From: Flynn, Diana K (CRT)
Sent: Wednesday, May 13, 2009 11:54 AM
To: Rosenbaum, Steven (CRT)
Cc: Coates, Christopher (CRT); McElderry, Marie K (CRT)
Subject: New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP

We have been asked to provide comments on the Voting Section's proposed motion and papers in support of default judgment and relief. Marie McElderry and I have reviewed the papers and discussed. Her comments, which also reflect my views, are below. I add the following observations:

1. We can make a reasonable argument in favor of default relief against all defendants and probably should, given the unusual procedural situation. The argument may well not succeed at the default stage, and we should expect the district court to schedule further proceedings. But it would be curious not to pray for the relief on default that we would seek following trial. Thus, we generally concur in Voting's recommendation to go forward, with some suggested modifications in our argument, as set out below.

2. The fact that *Chamberlain's* minimal standard for entry of a default judgment may be satisfied does not entitle us to one. See Marie's discussion of the case law below. The district court will retain considerable discretion to withhold relief on default and schedule a hearing. Given that we are seeking relief against political organizations and members in areas central to First Amendment activity, it is likely that the court will not order relief absent such further proceedings. That said, the procedural posture leaves few good alternatives to filing in support of such relief now.

3. By far, the most difficult case to make at this stage is against the national party and Malik Shabazz. There is discussion in the internal papers of the history of the organization with respect to voter intimidation with the use of weapons and uniforms. If the Voting Section opts for seeking relief against the national defendants at this stage, we suggest including that history in our supporting Memorandum. Our case against the nationals may be a bit of a reach, particularly at this stage, particularly because of First Amendment concerns. But we already brought the case and made the allegations. See *COMPLAINT*, par. 12. I assume that this reflects the Division's policy judgment that it is appropriate to seek such relief after trial. We probably should not back away from those allegations just because defendants have not appeared. And Voting does seem to have evidence in support of the allegations.

4. We would NOT say that First Amendment defenses are irrelevant at this stage. (Contra, *MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT at 4).* The court should anticipate likely defenses and so should we. See Marie's detailed discussion

below. We think a discussion of the narrowness of the proposed relief, which is generally discussed throughout the memorandum, can be used explicitly at this point to explain why First Amendment defenses are unlikely to prevail. In other words we can argue up front that the proposed order is carefully crafted to avoid any First Amendment concerns. Emphasis can be placed on the fact that our proposal is designed to prevent the paramilitary style intimidation of voters, and otherwise leaves open ample opportunity for political expression.

The First Amendment concerns Steve expressed earlier are well-taken, and I think proceeding against the nationals is a very close call. But it appears to us that there is a basis for the relief we seek, and the unusual posture of the case probably requires that we say the relief is appropriate on default. In any event, we should expect to be required to try these issues.

Marie may make some additional suggestions to the wording of the papers, if permitted.

From: McElderry, Marie K (CRT)
Sent: Tuesday, May 12, 2009 5:15 PM
To: Flynn, Diana K (CRT)
Subject: Comments on the proposed default judgment filings in NBPP

Comments on proposed filings re default judgment in *United States* v. *New Black Panther Party For Self-Defense*, No. 2:09-cv-0065 SD (E.D. Pa.)

We have been asked to comment on whether the United States should seek injunctive relief against all defendants, and, if so, what relief we should request. As I understand the situation, the documents Voting proposes to file are the Motion for Default Judgment (dated April 30), the Memorandum of Law in Support of Motion for Default Judgment (dated April 30), and the proposed Order (dated May 6). Further support for these filings is contained in the May 6 internal Remedial Memorandum Concerning Proposed Injunction Order.

Standard for obtaining default judgment. An overarching principle that we need to keep in mind is that the Third Circuit "does not favor entry of defaults or default judgments." *U.S.* v. *$55,518.05 In U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Rather, it is its "preference that cases be disposed of on the merits whenever practicable." *Hritz* v. *Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984).

Our proposed Memorandum of Law relies on the three-part test in *Chamberlain* v. *Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000), as governing a district court's determination whether a default judgment is proper. As the Third Circuit more recently acknowledged in an unreported decision, however, *Chamberlain* cites *U.S.* v. *$55,518.05, supra*, as the source of that standard, and *$55,518.05* is a case where a defendant sought to overturn a default judgment. *Hill* v. *Williamsport Police Dept.*, 69 Fed. Appx. 49, 51 (3d Cir. 2003). In *Hill*, the court noted that "both major treatises on federal practice and procedure, as well as the Ninth Circuit, set out additional factors to those listed in *Chamberlain* as appropriate for consideration when ruling on motions to grant default judgments." 69 Fed. Appx. at 51 n.3.[1] Among those factors are "whether material issues of fact or issues of substantial public importance are at issue," "how harsh an effect a default judgment might have," and "the strong policy of the Federal Rules of Civil Procedure." *Ibid.*

Nonetheless, the court in *Hill* determined that it is bound to follow *Chamberlain* in determining whether a district court has abused its discretion in deciding whether to issue a default judgment in the first place. The problem with importation of the three-part test to that context is that step two of the test requires the court to determine "whether the defendant appears to have a litigable defense," and that determination is complicated where, as here, the defendant has totally failed to file a response to the complaint (as opposed to having filed late). Our proposed Memorandum of Law, pg. 4, alludes to that complication by quoting the unreported decision in *Nationwide Mutual Insurance Company* v. *Starlight Ballroom Dance Club, Inc.*, 175 F. Appx. 519, 522 (3d Cir. 2006) ("The second factor is the 'threshold issue in *opening* a default judgment.'"). We then take the position that the presence or absence of a meritorious defense "has no relevance at this stage of the proceedings." Memo. at 4. That is not actually the case, however, since the Court will be following *Chamberlain*.

In any event, I think that we can get over that hurdle by anticipating, as we do in our May 6 internal Remedial Memorandum, possible defenses that might be raised, *i.e.*, First Amendment claims and the post-litigation

denunciation of the conduct of the Philadelphia chapter by the Party (and possibly by Malik Zulu Shabazz). I believe that the district court will anticipate such possible defenses and will want to know how we would address them. Indeed, by the time we file this motion and/or the court sets a hearing, the defendants may file something raising those or other defenses. Given that the court is bound to follow the three-part test, I think that we need to address in the Memorandum in support of the Motion at least those defenses that we have already identified.

I am also not sure that we have made a sufficient showing that we would be prejudiced by denial of a default judgment. When we filed the Complaint, we assumed that we would be engaging in the usual course of litigation, including discovery and filing of legal briefs. The opportunity to receive a judgment without pursuing all of those steps would be a benefit to us, but I am not sure that the court will be persuaded that we would be prejudiced by having to try the case on the merits, which is the preferred method of proceeding under Third Circuit case law. Especially in a case such as this, which is not cut and dried, I think the court will feel that its judgment would be informed by a more deliberate process.

Whether the unchallenged facts constitute a legitimate cause of action against the Party and its national leader. I have some reservations about whether we have a sufficient factual basis to state a claim against the Party and Malik Zulu Shabazz. Paragraph 12 of the Complaint alleges that they "managed, directed, and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson." The May 6 internal memorandum refers to an announcement made in advance of the November 4 election of a "plan to post party members at polling places." But nowhere do I see that we can show that either the Party or Malik Zulu Shabazz suggested, counseled, or endorsed the bringing or brandishing of weapons in advance of what happened in Philadelphia. Assuming that the main behavior we seek to enjoin is bringing weapons to the polls, I am not convinced that we can establish a basis for an injunction against the Party or Malik Shabazz by showing that the Party has violent and racist views against non-blacks and Jews. The additional information discussed on page 8 of the May 6 internal memorandum about

the Party's past actions of bringing weapons to political rallies may, however, be the basis for an argument that both the Party and Malik Shabazz should reasonably have known that the Philadelphia defendants might believe they were authorized to carry weapons to the polls, but I am not sure that would be sufficient to justify the relief we are seeking.

As I read our justification for relief against the Party and Malik Shabazz, it is based largely on Malik Shabazz's statements *after* the events in Philadelphia in which he defended the actions of King Samir Shabazz and Jerry Jackson on national television as based on the alleged presence of members of the Aryan brotherhood or the American Nazi party at that particular polling place. In addition, the Voting Section is relying on admissions made by Malik Shabazz to members of the section. It is unclear how we would present that evidence to the court. That "endorsement," however, is complicated by the statements on the Party's website renouncing the events in Philadelphia and suspending the Philadelphia chapter. It appears that we may have difficulty proving when those statements were added. At least as to the Party, those statements could be an impediment to proving a violation at all, not just an impediment to injunctive relief.

What type of injunctive remedy should be sought. Certainly, we have established a sufficient basis for the very limited injunctive relief that is recited in the proposed order dated April 30 against defendants King Samir Shabazz and Jerry Jackson. But I understand that such a limited injunction will not accomplish very much.

As to those "Philadelphia" defendants, however, the proposed order dated May 6 goes somewhat further. It seeks to enjoin defendants "from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons." Presumably, both deploying and appearing are meant to be modified by "with weapons." It is not clear what we mean by deploying, especially since the Voting Section indicated in its May 1, 2009, email that, in light of discussions with the Front Office, it does "not seek to enjoin the wearing of the NBPP uniforms at the polls." According to most dictionary definitions, the term "deploy" is used mainly in the context of

troops. I think it suggests that the military-type uniforms used by the Party are an integral part of what we want to enjoin, regardless of our stated intent not to seek to enjoin the wearing of those uniforms.

It appears that, at least as to the Philadelphia defendants, the violation we have alleged encompasses not only bringing the weapon, but also the intimidating atmosphere created by the uniforms, the military-type stance, and the threatening language used. I have not had time to do a comprehensive analysis of the First Amendment implications of attempting to enjoin members of the New Black Panther Party (or any other hate group, such as the American Nazi Party or the Klan) from wearing their uniforms at the polls on election day. The Supreme Court has stated that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) (flag-burning case). It may not, however, "proscribe particular conduct *because* it has expressive elements."

In this case, Party members' wearing of the uniform would likely be viewed as "expressive conduct." It would be relevant, then, to know whether the government has asserted an interest in regulating the wearing of the uniform that is unrelated to the suppression of expression. Here, the government's predominant interest, as expressed in 42 U.S.C. 1973i(b), is preventing intimidation, threats, and coercion (or attempts to do so) against voters or persons urging or aiding persons to vote or attempt to vote. Part of the intimidation in this case is wearing a military-style uniform, which suggests some kind of authority to take action. That aspect of the uniform could theoretically be separated from the particular message that this uniform is intended to convey, *e.g.*, racial hatred. Thus, appearing at the polls in such a uniform with a weapon is more intimidating than appearing in street clothes with a weapon. Interestingly, all three of the Declarations that we propose to present to the court focus on a combination of the uniform and the weapon. None of them mentions the third element of intimidation, *i.e.*, the verbal threats and racial taunts and slurs.

The April 30 Memorandum in support of our Motion addresses the

possible First Amendment claims of the Philadelphia defendants in the context of whether injunctive relief would harm them, *i.e.*, the third part of the traditional test for obtaining an injunction. Memo. at 13-14. As to those defendants, our arguments appear to be sufficient to support the narrow injunction that the Voting Section was seeking as of April 30. It is obviously a closer question whether it would also support either Paragraph V of the May 6 proposed order, either as presently worded using the word "deploy," or a proposed order that explicitly mentions the Party uniform in some way.

As discussed above, my problems with applying Paragraph V to the Party and Malik Shabazz involve whether we have enough evidence to show that they violated the statute. If a decision is made that the evidence is sufficient, I would suggest a separate paragraph in the order for injunctive relief against these defendants that is narrowly tailored to the scope of their violation. That violation is described at various points of the Complaint as "deployment of armed and uniformed personnel at the entrance to [a] polling location," which involves the organization and planning of such activities involving the members of the Party. This portion of the injunction should therefore be geared to enjoining those actions. We might also want to ask the court to order these defendants to undertake some type of procedures or training, such as mentioned on page 8 of the May 6 internal Remedial Memorandum, that would make abundantly clear that the national organization and its leaders do not endorse intimidation, threats or coercion of voters or those who are urging or aiding them to vote.

Marie K. McElderry
Appellate Section
Civil Rights Division

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[1] As the concurring judge in *Hill* pointed out, the Eighth Circuit does not use

the three-part test outside of the context where a party against whom default has been entered has moved to set aside the judgment. 69 Fed. Appx. at 53.

Memorandum

Subject:	Recommended Lawsuit Against the New Black Panther Party for Self-Defense and Three Individual Members for Violations of Section 11(b) of the Voting Rights Act DJ #166-62-22	Date:	December 22, 2008

To: Grace Chung Becker
Acting Assistant Attorney General

From: Christopher Coates
Chief, Voting Section

Robert Popper
Deputy Chief

J. Christian Adams
Trial Attorney

Spencer R. Fisher
Law Clerk

Recommendation

We recommend that you authorize us to file the attached complaint against the New Black Panther Party for Self-Defense, an unincorporated association, Chairman Malik Zulu Shabazz, Minister King Samir Shabazz, and Jerry Jackson. On Election Day, Tuesday, November 4, 2008, two members of the New Black Panther Party for Self-Defense ("NBPP") deployed at the entrance to a polling place in Philadelphia, Pennsylvania wearing military-style uniforms. They possessed and brandished a weapon. They directed racially-based threats at poll watchers. The national leader of the NBPP subsequently endorsed the Election Day behavior of the party members and said their deployment was part of a larger NBPP effort. We believe the deployment of uniformed members of a well-known group with an extremely hostile racial agenda, combined with the brandishing of a weapon at the entrance to a polling place, constitutes a violation of Section 11(b) of the Voting Rights Act which prohibits types of intimidation, threats, and coercion. We propose seeking a remedy that prohibits the members of the NBPP from deploying athwart the entry of polling places in future elections.

I. Factual Background

A. The New Black Panther Party for Self-Defense is a well organized and well known group with an openly hostile racial agenda.

The NBPP's members and leaders openly advocate violence against members of a particular racial group. As part of its on-going monitoring activities of various groups, the Southern Poverty Law Center has described the NBPP as an active black-separatist group constituting a "federation of as

many as 35 chapters in at least 13 cities with informal links to certain Black Muslims." 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). The NBPP is recognized as a 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." Id. The Anti-Defamation League has cataloged a lengthy list of anti-Semitic statements by the NBPP's current chairman, Dr. Malik Zulu Shabazz. 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 NBPP) (last visited Dec. 19, 2008). Bobby Seale, a founding member of the original Black Panther Party, has accused the NBPP of being a "black racist hate group," as evidenced by the NBPP showing up heavily armed at demonstrations and preaching violent, racist, and extremist views on its web site. See S. Poverty Law Ctr., supra; see also FOXNews.com, New Black Panthers of a Different Stripe, http://www.foxnews.com/story/0,2933,65535,00.html (last visited Nov. 10, 2008).

The leadership and organization of the NBPP extends to a women's league called the "Panther Queens" and a children's organization called the "Panther Youth" which their website characterizes as "the future of our people." (Attach. B, photographs of the leadership and organization of the NBPP.) The leadership includes, as described at the NBPP website, [Chairman and] Attorney-at-War Malik Zulu Shabazz, National Field Marshall Najee Muhammad, National Minister of Culture Zayid Muhammad, National Youth Minister Divine Allah, and National Minister of Justice Imam Akbar Bilal. Id. A tribute to deceased NBPP "Black Power General Dr. Khallid Abdul Muhammad" is also located on the leadership page.[1]

Minister King Samir Shabazz, a.k.a. Maurice Heath, is the chairman of the Philadelphia chapter of the NBPP. (Attach. A, Figure 1.) He identifies his rank within the NBPP as a "Field Marshall." Samir Shabazz is also a recognized presence in Philadelphia street politics.

[redacted]

A Philadelphia Daily News article pertaining to the Philadelphia chapter of the NBPP was published the week before the election on October 29, 2008. The article stated that 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

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[1] In 1993, following 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, the United States Senate voted 97-0 to censure Muhammad, and the United States House of Representatives in a special session passed a House Resolution. After Muhammad was dismissed from the Nation of Islam by Minister Louis Farraakhan, who found the statements too extreme, Muhammad formed 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.

__war_on_whites.html. Statements attributed to Samir Shabazz were published in the article. The article stated: "'the only thing the cracker understands is violence,' said Samir Shabazz, whose face also bears the tattoos 'Freedom,' 'BPG' (Black Power Gang) and 'NBPP'." Id. Further, the article attributed to Samir Shabazz the statements "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. The article also attributed a statement to Samir Shabazz that he "listens to 'revolutionary, cracker-killing hip-hop' on his headphones." Id.

B. The NBPP's presence at a Philadelphia polling place on Election Day was well documented.

On Election Day, November 4, 2008, at a polling place in Philadelphia, PA in Ward 14, Division 4 (The Guild House, 1221 Fairmount St.) two members of the NBPP, Samir Shabazz and Jerry Jackson, were positioned directly in front of (approximately 8 to 15 feet), and close to, the entrance to the polling location. (Attach. A, Figures 2 & 3.) Because of the configuration of the sidewalk and landscaping, every voter entering the polling place would necessarily pass within a few feet of the men.[2] Further, the men were standing side-by-side, facing outward, as if stationed there as guards or sentries. They were not milling about or deployed askew to the entrance. Instead, they were positioned such that any voter would necessarily pass within their radius. Moreover, as discussed in detail below, the men brandished a weapon. Consequently, every voter necessarily had to pass within the mens' armed purview, and within a distance at which the weapon could potentially be swung to hit them.[3]

Both Samir Shabazz and Jackson were wearing the NBPP's uniform. Their uniforms consisted of black berets, black tunics with various NBPP insignia, and battle dress uniform (BDU) pants which were bloused into black combat boots. Samir Shabazz wore rank insignia on his collar consistent with a Captain in the United States Armed Forces. Samir Shabazz also possessed a black billy club, or baton, approximately two feet in length. The grip of the baton was contoured and there was a leather lanyard, or a thong, on the end to wrap around his wrist. Witness Chris Hill, a Republican poll watcher and Army infantry veteran, indicated that Samir Shabazz deployed his hand through the thong and wrapped the slack tight around his wrist.[4]

The presence of the uniformed Black Panthers at the entrance to the polling place was documented by Republican Party videographer Steve Morse. See Google Video,

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[2] Samir Shabazz and Jackson were both at times within and beyond the state statutory limit which prohibits unauthorized parties within ten feet of the entrance to a polling place. This is a matter of state law, however, and irrelevant in this case for the purposes of analyzing the behavior under the Voting Rights Act.

[3] The best estimate of the total number of those who voted at the precinct is 580. This is the sum of the number of votes for Senator Barack Obama (568) and Senator John McCain (12). This is the highest total of votes for any of the contests on the ballot. It is unclear, however, if this sum includes any absentee votes.

[4] These details are not insignificant. According to Hill, the grip and the leather thong allow the person using a baton to swing and thrust with more force and greater abandon without the fear of dropping the weapon.

http://video.google.com/ (search "Black Panthers Philadelphia"; then follow "Black Panther patrols intimidating voters in Philadelphia" hyperlink) (last visited Dec. 7, 2008). We also have obtained original digital files of Samir Shabazz's deployment and brandishing of the baton or nightstick. These digital files have a higher level of definition and clarity than the videos placed on Google Video, Youtube, and other internet video sites. As Morse approached and asked the men what they were doing at the polling place, Samir Shabazz began tapping the baton in his hand and identified himself as "security." Id. The weapon was never holstered, but was moved about and at times tapped against his leg. The baton was also used to point at individuals with whom the Black Panthers were having antagonistic discussions.

A second video, apparently shot a short time later, showed Philadelphia police arriving on the scene and approaching the two men. See Google Video, http://video.google.com/ (search "Black Panthers Philadelphia"; then follow "Police confront Black Panthers who are intimidating voters in Philadelphia" hyperlink) (last visited Nov. 10, 2008). Police officer Richard Alexander is seen in the video. We interviewed Officer Alexander and he told us that he received a call from police dispatch about reports of "voter intimidation" at a polling place. Officer Alexander arrived with a partner, Officer Hazel. Officer Alexander said that when he arrived he saw Samir Shabazz and Jackson 10 to 12 feet from the entrance to the polling place. The video shows Officer Alexander and Officer Hazel, approach the Black Panthers and requesting that they "step over to the car." Jackson does not comply and Officer Hazel says "we aren't asking." The men then follow. Officer Alexander told us that he said to Samir Shabazz and Jackson, "you can't be out here intimidating voters." Samir Shabazz and Jackson denied they were intimidating voters. Officer Alexander said that Samir Shabazz wore various NBPP insignia on his uniform. Officer Alexander told us he concluded that they should not be standing athwart the entrance to a polling place with a weapon and ordered them to disperse. Samir Shabazz did so, but Jackson had poll watching credentials allowing him to stay. Jackson did not retain the weapon when Samir Shabazz departed. Republican poll watcher Mike Mauro, an attorney, recalls that he saw the police officers confiscate the weapon from Samir Shabazz. Officer Alexander stated that Shabazz complained to him that his removal from the polling location was "another white man trying to bring the black man down."

A FOX News reporter also responded to the scene and shot video. See Google Video, http://video.google.com/ (search "Black Panthers Philadelphia"; then follow "Rick Leventhal of Fox News confronts Black Panther" hyperlink) (last visited Nov. 10, 2008). Video from that encounter (also readily available on elsewhere on the internet) shows the news team approaching and questioning the remaining man, Jackson, who was still standing in front of the entrance to the polling place. Id. When questioned about the presence of the other man and the baton, Jackson said no one had ever been at the polling station with a baton and claimed he didn't know what the reporter was talking about. Id. Witnesses we spoke with indicated that Samir Shabazz and Jackson were deployed at the poll for some time with the baton prior to the video being taken.

C. Poll watchers and attorneys were deployed to various polling locations on Election Day both to observe and to aid voters.

Attorney Joe DeFelice, an employee of the Pennsylvania Republican Party, was responsible for the deployment of poll watchers to polling locations in Philadelphia on Election Day. This program deployed both attorneys and non-attorneys as poll watchers. While the primary purpose of the Election Day monitoring program was to observe and document any behavior at the polls which was illegal or unwelcome, another purpose was to aid voters, according to DeFelice and others. Attorney

John Giordano, the Election Day operations director for southeastern Pennsylvania, trained the poll watchers. He said that one of the purposes of the poll watching program was to aid particular voters should they encounter difficulties in casting a ballot.[5]

Wayne Byman, an African-American, was a Republican Party poll watcher deployed in the program managed by DeFelice. He described how he would aid voters on Election Day. Byman noted that, in Pennsylvania, he could identify the political party of a voter through the registration books at a polling location. He also has identified voters' party affiliations by speaking to them. Byman said he "would introduce myself to the voter if I saw they had any problem casting a ballot." He attempted to resolve their problems with the goal of allowing them vote. He made direct appeals to the election officials on behalf of voters, both at the polling location and by telephone to the Board of Elections. Byman stated that he "help[ed] the voter by telling the voter what they need to do to get their vote counted. I can [also] get the voter to present their case to the election judges." Byman could testify in detail about how was trained to, and how he did, aid voters on Election Day.

Mauro said that, during his training, he was "specifically instructed that part of their job was to help voters." He stated "we were told that if a voter was denied the right to vote, we were allowed to speak to the voter and answer questions." In sum, Giordano, Defelice, Byman, and Mauro are witnesses with knowledge of how aiding voters was one of the purposes of the poll watcher program.

D. Reports concerning the NBPP's presence at the polling place were made by poll watchers on the scene.

The events which precipitated reports about the Black Panthers' presence were statements made by Samir Shabazz or Jackson, or both, to poll watchers for the Republican Party, and a complaint by an unspecified voter about the presence of the Black Panthers. Byman was at 1221 Fairmount Street for a short time and saw the Black Panthers. He characterized their presence as "menacing and intimidating." Byman told us they "were the type you don't confront unless you are ready for a confrontation." He reported their presence to Joe Fischetti, an attorney poll watcher for the Republican Party. Fischetti then arrived at 1221 Fairmount Street and encountered the Black Panthers and two African-American poll watchers for the Republican Party, Larry Counts and his wife Angela Counts, who were assigned there. The Counts' had credentials entitling them to enter and remain in the polling place. Fischetti described Larry Counts as scared and worried about his safety at the polling place. Counts, according to Fischetti, huddled away from the Panthers' presence and kept looking over his shoulder as he spoke to Fischetti. Counts described to Fischetti his concern about leaving the polling place at the end of the day given the presence of the Panthers. Fischetti also described the Black Panthers' presence as alarming and said members of the local community present at the time also seemed alarmed and annoyed by the Panthers. Fischetti made a call concerning the situation to the Philadelphia Republican Party headquarters that resulted in an incident report. Morse, back at headquarters, also separately received a telephone complaint from a voter concerning a man with a "billy club" at 1221 Fairmount Street.

Larry and Angela Counts, the husband and wife poll workers, confirmed that they were afraid to leave the polling place until the Black Panthers had departed. This is consistent with the behavior

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[5] Giordano was recently Counsel to the Assistant Attorney General in the Environmental and Natural Resources Division and an Assistant United States Attorney in the Eastern District of Virginia before that.

of Counts as described to us by Fischetti. Angela Counts said she kept looking out the window at the Black Panthers with concern. She said she wondered what might occur next and if someone might "bomb the place." Lunch was brought to them, instead of them leaving to get it themselves. Larry and Angela Counts told us that when they finally departed the polling place, they first checked to see if the Black Panthers were still deployed outside. They told us that they left only because the Black Panthers had departed.

After these complaints were received, Mauro, Justin Myers, and Hill were deployed to the polling location by headquarters. Mauro stated that they were deployed because of a report that "one of our poll watchers was being harassed [by the Black Panthers]." Hill noted that he received a report that the Black Panthers had confronted Counts and called him a "race traitor." After Mauro, Myers, and Hill arrived, they approached the entrance to the polling place. Samir Shabazz, when engaging and speaking with Mauro and his fellow poll watchers, tapped the baton in the palm of his other hand. Hill told us that the leather thong on the end of the baton was wrapped around Shabazz's hand while he did this. Mauro heard the Black Panthers call him and his poll watching colleagues "white supremacists." Mauro said that Samir Shabazz also yelled at the poll watchers "fuck you cracker" as he alighted. When Hill sought to enter the polling location, he said Jackson and Shabazz formed ranks, meaning stood side by side to create a larger obstacle to Hill's entry into the polls.[6] The weapon was in plain view as Hill approached. Hill reported that as he departed the polling place, Samir Shabazz yelled "how you [sic] white mother fuckers gonna like being ruled by a black man?" Meyers told us the Black Panthers called him a "cracker" and opined that Meyers would "soon know what it was like to be ruled by the black man." Meyers, "found the guy to be intimidating." Morse, the videographer, also said that he was "scared to death" of the Black Panthers. Hill, Meyers, Mauro, Byman, and Morse are witnesses with knowledge concerning intimidation and threats by NBPP members.

E. Witnesses observed voters reacting to the Black Panthers at the polling place.

Mauro told us that he watched voters arrive at the polling location and exhibit manifest surprise and apprehension at the presence of the Black Panthers. Mauro also stated that he saw black voters congregate away from the entrance to the polling location and speak about the presence of the Black Panthers. He recalls them saying words to the effect of "what is going on there?" Mauro also witnessed an elderly black woman approaching the polls and exhibiting apprehension as she approached the scene. Attorney poll watcher Harry Lewis told us he saw voters appear apprehensive about approaching the polling location entrance behind the Black Panthers. We received similar information from Fischetti. Officer Alexander said that he received a call from dispatch about reports of "voter intimidation" at the polling place. He said he saw individuals gathered within sight of the polling entrance, but they did not attempt to enter. Officer Alexander did not interview any voters while he was at the polling location.

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[6] Hill had credentials allowing him inside the polling location. He successfully entered the building.

F. The leadership of the NBPP endorsed the polling place deployment in Philadelphia.

We interviewed by telephone Chairman Malik Zulu Shabazz from his Washington D.C. law office.[7] He told us, "there were members of the party in many areas [on Election Day]." According to an interview with Fox News Zulu Shabazz, said that there were more than 300 Panthers deployed in several cities across the U.S. to ensure the voting process went fairly and smoothly.[8] See AOL Video, http://video.aol.com/video-detail/dr-malik-shabazz/1916264308/?icid=VIDLRVGOV07 (follow hyperlink to FoxNews) (last visited Dec. 18, 2008). Zulu Shabazz told Fox News that the NBPP is comprised "of thousands" with a "very active grass roots." Id. Zulu Shabazz also specifically endorsed the use and display of the weapon at 1221 Fairmount Street by Samir Shabazz in our telephone conversation with him as well as in an the interview with Fox News. See id. For his part, the NBPP leader has claimed that his members were at the polling place merely to quell voter intimidation by white supremacists. See id.; see also FOXNews.com, Party Leader Says Black Panther Presence at Polls Provoked by 'Neo-Nazis',http://elections.foxnews.com/2008/11/07/party-leader-says-black-panther-presence-polls-provoked-neo-nazis/ (last visited Nov. 10, 2008).

No witness we interviewed said they saw any skinheads or white supremacists at 1221 Fairmount Street. When we spoke by telephone to Zulu Shabazz on December 5, 2008, he said he was still gathering facts about the presence of skinheads at the polls. We also attempted to contact Jackson to obtain his version of events. Jackson did not return our telephone call. We were unable to find contact information for Samir Shabazz. Based on our interviews with poll watchers, Officer Alexander, and Zulu Shabazz, we do 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. This excuse would likely be presented by the defendants to offer a motivation other than an intent to intimidate; but this reason must be plausible to have any weight, and in our investigation we found it to be implausible.

II. Section 11(b) of the Voting Rights Act

Section 11(b) of the Voting Rights Act (VRA) of 1965, 42 U.S.C. § 1973i(b) (2000), provides as follows:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.

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[7] As Shabazz is not the given name of either Malik Zulu Shabazz or Samir Shabazz, they are apparently unrelated.

[8] We were unable to ascertain where or whether the NBPP actually deployed any other members at polling locations throughout the United States.

Section 11(b) protects both voters and those "aiding" voters. Unlike other sections of the Voting Rights Act, it does not require state action. It is a broad prohibition against intimidating, threatening, or coercive behavior pertaining to the process of voting.

Cases brought under Section 11(b) have been uniformly unsuccessful. But see Jackson v. Riddell, 476 F.Supp. 849, 859-60 (N.D. Miss. 1979) (finding that Section 11(b) "is to be given an expansive meaning."); Whatley v. City of Vidalia, 399 F.2d 521, 525-26 (5th Cir. 1968) (noting that Section 11(b) was intended to expand rights protected by 42 U.S.C. § 1971(b)). In fact, of the fewer than ten cases reported as being brought under Section 11(b), no plaintiff has ever won.

Cases brought under Section 11(b) have failed for two reasons. First, courts have held that the behavior alleged does not constitute a genuine threat, coercion, or intimidation. At one extreme, actual violence would seem to be the clearest example of a Section 11(b) violation. But no plaintiff has brought a case alleging actual violence. Second, courts have at times read into the statute an additional requirement that neither its plain language nor its legislative history supports, namely, that plaintiffs must prove racial intent. See, e.g., Willing v. Lake Orion Cmty. Schs., 924 F.Supp. 815, 820 (E.D. Mich. 1996) (finding that no claim exists under Section 11(b) "[a]bsent a claim of any racial or other intentional invidious discrimination[.]") Indeed, the legislative history of 11(b) suggests that Congress specifically intended to eliminate any necessity to prove racial intent.[9] Regardless, we believe that both of these historic barriers to plaintiffs' success in Section 11(b) cases are overcome in this matter. First, the deployment of armed and uniformed members of the NBPP who brandish a weapon will likely satisfy the high factual burden placed on plaintiffs to show a genuine threat, coercion, or intimidation. Second, if a court were to require evidence of racial intent, it would likely be established by the express racist agenda of the NBPP and the racial slurs and comments directed at various individuals by Samir Shabazz and Jackson at the polls.

Most recently, the Department litigated and lost a Section 11(b) claim in United States v. Brown, 494 F. Supp.2d 440, 477 n. 56 (S.D. Miss. 2007).[10] In Brown, the Department presented two sets of evidence to establish a violation of Section 11(b). First, the defendant, Ike Brown, published a list of 174 voters in a newspaper. Brown stated that they might be subject to challenge if they attempted to vote. A witness for the United States whose name appeared on the list testified at trial that she feared she would be arrested if she attempted to vote. She therefore stayed home on Election Day. Second, "Brown confronted [a white voter attempting to vote] and in a loud voice, ordered him to get away from the entrance to the building. When [the voter] refused, Brown summoned law enforcement, and [Deputy Sheriff] Terry Grasseree appeared." Id. at 472.

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[9] On June 1, 1965, the House Judiciary Committee reported its version of the bill which would become the Voting Rights Act of 1965. Section 11(b) of the House committee bill was similar to the provision in the Senate-passed bill. In discussing Section 11(b), the House report stated that:

> The prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C. 1971(b) (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown.

H.R. Rep. at 30 (1965). One difference between the two versions of Section 11(b) was that the House committee extended coverage to persons urging or aiding others to vote.

[10] The Department won a claim brought under Section 2 in this case.

The district court ruled against the United States and found that this evidence was not sufficient to find a violation Section 11(b). The court noted:

> The Government contends that Brown's public 'threat' to challenge persons on the list of 174 white voters if they attempted to vote in the 2003 Democratic primary violates Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973i(b), which prohibits anyone from intimidating, threatening or coercing any person from attempting to vote. Although the court does conclude that there was a racial element to Brown's publication of this list, the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b).

Id. at 472.

Regarding the threat to arrest the voter attempting to vote and the subsequent appearance of law enforcement, the district court noted Brown may have "mistakenly believed Coleman [a candidate] was in violation of the thirty-foot rule." Id. at 472. Instead of finding Brown liable for violating Section 11(b), the district court merely suggested that a "fair-minded person" would "have inquired before ordering [Coleman] to leave, and certainly before calling for law enforcement." Id.[11]

In United States v. Harvey, 250 F. Supp. 219 (E.D. La. 1966), the court heard another case brought under section 11(b) by the Department. The Department alleged that, in violation of Section 11(b) and § 1971(b), the defendants terminated sharecropping and tenant-farming relationships with blacks who had registered to vote, evicted such persons from rental homes, and discharged them from salaried jobs. Id. at 221-22. The court first concluded the applicability of the intimidation statutes to state and local elections exceeded Congress' power. See id. at 225-26, 236-37; but see United States v. Simms, 508 F. Supp. 1179, 1186-87 (W.D. La. 1979) (rejecting Harvey's constitutional analysis). The court further held that even if Congress had such power, the plaintiff had failed to prove the intimidation allegation since its entire claim rested on nothing more than the termination of a business relationship shortly after the complainants registered to vote. Id. at 231-37.

In Gremillion v. Rinaudo, 325 F. Supp. 375, 376-77 (E.D. La. 1971), an unsuccessful black candidate brought an action to set aside the results of a 1970 primary election for school board, alleging various irregularities, including intimidation by a uniformed police officer who assisted white and black voters in the voting booth. The court stated that the purpose of the VRA was to "protect voters from an actual or potential denial or abridgement of their right to vote only where the basis for the infringement was racial discrimination." Id. at 378. The court dismissed the only claim brought by plaintiffs which implicated Section 11(b) (the claim of intimidation based on assistance from a uniformed, white officer), holding that the officer's presence, without anything more, did not constitute a general violation of the VRA on its face. Id.

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[11] The Department approved the filing of a complaint in United States v. North Carolina Republican Party, (E.D.N.C., No. 91-161-CIV-5-F, filed February 26, 1992) under Section 11(b). This case involved the potential of an election day challenge program. The challenge program included a mailing to voters which stated they may be asked on election day about how long they resided at their residence. The case was not litigated and the defendants entered into a consent decree before discovery began.

In Pincham v. Illinois Judicial Inquiry Board, 681 F. Supp. 1309, 1314-17 (N.D. Ill. 1988), the district court refused to allow the plaintiff to amend his complaint to include a claim under Section 11(b). The court made its finding on a number of bases, including the fact that the plaintiff had made "no allegation that the defendants intended to intimidate, threaten, or coerce Justice Pincham." Id. at 1317. The Section 11(b) claim was based on the defendant Board bringing a disciplinary action against the black plaintiff, Judge Pincham, for statements he made in a political campaign. Id. at 1312.

What actions constitute satisfaction of the statutory terms "intimidate, threaten, or coerce" in Section 11(b) have never been precisely defined. As discussed above, courts have opined what does not constitute "intimidate, threaten or coerce" under Section 11(b). Based on these cases, the following facts would most likely not constitute violations of Section 11(b): termination of a voter's lease contracts, contractual eviction from homes, termination of employment, or termination of a business relationship for exercising the franchise (Harvey), police officers in a polling place assisting voters (Gremillion), election improprieties (Willing), regulatory enforcement actions for statements made in political campaigns (Pincham), threats to arrest voters and the summoning of law enforcement officials, in the absence of clear evidence of intent; published threats to challenge named voters; and subjective fears that said named voters might be arrested if they tried to vote (Brown).

The meaning of "intimidate, threaten, or coerce" was explored, however, in a case not brought under Section 11(b), United States v. McLeod, 385 F.2d 734, 741 (5th Cir. 1967).[13] In McLeod, the Fifth Circuit reversed the district court's dismissal of an action seeking an injunction against the mass arrest of blacks seeking to vote or register to vote as well as police surveillance of private associations active in registering black voters. The district court had found "that each of the allegedly coercive acts was justified – that the surveillance of the mass meetings was necessary to keep order and to protect the Negroes" and that the mass arrests were warranted. Id. at 739. On appeal, the Fifth Circuit said "[i]t is difficult to imagine anything short of physical violence which would have a more chilling effect on a voter registration drive than the pattern of baseless arrests and prosecutions revealed in this record." Id. at 740-41. "We hold that the trial judge clearly erred in failing to find that the defendants' acts threatened, intimidated, and coerced the prospective Negro voters in Dallas County." Id. at 741; see also NAACP v. Thompson, 357 F.2d 831, 838 (5th Cir. 1966) (characterizing "arrest[s] en masse on frivolous or unfounded charges" as intimidation.).

III. Legal & Factual Analysis

A. Brandishing a deadly weapon at the entrance to a polling place and related actions and statements by the uniformed members of the NBPP constituted acts designed to intimidate, threaten, or coerce those voting or attempting to vote.

Section 11(b) broadly prohibits intimidation pertaining to voting. It states: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce . . . any person for voting or attempting to vote." § 1973i(b). Standing athwart the entrance to a polling place in formation and brandishing a weapon in the presence of voters and poll watchers objectively violates Section 11(b), because a fact-finder would likely conclude that brandishing a weapon could have no

[13] McLeod was an action brought under, among others, § 1971(b). Both § 1971(b) and Section 11(b), § 1973i(b), use the same language, "intimidate, threaten, or coerce" pertaining to voting.

effect other than to intimidate, threaten, or coerce.[14] The well-recognized military-style uniform, complete with insignia, patches and bloused combat boots; the notoriety of the party and the individuals involved; and the many statements advocating racially-motivated violence made by the party and the individuals involved, would all reinforce this conclusion.

The evidence at trial obviously would include the many, nationally publicized digital video recordings of the incident, as well as the direct testimony of the many eyewitnesses named herein. The statements and racial comments by the NBPP members involved in the incident, both prior to and on Election Day, are very likely to be deemed non-hearsay admissions by a party opponent. The evidence would include the testimony of the Philadelphia police, who concluded that the NBPP members were sufficiently intimidating to the poll watchers, the voters, or both, to order them dispersed and to confiscate their weapon. The evidence also would include expert testimony about the NBPP, their stated mission, and their rhetoric.

We would argue at trial that the evidence objectively establishes a violation of Section 11(b). It is shocking to think that a United States citizen might have to run a gauntlet of billy clubs in order to vote. Where this occurs, we would argue that no further, special, or subjective harm need be proved. Stated differently, we would argue that all voters arriving at this polling location were subject to intimidation by the very fact of having to endure the implied physical threat posed by armed, uniformed individuals, of uncertain intentions, standing in formation in front of the polling place.

Notwithstanding this point, we also would proffer evidence showing that the intimidating behavior was particularly directed at two classes of voters, who were, in fact, intimidated. The most obvious targets of intimidation were the white voters in the precinct, a class of citizens about whom Shabazz and the NBPP have made statements expressing extreme racial hostility. Further, the NBPP's actions were directed at African-American voters who were not inclined to vote for the candidate favored by the NBPP. The threatening actions described represent an effort to impose racial solidarity on black voters in an election where race was regularly discussed. Accordingly, the evidence at trial would include testimony concerning the reactions of both white and black voters who came to the polling station to vote.

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[14] Deployment and movement of the baton by Samir Shabazz likely constitutes "brandishment" of a deadly weapon. See United States v. Johnson, 931 F.2d 238, 240 (3d Cir. 1991) ("dictionary defines 'brandish' as 'to shake or wave (a weapon) menacingly,' and gives as synonyms 'flourish' and 'wave.'"); see also United States v. Marin, 523 F.3d 24, 30 (1st Cir. 2008) (United States argued exiting a vehicle with a billy club constituted admissible evidence creating inference that drug dealer recognized potential use of weapon may further drug business.); United States v. Koon, 833 F. Supp. 769, 781 (C.D. Cal. 1993) (United States argued and district court agreed that single handed baton was a dangerous weapon capable of inflicting death or serious bodily injury under sentencing guidelines.) Pennsylvania does not specifically criminalize the act of brandishing so no state statute or case defines what constitutes brandishing. Cf. Iowa Code § 723A.1(h)(1) (criminal brandishment is "display of a dangerous weapon, with intent to . . . intimidate."). The federal sentencing guidelines, however, define brandishing as "all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person." U.S. Sentencing Guidelines Manual § 1B1.1.

Finally, we would assert a second claim under Section 11(b), on the ground that Samir Shabazz, Jackson, and the NBPP attempted to intimidate, threaten or coerce voters. Section 11(b) provides that "[n]o person, . . . shall . . . attempt to intimidate, threaten, or coerce any person for voting or attempting to vote," regardless whether the attempt was successful. This language, which was specifically added by the House of Representatives, was designed to give Section 11(b) a broader reach. Whatever the actual effect of the defendants' conduct, the foregoing evidence amply demonstrates that they attempted to intimidate, threaten, and coerce voters.

The totality of the evidence should make a compelling case for a violation of Section 11(b). Indeed, it is difficult to imagine what could constitute a violation of Section 11(b) if armed, uniformed men standing in formation at the entrance to a polling location making racial slurs does not violate the statute. The facts in this case may present the clearest case for a violation of Section 11(b) that any plaintiff has brought in the 44-year history of the law.

B. Brandishing a deadly weapon at the entrance to a polling place and related actions and statements by the uniformed members of the NBPP constituted acts designed to intimidate, threaten, or coerce those aiding voters.

Section 11(b) also protects those who aid voters or urge them to vote. Section 11(b) of the Voting Rights Act provides that: "No person . . . shall . . . intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote." § 1973i(b). The statute prohibits both the attempt to intimidate those aiding voters, as well as actual intimidation. We believe that the evidence supports a separate cause of action against the NBPP concerning the intimidation of those deployed to aide voters.

Republican poll watchers were, in part, deployed to aid voters. It is true that the deployment had broader purposes, but there is cumulative and credible evidence that aiding voters was one purpose of the deployment. Byman provided specific detail about how he identified and aided voters who encountered difficulty at the polls.

Many of the threatening actions and statements by the NBPP members were specifically directed at poll watchers. Republican Party poll watcher Larry Counts was subject to abuse. Videos show that Samir Shabazz, when engaging and speaking with Mauro and his fellow poll watchers, tapped the baton in the palm of his other hand. Other shots show Samir Shabazz using the baton to point at them. The Black Panthers also altered their positioning to threaten poll watchers. When Hill sought to enter the polling location, he said both Samir Shabazz and Jackson formed ranks, meaning stood side by side in front of Hill to create a larger obstacle to his entry into the polls. Meyers said the Black Panthers called him a "cracker" and opined that Meyers would "soon know what it was like to be ruled by the black man." The Black Panthers directed racially tinged profanity at nearly all of the poll watchers at one time or another. This evidence should demonstrate both that the defendants attempted to, and they did, intimidate, threaten, and coerce those aiding others who were trying to vote.

IV. Conclusion

For the reasons given above, we believe that Section 11(b) was violated by Samir Shabazz, Zulu Shabazz, Jackson, and the NBPP when armed and uniformed members were deployed at the entrance to polling place. Section 11(b) was violated because their behavior was objectively intimidating and threatening to voters; because they attempted to intimidate and threaten, and did, in

fact, intimidate and threaten, voters, and those attempting to assist voters. We recommend authorization to file the attached complaint against the New Black Panther Party for Self-Defense, an unincorporated association, Chairman Malik Zulu Shabazz, Minister King Samir Shabazz, and Jerry Jackson.[15] We propose seeking a remedy that prohibits members of the NBPP from deploying in front of polling places in future elections.

Approved: _____

Disapproved: _____

Comments:

[15] We have attached a notice letter and consent decree as per our usual practice. We recommend, however, that you consider foregoing the sending of the notice letter and the attempt to negotiate the consent decree in this case. The nature of the NBPP is such that the letter and consent decree may not be received seriously or addressed in good faith by the defendants, who may instead seek to gain favorable publicity by publishing these documents and/or characterizing their contents in a tendentious manner. Accordingly, we recommend that you consider simply authorizing the commencement of a lawsuit.

Memorandum

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

To: Loretta King
Acting Assistant Attorney General

From: Christopher Coates
Chief, Voting Section

Robert Popper
Deputy Chief

J. Christian Adams
Spencer R. Fisher
Trial Attorneys

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.