UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

RAJA'EE FATIHAH, Plaintiff, v. CHAD NEAL (d.b.a. Save Yourself Survival and Tactical Gun Range) and NICOLE MAYHORN NEAL (d.b.a. Save Yourself Survival and Tactical Gun Range), Defendants.	No. 6:16-cv-00058-JHP

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Raja'ee Fatihah testified under oath as follows:

> Q: Do you have any objection to a gun range adopting a safety-conscious policy like that as indicated in Exhibit No. 18 that you just read?
> MR. HENDERSON: Objection.
> A: Being a Muslim and understanding the current climate with regard to Islam, I think it's problematic that the language on association with terrorism and I would question how they make the determination as to who is associated with terrorism and—
> Q: Let me pause you. What if they relied on the government, the U.S. government, would that be appropriate?
> MR. HENDERSON: Objection.
> A: If the United States government determined an organization was a terrorist organization, I think it would be responsible of them to follow that guidance.
> Q: And how about if the government determined that ***they have ties to terrorist organizations***?
> MR. HENDERSON: Objection.
> A: If the government determined that an organization has ties to a terrorist organization, I think it would also be ***a responsible thing***.
> Q: ***To not allow them to shoot at the range***?
> A: ***Yes***.

(Fatihah Dep. at 120:4-25 to 121:1-2; Dep. Ex. 18 [emphasis added] [Doc. No. 67-2]).

In the *United States v. Holy Land Foundation for Relief & Development* criminal trial, the United States government "produced ***ample evidence*** to establish the associations of CAIR, ISNA and NAIT with HLF, the Islamic Association for Palestine ('IAP'), and with Hamas." Mem. Op. Order at 14-19, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-0240-P (N.D. Dall. July 1, 2009), ECF No. 1356 (Nicole Decl. ¶ 43, Ex. R [Doc. No. 68-1]; Yerushalmi Decl. ¶ 8, Ex. D [Doc. No. 69-1]). The United States government has designated Hamas a terrorist organization. (Nicole Decl. ¶ 43, Ex. Y [Doc. No. 68-1]). Therefore, *based on Plaintiff's own sworn testimony*, Defendants' actions in this case were "responsible." This case should be dismissed.

Despite the evidence, Plaintiff urges this Court to bury its head in the sand and remain willfully blind to the existential threat posed by Islamic terrorism. Plaintiff's emotional invocation of Jim Crow is a smokescreen. (Pl.'s Br. at 1, 20, 26 [Doc. No. 71]). Worse, it is shameful. It is shameful to equate the legitimate civil rights movement to bring political equality to black Americans in the South with what Plaintiff is doing here: asking the Court to do the bidding of the Council on American-Islamic Relations ("CAIR") by punishing anyone who dares to publicly

equate Islam with terrorism. This case is just one more attempt by CAIR to hijack the civil rights movement to conceal its nefarious objectives—objectives that the United States government publicly revealed during the *Holy Land Foundation* trial. CAIR desperately tried to hide the evidence in that case, but Judge Solis would have no part of it. *See* Mem. Op. Order at 14-19, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-0240-P (N.D. Dall. July 1, 2009), ECF No. 1356 (Nicole Decl. ¶ 43, Ex. R [Doc. No. 68-1]; Yerushalmi Decl. ¶ 8, Ex. D [Doc. No. 69-1]). This Court should join Judge Solis and have no part in promoting CAIR's dangerous agenda.[1] Political correctness and emotional pleas should not trump public safety. Defendants' *actual* policy as set forth in the Gun Range Rules and codified in the Company's Operating Agreement is lawful and, as Plaintiff concedes above (perhaps unwittingly), it was lawfully applied in this case.

As Defendants demonstrate in their motion to dismiss and/or for summary judgment (Doc. No. 66), accompanying brief (Doc. No. 67) with supporting evidence (Doc. Nos. 67, 68, 69), and this response, this case should be summarily dismissed.[2] Plaintiff was *not* denied use of Defendants' gun range[3] based on any prohibited category or characteristic, including religion, and Defendants do *not* have a policy of restricting access to the gun range on the basis of religion (or any other prohibited category or characteristic).

Instead, we have a situation where CAIR is trying to advance its political agenda by creating a conflict between armed individuals at a local gun range in order to file this meritless lawsuit. If Plaintiff's motives were as pristine as he would have this Court believe, he wouldn't be going to a gun range with a secret recording device, armed to the teeth, and confronting the

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[1] As the Government demonstrated in the *Holy Land Foundation* trial, CAIR was born out of a terrorist conspiracy (*i.e.*, Philadelphia meeting held in 1993), and one of the objectives of this meeting was to create organizations such as CAIR, which would masquerade—and publicly hold themselves out—as civil rights organizations. (*See* Yerushalmi Decl. ¶¶ 9-11 & supporting evidence [Doc. No. 69-1]).

[2] Plaintiff has not advanced any arguments under his state law claim. (Pl.'s Br. at 21, n.9). However, as argued in Defendants' motion, Plaintiff's state law claim (like his federal claim under Title II) should be summarily dismissed. (Defs.' Br. at 16, 17-18, 20-21 [Doc. No. 67]).

[3] As set forth in Defendants' motion and supporting evidence, Defendant Nicole Neal is the sole owner of Save Yourself Survival and Tactical Gear and Gun Club, LLC, which is a retail establishment that also operates a small outdoor gun range. (*See* Nicole Decl. ¶¶ 2, 3 [Doc. No. 68-1]). For ease of reference purposes only, the business will be referred to generally as Defendants' gun range.

owners about an issue that *Plaintiff knows* was contentious and, in fact, dangerous.[4] Had Plaintiff's motives been pure, he would have reached out to Defendants to alert them and to schedule a time to have a civil conversation about Islam, if that were truly his goal. Rather, what Plaintiff did here was reckless. And that recklessness alone is enough to ban him from the range. Operating a gun range is a dangerous business (this isn't a lunch counter). And Plaintiff was engaging in a dangerous game,[5] one that should *not* be shielded by federal (or state) law. In fact, Plaintiff's conduct likely violated Oklahoma law. *See* Okla. Stat. tit. 21, § 1289.11 ("It shall be unlawful for any person to engage in reckless conduct while having in his or her possession any shotgun, rifle or pistol, such actions consisting of creating a situation of unreasonable risk and probability of death or great bodily harm to another, and demonstrating a conscious disregard for the safety of another person.").

As Defendants predicted (*see* Defs.' Br. at 17 [Doc. No. 67]) and fully expected given the fact that this case was a complete set up from the very beginning by CAIR and one of its Oklahoma-affiliate board members (Plaintiff Fatihah), Plaintiff wants this Court to punish Defendants because he (and CAIR) dislikes Defendants' speech about Islam. Indeed, Plaintiff's entire case is based on Defendants' speech. However, contrary to Plaintiff's assertion, speech (including speech deemed critical of Muslims or Islam) cannot serve as a basis for civil liability no matter how controversial or odious it might be to the listener. *Snyder v. Phelps*, 562 U.S. 443 (2011). And alleged discriminatory statements are only relevant when there is a direct connection between an actual *policy* of unlawful discrimination and the decision at issue. *There is no such policy as a matter of fact* and the *decision to deny Plaintiff under the actual policy* was "responsible."

As the undisputed evidence shows, Defendants *never* inquired as to Plaintiff's religion when he visited the gun range on October 23, 2015. As a matter of policy and as a matter of fact, Defendants *never* inquire as to *any* customer's religion. It wasn't until Plaintiff decided to create a conflict about his religion and assumed a threatening, armed stance that Defendants became

[4] Plaintiff admits that he knew about the controversy surrounding Defendants' sign. (Fatihah Dep. at 50:9-17 [Doc. No. 67-2]).

[5] Make no mistake, it is dangerous to intentionally create a disturbance and a controversy at a gun range, like Plaintiff has done here, where individuals are armed and wary of potential safety threats. (Nicole Decl. ¶ 29 [Doc. No. 68-1]). This Court should defer to Defendants' judgment in such matters since *the Court is not the one who has to stand on the firing line wondering if the next round is coming his way*.

concerned about Plaintiff firing at the range that day. Defendants knew *at that moment* that Plaintiff came to their store with an agenda beyond firing at the range (Defendant Chad Neal expressed this very point, as captured by Plaintiff's secret recording). This alone is sufficient to ban Plaintiff from the range. But even then, Defendants considered the possibility of allowing Plaintiff to fire his weapons that day, so long as extra safety precautions were taken (*i.e.*, that both Defendants Nicole and Chad Neal would supervise his firing as range safety officers). This alone demonstrates that Defendants do not have a blanket policy of prohibiting service to a potential customer based solely on the customer's religion. As the discussion continued and the tension mounted, Defendants ultimately decided to invoke Range Rule 10, which is posted and which states that all memberships are subject to board approval, so that Defendants could ease the tension, take a pause, and conduct a background check of Plaintiff. And this background check confirmed their suspicions and concerns: Plaintiff was associated with an organization (CAIR) that has strong ties to terrorism (as the public record amply demonstrates) and one that was looking to create a controversy and conflict with Defendants to file a lawsuit. Defendants' suspicions that Plaintiff came to their store on October 23, 2015, with an "agenda" have been confirmed in this litigation.

In short, no federal or state law prevents a gun range owner from prohibiting someone who is associated with an organization like CAIR (which is not a religious organization and which does not require its workers to be Muslim or profess any religious belief whatsoever) from firing at her range. No federal or state law prevents a gun range owner from prohibiting someone who creates a disturbance or a conflict with the owner from firing at her range. No federal or state law prevents a gun range owner from prohibiting someone who presents a safety threat from firing at her range. No federal or state law prevents a gun range owner from prohibiting someone who violates a gun range safety rule from firing at her range. No federal or state law prevents a gun range owner from prohibiting someone from firing at her range who is reckless enough to go to the range armed with a loaded weapon and a concealed recording device in order to create a conflict and controversy with the owner. In sum, no federal or state law compels this Court to order Defendants to permit Plaintiff to ever step foot on their range under the circumstances of this case. Public safety (and policy)[6] compels otherwise. This case should be dismissed.

[6] It is dangerous to allow (or to order) a situation where tension exists between and amongst the operators of the range and those who want to use it. This is yet another reason why a gun range is

In the final analysis, the Court should deny Plaintiff's motion for summary judgment and dismiss this dangerous lawsuit for the following reasons, and for those set forth in Defendants' motion to dismiss and/or for summary judgment: Defendants' gun range is not subject to Title II as a matter of law; Plaintiff lacks standing to pursue his claim under Title II, which only permits prospective injunctive relief; Defendants do not have a policy of unlawful discrimination; Defendants have legitimate reasons for denying Plaintiff access to their gun range; and the First Amendment prohibits imposing civil liability on Defendants on the basis of their speech.

In conclusion, Plaintiff is asking this Court to establish a dangerous (and unconstitutional under the First Amendment) precedent that will have a chilling effect upon owners of gun ranges who must vigilantly safeguard against potential terrorists using their ranges to train for their next deadly attack.[7] This case is not at all about religious discrimination; it is about public safety and the right to free speech. It should be summarily dismissed.

RESPONSE TO PLAINTIFF'S "STATEMENT OF MATERIAL UNDISPUTED FACTS"

1. Defendants posted the sign (and replacements) described in Plaintiff's paragraph 1 as a political statement in response to the Chattanooga, Tennessee terrorist attack where a self-proclaimed Muslim trained at a firing range before embarking upon his deadly attack. (Nicole Decl. ¶¶ 13-16 [Doc. No. 68-1]). And when Plaintiff came to Defendant's gun range on October 23, 2015, he was told that the sign was posted because of the Chattanooga terrorist attack—as evidenced by Plaintiff's secret recording. (Fatihah Dep. at 96:8-9 [Recording] [Doc. No. 67-2]; Recording [Doc. No. 74]). Defendants further assert that Defendant Nicole Neal's testimony was unequivocal: the "Muslim Free" sign does not convey a business policy to the public. (Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]). The actual business policy is as stated in the posted Gun Range Rules. (Nicole Decl. ¶ 21; *see also* ¶ 19 [Doc. No. 68-1]).

2. Defendants posted the message on Facebook identified in Plaintiff's paragraph 2, and this post makes clear: "***we do not tolerate terrorism***." (Pl.'s Br. at 2).

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not properly a place of public accommodation under Title II, particularly in light of the fact that the exclusive remedy is injunctive relief.

[7] Recall the neighbors of the San Bernardino terrorists. They feared reporting the suspicious activity they observed because they did not want to "profile" their Muslim neighbors and be labeled racist. (*See* http://www.foxnews.com/us/2015/12/05/neighbor-to-family-san-bernardino-terrorist-couple-purportedly-saw-but-didnt.html).

3. Defendants do not deny that Defendant Chad Neal sent the Facebook message referenced in paragraph 3. Defendants assert that this is further evidence that they were aware that CAIR was targeting their gun range prior to Plaintiff's arrival on October 23, 2015. Defendants further assert that the term "muzrat" is in the context of referring to CAIR (an organization with ties to terrorism). Defendants further assert that there is ***no*** evidence that Jan Morgan has ever denied anyone service at her range because they are Muslim, and Plaintiff's submission in this regard is objectionable as hearsay. Fed. R. Evid. 801. Defendants further assert that Jan Morgan's article and Defendant Neal's comments are protected speech. Defendants further assert that Jan Morgan's article itself demonstrates that her concern is with terrorism and public safety. In fact, Defendant Chad Neal's statement, "We align ourselves and our store polices with Jan Morgan," is not only protected speech, it is in reference to Ms. Morgan's concerns about terrorism and public safety. Indeed, the very next day (August 14, 2015), Defendant Chad Neal and Ms. Morgan communicated via Facebook, and this very point of clarification was made. (Pl.'s Ex. B [Dep. of Chad Neal Ex. 39] [Doc. No. 71-3, ECF pp. 53-54] ["This establishment has not engaged in religious discrimination. Federal law does not require us to equp (sic) or train Islamic terrorists becausse (sic) they engage in violence in the name of Islam. . . ."]). Defendants further assert that on October 24, 2015 (the day after Plaintiff tried to gain access to the gun range), Defendant Chad Neal stated to Ms. Morgan in the same message thread, "[H]ad a face to face probe by a muzrat from CAIR yesterday try (sic) to gain access to the range. *Thinking about doing a restraining order on CAIR and their operatives*. Thoughts?" (Pl.'s Ex. B, Dep. Ex. 39 [Doc. No. 71-3, ECF p. 55 of 70]) (emphasis added). Defendants further assert that Ms. Morgan replied to Defendant Chad Neal as follows: "I would. *CAIR has documented ties to HAMAS*. . That is plenty of reason for denying them access . . What happened? How did you know they were from CAIR." Defendant Chad Neal responded, "We Google the guys (sic) name and looked him up on fb [Facebook]." (Pl.'s Ex. B, Dep. Ex. 39 [Doc. No. 71-3, ECF p. 55 of 70]) (emphasis added). Defendants further assert that Defendant Nicole Neal's testimony was unequivocal: the "Muslim Free" sign does not convey a business policy to the public. (Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]). The actual business policy is set forth in the Operating Agreement and in the posted Gun Range Rules, and this policy is "aligned" with a *lawful* policy to promote public safety. (Nicole Decl. ¶ 21; *see also* ¶ 19 [Doc. No. 68-1]).

4. Defendants have made many public statements regarding their concerns about training the next terrorist at their gun range, including the statements referenced in Plaintiff's paragraph 4. All of these statements are protected speech. Defendants object in so far as the entire context of the news interviews are not included. Furthermore, Defendant Nicole Neal's testimony was unequivocal: the "Muslim Free" sign does not convey a business policy to the public. (Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]). Defendants' ***business policy*** is set forth in the Operating Agreement and Gun Range Rules. (Nicole Decl. ¶ 21 [Doc. No. 68-1]).

5. Defendants have made many public statements regarding Islam and their concerns about training the next terrorist at their range, including the statements referenced in Plaintiff's paragraph 5. All of these statements are protected speech. Moreover, Defendants' ***business policy*** is set forth in the Operating Agreement and Gun Range Rules. (Nicole Decl. ¶ 21 [Doc. No. 68-1]; *see also* Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]).

6. Defendants do not dispute the background information provided in Plaintiff's paragraph 6. However, Plaintiff is also a board member for CAIR-Oklahoma, which is a direct affiliate of CAIR that must "operate within the mission of CAIR." (Soltani Dep. 74 [Doc. No. 67-2]). CAIR is an organization with strong ties to terrorism. The United States government has presented "ample evidence" of these ties in the *Holy Land Foundation* criminal trial; the FBI has severed ties with CAIR, including its affiliate CAIR-Oklahoma, due to these ties; the U.S. Senate held a hearing where these ties were addressed; the Louisiana House of Representatives passed a resolution that set forth facts demonstrating these ties; and the United Arab Emirates ("UAE") has officially designated CAIR a terrorist organization. (Nicole Decl. ¶ 43 [Doc. No. 68-1]). The only background information relevant here, aside from Plaintiff's assertion that he is a Muslim, is Plaintiff's direct relationship with CAIR.

7. Defendants do not dispute that Plaintiff visited Defendants' store on October 23, 2015 and initially presented to Defendants that he wanted to use the range. However, Plaintiff was denied use of the gun range based on safety reasons (and not his religion) as set forth in Defendants' actual business policy. (*See* Nicole Decl. ¶¶ 5-45 [Doc. No. 68-1]).

8. Plaintiff's testimony speaks for itself. Furthermore, Plaintiff testified that he came to Defendants' gun range with an agenda beyond just shooting (Fatihah Dep. at 54:6-13 [describing his reason for bringing a concealed recording device]; 50:21-25 to 51:1 [admitting that he received advice from a CAIR lawyer before going to the range]; 81:11-21 [admitting that he sent the

recording to a CAIR lawyer] [Doc. No. 67-2]), and that prior to his visit, he convinced his friend, Kenneth Harper, to visit Defendants' gun range so that Mr. Harper could investigate it before Plaintiff's planned visit, (Fatihah Dep. 75:22-25 to 77:1-8 [Doc. No. 67-2]). *In short, it is undisputed that this was a set up*. Furthermore, Plaintiff's game of "gotcha" was utterly reckless and an independent and legitimate basis for banning him from the gun range. (Nicole Decl. ¶ 29 [Doc. No. 68-1]).

9. Defendants do not dispute the information provided in Plaintiff's paragraph 9.

10. Defendants do not dispute that the range was open when Plaintiff arrived on October 23, 2015. However, there is no dispute that at the time he arrived, the range was sloppy and wet from rain. (Nicole Decl. ¶ 30 [Doc. No. 68-1]; *see also* Fatihah Dep. at 90:17 [Recording informing Plaintiff that the range is "sloggy"] [Doc. No. 67-2]). Consequently, Plaintiff was the only customer at the gun range that morning when he arrived. (Fatihah Dep. at 91:13-20 [Doc. No. 67-2]; Nicole Decl. ¶ 30 [Doc. No. 68-1]). Furthermore, as noted, the range is an outdoor range, and when it rains hard like it did that evening and morning, the range is very sloppy and most shooters don't want to shoot. In particular, they don't want to shoot their rifles because, at the time, there was no overhead cover for the rifle range and the ground gets muddy. While most shooters don't want to shoot at an outdoor range when it is wet, because Defendants are running a business, they still encourage people to show up at the range when it is raining. Defendants need to earn money, even on rainy days. The first customer to come to the store after Plaintiff on that wet morning arrived at approximately 11:57 am. By that time, the rain had cleared and the range had started to dry up. (Nicole Decl. ¶¶ 30-32 [Doc. No. 68-1]).

11. Defendants dispute Plaintiff's characterization of the events of October 23, 2015, which was secretly recorded by Plaintiff. The recording speaks for itself. To begin, Plaintiff declared, out of the blue and unsolicited, "I am Muslim. Is that going to be a problem?"[8] (Nicole Dep. at 88:11-12 [Doc. No. 67-2]; Nicole Decl. ¶¶ 9, 38 [Doc. No. 68-1]; *see also* Fatihah Dep. 94:14-1 [Recording] [Doc. No. 67-2]; Recording [Doc. No. 74]), when it was obvious that he was going to be allowed to use the range, *which would have undermined his very reason for going*

[8] As the undisputed evidence shows, Defendants *never* inquire into a person's religion (and didn't do so with Plaintiff in this case), because it is not relevant. (Nicole Decl. ¶ 9 [Doc. No. 68-1]; s*ee also* Fatihah Dep. at 70:21 ["***Nicole did not inquire about my faith***."] [emphasis added]; 68:10-25 to 69:1-7 [admitting that none of the paperwork, including the Gun Range Rules, required a customer to disclose his or her religion], Dep. Exs. 13, 14, 15, 18 [Doc. No. 67-2]).

there (to wit: to be denied so he could file this lawsuit). Upon making his declaration, Plaintiff assumed a threatening stance (he dropped his right foot back and reached back with his right hand/arm—which is a stance a person would take if he were planning on engaging someone with a firearm). (Nicole Dep. at 69:1-23; 84:10-11, 20-23; 89:12-16, 8-90 [Doc. No. 67-2]; Nicole Decl. ¶ 38 [Doc. No. 68-1]). The rustling noise made by Plaintiff's movement when he assumed his threatening stance can be heard on the secret recording made by Plaintiff that day. (Nicole Decl. ¶¶ 38, 39 [Doc. No. 68-1]; Recording [Doc. No. 74]). Plaintiff wore his handgun in a concealed position (under his jacket), but when he assumed the threatening stance, his handgun was revealed to Defendants. (Nicole Decl. ¶ 38 [Doc. No. 68-1]; Nicole Dep. at 49:7-22 [Doc. No. 67-2]). When Plaintiff assumed his threatening stance, it appeared to Defendant Nicole Neal that he had a magazine inserted in his rifle[9] (Nicole Decl. ¶ 38 [Doc. No. 68-1]; *see also* Nicole Dep. at 50:23-25 to 51:1-2 [Doc. No. 67-2]), which is a violation of the Gun Range Rules (Rule 5) (Nicole Dep. at 50:8-15 to 51:1-2 [Doc. No. 67-2]). Upon feeling threatened by Plaintiff's actions, Defendant Nicole Neal promptly called for her husband, Defendant Chad Neal, who immediately recognized what was happening and shouted from the back room, "Wow. He just came in here with an agenda." (Fatihah Dep. at 94:20-2 [Doc. No. 67-2]; Reporter errata [Ex. B] [Doc. No. 67-2]; Nicole Decl. ¶ 38 [Doc. No. 68-1]; Recording [Doc. No. 74]).[10]

12. Defendants dispute Plaintiff's characterization of the events of October 23, 2015, which was secretly recorded by Plaintiff. The recording speaks for itself. To begin, Plaintiff declared, out of the blue and unsolicited, "I am Muslim. Is that going to be a problem?" (Nicole Dep. at 88:11-12 [Doc. No. 67-2]; Nicole Decl. ¶¶ 9, 38 [Doc. No. 68-1]; *see also* Fatihah Dep. 94:14-1 [Recording] [Doc. No. 67-2]; Recording [Doc. No. 74]), when it was obvious that he was going to be allowed to use the range, *which would have undermined his very reason for going*

[9] Since the rifle was slung over Plaintiff's shoulder the entire time, the magazine well was not readily visible so Defendant Nicole Neal did not notice the inserted magazine until Plaintiff took his threatening stance. (Nicole Decl. ¶ 38 [Doc. No. 68-1]).

[10] Regarding the issue of dress, the "Muslim garb" statement is a reference to clothing such as a burka worn by Muslim women or a loose-fitting robe worn by Muslim men. Either of these clothing choices would pose safety issues at a firing range as they could obstruct the shooter from safely operating a firearm (and the same is true for any other similar clothing that could obstruct vision, interfere with the safe handling of a weapon, or present other safety issues). Skimpy clothing also poses safety issues and is prohibited at the range. Proper range attire must be worn at all times by everyone. (Nicole Supplemental Decl. ¶ 9, at Ex. 2 attached).

there (to wit: to be denied so he could file this lawsuit). *See also* n.8, *supra*. Upon making his declaration, Plaintiff assumed a threatening stance (he dropped his right foot back and reached back with his right hand/arm—which is a stance a person would take if he were planning on engaging someone with a firearm). (Nicole Dep. at 69:1-23; 84:10-11, 20-23; 89:12-16, 8-90 [Doc. No. 67-2]; Nicole Decl. ¶ 38 [Doc. No. 68-1]). The rustling noise made by Plaintiff's movement when he assumed his threatening stance can be heard on the secret recording made by Plaintiff that day. (Nicole Decl. ¶¶ 38, 39 [Doc. No. 68-1]; Recording [Doc. No. 74]). Plaintiff wore his handgun in a concealed position (under his jacket), but when he assumed the threatening stance, his handgun was revealed to Defendants. (Nicole Decl. ¶ 38 [Doc. No. 68-1]; Nicole Dep. at 49:7-22 [Doc. No. 67-2]). When Plaintiff assumed his threatening stance, it appeared to Defendant Nicole Neal that he had a magazine inserted in his rifle[11] (Nicole Decl. ¶ 38 [Doc. No. 68-1]; *see also* Nicole Dep. at 50:23-25 to 51:1-2 [Doc. No. 67-2]), which is a violation of the Gun Range Rules (Rule 5) (Nicole Dep. at 50:8-15 to 51:1-2 [Doc. No. 67-2]). Upon feeling threatened by Plaintiff's actions, Defendant Nicole Neal promptly called for her husband, Defendant Chad Neal, who immediately recognized what was happening and shouted from the back room, "Wow. He just came in here with an agenda." (Fatihah Dep. at 94:20-2 [Doc. No. 67-2]; Reporter errata [Ex. B] [Doc. No. 67-2]; Nicole Decl. ¶ 38 [Doc. No. 68-1]; Recording [Doc. No. 74]).

13. Defendants admit that they invoked Gun Range Rule 10 based on all of the facts and circumstances of October 23, 2015, and not based on the fact that Plaintiff was Muslim. (Nicole Decl. ¶¶ 33-45 [Doc. No. 68-1]; *see also* Nicole Decl. ¶ 9 [Doc. No. 68-1]; Fatihah Dep. at 70:21 ["***Nicole did not inquire about my faith***."] [emphasis added]; 68:10-25 to 69:1-7 [admitting that none of the paperwork, including the Gun Range Rules, required a customer to disclose his or her religion], Dep. Exs. 13, 14, 15, 18 [Doc. No. 67-2]). Moreover, Plaintiff's statement that "Defendants have never before sought approval from the board for a customer to use the Gun Range or purchase a membership, whether daily or annual" is misleading. While prior to October 23, 2015 (the gun range opened on April 1, 2015), Defendant were never confronted with a situation where they had to invoke Rule 10, shortly after this incident with Plaintiff (and well before this lawsuit was filed), Defendants invoked Rule 10 in November 2015 when a

[11] (*See* n.9, *supra*).

customer who wanted to shoot at the range simply appeared distracted and in a rush (the customer's name is Alberto Riera). (Nicole Decl. ¶¶ 10, 12 [Doc. No. 68-1]).

14. Defendants dispute Plaintiff's characterization of the events of October 23, 2015. (*See* ¶¶ 11, 12, *supra*). The recording speaks for itself. However, the fact, as acknowledged by Plaintiff, that Defendants would consider permitting Plaintiff to shoot on the range that day demonstrates that Defendants do not have a blanket policy of discrimination against Muslims. Moreover, Defendant Chad Neal explained Rule 10 before any of the follow-on discussion about Islam. (*See* Recording at 6:00 min. [Doc. No. 74]). Nonetheless, the follow-on discussion only served to create more tension and conflict between Defendants and Plaintiff. (Nicole Decl. ¶¶ 38-40 [Doc. No. 68-1]).

15. Defendants dispute Plaintiff's characterization of the events of October 23, 2015. (*See* ¶¶ 11, 12, *supra*). The recording speaks for itself. Moreover, Plaintiff's interpretation of sharia law is not the only interpretation, as Plaintiff himself acknowledges (indeed, one would have to bury his head in the sand to ignore this reality). As Plaintiff admits, there are "people who engage in acts of violence and attribute it to their understanding of Islam." (Fatihah Dep. at 102:13-16, Fatihah Errata attached as Ex. A to Muise Supplemental Decl. at Ex. 1; *see also* 108:2-25 to 109:2-6; 22-25; 110:6-8, 19-21; 111:5-10, 13-22; 112:8-11; 113:2-7; *see also* Nicole Decl. ¶¶ 14-16 [Doc. No. 68-1]).

16. Defendants dispute Plaintiff's characterization of the events of October 23, 2015. (*See* ¶¶ 11, 12, *supra*). The recording speaks for itself. Moreover, Plaintiff's interpretation of sharia law is not the only interpretation. As Plaintiff admits, there are "people who engage in acts of violence and attribute it to their understanding of Islam." (Fatihah Dep. at 102:13-16, Fatihah Errata attached as Ex. A to Muise Supplemental Decl. at Ex. 1; *see also* 108:2-25 to 109:2-6; 22-25; 110:6-8, 19-21; 111:5-10, 13-22; 112:8-11; 113:2-7; *see also* Nicole Decl. ¶¶ 14-16 [Doc. No. 68-1]).

17. Defendants dispute Plaintiff's characterization of the events of October 23, 2015. (*See* ¶¶ 11, 12, *supra*). The recording speaks for itself. However, Defendants properly (and legally) invoked Gun Range Rule 10 based on all of the facts and circumstances of October 23, 2015. (Nicole Decl. ¶¶ 35-45 [Doc. No. 68-1]).

18. Defendants dispute Plaintiff's characterization of the events of October 23, 2015. (*See* ¶¶ 11, 12, *supra*). The recording speaks for itself. However, Defendants acknowledge that

the verbal exchange between Defendants and Plaintiff concluded as indicated in Plaintiff's paragraph 18.

19. Defendants dispute Plaintiff's characterization of the facts. Because comments were not made about the weapons at the time Defendants were unexpectedly confronted by someone who had clearly come to the store with an agenda (an agenda that was threatening to Defendants), does not mean that observations were not made. For example, Plaintiff alleges in his First Amended Complaint that "Defendants armed themselves with handguns," (First Am. Compl. ¶ 32 [Doc. No. 35]), but he never says anything about that on the recording. And it wasn't until Plaintiff exposed his agenda (declaring that he was a Muslim) and assumed his threatening stance that it appeared to Defendant Nicole Neal that he had a magazine inserted in his rifle.[12] (Nicole Decl. ¶ 38; *see also* Nicole Dep. at 50:23-25 to 51:1-2). At that point, it was a matter of getting the immediate situation resolved without it escalating into violence.

20. Defendants do not dispute that they Googled Plaintiff and found out that he was affiliated with CAIR (an organization that the U.S. government has determined has substantial ties to terrorist organizations). During Plaintiff's visit to the gun range, Defendants did not know of Plaintiff's ties with CAIR. However, since only prospective injunctive relief is available to Plaintiff under Title II, *see infra*, that fact is not relevant.

[12] By Plaintiff's own admission, he arrived at Defendants' store dressed in military-style clothing (black Army jacket) and carrying a loaded military-issue handgun strapped to his belt, a military-style rifle slung over his shoulder, fully loaded magazines with over 140 rounds of 9 mm ammunition, and a concealed recording device he kept in his pocket. (Fatihah Dep. 54:14-25 to 58:1-24; 60:12-25; 117:17-23, Dep. Ex. 12 [Doc. No. 67-2]). Plaintiff identified the rifle as a Chiappa M 1-9 rifle, which is a military-style rifle. However, Defendants do not believe that the rifle Plaintiff identified through discovery was in fact the rifle he had with him on October 23, 2015. Defendants believe that the rifle was an AK-47 or AR-style rifle (both of which are military-style rifles, and there are various, and similar, stock configurations available on the market for each). Bear in mind as well that Plaintiff's rifle was slung over his shoulder—Defendants were not afforded an opportunity to conduct a close inspection of Plaintiff's weapon to completely verify make and model. Moreover, in addition to owning an AR-15, Plaintiff's friend, Kenneth Harper, testified that Plaintiff owns a Russian sniper rifle with a synthetic stock (another weapon that can have various stock configurations). (Harper Dep. at 38:10-14, 25 to 39:1-6, attached as Ex. B to Muise Supplemental Decl. at Ex. 1). At the end of the day, the precise make and model of Plaintiff's rifle is not a material fact. What is material and relevant, is the fact that Plaintiff was well armed (and that was readily apparent) when he was at Defendants' gun range on October 23, 2015.

21. Defendants do not dispute that CAIR-Oklahoma is separately incorporated from CAIR-National. However, that is irrelevant. There is no dispute that CAIR-Oklahoma is an affiliate of CAIR-National, (Fatihah Dep. 19:23-25 to 21:1-6, Dep. Ex. 3 [CAIR-Ok Annual Report] [Doc. No. 67-2]; Soltani Dep. 20:13-15 [Doc. No. 67-2]), and as an affiliate, CAIR-Oklahoma must "operate within the mission of CAIR," (Soltani Dep. at 74 [Doc. No. 67-2]). Also, the FBI has similarly severed ties with CAIR-Oklahoma due to its direct affiliation with CAIR-National. (Nicole Decl. ¶ 43, Ex. Z [Doc. No. 68-1]). Moreover, the executive director of CAIR-National, Nihad Awad, is a personal friend of the executive director of CAIR-Oklahoma, Mr. Adam Soltani. (Soltani at 20-21 [Doc. No. 67-2]). In short, CAIR-Oklahoma is directly tied to and connected with CAIR-National (indeed, they share the very same name: "CAIR").

22. Defendants do not dispute that Plaintiff is a board member of CAIR-Oklahoma and not currently a board member of CAIR-National; however, the distinction is irrelevant for purposes of this case. (*See* ¶ 21, *supra*). *Plaintiff is directly affiliated with CAIR*.

23. Defendants do not dispute that then-Secretary of State John Kerry sent a letter to Nihad Awad following (and, indeed, confirming) the UAE's official designation of CAIR as a terrorist organization and stating, in that letter, that CAIR is not currently designated a terrorist organization by the U.S. government. However, Kerry's letter is irrelevant. (*See, e.g.*, Nicole Decl. ¶ 44 [Doc. No. 68-1]). Kerry's letter does not (because it cannot) refute the "ample evidence" produced by the U.S. government establishing the associations of CAIR, ISNA and NAIT with HLF, the Islamic Association for Palestine ("IAP"), and with Hamas—an organization designated as a terrorist organization by the U.S. government. (Nicole Decl. ¶¶ 43, 44 [Doc. No. 68-1]). Further, Plaintiff presents no citation to support its claim that "[n]either CAIR-National nor CAIR-Oklahoma has ever been indicted for or convicted of any crime." (Pl.'s Br. at 11, ¶ 23). Indeed, CAIR was an unindicted co-conspirator in the *Holy Land Foundation* criminal trial, and as the Louisiana House Resolution demonstrates, as a matter of public record, there have been *numerous* persons directly associated with CAIR who have been indicted and/or convicted of terrorism related crimes. (Nicole Decl. ¶ 43, Ex. BB [Doc. No. 67-2]). The evidence connecting CAIR and many of its associates to terrorist activity is well established as a matter of public record. (Nicole Decl. ¶ 43, Ex. BB [Doc. No. 67-2]; Yerushalmi Decl. ¶¶ 3-18 [Doc. No. 69-1]).

24. Defendants acknowledge that Defendant Nicole Neal's search of Plaintiff on the On Demand Court Records database did not reveal any criminal history. However, Defendants

dispute Plaintiff's assertion that there is no evidence of Plaintiff's involvement with terrorist activity. Plaintiff has personally chosen to be directly affiliated with CAIR, an organization that the U.S. government (Department of Justice, FBI, U.S. Senate subcommittee, various members of Congress) and the Louisiana House of Representatives have concluded has substantial ties to terrorism and that at least one foreign government, UAE, has designated as a terrorist organization. (Nicole Decl. ¶ 43 [Doc. No. 68-1]). The evidence connecting CAIR and many of its associates to terrorist activity is well established as a matter of public record. (Nicole Decl. ¶ 43, Ex. BB [Doc. No. 67-2]; Yerushalmi Decl. ¶¶ 3-18 [Doc. No. 69-1]).

25. Defendants do not dispute that they did not call law enforcement about Plaintiff; however, they did consider getting a restraining order against him. (Pl.'s Ex. B, Dep. Ex. 39 [Doc. No. 71-3, ECF p. 55 of 70] ["[H]ad a face to face probe by a muzrat from CAIR yesterday try (sic) to gain access to the range. Thinking about doing a restraining order on CAIR and their operatives. Thoughts?"]). Nevertheless, they will not let Plaintiff train with weapons at their gun range because he is a safety threat. (Nicole Decl. ¶¶ 9-45 [Doc. No. 68-1]).

26. Defendants do not dispute that Defendant Chad Neal made the comment as stated in Plaintiff's paragraph 26. However, this comment is protected speech. Moreover, it corroborates Defendants' basis for denying Plaintiff use of their gun range: (1) it shows that Defendants were immediately aware of Plaintiff's association with CAIR; (2) it shows that Defendants were aware that Plaintiff came to the gun range with a hostile agenda ("face to face probe"); (3) and the use of the term "muzrat" is in the context of referring to someone associated with CAIR, an organization with substantial ties to terrorism.

27. Defendants do not dispute that Plaintiff made a second secret recording involving Defendants—a recording of a phone conversation with Defendant Nicole Neal in December 2015. Plaintiff, who often mumbles when he talks, is difficult, if not impossible at times, to understand, as the recordings in this case demonstrate. Moreover, it is evident from the recording of this phone call that Defendant Nicole Neal was struggling to understand Plaintiff, and, as she testified, didn't remember who he was on the phone.[13] Finally, it should come as no surprise that she didn't call him back under the circumstances (*i.e.*, when she realized that this was the man from CAIR who came to the store with an agenda).

[13] It's rather curious that Plaintiff's conversation is distorted beyond recognition, but yet he was able to clearly record Defendant Nicole Neal's side of the conversation.

28. Defendants do not dispute that they will not allow Plaintiff to use the gun range in the future based on their "responsible," safety-conscious policy. (Nicole Decl. ¶¶ 9-45 [Doc. No. 68-1]; *see also* Fatihah Dep. at 120:4-25 to 121:1-2; Dep. Ex. 18 [Doc. No. 67-2]).

29. Plaintiff's statement that "[p]rior to the denial of service to Mr. Fatihah, Defendants had never denied a customer the ability to purchase a membership to use the Gun Range" is misleading. While prior to October 23, 2015 (the gun range opened on April 1, 2015), Defendants were never confronted with a situation where they had to invoke Rule 10 and then subsequently deny a membership, shortly after this incident with Plaintiff (and before this lawsuit was filed), Defendants invoked Rule 10 in November 2015 when a customer who wanted to shoot at the range simply appeared distracted and in a rush (the customer's name is Alberto Riera). The customer was denied service that day for safety reasons. The background check revealed nothing suspicious, so his application was later approved. (Nicole Decl. ¶¶ 10, 12 [Doc. No. 68-1]). Defendants have never knowingly permitted anyone directly associated with CAIR, regardless of the person's religion, to use the gun range. Defendants are not making an exception for Plaintiff simply because he is Muslim. (*See* Nicole Supplemental Decl. ¶ 6, at Ex. 2 attached; Nicole Decl. ¶¶ 42, 43 [Doc. No. 68-1]).

30. Defendants dispute Plaintiff's statement as set forth in paragraph 30. While prior to October 23, 2015 (the gun range opened on April 1, 2015), Defendants were never confronted with a situation where they had to invoke Rule 10 and then subsequently conduct a background check of the suspicious person, shortly after this incident with Plaintiff (and before this lawsuit was filed), Defendants invoked Rule 10 in November 2015 when a customer (Alberto Riera) who wanted to shoot at the range simply appeared distracted and in a rush. The customer was denied service that day for safety reasons. The background check revealed nothing suspicious, so his application was later approved. (Nicole Decl. ¶¶ 10, 12 [Doc. No. 68-1]). Pursuant to Defendants' written Gun Range Rules, "All memberships are subject to board review and approval," and as a matter of policy and practice, background checks are conducted as necessary. (Nicole Decl. ¶¶ 6-12, 22-25 [Doc. No. 68-1]).

31. Defendants dispute Plaintiff's statement as set forth in paragraph 31 in that it is false. Shortly after posting the "Muslim Free" sign, on ***August 19, 2015***, Defendant Nicole Neal published an "official statement" on Facebook stating, in relevant part:

> No person has ever been turned away from Save Yourself Survival And Tactical Store for discrimination of any kind. People's (sic) of every race, and religion are welcome at our store so long as our safety rules, and our store policies are observed. Safety of our customers, staff and community is our primary concern . . . Hateful behavior of any kind by anyone will not be tolerated period. . . . Members found guilty of discrimination will be asked to leave the property immediately, their club membership will be revoked (without refund), and they will be banned from our establishment for life. . . . We do stand by, and defend *our policy not to allow radical, or extremists persons, groups, or establishments to do business at our establishment*. . . .

(Nicole Decl. ¶ 19 [emphasis added]; *see also* ¶ 21[Doc. No. 68-1]).

32. Defendants dispute Plaintiff's statement as set forth in paragraph 32 in that it is false and misleading. To begin, nothing requires Defendants to "convene" a board or to hold a "formal vote" on an application. Nonetheless, Defendants' procedures are to consult with each board member (which they did) so as to reach a consensus on a decision about an application (which they did). Those procedures were followed here. (Pl.'s Ex. A [Nicole Dep. at 116:9-25 to 117:1-13] [Doc. No. 71-1]). Consequently, the board did "meet" and the members did "vote."

33. Defendants dispute Plaintiff's statement as set forth in paragraph 33. To begin, Plaintiff testified that he visited the United States Shooting Academy "*when* [he] was looking for a range *and* outdoor facility." (Pl.'s Ex. D [Fatihah Dep. at 47:6-7] [Doc. No. 71-5] [emphasis added]). Plaintiff's range experience plainly demonstrates a preference for indoor ranges (which are not affected by adverse weather). (Fatihah Dep. at 41:18-25 to 46:1-17; 52:19-24; *see also* 121:19-21 [Doc. No. 67-2]). Plaintiff also claims to have learned about Defendants' gun range during the controversy in August 2015 (Fatihah Dep. at 50:9-17 [Doc. No. 67-2]), but yet waited to go there until the end of October 2015 (with a recording device). His only reason for visiting this small, "mom and pop" range was to set up this lawsuit.[14] There are gun ranges in the Tulsa, Oklahoma area that are closer for Plaintiff to use than to travel approximately an hour to Oktaha to use Defendants' gun range. (Fatihah Dep. at 41:18-25 to 46:1-17; 52:19-24; *see also* 121:19-21 [Doc. No. 67-2]). Prior to going to Defendants' gun range with his weapons, recording device,

[14] Indeed, here you have a large Washington, D.C. law firm (Jenner & Block LLP), the ACLU Foundation out of Washington, D.C., CAIR-Oklahoma, and ACLU-Oklahoma going after a small, local business that last year reported a net loss of $6,663. (Nicole Supplemental Decl. ¶ 8, at Ex. 2 attached). This lawsuit is a complete set up designed to promote a political agenda and to overwhelm a small business into a capitulation.

and agenda, Plaintiff had never been to Oktaha in his life. (Fatihah Dep. at 121:19-21 [Doc. No. 67-2]).

34. Defendants do not dispute that their retail store sells items that move through interstate commerce. However, Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. To use the gun range, a customer need only purchase a membership pass and nothing else. (Nicole Supplemental Decl. ¶ 4, at Ex. 2 attached).

35. Defendants do not dispute that if a person wants to fire at the gun range, he or she must bring his or her own weapons to do so. Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. (Nicole Supplemental Decl. ¶ 4, at Ex. 2 attached).

36. Defendants do not dispute that the business offers firearms classes and that on one occasion (a two-day period in March 2016) an instructor travelled from out of state. However, Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. (Nicole Supplemental Decl. ¶ 7, at Ex. 2 attached).

37. Defendants assert that Facebook's categories are irrelevant. Defendants do not dispute that Defendant Nicole Neal created the business's Facebook page and that she and Defendant Chad Neal are its administrators.

38. Defendants do not dispute that they have used the business's Facebook page to encourage customers to patronize their business. However, Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. (Nicole Supplemental Decl. ¶¶ 4, 7, at Ex. 2 attached).

39. Defendants do not dispute that they have held events designed to encourage customers to patronize their business. However, Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. (Nicole Supplemental Decl. ¶ 4, at Ex. 2 attached).

40. Defendants do not dispute the information contained in Plaintiff's paragraph 40 and further assert that to use the gun range, a customer need only purchase a membership pass and nothing else. Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. (Nicole Supplemental Decl. ¶ 4, at Ex. 2 attached).

41. Defendants do not dispute the information contained in Plaintiff's paragraph 41.

42. Defendants do not dispute the information contained in Plaintiff's paragraph 42, except Plaintiff's claim that "there is no written documentation of their duties" as the written Gun Range Rules state that "All memberships are subject to board review and approval." (Nicole Decl. ¶¶ 6-7 [Doc. No. 68-1]).

43. Defendants do not dispute the information contained in Plaintiff's paragraph 43.

44. Defendants dispute the information contained in Plaintiff's paragraph 44 in that Defendants' procedures are to consult with each board member (which they did) so as to reach a consensus on a decision about an application (which they did). Those procedures were followed here. (Pl.'s Ex. A [Nicole Dep. at 116:9-25 to 117:1-13] [Doc. No. 71-1]). Consequently, the board does "meet" and the members do "vote."

45. Defendants do not dispute that the Gun Range Rules do not require the board to approve every application. As a small business, it is not possible or practical to do so. (*See* Nicole Decl. ¶¶ 22-25 [Doc. No. 68-1]). Defendants further assert that Plaintiff's claim that the board "had never been consulted about a potential customer or member before Mr. Fatihah's visit to the Gun Range" is misleading. While prior to October 23, 2015 (the gun range opened on April 1, 2015), Defendant were never confronted with a situation where they had to invoke Rule 10 (and thus consult the board), shortly after this incident with Plaintiff (and well before this lawsuit was filed), Defendants invoked Rule 10 in November 2015 when a customer who wanted to shoot at the range simply appeared distracted and in a rush (the customer's name is Alberto Riera). (Nicole Dep. at 27:13-25 to 35:1-11, attached as Ex. C to Muise Supplemental Decl. at Ex. 1 attached; Nicole Decl. ¶¶ 10, 12 [Doc. No. 68-1]).

46. Defendants do not dispute the information contained in Plaintiff's paragraph 46; however, Defendants assert that their procedures are to consult with each board member (which they did) so as to reach a consensus on a decision about an application (which they did). Those procedures were followed here. (Pl.'s Ex. A [Nicole Dep. at 116:9-25 to 117:1-13] [Doc. No. 71-1]).

47. Defendants do not dispute the information contained in Plaintiff's paragraph 47.

48. Defendants do not dispute the information contained in Plaintiff's paragraph 48.

49. Defendants do not dispute that to date they have not had to revoke a membership. However, Defendants have invoked Rule 10 on two occasions where they were presented with a

safety concern. The first involved Plaintiff, and the second involved Mr. Riera. (Nicole Decl. ¶¶ 10, 12 [Doc. No. 68-1]). Both individuals were treated the same.

50. Defendants do not dispute that they have advertised their business without including copies of the Gun Range Rules in the advertisement. However, as Plaintiff admits, anyone who uses a gun range knows that there are rules that he must abide by before using the range. (Fatihah Dep. at 65:18-25 to 66:1-5 [Doc. No. 67-2]). Defendants' gun range is no different.

51. Defendants dispute the information contained in Plaintiff's paragraph 51 in that *everyone* who shoots at Defendants' gun range must abide by the Gun Range Rules—there are no exceptions. (Nicole Supplemental Decl. ¶ 5, at Ex. 2 attached).

52. Defendants admit that they codified their range safety policy as part of the Company's Operating Agreement and Gun Range Rules and posted this official policy with the Gun Range Rules at the store. (*See* Nicole Decl. ¶¶ 19-21 [Doc. No. 68-1]). However, the safety concerns expressed in this policy have always been enforced. (*See id*.). And it is this policy and the associated Gun Range Rules that serve as the basis for the continuing rejection of Plaintiff's application. (Nicole Decl. ¶¶ 6-45 [Doc. No. 68-1]).

53. Defendants dispute Plaintiff's characterization of the enforcement of the Gun Range Rules in that every shooter must agree to abide by the Rules (and associated safety policy set forth in Rule 11). As a small business, Defendants do not conduct background checks on everyone. Consequently, the Gun Range Rules do not *require* such checks for every applicant. Rather, Rule 10 provides that all applications are *subject* to further review. Thus, it is possible for someone who does not comply with Rule 11 (for example, the person may have a felony conviction or work for CAIR) to show up and use Defendant's range without them knowing that he is not in compliance. The person, however, would be trespassing, and if Defendants found out, they would ban him from the range. (Nicole Decl. ¶ 22 [Doc. No. 68-1]). Defendants principally rely upon Defendant Nicole Neal's training as a former correctional officer/jailer to observe a customer's behavior and mannerisms for anything suspicious. (Nicole Decl. ¶¶ 23, 24 [Doc. No. 68-1]).

54. Defendants dispute Plaintiff's characterization of the enforcement of the Gun Range Rules in that every shooter must agree to abide by the Rules (and associated safety policy set forth in Rule 11). As a small business, Defendants do not conduct background checks on everyone. Consequently, the Gun Range Rules do not *require* such checks for every applicant.

Rather, Rule 10 provides that all applications are *subject* to further review. Thus, it is possible for someone who does not comply with Rule 11 (for example, the person may have a felony conviction or work for CAIR) to show up and use Defendant's range without them knowing that he is not in compliance. The person, however, would be trespassing, and if Defendants found out, they would ban him from the range. (Nicole Decl. ¶ 22 [Doc. No. 68-1]). Defendants principally rely upon Defendant Nicole Neal's training as a former correctional officer/jailer to observe a customer's behavior and mannerisms for anything suspicious. (Nicole Decl. ¶¶ 23, 24 [Doc. No. 68-1]).

55. Defendants dispute Plaintiff's characterization of the enforcement of the Gun Range Rules in that every shooter must agree to abide by the Rules (and associated safety policy set forth in Rule 11). As a small business, Defendants do not conduct background checks on everyone. Consequently, the Gun Range Rules do not *require* such checks for every applicant. Rather, Rule 10 provides that all applications are *subject* to further review. Thus, it is possible for someone who does not comply with Rule 11 (for example, the person may have a felony conviction or work for CAIR) to show up and use Defendant's range without them knowing that he is not in compliance. The person, however, would be trespassing, and if Defendants found out, they would ban him from the range. (Nicole Decl. ¶ 22 [Doc. No. 68-1]). Defendants principally rely upon Defendant Nicole Neal's training as a former correctional officer/jailer to observe a customer's behavior and mannerisms for anything suspicious. (Nicole Decl. ¶¶ 23, 24 [Doc. No. 68-1]).

56. Defendants dispute Plaintiff's characterization of the enforcement of the Gun Range Rules in that every shooter must agree to abide by the Rules (and associated safety policy set forth in Rule 11). As a small business, Defendants do not conduct background checks on everyone. Consequently, the Gun Range Rules do not *require* such checks for every applicant. Rather, Rule 10 provides that all applications are *subject* to further review. Thus, it is possible for someone who does not comply with Rule 11 (for example, the person may have a felony conviction or work for CAIR) to show up and use Defendant's range without them knowing that he is not in compliance. The person, however, would be trespassing, and if Defendants found out, they would ban him from the range. (Nicole Decl. ¶ 22 [Doc. No. 68-1]). Defendants principally rely upon Defendant Nicole Neal's training as a former correctional officer/jailer to observe a customer's behavior and mannerisms for anything suspicious. (Nicole Decl. ¶¶ 23, 24 [Doc. No. 68-1]).

57. Defendants dispute Plaintiff's characterization of the enforcement of the Gun Range Rules in that every shooter must agree to abide by the Rules (and associated safety policy

set forth in Rule 11). As a small business, Defendants do not conduct background checks on everyone. Consequently, the Gun Range Rules do not *require* such checks for every applicant. Rather, Rule 10 provides that all applications are *subject* to further review. Thus, it is possible for someone who does not comply with Rule 11 (for example, the person may have a felony conviction or work for CAIR) to show up and use Defendant's range without them knowing that he is not in compliance. The person, however, would be trespassing, and if Defendants found out, they would ban him from the range. (Nicole Decl. ¶ 22 [Doc. No. 68-1]). Defendants principally rely upon Defendant Nicole Neal's training as a former correctional officer/jailer to observe a customer's behavior and mannerisms for anything suspicious. (Nicole Decl. ¶¶ 23, 24 [Doc. No. 68-1]).

58. Defendants do not dispute the statements made by Defendant Nicole Neal as set forth in Plaintiff's paragraph 58; however, Defendants reject Plaintiff's characterization of them. These statements are comments about this very public lawsuit and constitute protected speech.

ADDITIONAL FACTS[15]

1. Plaintiff belongs to and is directly affiliated with an organization (CAIR) that has substantial ties to terrorism, as revealed by the extensive public record.[16] ((Fatihah Dep. 14:25 to 15:1-2 [Doc. No. 67-2]; Nicole Decl. ¶ 43 [Doc. No. 68-1]; Yerushalmi Decl. ¶¶ 3-18 [Doc. No. 69-1]).

2. Plaintiff came to Defendants' gun range on October 23, 2015, armed with military-style weapons, a secret recording device, and a dangerous agenda. (Nicole Decl. ¶¶ 28, 29 [Doc. No. 68-1]; Fatihah Dep. at 54:6-13 [describing his reason for bringing a concealed recording

[15] Defendants hereby incorporate their statement of facts and supporting evidence from their motion to dismiss and/or for summary judgment. (Defs.' Br. at 4-12 [Doc. No. 67]). *See, e.g., Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001) ("[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them.").

[16] Plaintiff claims that "Defendants' opinions about CAIR are just another variation on their anti-Muslim prejudice." (Pl.'s Br. at 29 n.12). Plaintiff is mistaken. Defendants' assertion that CAIR has ties to terrorist organizations, including Hamas, is not an "opinion," it is a fact that is well established by the public record, including the decision by U.S. District Court Judge Jorge A. Solis, who, according to Plaintiff's logic, must also be an Islamophobe and a bigot (indeed, per Plaintiff, the FBI, DOJ, Several U.S. Senators, including Senator Chuck Schumer (D-NY), the Louisiana House of Representatives, and the entire UAE government are Islamophobes and bigots). (*See* Nicole Decl. ¶ 43 [Doc. No. 68-1]). This is not "ignorance and fear" about Muslims—it is the truth about CAIR and the existential threat posed by Islamic terrorism.

device]; 50:21-25 to 51:1 [admitting that he received advice from a CAIR lawyer before going to the range]; 81:11-21 [admitting that he sent the recording to a CAIR lawyer] [Doc. No. 67-2]).

3. Save Yourself Survival And Tactical Gear And Gun Club, LLC, which is incorporated in the State of Oklahoma, is principally a retail establishment that sells survival and tactical gear; it also operates the outdoor gun range at issue here. (Nicole Decl. ¶¶ 2, 3 [Doc. No. 68-1]).

4. Defendants do not have a policy of discrimination based on religion, race, gender, or any other prohibited category. (Nicole Decl. ¶¶ 19-21 [Doc. No. 68-1]; *see also* Fatihah Dep. at 70:21 ["*Nicole did not inquire about my faith*."] [emphasis added]; 68:10-25 to 69:1-7 [admitting that none of the paperwork, including the Gun Range Rules, required a customer to disclose his or her religion], Dep. Exs. 13, 14, 15, 18 [Doc. No. 67-2]).

5. Defendants never inquire into a customer's religion, and they did not inquire into Plaintiff's religion on October 23, 2015, because religion is not a factor as to whether someone can or cannot use the gun range. (Nicole Decl. ¶¶ 19-21 [Doc. No. 68-1]; *see also* Fatihah Dep. at 70:21 ["*Nicole did not inquire about my faith*."] [emphasis added]; 68:10-25 to 69:1-7 [admitting that none of the paperwork, including the Gun Range Rules, required a customer to disclose his or her religion], Dep. Exs. 13, 14, 15, 18 [Doc. No. 67-2]).

6. While Defendants never inquired into Plaintiff's religion, out of the blue, Plaintiff declared, "I am Muslim. Is that going to be a problem?" or words to that effect. (Nicole Dep. at 88:11-12 [Doc. No. 68-1]; Nicole Decl. ¶¶ 9, 38 [Doc. No. 67-2]; *see also* Fatihah Dep. 94:14-1 [Recording]; Recording [Doc. No. 74]).

7. Upon hearing Plaintiff's declaration, Defendant Chad Neal, who was getting ready for the day, immediately recognized what was happening and shouted from the back room, "Wow. He just came in here with an agenda." (Fatihah Dep. at 94:20-2 [Doc. No. 67-2]; Reporter errata [Ex. B] [Doc. No. 67-2]; Nicole Decl. ¶ 38 [Doc. No. 68-1]).

8. Moments after declaring himself a Muslim, Plaintiff assumed a threatening stance (he dropped his right foot back and reached back with his right hand/arm—which is a stance a person would take if he were planning on engaging someone with a firearm). (Nicole Dep. at 69:1-23; 84:10-11, 20-23; 89:12-16, 8-90 [Doc. No. 67-2]; Nicole Decl. ¶ 38 [Doc. No. 68-1]; Recording [Doc. No. 74]).

9. The rustling noise made by Plaintiff's movement when he assumed his threatening stance can be heard on the secret recording made by Plaintiff on October 23, 2015. (Nicole Decl. ¶¶ 38, 39 [Doc. No. 68-1]).

10. Plaintiff wore his handgun in a concealed position (under his jacket), but when he assumed the threatening stance, his handgun was revealed to Defendants. (Nicole Decl. ¶ 38 [Doc. No. 68-1]; Nicole Dep. at 49:7-22 [Doc. No. 67-2]).

11. When Plaintiff assumed his threatening stance, it appeared to Defendant Nicole Neal that he had a magazine inserted in his rifle.[17] (Nicole Decl. ¶ 38 [Doc. No. 68-1]; *see also* Nicole Dep. at 50:23-25 to 51:1-2 [Doc. No. 67-2]).

12. Defendants' "Muslim Free" sign is not a business policy; it is political speech in response to the Chattanooga, Tennessee terrorist attack. (Nicole Decl. ¶ 14 [Doc. No. 68-1]; (Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]).

13. Defendants' business policy is set forth in the Gun Range Rules, which are codified as part of the Company's Operating Agreement. (Nicole Decl. ¶¶ 6-9, 14, 19-21 [Doc. No. 68-1; *see also* Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]).

14. Plaintiff was denied use of the gun range based on Defendants' policy set forth in the Gun Range Rules and not based on his religion. (Nicole Decl. ¶¶ 6-45 [Doc. No. 67-2]).

15. Defendants' policy as set forth in the Gun Range Rules and its application here (*i.e.*, to deny Plaintiff use of the range) was "responsible." (Nicole Decl. ¶¶ 6-45 [Doc. No. 68-1; *see also* Fatihah Dep. at 120:4-25 to 121:1-2; Dep. Ex. 18 [Doc. No. 67-2]).

16. Defendants do not customarily present any source of entertainment at the gun range that moves through commerce. (Nicole Supplemental Decl. ¶¶ 4, 7, at Ex. 2 attached).

ARGUMENT

I. Title II Does Not Regulate Defendants' Local Gun Range.

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and

[17] (*See also* n.9, *supra*).

> independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

United States v. Lopez, 514 U.S. 549, 552 (1995).

While Congress's power under the Commerce Clause is expansive, it is not without limits. As stated by the U.S. Supreme Court*:*

> In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so *indirect* and *remote* that to embrace them, in view of our complex society, would *effectually obliterate the distinction between what is national and what is local and create a completely centralized government*."

Lopez, 514 U.S. at 556-57 (emphasis added).

Accordingly, there are three broad categories of activity that Congress may regulate under its Commerce Clause power:

> First, Congress can regulate the channels of interstate commerce. . . . Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. . . . Third, Congress has the power to regulate activities that substantially affect interstate commerce.

Gonzales v. Raich, 545 U.S. 1, 16-17 (2005) (internal citation omitted). And while Congress may have the power to regulate in a particular area such that a federal statute could survive a facial challenge, the application of the statute (and thus Congress' regulatory power) must be evident in each case, particularly where Congress sets forth a specific jurisdictional provision. *See, e.g., United States v. Wang*, 222 F.3d 234 (6th Cir. 2000) (invalidating, *inter alia*, the Hobbs Act conviction of the defendant because Congress was without authority under the Commerce Clause to punish the conduct at issue).

Title II provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, *as defined in this section*, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (emphasis added). Thus, not all businesses open to the public are subject to Title II—only those which expressly fall within the statutes proscriptions.

Title II continues, in relevant part:

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce* . . . .
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;

42 U.S.C. § 2000a(b) (emphasis added). The statute then expressly defines what "affect[ing] commerce" means for each of the listed establishments. Thus, a business listed as one of the "establishments" under Title II must also "affect commerce" as that term is defined by the statute (not by some broad notion of commerce) in order to qualify as a place of public accommodation. For an establishment that is a place of entertainment, the statute provides as follows: "(3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce. . . ." 42 U.S.C. § 2000a(c).

With this as a background, we turn to this case. Here, Plaintiff seeks to apply a federal law to regulate the *local* conduct of a small "mom and pop" business located in Oktaha, Oklahoma. More specifically, Plaintiff claims that Defendants' gun range has a policy of discrimination that violates 42 U.S.C. § 2000a—a federal law which generally prohibits discrimination based on protected categories, including religion, in the provision of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." 42 U.S.C. § 2000a.

As Defendants demonstrated in their motion, Defendants' store—a retail establishment—is not covered by Title II.[18] *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 436 (4th Cir. 1967) ("Retail stores, food markets, and the like were excluded from the Act for the policy reason that there was little, if any, discrimination in the operation of them."); *Priddy v. Shopko Corp.*, 918 F. Supp. 358 (D. Utah 1995) (holding that a retail establishment was not a place of public accommodation). And this is true regardless of whether or not items sold by Defendants at their store travel in interstate commerce. *See, e.g., Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427,

[18] Defendants have also demonstrated that their gun range is not a place of public accommodation based on the construction of Title II. (Defs.' Br. 12-16 [Doc. No. 67]). To avoid needless repetition, Defendants will not restate those arguments in full here, but they nonetheless apply with equal force. Defendants will focus this response on the plain language of Title II and its commerce clause nexus requirement assuming, for argument purposes only, that the gun range is a place of "entertainment" under the first part of Title II.

431 (4th Cir. 2006) (concluding that because § 2000a(b) "sets forth a comprehensive list of establishments that qualify as a 'place of public accommodation,'" it "excludes from its coverage those categories of establishments not listed" and thus holding that a beauty salon is not covered by Title II).

Apparently realizing this to be the case, Plaintiff instead argues that the gun range "is a place of entertainment under 42 U.S.C. § 2000a(b)(3)." (Pl.'s Br. at 21-23). However, in order to fall within Congress' authority to regulate places of "entertainment" under Title II, Plaintiff has the burden of proving that Defendants' gun range "*customarily presents* films, performances, athletic teams, exhibitions, or other *sources of entertainment* which *move in commerce* . . . ." 42 U.S.C. § 2000a(c). That is, Plaintiff must prove that the *gun range customarily*[19] *presents sources of entertainment which move in commerce*, which Plaintiff has not (and cannot) do. Title II does not apply here. All that Defendants' gun range "*customarily presents*" to customers is an *opportunity* to fire their own weapons at the range, which is located in Oktaha, Oklahoma. Nothing that Defendants "*present*" which might be considered "*entertainment*" ever "move[s] in commerce." Defendants do not "customarily present" any films, performances, athletic teams, or exhibitions "which move in commerce." And while it might be "entertaining" to shoot at Defendants' gun range (*see* Pl.'s Br. at 21 ["For purposes of Title II, 'entertainment' is defined as '"the act of diverting, amusing, or causing someone's time to pass agreeably'" and includes participation in a "sport or activity."]), that is only the first requirement under the statute. The more significant part is demonstrating that the "*source*" of this entertainment is "*present*[*ed*]"[20] *by* Defendants and what *Defendants* "*present*" by way of "entertainment" in fact "move[d] in

[19] "Customarily" is defined as "In a way which follows customs or usual practices; usually." (*See* https://en.oxforddictionaries.com/definition/customarily, last visited on May 2, 2017 [defining "customarily"]). Consequently, a random or one-time event is not something that is "customarily" done.

[20] Plaintiff cites *Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 959 (W.D. Tex. 1987) for the proposition that "by allowing various members and guests to bring in boats, camping equipment and guns which had moved in interstate commerce" the targeted club "affect[ed] commerce" and was thus subject to Title II. However, this broad (and rather careless) reading of Title II is contradicted (appropriately so) by the express language of the statute. Per the statute, it is the "entertainment" that Defendants "present" that must "move in commerce"—like a movie or a sport team or a travelling orchestra. *See* 42 U.S.C. § 2000a(b) (listing as covered establishments a "motion picture house, theater, concert hall, sports arena, stadium").

commerce."[21] Since a retail establishment is excluded from coverage, Plaintiff cannot "bootstrap" the gun range to the retail store. In sum, Plaintiff cannot make this jurisdictional showing.

In the final analysis, the only "entertainment" for Title II purposes presented *by* Defendants at their gun range is purely local. All that Defendants "present" is their property (located in Oklahoma) and an opportunity for others to use it to fire their own weapons. Title II does not reach this local gun range as a matter of law.

II. Defendants' Protected Speech Cannot Serve as a Basis for Civil Liability.

Defendants' sign stating that the gun range is "Muslim Free," social media posts that harshly criticize Islam, and media interviews doing the same cannot serve as a basis for civil liability under the First Amendment. Indeed, Defendants' expression of their view (offensive or not) that they do not want to be responsible for training the next Chattanooga, Tennessee terrorist (the very incident that prompted the posting of the sign) in all of its forms is protected speech. In fact, <u>*all*</u> of this speech (specifically including the speech referenced by Plaintiff in his motion) is public issue speech, which "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

As stated by the Sixth Circuit, sitting *en banc*, in a case protecting the free speech rights of a group that expressed anti-Islam messages at an Arab Festival in Dearborn, Michigan:

> But even when communication fails to bridge the gap in understanding, or when understanding fails to heal the divide between us, the First Amendment demands that we tolerate the viewpoints of others with whom we may disagree. If the Constitution were to allow for the suppression of minority or disfavored views, the democratic process would become imperiled through the corrosion of our individual freedom. Because "[t]he right to speak freely and to promote diversity of ideas . . . is . . . one of the chief distinctions that sets us apart from totalitarian regimes," *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949), dissent is an essential ingredient of our political process.

[21] Because states may regulate more broadly without having to show a nexus to interstate commerce, cases applying state public accommodation laws are inapposite. (*See, e.g.*, Pl.'s Br. at 22). Moreover, any statement by the court in *CAIR Fla., Inc. v. Teotwawki Invs., LLC*, No. 15-cv-61541, 2015 U.S. Dist. LEXIS 182418 (S.D. Fla. Nov. 24, 2015) to the contrary (*see* Pl.'s Br. at 27 [citing case]) are *dicta* since the court dismissed CAIR's lawsuit for lack of standing. That is, the court had no jurisdiction to hear or decide the case. CAIR Florida's efforts to fabricate a lawsuit in that case failed, and Plaintiff's (CAIR's) efforts should fail here as well.

> The First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.*

Bible Believers v. Wayne Cnty., 805 F.3d 228, 233-234 (6th Cir. 2015) (*en banc*) (upholding the free speech rights of a group that expressed messages such as "Islam is a religion of blood and murder").

As *Plaintiff admits*, there are "people who engage in acts of violence and attribute it to their understanding of Islam." (Fatihah Dep. at 102:13-16, Fatihah Errata attached as Ex. A to Muise Supplemental Decl. at Ex. 1; *see also* 108:2-25 to 109:2-6; 22-25; 110:6-8, 19-21; 111:5-10, 13-22; 112:8-11; 113:2-7 [Doc. No. 67-2]). That is a harsh (and politically incorrect) reality of the times we live in. One would have to be willfully blind to deny it, particularly in light of the attacks in New York (9/11), Fort Hood, Boston, Chattanooga, San Bernardino, Garland, Orlando, and countless others across the globe. Nonetheless, the First Amendment does not permit Plaintiff to use this Court to demand political correctness at Defendants' gun range by forcing Defendants to cleanse their speech of anything that might be deemed hurtful to Plaintiff or other Muslims. Consider for a moment the relief Plaintiff is seeking here. Assume, *arguendo*, that this Court determines that Plaintiff was denied use of the gun range simply because he was Muslim (and not because of all of the safety concerns articulated by Defendants, including the undisputed fact that Plaintiff is directly tied to CAIR, an organization that state, federal, and foreign governments have concluded has ties to terrorism, and the undisputed fact that this lawsuit was a complete, and dangerous, set up), is it Plaintiff's position that the Court can order Defendants to scrub their Facebook pages of any and all anti-Muslim comments, or recant anti-Muslim statements made to the media, or even take down their homemade "Muslim-Free" sign—a sign that was indisputably posted as a political protest to the Chattanooga, Tennessee terrorist attack? Is it Plaintiff's position that Defendants would be forever prohibited, and thus gagged, by this Court from saying or posting anything in their store or on Facebook that Plaintiff considers critical of Islam or hurtful to Muslims? Does Plaintiff want an order that requires Defendants to stop discussing in the media and on social media CAIR's many ties to terrorist organizations?

When you put into context what it is that Plaintiff is actually seeking to do here, it is evident that he wants this Court to punish Defendants because of their speech. However, the First Amendment forbids Plaintiff's request. As stated by the Supreme Court, even if Defendants' speech "inflict[s] great pain. . . , we cannot react to that pain by punishing the speaker. As a Nation

we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 460 (2011). "That choice requires that [this Court] shield [Defendants] from . . . liability . . . in this case."[22] *Id.*

III. Plaintiff Cannot Establish a Standard Operating Procedure of Discrimination.

To succeed on the merits of his Title II claim, Plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [He must] establish by a preponderance of the evidence that [religious] discrimination was [Defendants'] standard operating procedure—the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). And contrary to Plaintiff's suggestion, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

While Defendants maintain that the *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), allocation of burdens and order for presenting proof of Defendants' alleged discriminatory operating procedure is the proper standard to apply in this case (*see* Defs.' Br. at 17-18 [Doc. No. 67]), regardless of the test, the evidence proves (beyond the preponderance of evidence standard) that there is no such discriminatory procedure and that Plaintiff was and is denied use of the gun range for *lawful* reasons. That is, Plaintiff is not denied use of the range because he is a Muslim. He is denied use of the range because of safety concerns. To summarize:

- Defendants do not have a standard operating procedure of discriminating against customers on the basis of religion;
- Defendants have <u>*never*</u> denied a customer use of the gun range on the basis of religion;
- In an "official statement" posted on Facebook in August 2015, following the controversy related to Defendants' "Muslim Free" sign, Defendants disavowed any unlawful policy of discrimination;

[22] While a "Whites Only" sign that is intended by the owners of an establishment to convey an unlawful policy of discrimination may be precluded as a matter of law (*i.e.*, regulating conduct and not speech) (*see* Pl.'s Br. at 26-27, 31-33), a sign that was posted to make a political statement in the wake of a public event (Chattanooga terrorist attack) and which the owner expressly disavows as representing a business policy is protected speech. *See supra.*

- Defendants' operating procedure is set forth in the Gun Range Rules,[23] which expressly disavow any policy of discrimination and which set forth "reasonable"—*per Plaintiff*—safety considerations;[24]
- Defendants never inquire into the religion of a customer;
- None of Defendants' paperwork requires a customer to disclose his or her religion;
- Defendants *did not inquire into Plaintiff's religion* on October 23, 2015;
- Plaintiff came to Defendants' gun range armed with military-style weapons, a *concealed recording device*, and an agenda to create a conflict with Defendants;
- Defendants were considering allowing Plaintiff to fire his weapons, but prudently reconsidered as the tension mounted, causing Defendants to invoke Rule 10;
- Plaintiff intentionally created a conflict with Defendants on October 23, 2015—actions which demonstrate a reckless disregard for safety;[25]
- Upon conducting the background check under Rule 10, it was revealed to Defendants that Plaintiff is a board member for the Oklahoma affiliate of CAIR—a non-religious organization with strong ties to terrorist organizations, as the public record "amply" demonstrates;
- Upon conducting Plaintiff's background check and finding out that he was affiliated with CAIR, Defendants' suspicions that Plaintiff came to the gun range with a dangerous "*agenda*" were confirmed.

Plaintiff wants this Court to ignore the actual evidence showing the basis for Defendants' *decision to deny him access to the gun range* and instead to rely wholly on Defendants' political speech as his alleged "direct" evidence of discrimination. Plaintiff is mistaken. He is mistaken first as a matter of First Amendment jurisprudence, as argued above. And he is mistaken because Defendants' statements do not provide such evidence. "When a plaintiff alleges that discriminatory comments constitute direct evidence of discrimination, [the Tenth Circuit] has held

[23] The "Muslim Free" sign does not express a business policy—it is a political statement. (Nicole Dep. at 72:3-25 to 74:1-4 [Doc. No. 67-2]).

[24] These Gun Range Rules are codified as part of the Company's Operating Agreement and they are posted on the counter at Defendants' store for all customers to review. (Nicole Decl. ¶¶ 6-8, 19-21 [Doc. No. 68-1]).

[25] Because it was evident that Plaintiff's plan was going to fail (*i.e.*, he was going to be allowed to use the range), he had to start a conflict with Defendants about Islam.

that the plaintiff must demonstrate a nexus exists between [the] allegedly discriminatory statements and the decision to terminate [him]." *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 922 n.3 (10th Cir. 2001). In other words, Plaintiff has to demonstrate a nexus between Defendants' allegedly discriminatory statements and the actual decision to deny *him* use of the gun range.

As stated by the Tenth Circuit:

> It is true that the three-part shifting allocation of burdens of proof and production set forth in *McDonnell Douglas* and *Burdine* is inapplicable when a plaintiff can show direct evidence of the discriminatory basis of the employment decision. [*Trans World Airlines, Inc. v.*] *Thurston*, 469 U.S. [111, 121 (1985)]; *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1430 (10th Cir. 1985). The unsuccessful plaintiffs here, however, confuse their offer of specific instances of discriminatory statements, from which they then argue the determining cause of the employment decision may be inferred, with direct evidence that age *was the cause of **that** decision*. Direct evidence of causation is not before us here. *Compare Thurston*, 469 U.S. at 121 (*McDonnell Douglas* test inapplicable when challenged transfer policy expressly discriminates on the basis of age) *with Toussaint v. Ford Motor Co.*, 581 F.2d 812, 815 (10th Cir. 1978) (*McDonnell Douglas* analysis applied when plaintiff established prima facie case of discrimination based on age by testimony to specific instances of discriminatory statements), *and Blim* [*v. Western Elec. Co.*], 731 F.2d [1473,] 1477 [10th Cir. 1984] (same).

Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1549 (10th Cir. 1987) (emphasis added). Similarly here, Plaintiff confuses his offer of allegedly discriminatory statements, from which he then argues the determining cause of the alleged discrimination may be inferred, with direct evidence that Plaintiff's religion was the actual cause of Defendants' decision. Indeed, the only statements that Plaintiff alleges that could possibly reference Plaintiff specifically are Defendant Chad Neal's statement he made in a private Facebook message in August 2015 to Jan Morgan after CAIR issued a press release complaining about Defendants' sign in which Chad states, "The muzrats will be targeting us now," (Pl.'s Ex. B, Dep. Ex. 39 [Doc. No. 71-3, ECF p. 45 of 70]), and then later on October 24, 2015 (the day after Plaintiff tried to gain access to the gun range), Chad's statement to Ms. Morgan in the same message thread, "[H]ad a face to face probe by a muzrat from CAIR yesterday try (sic) to gain access to the range. *Thinking about doing a restraining order on CAIR and their operatives*. Thoughts?"[26] (Pl.'s Ex. B, Dep. Ex. 39 [Doc.

[26] Ms. Morgan replied to Defendant Chad Neal as follows: "I would. *CAIR has documented ties to HAMAS*.. That is plenty of reason for denying them access . . What happened? How did you know they were from CAIR." Defendant Chad Neal responded, "We Google the guys (sic) name

No. 71-3, ECF p. 55 of 70]) (emphasis added). Consequently, the alleged discriminatory statements that are connected with Plaintiff fully support Defendants' lawful basis for rejecting Plaintiff's membership application: Plaintiff is directly associated with CAIR, an organization that has ties to Hamas, a terrorist organization.[27]

As the evidence shows, Defendants do not have a standard operating procedure of denying use of their gun range on the basis of religion nor was Plaintiff denied use of the gun range on the basis of his religion. Indeed, Defendants even considered allowing Plaintiff to shoot at their range on the day he arrived despite the conflict he was creating and knowing that he came with an "agenda," but then prudently decided otherwise as the tension mounted. If there was a ban on Muslims *for being Muslim*, upon disclosing his name (Raja'ee Fatihah), Plaintiff would have been denied service—but he wasn't. It wasn't until he exposed his agenda, assumed a threatening stance, and engaged in a verbal dispute with Defendants (any one of which would be a legitimate basis for denying service that day), that Defendants exercised their written policy provision that permits them to take a "time out" when a potential safety issue arises. As the evidence shows, when someone appears distracted, in a rush, or impatient, Defendants have invoked this policy provision. (Nicole Decl. ¶¶ 10, 12 [Doc. No. 68-1]). And upon conducting their background check and finding that Plaintiff is a board member of CAIR—an organization that federal, local, and foreign governments have identified as an organization with ties to terrorism (and one that was specifically targeting Defendants on account of their sign)—Defendants appropriately (and legally) denied Plaintiff's membership. And now that Plaintiff's reckless agenda has been further revealed, he has no claim to ever step foot on Defendants' gun range. In short, Defendants' legitimate, non-discriminatory reasons for denying Plaintiff access to the gun range are amply supported by the record.

IV. Plaintiff Lacks Standing to Pursue His Claim for Injunctive Relief.

To invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Plaintiff cannot establish standing in this case

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and looked him up on fb [Facebook]." (Pl.'s Ex. B, Dep. Ex. 39 [Doc. No. 71-3, ECF p. 55 of 70])(emphasis added).

[27] And Defendant Nicole Neal's statements in June 2016 about Plaintiff's lawsuit (the "Muslim lawsuit") are indicative of nothing more than that: they are comments about the fact that she is being sued by CAIR and the ACLU for posting the "Muslim Free" sign.

because "[i]n a suit under Title II, a plaintiff may not recover damages, but is entitled only to injunctive relief." *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1351 (N.D. Ga. 2005) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-02 (1968)); *see also Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990) ("[T]he Supreme Court has been clear in that the substantive rights to public accommodations defined in § 2000a and § 2000a-1 are to be enforced exclusively by injunction." (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 150-51 n. 5 (1970); *United States v. Johnson*, 390 U.S. 563, 567 (1968)). "In order to claim injunctive relief, a plaintiff must show 'real or immediate threat that the plaintiff will be ***wronged*** again—a likelihood of substantial and immediate irreparable injury.'" *Brooks*, 365 F. Supp. 2d at 1351 (quoting, *inter alia*, *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983)) (emphasis added). Injunctive relief is prospective. Consequently, regardless of what happened on October 23, 2015, the question remains whether *today* Defendants have a legitimate basis for denying Plaintiff use of the gun range. And the answer to that question is unequivocally, "yes."

Plaintiff, a board member of CAIR-Oklahoma, is disqualified from using the range based on Defendants' lawful—and *per Plaintiff*, "responsible"—policy of prohibiting individuals from using the range who are associated with organizations which have ties to terrorism. (Fatihah Dep. at 120:4-25 to 121:1-2; Dep. Ex. 18 [Doc. No. 67-2]). CAIR-Oklahoma is such an organization. And CAIR-Oklahoma is not a religious organization. Anyone working for CAIR or any of its affiliates, regardless of religion, race or gender, is prohibited from firing at Defendants' range. Title II does not prohibit denying a person service at a business based on the person's affiliation with a non-religious group that has ties to terrorism. And the existence of these ties is acknowledged in the public record by federal, state, and foreign governments. In sum, relying on this vast public record to deny someone access to a gun range does not constitute discrimination precluded by the federal and state statutes at issue here.

Additionally, Plaintiff has demonstrated his reckless disregard for safety by going to a gun range armed with a loaded weapon, a secret recording device, and an agenda to create a controversy with the owner so as to file a lawsuit. There now exists a serious conflict between Plaintiff and Defendants such that Plaintiff's ban from using the range is entirely appropriate and independent from Plaintiff's association with CAIR. As Defendants argued in their motion, this is yet another important reason why a firing range is not properly a place of public accommodation—since prospective injunctive relief is the only available remedy, the Court would have to issue an order

that will create a very tense and potentially dangerous situation. In short, Plaintiff cannot show that he will be "wronged" in the future. Therefore, injunctive relief is not available.

And despite Plaintiff's last minute effort to fabricate standing, (*see* Pl.'s Decl. [Doc. No. 71-13]), he has only ever been to this gun range (and Oktaha) once in his life (Fatihah Dep. at 121:19-21)—to set up this lawsuit. There are other gun ranges he uses (quite frequently) that are closer and more convenient for him. Defendants' gun range is small—it is essentially an indoor range without cover from the elements. (*See* Nicole Decl. ¶ 3, Ex. C [photographs of gun range] [Doc. No. 68-1]). There is no basis to conclude that Plaintiff will ever go to Defendants' gun range again, nor should he be permitted to do so.

Finally, Plaintiff has failed to sue Save Yourself Survival And Tactical Gear And Gun Club, LLC, the company that actually operates the gun range at issue. Consequently, no injunctive relief is available against the company.

In sum, Plaintiff cannot show that he will be "wronged" in the future such that he has no claim for relief and thus lacks standing. This lawsuit should be dismissed.

CONCLUSION

For the forgoing reasons, Defendants request that this Court deny Plaintiff's motion and grant their motion to dismiss and/or for summary judgment.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.* (MI Bar No. P62849)
PO Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
Fax: (801) 760-3901
rmuise@americanfreedomlawcenter.org

David Yerushalmi, Esq.* (Ariz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901
*Admitted *pro hac vice*

WOOD, PUHL & WOOD, P.L.L.C.

/s/ *Scott B. Wood*
Scott B. Wood, Esq. (OBA 12536)
2409 E. Skelly Dr., Suite 200
Tulsa, Oklahoma 74105
Tel: (918) 742-0808
Fax: (918) 742-0812

Attorneys for Defendants Chad Neal and Nicole Mayhorn Neal

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/*Robert J. Muise*
Robert J. Muise, Esq.