which the Ninth Circuit Court of Appeals addressed an appeal from an order imposing civil contempt sanctions upon individuals who took part in a demonstration blocking access to an abortion clinic. A previous district court order had "provided for sanctions . . . for each prospective violation of the order by any defendant or person acting in concert with any defendant having notice of the injunction." Id. The Ninth Circuit affirmed the district court's determination that the individuals, none of whom had been parties to the injunction action, had acted in concert with Operation Rescue (an unincorporated association). Id. at 533. The court noted that "the record [was] replete with evidence of Operation Rescue's activities, including publication of a newsletter, showing it to be an organization with stated purposes and operating through affiliates in numerous states . . . . Nor can there be any question from this record that these appellants acted in concert with Operation Rescue." Id.

IV. The apparent renunciation of the events of election day and the suspension of the Philadelphia chapter are not impediments to the United States' proposed remedy.

Internet statements on the New Black Panther Party's website posted after the Complaint in this action was filed disclaim the behavior of King Samir Shabazz and Jerry Jackson in Philadelphia. The disclaimers appear in two places. The first is in a section dated "11/04/08," though the following statement (among others) was added after this lawsuit was filed on January 7, 2009:

> Specifically, in the case of Philadelphia, the New Black Panther Party wishes to express that the actions of people purported to be members do not represent the official views of the New Black Panther Party and are not connected nor in keeping with our official position as a party. The publicly expressed sentiments and actions of purported members do not speak for either the party's leadership or its membership.

New Black Panther Party for Self-Defense, http://www.newblackpanther.com/statement-voterintimidation_phillychapter.html (last visited May 5, 2009). The second statement is contained in a section entitled, "Public Notice Regarding Philadelphia Chapter Suspension 1/7/09 NBPP Official Statement." It says:

> Philadelphia Chapter of the New Black Panther Party is suspended from operations and is not recognized by the New Black Panther Party until further notice.
> The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place. Such actions that were taken were purely the individual actions of Samir Shabazz and not in any way representative or connected to the New Black Panther Party. On that day November 4th, Samir Shabazz acted purely on his own will and in complete contradiction to the code

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[5] "Injunctions that purport to apply to all persons with actual notice of the injunction—regardless of whether or not those persons are acting in concert with or on behalf of those enjoined—have been struck down as overbroad." Atkinson, supra, at 1700-01.

> and conduct of a member of our organization. We don't believe in what he did and did not tell him to do what he did, he moved on his own instructions.
> It is true that volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out. We were incident free. We are intelligent enough to understand that a polling place is a sensitive site and all actions must be carried out in a civilized and lawful manner.
> Certainly no advice from the leadership of the New Black Panther Party was given to Samir Shabazz to do what he did, he acted on his own. This will be the New Black Panther Party's Only Statement on the matter.

Id.

We do not know at present the precise extent to which these statements were drafted by, or represent the views, of Malik Zulu Shabazz. Nevertheless, it is reasonable to conclude that his position as chairman means that these statements would not have been posted without some form of approval from him (or other officers of the organization).

The disclaimers conflict both with Malik Zulu Shabazz's televised statements and with his private statements to Department lawyers, insofar as he volunteered on those occasions that the actions were taken by party members and that he endorsed them. The two statements also conflict with each other, in that the first statement refers to the actors as "purported members," while the second statement says that the Philadelphia chapter is "suspended." A chapter can only be suspended if previously it was affiliated. Indeed, we plan to introduce the second statement at any hearing in order to establish that a relationship did exist on election day.

In any event, these statements would not form a basis for a court to deny our requested injunction. In all cases where it seeks an injunction, a plaintiff retains the burden to "satisfy the court that relief is needed. . . . that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'" United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). "In determining whether there is a danger of recurrence, a court may consider the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of past violations." FTC v. Davison Assocs., Inc., 431 F. Supp. 2d 548, 560 (W.D. Pa. 2006) (action under section 13(b) of the Federal Trade Commission Act; citing W.T. Grant Co.). On the other hand, it is a defendant's burden to show that a case is moot on account of remedial action.[6] That burden is substantial:

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[6] Note that we are considering here the potential mootness challenge specifically based on Defendants' remedial statements and action. We are not considering a potential broad-based mootness challenge based on the fact that electoral events are inherently short-lived and the election is over. That kind of challenge would be addressed by invoking the doctrine that Defendants' conduct is "capable of repetition yet evading review," which doctrine applies where "(1) the challenged action is, in its duration, too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Merle v. United States, 351 F.3d 92, 95 (3d Cir. 2003) ("This controversy, like most election cases, fits squarely within the 'capable of repetition yet evading review' exception to the mootness doctrine.")

> The standard for "determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." . . . Moreover, the party alleging mootness bears the "heavy," even "formidable" burden of persuading the court that the challenged conduct cannot reasonably be expected to resume.

United States v. Gov't of V.I., 363 F.3d 276, 285 (3d Cir. 2004) (citations omitted).

In particular, remedial actions that appear to be responses to threatened or pending litigation do not favor a finding that conduct will not recur. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952); see also Bowers v. City of Phila., No. 06-CV-3229, 2007 WL 219651 at *32 (E.D. Pa. Jan. 25, 2007) (cessation of conduct "strongly suggests that the cessation was connected in large part to the instant litigation, a circumstance that does not favor a finding that the conduct is unlikely to recur."); Gov't of V.I., 363 F.3d at 285 ("The timing of the contract termination – just five days after the United States moved to invalidate it, and just two days before the District Court's hearing on the motion – strongly suggests that the impending litigation was the cause of the termination.").

Applying this law to the facts of the instant case, it is clear that the post-complaint disclaimers will not enable Defendants to avoid our injunction. We can show "some cognizable danger of recurrent violation, something more than the mere possibility" of recurrence. W.T. Grant Co., 345 U.S. at 633. We have Defendants' repeated expressions of violent intentions and of approval of violent methods. Aside from their very explicit statements, we have photographic evidence documenting the party's propensity to pose with and brandish weapons. We know and can document, for example, that they brought weapons to a political rally in Texas. We can offer expert opinion that one of the party's distinguishing characteristics is its proclivity to send members to political hot spots with weapons. [redacted] We know that Defendants have not renounced their violent exhortations and images, their racial rhetoric, or their intention to get their members to the polls in future elections. While it has denounced the events in Philadelphia, the party has not described any practical steps, procedures, or training it will implement to avoid this kind of incident. This entire discussion, moreover, takes place in the context of strong indications that the disclaimers are not trustworthy, because (1) they are inconsistent with endorsing statements made by Malik Zulu Shabazz both on television and to Department attorneys, (2) they are inconsistent with each other, (3) they are inconsistent with earlier versions, and were back-dated, and (4) they were issued the same day as, and obviously in response to, the filing of this lawsuit. See Davison Assocs., Inc., 431 F. Supp. 2d at 560 ("a court may consider the bona fides of the expressed intent to comply").

For their part, Defendants cannot meet their "heavy," "formidable," and "stringent" burden of establishing mootness by making it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gov't of V.I., 363 F.3d at 285 (citations omitted). Even if Defendants were to appear at the default hearing, we do not know how they possibly could show this.

They certainly would be unable to do so by means of statements and a suspension issued after the lawsuit was commenced.

V. The First Amendment is not an impediment to the United States' proposed remedy.

The proposed injunction may be defended against a First Amendment challenge in two different ways.

A. The Defendants' conduct is not protected speech.

We can argue that the First Amendment is not implicated by the proposed remedy because First Amendment speech is not affected as Defendants' were not engaged in activity typically deserving of protections. Simply put, there is no First Amendment right to violate the law by illegitimately engaging in voter intimidation during an election directly in front of a polling place.[7]

Defendants in another case, United States v. Brown, made a similar First Amendment argument to the district court and Fifth Circuit Court of Appeals. The Court of Appeals rejected the Defendants' First Amendment arguments and upheld injunctions against presence at the polls and communication with poll workers. Brown, 561 F.3d at 436-38. In Brown, the United States sought and obtained a remedy that barred the defendant from the polling location and prohibited him from speaking with poll workers about the administration of the election. This remedial request was based on a liability finding that the defendant had improperly run primary elections in violation of Section 2 of the Voting Rights Act. The United States also sought the ban on defendant's polling place presence, save to vote, as a way to ensure that the defendant would not meddle with the administration of the election. The United States also sought and obtained an injunction stripping the defendants of all powers of election administration.

Both the district court and Fifth Circuit rejected arguments that any First Amendment liberty interest was implicated by the injunction. It is important to note that neither the district court nor the Fifth Circuit engaged in any heightened scrutiny analysis, and did not require any compelling interest to justify the remedy. Instead, the courts found that no First Amendment rights were implicated by the remedy.

The Fifth Circuit upheld the polling place ban and prohibition on speaking with poll workers. "Brown is only enjoined from communicating with poll managers regarding their electoral duties and the counting of ballots. The facts of the 2003 and 2007 elections make plain the need for these limitations; in both instances, Brown's statements, whether spoken or scribbled on post-it notes, resulted in poll managers improperly terminating the counting of absentee ballots and selectively rejecting absentee ballots." Brown, 561 F.3d at 438. Because Brown had violated the Voting Rights Act by speaking with poll workers and giving them instructions in violation of the law, there was no First Amendment liberty interest in banning future communications with poll workers. Similarly, the remedy sought against the Defendants in this case would prohibit them from again intimidating voters by creating an intimidating presence at the polls. Creating an intimidating presence at a polling place

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[7] Similarly, fighting words are punishable because they amount to an assault rather than communication of ideas. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (characterizing fighting words as "personal abuse").

by blocking the entrance, shouting threatening statements, and brandishing a weapon is simply not protected by the First Amendment.

The Fifth Circuit in Brown also upheld an injunction against defendant's mere presence at the polls and at the circuit clerk's office two weeks prior to an election. In Mississippi, there is no prohibition on anyone being allowed at the polls during the counting of the votes and processing of absentee ballots. "Similarly necessary based on Brown's conduct is the order's restricting Brown's presence at the polling place [except to vote or if appointed as a poll watcher.]" Brown, 561 F.3d at 438. The Fifth Circuit found this physical ban did not implicate the First Amendment. "Again, insofar as defendants assert that these provisions restrict their freedom of expression, they fail to explain what expressive conduct Brown will engage in at the Circuit Clerk's office or within the polling places at the specifically restricted times." Id. at 438.

Finally, the Fifth Circuit upheld stripping the defendants of all powers to administer primary elections. Defendants argue the injunction stripping them of all power to run primary elections "is too broad and deprives them of their First Amendment rights to free expression and association. Defendants, however, fail to explain how delegating these duties to the Referee-Administrator interferes with such rights." Brown, 561 F.3d at 437. Because the remedy affected the "mechanics of administering a primary election," the First Amendment was not implicated. Id. Similarly, there is no First Amendment right to be positioned at the entrance of a poll with an intimidating weapon. Restrictions on this sort of behavior impairs the mechanics of how close one may get to voters when seeking to intimidate and threaten them.

The Third Circuit adopted similar reasoning and characterized criminal or illegal behavior as outside the protection of the First Amendment in United States v. Dickens, 695 F.2d 765, 772 (3d Cir. 1982). In upholding a conviction under RICO over defendants' objection to the government's contention that the robberies were committed to finance defendants' religious Black Muslim organization, this court stated, "[t]he First Amendment, which guarantees individuals freedom of conscience and prohibits governmental interference with religious beliefs, does not shield from government scrutiny practices which imperil public safety, peace or order." Id.

In Brown, the Fifth Circuit noted, "defendants' own conduct has rendered the remedial order's terms necessary to right the § 2 violation." 561 F.3d at 436. In this case, the Defendant New Black Panther Party for Self-Defense and its named members have rendered a remedial order necessary which prohibits them from repeating their behavior from election day 2008. Any proposed future remedy would enjoin specific illegal behavior from the past.

B. Assuming Defendants' conduct is protected speech, the proposed injunctive remedy would be upheld.

Even if the Defendant's conduct is categorized as speech protected by the First Amendment, it can be restricted in the manner set out in the proposed order as a viewpoint-neutral and content-neutral time, place, and manner restriction because the order "burdens no more speech than necessary to serve a significant government interest." Madsen v. Women's Health Center, 512 U.S. 753, 765 (1994) (upholding a 36-foot buffer zone as applied to the street, sidewalks, and driveways "as a way of ensuring access to the clinic" where throngs of protesters would congregate in close proximity to the clinic); see also Schenk v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 380 (1997) (upholding 15-foot fixed buffer zones necessary to ensure access, but striking down floating buffer zones around

people entering and leaving abortion clinics). Here, the significant governmental interests are many, including: ensuring the right of individuals to vote freely for the candidate of their choice without being threatened, intimidated, or coerced and, more generally, providing access to polling places and ensuring the public safety of polling sites.[8] The proposed injunction is appropriately tailored to this end preventing coercing, threatening, or intimidating behavior, thus closely tracking the requirements of federal law under Section 11(b), at polling locations during elections.

The injunction includes a prohibition on appearing with weapons within 200 feet of open polling locations during elections by Defendants. These restrictions, unlike the floating buffer zones around individuals struck down in Schenk, are fixed at open polling locations during the conduct of elections and would burden no more speech than necessary to ensure that federal law, under Section 11(b), is not violated. A proposed injunction need not be the least restrictive or the least intrusive means of furthering the government's interests. See Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989). The proposed injunctive relief here has no application outside of the area in the direct proximity to entrances to polling places during the conduct of elections and does not "burden substantially more speech than is necessary to further the government's legitimate interests." Id. at 799. Absent such limitations it is likely that the Defendants' activities, if considered speech, would constitute prohibited voter intimidation. Thus, the scope of the restrictions constitute a proper fit to remedy the substantial violations alleged.

In Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991), a case pre-dating the Supreme Court's decisions in Madsen and Schenck, the Third Circuit addressed the constitutionality of an injunctive remedy issued against a group of anti-abortion activists.[9] Id. at 60. The McMonagle court noted that the plaintiff had not challenged the protesters' rights to free speech, but their illegal and tortious conduct. Id. The McMonagle court affirmed the injunctive remedy issued by the district court in nearly all respects finding no abuse of the district court's discretion.[10] Id. at 65. In response to the defendant's challenge under the First Amendment, the court first stated that "[t]he district court found that McMonagle, and his group had engaged in acts of violence,

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[8] The Madsen Court found that numerous significant government interests were protected by the injunction in that case. These included the State's interest in: (1) protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy; (2) ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting the property rights of all citizens; (3) ensuring residential privacy; and (4) analogously, protecting "captive" patients from targeted picketing. See Madsen, 512 U.S. at 767-69.

[9] The McMonagle court previously noted that the district court properly instructed the jury that "the First Amendment does not offer a sanctuary for violators. The same constitution that protects the defendants' right to free speech, also protects the Center's right to abortion services and the patients' rights to receive those services." 868 F.2d at 1349.

For a complete recitation of the detailed injunctive remedy issued in the McMonagle case see Ne. Women's Center, Inc. v. McMonagle, 749 F. Supp. 695, 698 (E.D. Pa. 1990).

[10] The remedy "barred, inter alia, 'picketing, demonstrating, or using bullhorns or sound amplification equipment at the residences of plaintiff's employees or staff." The court remanded the district court's selection of a 2500-foot protected zone on this type of home picketing. See McMonagle, 939 F.2d at 65.

intimidation, and trespass. The right of a court to enter an injunction restricting the form and location of expressive activity is particularly clear in such a context." Id. at 62. The court then determined that the injunction was content-neutral. Id. at 63. It regulated when, where, and how an anti-abortion activist could speak, not what he could say and "ma[d]e no mention whatsoever of abortion or any other substantive issue," but "merely restrict[ed] the volume, location, timing, and violent or intimidating nature of his expressive activity." Id. Further, the injunctive remedy, permitting inter alia, six protesters at a time within 500 feet of the Center, was narrowly tailored and left open alternative methods of communication. Id. at 64-65.

The Supreme Court has also upheld even content-based restrictions on electioneering in close proximity to the polls. See Burson v. Freeman, 504 U.S. 191, 193 (1992). In striking down a law which prohibited election day endorsements by newspapers, the Court noted the challenged statute "in no way involve[d] the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there." Mills v. Alabama, 384 U.S. 214, 218 (1966).

In Burson, the Court held that, even where the establishment of a 100-foot zone in which no political campaigning could occur was not a content-neutral time, place, and manner restriction, Tennessee had a compelling interest in protecting the right of citizens to vote freely for candidates of their choice, and a compelling interest in election integrity. Id. at 197-99. The campaign-free zone was narrowly tailored to achieve the compelling interest of preventing the harassment of voters. "This Court has recognized that the right to vote freely for the candidate of one's choice is of the essence of a democratic society." Burson, 504 at 199 (internal citation omitted). Further,

> [a]pproaching the polling place under this system [unregulated elections of the 19th Century] was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers who were only too anxious to supply him with their party tickets. Often the competition became heated when several such peddlers found an uncommitted or wavering voter. [] Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. [] In short, these early elections were not a very pleasant spectacle for those who believed in democratic government.

Id. at 202 (internal citations & quotations omitted). The electioneering restrictions were upheld because they helped ensure the right to vote freely. "Today, all 50 States limit access to the areas in or around polling places . . . . In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud." Id. at 206.

Conclusion

We request authorization to file a motion for default judgment seeking the issuance of the proposed injunction order against Defendants Minister King Samir Shabazz, Jerry Jackson, Malik Zulu Shabazz, and the New Black Panther Party for Self-Defense.