UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

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| RAJA'EE FATIHAH,<br><br>Plaintiff,<br><br>v.<br><br>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),<br><br>Defendants. | No. 6:16-cv-00058-JHP |

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules**



**Other**

## SUMMARY OF THE CASE

The recent attack in Manchester, England is a stark and tragic reminder of the very real threat posed by Islamic terrorists. We can remain politically correct and willfully blind as a matter of personal or political preference, but Title II does not demand it as a matter of law. Defendants' policy of prohibiting "[a]nyone associated in any way with an organization that is associated with terrorism" from using their gun range is not only lawful, it is "responsible." (Fatihah Dep. at 120:4-25 to 121:1-2; Dep. Ex. 18 [Doc. 67-2]).

Here, Plaintiff Raja'ee Fatihah cannot demonstrate that he will be denied use of Defendants' gun range *in the future* because of his religion, and Defendants do not have a policy of denying service to anyone on the basis of religion or any other prohibited characteristic. Indeed, the very fact, *which is undisputed*, that Defendants considered allowing Plaintiff to use the range on October 23, 2015, completely undermines Plaintiff's theory of the case. (Fatihah Dep. at 71:4-25 to 72:1-8 [Doc. 67-2]; Nicole Decl. ¶ 40 [Doc. 68-1]). This case should be dismissed.

Following the public controversy surrounding Defendants' "Muslim Free" sign[1]—and well *before* Plaintiff came to Defendants' gun range—Defendant Nicole Neal published an "official statement" on Facebook[2] expressly disavowing any claim that this sign represented a policy of unlawful discrimination. (Nicole Decl. ¶¶ 19, 21 [Doc. 68-1]). And to ensure that there was no mistake about this, Defendants modified their official Gun Range Rules, which *they post in plain view for every customer of the gun range to read*,[3] and these rules are included as part of the company's official Operating Agreement. (Nicole Decl. ¶ 19, 21 [Doc. 68-1]). Defendant Nicole Neal's testimony was also unequivocal: the "Muslim Free" sign does not represent a business policy, it was posted as a political statement. (Nicole Dep. at 72:3-25 to 74:1-4 [Doc. 67-2]). In other words, the posting of this sign is not "conduct" that can be prohibited by Title II; it is *speech* that is fully protected by the First Amendment.

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[1] Defendants' sign was indisputably posted after, and as a result of, the Chattanooga, Tennessee terrorist attack. (Nicole Decl. ¶¶ 13-16 [Doc. 68-1]; Recording [Doc. 74])).

[2] It is disingenuous for Plaintiff to ask this Court to consider every statement Defendants have ever made on social media that is critical of Islam, but to ignore this August 19, 2015 Facebook post, which goes directly to the issues presented in this case. (*See* Pl.'s Opp'n Br. 11, ¶ 51).

[3] Plaintiff's claim that this policy is not posted at the store is factually incorrect. (*See* Pl.'s Opp'n Br. at 11, ¶ 51 [incorrectly claiming that "Defendants never posted any other notices at the business clarifying that Muslims would be permitted to use the Gun Range, notwithstanding the sign"]).

We learn from Plaintiff's opposition that this is an "*individual discrimination case*" and that Plaintiff is ***not*** claiming that Defendants maintain a "systemwide pattern or practice" of unlawful discrimination. (Pl.'s Opp'n Br. at 20 n.8). That is, Plaintiff disavows any allegation that Defendants maintain a widespread policy of discriminating against Muslims. Consequently, the issue here is far narrower: whether *Plaintiff* will be denied use of Defendants' gun range *in the future* because *he* is a Muslim and *for no other reason*. Plaintiff cannot meet his burden.

We also learn from Plaintiff's opposition that his Oklahoma state law claim lacks merit and should be dismissed.[4] (Pl.'s Opp'n Br. at 19 n.7 ["Plaintiff concedes that his state-law claim . . . may be dismissed by the Court."]). And contrary to Plaintiff's assertion, it is not a matter of *having one's cake and eating it too* for Defendants to argue that the gun range falls outside of both the Oklahoma statute and Title II. (Pl.'s Opp'n Br. at 19 n.7). Rather, it is a matter of statutory construction (Title II is specific while the Oklahoma statute is not) and the fact that the federal government does not possess general police powers, like the states. Here, in addition to the fact that Title II does not cover gun ranges in the first instance, Plaintiff cannot prove 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).

Although Defendants' gun range is not a "place of public accommodation," Title II nonetheless does not prohibit a gun range owner from relying on the vast public record (from government sources, no less) when enforcing a safety-conscious (and "responsible" per Plaintiff) policy that disqualifies "[a]nyone associated in any way with an organization that is associated with terrorism" from using her range. To rule otherwise would create a very dangerous precedent.

Plaintiff is denied use of Defendants' gun range because he is directly associated with CAIR,[5] an organization that the public record demonstrates has ties to terrorist organizations.

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[4] Upon dismissal of this claim, Defendants will be seeking an award of their reasonable attorneys' fees and costs. Okla. Stat. tit. 25, § 1506.8 ("award[ing] reasonable attorney fees to the prevailing party and assess[ing] court costs against the nonprevailing party").

[5] This is not a *post hoc* justification as Plaintiff suggests. The day after Plaintiff visited Defendants' gun range, Defendant Chad Neal sent a message to Jan Morgan, stating, "[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?" Ms. Morgan replied 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. 71-3, ECF p. 55 of 70]) (emphasis added).

Plaintiff does not deny the existence of this public record (nor could he). (*See, e.g.,* Pl.'s Opp'n Br. at 3-5, ¶¶ 8, 14, 15, 16, 17). Rather, in his opposition, Plaintiff tries to explain it away (and engage in an impertinent *ad hominin* attack against the Center for Security Policy in the process)[6] by impermissibly relying upon his *rebuttal* expert witness, Mr. Richard Frankel. But Mr. Frankel is not a fact witness, and Defendants have offered no expert opinion evidence for him to rebut. Defendants object to Mr. Frankel's testimony because it is improper and should be excluded.[7]

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[6] Plaintiff's reliance (Pl.'s Opp'n Br. at 23 n.11) on the discredited, agenda-driven Southern Poverty Law Center (*see* http://www.breitbart.com/big-government/2017/05/15/dale-wilcox-why-the-mainstream-media-must-stop-citing-anti-hate-crusader-southern-poverty-law-center/ & http://immigrationreformlawinstitute.org/Docs/EOIRDecision.pdf [publicly released 2016 disciplinary opinion from the President Obama-era U.S. Department of Justice officially reprimanding a Southern Poverty Law Center attorney]) as a basis for their impertinent attack of a non-party, the Center for Security Policy, should be rejected.

[7] Mr. Frankel was specifically identified as a *rebuttal* expert witness to the testimony of Mr. Stephen Coughlin. (*See, e.g.,* Am. Scheduling Order [Doc. 41]; Pl.'s Ex. N [Frankel Report] ["Plaintiff Raja'ee Fatihah hereby submits the written testimony of his <u>rebuttal</u> expert witness Richard M. Frankel."] [emphasis added] [Doc. 78-2]). Defendants did not present any expert opinion testimony from Mr. Coughlin (the only expert identified by Defendants) in their motion (or response to Plaintiff's motion or in this reply) because it is not necessary (and, for similar reasons, Defendants do not intend to use Mr. Coughlin at a trial in this matter [*see* Defs.' Witness List [Doc. 61]). Consequently, Plaintiff's attempt to present Mr. Frankel's testimony through the back door, as it were, should be rejected. *See Theoharis v. Rongen*, No. C13-1345RAJ, 2014 U.S. Dist. LEXIS 98086, at *7 (W.D. Wash. July 18, 2014) ("This court's interpretation begins with the text of Rule 26(a)(2)(D)(ii), which declares that rebuttal reports are those 'intended *solely* to contradict or rebut evidence' in an opposing party's expert disclosure. The court has emphasized 'solely.' At a bare minimum, a rebuttal expert cannot offer testimony unless the expert whom she rebuts has offered testimony. In addition, a rebuttal expert cannot offer evidence that does not contradict or rebut another expert's disclosure merely because she also has also offered some proper rebuttal."); *NIC Holding Corp. v. Lukoil, Pan Ams.*, 05-CV-09372(MEA), 2009 U.S. Dist. LEXIS 32580, at *10-11 (S.D.N.Y. Apr. 14, 2009) ("[W]e agree with the court in *Johnson v. Grays Harbor Cmty. Hosp.*, No. 06-C-5502, 2007 U.S. Dist. LEXIS 95725 (W.D. Wash. Dec. 18, 2007). In that case, the court held that '[u]ntil and unless Defendants' experts testify, Plaintiff's experts will be unable, as a practical matter, to offer true 'rebuttal' testimony. Therefore, Plaintiff's rebuttal experts will be allowed to testify at trial only *after* Defendants' experts have testified.' 2007 U.S. Dist. LEXIS 95725, at *2."); *see also Bleck v. City of Alamosa*, No. 10-cv-03177-REB-KMT, 2012 U.S. Dist. LEXIS 28270, at *11 (D. Colo. Mar. 5, 2012) ("[Rule 26(a)(2)] make[s] clear that a rebuttal expert's testimony must relate to and rebut evidence or testimony on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C). Such evidence is not tied to any particular witness; it is tied to whether the party with the affirmative burden *has presented evidence and/or testimony <u>from a duly disclosed expert</u>* on the same subject matter as that which will be rebutted by the disclosed rebuttal expert.") (emphasis added). Moreover, the way in which Plaintiff seeks to employ Mr. Frankel as a fact witness in an effort to rebut Defendants' statement

Moreover, Plaintiff's hearsay objection to Defendants' reliance on this public record evidence is improper and should be overruled. As an initial matter, the documents affirming the connection between CAIR and terrorist organizations are mainly public records that are exempt from the hearsay rule. *See* Fed. R. Evid. 803(8); *Lester v. Natsios*, 290 F. Supp. 2d 11, 26 (D.D.C. 2003) (holding that agency emails were admissible as public records under Rule 803(8)); *United States v. Loera*, 923 F.2d 725, 730 (9th Cir. 1991) (holding that justice court docket entries come within the public records exception to the hearsay rule). And "[t]he admissibility of a public record specified in the rule is assumed as a matter of course, . . . unless there are sufficient negative factors to indicate a lack of trustworthiness, in which case it should not be admitted. . . . The party opposing admission has the burden to establish unreliability." *Zeus Enters. v. Alphin Aircraft, Inc*., 190 F.3d 238, 241 (4th Cir. 1999) (internal citations omitted).

Nonetheless, this evidence is admissible simply because it is not hearsay. *See* Fed. R. Evid. 801 (defining hearsay as an out of court statement offered to prove the truth of the matter asserted). That is, the *truth* of the matters asserted in the public record is not what is relevant here. Rather, what is relevant is the very existence of this public record (*i.e.*, that these statements were made). *Anderson v. United States*, 417 U.S. 211, 220 n. 8 (1974) ("[E]vidence is not hearsay when it is used only to prove that a prior statement was made . . . ."). Also relevant and related to the fact

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of facts is improper. (*See, e.g.*, Pl.'s Opp'n Br. at 3 ¶ 8 ["*Plaintiff does not dispute this asserted fact*. However, it is incomplete because it fails to provide necessary and vital context . . . .] [emphasis added]). *Gen. Elec. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *United States v. Lundy*, 809 F.2d 392, 396 (7th Cir. 1987) ("District courts must ensure that expert opinion testimony is in fact expert opinion, not merely opinion given by an expert."). Finally, and this will be the subject of a separate motion in limine/*Daubert* motion should this case go to trial, Mr. Frankel does not possess any special expertise that will assist the trier of fact. *See generally Combs v. Shelter Mut. Ins. Co.*, No. 05-CV-474-JHP, 2007 U.S. Dist. LEXIS 96075, at *9 (E.D. Okla. Feb. 16, 2007) ("[T]he Court must . . . ensure the 'expert' testimony is relevant and would be of assistance to the jury. Expert testimony based solely on hearsay and third-party observations that are adequately comprehensible to lay people would be improper to admit under Rule 702."). Mr. Frankel is a former FBI agent. This case does not involve law enforcement. Defendants do not have to prove beyond a reasonable doubt, for example, that CAIR is in fact a terrorist organization before they can deny Plaintiff use of the gun range due to his association with CAIR. Defendants are relying upon the vast public record demonstrating CAIR's ties to terrorism—a public record that is available to any layperson. In short, this is a gun range; it is not a lunch counter. Title II does not require gun range owners to take risks nor does it permit a Court (or a former FBI agent) to substitute its judgment for the judgment of the person who must stand on the firing line with the shooter.

that the statements connecting CAIR to terrorism were made (by government agencies, no less), is the effect of these statements on Defendants and thus Defendants' reliance on them to demonstrate that they did not act with an illicit discriminatory intent. Defendants need not prove that CAIR is a terrorist organization (this is a red herring that Plaintiff advances throughout this litigation). Defendants are not federal prosecutors, and this is not a criminal trial. Defendants are private citizens who want to safely operate a gun range. It is entirely appropriate for Defendants to rely on the public record presented here to exclude Plaintiff from using the gun range. Title II does not require Defendants to bury their heads in the sand and ignore what the public record discloses about CAIR (nor deny the threat posed by self-proclaimed Muslim terrorists). Title II does not force Defendants to permit a member of CAIR to use their range just because he is Muslim.[8]

Similarly, Title II does not prohibit a gun range owner from banning someone from her range when that person has demonstrated a reckless disregard for safety by going to the range armed with a loaded weapon,[9] a concealed recording device, and an agenda to create a controversy.[10] Plaintiff's reckless conduct violated Defendants' Gun Range Rules (Nicole Decl. ¶ 21, Ex. M [prohibiting "[a]nyone who causes, or seeks to cause, any disturbance whatsoever at the Gun Club"] [Doc. 68-1]), and it may have violated state law, *see* Okla. Stat. tit. 21, § 1289.11 (making it "unlawful for any person to engage in reckless conduct while having in his or her possession any shotgun, rifle or pistol"). Plaintiff's assertion that he did not go to the range with

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[8] Defendants have chosen not to present the expert opinion testimony of Mr. Coughlin because after deposing Plaintiff's rebuttal experts it was evident that the presentation of any of these experts would turn this case from one involving Title II and safety at a private gun range to a debate about what is or is not "true" Islam and whether terrorists who commit violence in the name of Islam are "true" Muslims. None of this is relevant <u>or</u> within the purview of this Court. *See Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

[9] (Fatihah Dep. at 56:8 ["The Beretta was magazine and chamber loaded."] [Doc. 67-2]).

[10] Plaintiff's reliance on "tester" cases involving the issue of standing have no relevance here. (*See* Pl.'s Opp'n Br. at 14 n.4 [Doc. 78]). This case involves a gun range. It is dangerous to intentionally create a disturbance at a gun range where individuals are armed and wary of potential safety threats. (Nicole Decl. ¶ 29 [Doc. 68-1]; *see also* Pl.'s First Am. Compl. ¶¶ 31-33 [Doc. 35] ["31. Following Fatihah's disclosure [that he was Muslim], Mrs. Neal summoned Defendant Chad Neal, who had been in an adjacent area of the business. 32. The Defendants <u>*armed themselves with handguns*</u> and refused to allow Fatihah to use the gun range. 33. Fatihah was *asked if he was at the gun range to commit an act of violence* or as part of a 'jihad.'"] [emphasis added]).

an agenda beyond shooting is contrary to the undisputed facts. (*See* Pl.'s Opp'n Br. at 4 [incorrectly claiming that there is no "evidentiary support" for Defendants' assertion that Plaintiff "visited the Gun Range 'to set up this lawsuit'"]). Before going to Defendants' range, Plaintiff sent his friend (Kenneth Harper) to scope it out. (Fatihah Dep. at 75:22-25 to 77:1-8 [Doc. 67-2]). Before Plaintiff went to the range, he sought advice from his CAIR lawyer. (Fatihah Dep. at 50:21-25 to 51:1 [Doc. 67-2]). Plaintiff went to the range with a concealed recording device (he never did this any other time he went to a gun range).[11] (Fatihah Dep. at 50:3-8 [Doc. 67-2]). When it appeared that his agenda was going to fail (*i.e.*, that Defendants were going to allow him to shoot), Plaintiff declared out of the blue, "I am a Muslim, is that going to be a problem?"[12] Plaintiff gave the secret recording to his CAIR lawyer. (Fatihah Dep. at 81:11-21 [Doc. 67-2]). And Plaintiff prepared an article for the *Huffington Post* to be released to coincide with the filing of this lawsuit and the holding of his press conference. (Fatihah Dep. at 25:20-25 to 26:1-21, Exs. 5, 8; 26:22-25 to 30:1-7, Exs. 9, 10 [Doc. 67-2]).

This lawsuit was nothing ***but*** a dangerous set up and should be dismissed.

## ARGUMENT IN REPLY

### I. Plaintiff Lacks Standing.

To establish standing, Plaintiff has the burden of demonstrating that his alleged injury "will be redressed by the relief requested." (Pl.'s Opp'n Br. at 13). But the ***only*** relief available under Title II is injunctive relief. *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1351 (N.D. Ga. 2005) ("In a suit under Title II, a plaintiff may not recover damages, but is entitled only to injunctive relief."); *see also Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990) (same) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 150-51 n. 5 (1970); *United States v. Johnson*, 390 U.S. 563, 567 (1968)). Consequently, Plaintiff has the burden of establishing that he will be *unlawfully* denied use of Defendants' gun range in the future. *Brooks*, 365 F. Supp. 2d at 1351 ("In order to claim injunctive relief, a plaintiff must show [that he] will be ***wronged again*** . . . .") (internal quotations and citations omitted) (emphasis added). "The 'injury-in-fact' demanded by Article III requires an additional showing when injunctive relief is sought. In addition to past injury, a

[11] His stated reason for bringing his concealed recording device demonstrates his recklessness. (Fatihah Dep. at 54:10-13 [explaining that "I was aware that things may not go the way I wanted them to"] [Doc. 67-2]).

[12] (Nicole Dep. at 88:11-12 [Doc. 67-2]; Nicole Decl. ¶¶ 9, 38 [Doc. 68-1]; *see also* Fatihah Dep. 94:14-1 [Recording] [Doc. 67-2]; Recording [Doc. 74]).

plaintiff seeking injunctive relief must show a sufficient likelihood that *he will be affected by the allegedly unlawful conduct in the future*." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013) (internal quotations and citation omitted) (emphasis added).

Contrary to Plaintiff's assertion, Defendants are not confusing standing with the merits. (Pl.'s Opp'n Br. at 14). Nonetheless, when considering claims for injunctive relief, there is a "shading" between the two. *L.A. v. Lyons*, 461 U.S. 95, 103 (1983) (observing "that case-or-controversy considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief") (internal quotations omitted).

In *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Court held that the respondent failed to demonstrate a case or controversy with the City that would justify injunctive relief. The Court noted that simply because the respondent may have been illegally choked by City police in 1976, which would presumably afford him standing to claim damages, does not establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer *who would then illegally choke respondent* contrary to City policy. *Id*. at 111 ("Absent a sufficient likelihood that he will again be *wronged in a similar way*, Lyons is no more entitled to an injunction than any other citizen of Los Angeles . . . .") (emphasis added).

Assuming, *arguendo*, that Plaintiff was unlawfully discriminated against on October 23, 2015, he cannot show that he would be denied use of the range in the future based solely on his religion (*i.e.*, that he would "be wronged in a similar way"). Plaintiff has not set forth any evidence that he will be severing his ties with CAIR. As a board member of CAIR-Oklahoma, Plaintiff is disqualified from using the gun range based on Defendants' lawful policy of prohibiting individuals from using the range who are associated with organizations which have ties to terrorism—a policy that Plaintiff admits is "responsible." (Fatihah Dep. at 120:4-25 to 121:1-2 [Doc. 67-2]). CAIR-Oklahoma is such an organization.[13] (Nicole Decl. ¶ 43 [Doc. 68-1]). And the existence of these ties is acknowledged by federal, local, and foreign governments. (Nicole

[13] This would be similar to a situation where a gun range owner discovered after the customer came to the range and was denied use that the customer had a felony conviction which would preclude him from possessing a firearm under federal law (and Defendants' Gun Range Rules). *See* 18 U.S.C. § 922(g). If this customer claims (like Plaintiff) that he was previously denied service based on his religion, he would not have standing to pursue a discrimination claim because he cannot show that he would be denied service in the future on the basis of religion (*i.e.*, that he would be *wronged* again) because he is disqualified from using the range by his conviction.

Decl. ¶ 43 [Doc. 68-1]). In short, Title II does not prohibit a business from denying service to a person affiliated with a non-religious group that has ties to terrorism.[14] Additionally, Plaintiff has demonstrated his reckless disregard for safety by going to the gun range armed with a loaded handgun, a military-style rifle, and a recording to device to create a controversy with Defendants. This recklessness also bars him from the range. *See* (Nicole Decl. ¶ 21, Ex. M [Doc. 68-1]); Okla. Stat. tit. 21, § 1289.11. Thus, Plaintiff cannot show that he will be "wronged" in the future.

**II. The Gun Range Is Not a "Place of Public Accommodation."**

As Defendants demonstrated in their motion, in enacting the public accommodations section of Title II, Congress did not intend to regulate all establishments that it had power to regulate. Broad coverage of establishments was originally contemplated, but ultimately rejected. (*See* Defs.' Br. at 13-14 [Doc. 67]). This construction of the statute was also confirmed by the Fourth Circuit in *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006), where the court reasoned 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." *Id.* at 431. Notably, a gun range is not listed, and there is nothing comparable to it on the list. *See* 42 U.S.C. § 2000a(b) (listing places of entertainment as a "motion picture house, theater, concert hall, sports arena, [and] stadium").

Defendants' argument is further buttressed by the plain language of Title II which places additional limitations upon the definition of a "place of . . . entertainment." 42 U.S.C. § 2000a(b). In order to fall within Title II, the business must not only be a place of entertainment, it must also be a place that "*customarily presents* films, performances, athletic teams, exhibitions, or other *sources of entertainment* which *move in commerce* . . . ." 42 U.S.C. § 2000a(c) (emphasis added). This plainly describes a "motion picture house, theater, concert hall, sports arena, [and] stadium." 42 U.S.C. § 2000a(b). It does not describe Defendants' local gun range. To argue otherwise is contrary to the plain language of the statute, and it threatens to undermine "first principles"—namely, that the federal government has limited power. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). And while states may choose to regulate local gun ranges (*see* Pl.'s Opp'n Br. at 16 [citing cases applying state law]), Oklahoma has chosen not to do so (Pl.'s Opp'n Br. at 19 n.7 [conceding that the Court should dismiss Plaintiff's state law claim]). Title II does not apply.

[14] CAIR is not a religious organization, nor does someone have to be a Muslim to work for, or be associated with, CAIR. (Soltani Dep. at 13:20-22 [Doc. 67-2]).

**III. Defendants Are Entitled to Summary Judgment on the Title II Claim.**

Plaintiff accuses Defendants of "apply[ing] the wrong legal standard to Mr. Fatihah's discrimination claim." (Pl.'s Opp'n Br. at 20). Plaintiff is mistaken. As noted previously, we learn from Plaintiff's opposition that this is an "*individual discrimination case*" and *not* a case in which Plaintiff is claiming that Defendants maintain a "systemwide pattern or practice" of unlawful discrimination against Muslims. (Pl.'s Opp'n Br. at 20 n.8 [asserting that "Plaintiff makes no such allegation here. . . ."]). Plaintiff claims that he has established discrimination by "direct evidence"—but this "direct evidence" is simply statements made by Defendants in the media and on Facebook about Muslims and Islam in general. This "evidence" is not relevant, and it is protected by the First Amendment. (*See* sec. IV., *infra*). Moreover, "[w]hen a plaintiff alleges that discriminatory comments constitute direct evidence of discrimination, [the Tenth Circuit] has held 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' statements and the *actual decision* to deny *him* use of the gun range. Here, Plaintiff "confuse[s his] offer of specific instances of discriminatory statements, from which [he] then argue[s] the determining cause of the [alleged discriminatory] decision may be inferred, with direct evidence that [religion] *was the cause of that decision*." *Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir. 1987) (emphasis added). The *only* statements that have a direct nexus to Plaintiff (since Plaintiff is not arguing that Defendants have a systemwide pattern or practice of discriminating against Muslims in general) demonstrate that Plaintiff was denied use of the range because of his association with CAIR and CAIR's ties with Hamas. (Pl.'s Ex. B, Dep. Ex. 39 [Doc. 71-3, ECF p. 55 of 70]).

Consequently, regardless of the standard applied, Defendants have proven by more than a preponderance of evidence "that they would have denied Mr. Fatihah [access to the gun range] 'even in the absence of the[ir] [allegedly] impermissible motivation.'" (*See* Pl.'s Opp'n Br. at 20 [quoting *Long v. Laramie Cty. Cmty. Coll. Dist.*, 840 F.2d 743, 748-49 (10th Cir. 1988)]). On October 23, 2015, Plaintiff presented safety concerns, prompting Defendants to invoke Rule 10 (a rule they have invoked because a customer simply appeared to be in a rush). Upon conducting a background check, it was revealed that Plaintiff was a board member for CAIR-Oklahoma, disqualifying him from using the range. Furthermore, it was evident on October 23rd (as stated

on the recording by Defendant Chad Neal) that Plaintiff went to the range with an "*agenda*" beyond just shooting—Plaintiff wanted to create a controversy with Defendants about Islam (and even then, Defendants' considered allowing Plaintiff to use the range, but as the tension mounted, prudently decided otherwise and invoked Rule 10). Defendants never inquired into Plaintiff's religion—they never inquire into any customer's religion because religion is not a factor as to whether someone can use the range.[15] And Plaintiff's reckless and dangerous agenda has been confirmed by the fact that he went to the range with a concealed recording device to set up this lawsuit. In the final analysis, Defendants have rebutted Plaintiff's "evidence" of discrimination "by proving that [they] would have made the same decision even if [they] had not taken [religion] into account." (*See* Pl.'s Opp'n Br. at 22 [quoting *Dysart v. Palms of Pasadena Hosp.*, 89 F. Supp. 3d 1311, 1320 (M.D. Fla. 2015)]).

**IV. The First Amendment Shields Defendants from Liability.**

Defendants' "Muslim Free" sign, which was posted as a political protest to the Chattanooga terrorist attack, cannot serve as the basis for civil liability under *Snyder v. Phelps*, 562 U.S. 443 (2011). And *Snyder* is not limited to just "state tort claim[s]," as Plaintiff suggests. (Pl.'s Opp'n Br. at 29). Title II does not trump the First Amendment. (*Compare* Pl.'s Opp'n Br. at 29 [arguing that "the First Amendment is not a defense to a discrimination claim"]). Additionally, Plaintiff's reliance on *dicta* in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), is unavailing. (Pl.'s Opp'n Br. at 28). While it may not implicate the First Amendment to order the removal of a sign that is intended to reflect an illegal course of conduct, it certainly violates the First Amendment to order the removal of a sign that reflects a political message, as in this case. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.") (internal quotations and citation omitted).

**CONCLUSION**

For the forgoing reasons, Defendants request that this Court grant their motion.

[15] (Nicole Decl. ¶¶ 33-45 [Doc. 68-1]; *see also* Nicole Decl. ¶ 9 [Doc. 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. 67-2]).

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 26, 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.

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