

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA**

**JAMES W. GREEN**, an individual, and )  
**AMERICAN CIVIL LIBERTIES UNION** )  
**OF OKLAHOMA**, a non-profit corporation, )  
 )  
Plaintiffs, )

vs. )

**BOARD OF COUNTY COMMISSIONERS** )  
**OF THE COUNTY OF HASKELL**, and )  
**SAM COLE**, Haskell County Commissioner, )  
Chairman, in his official capacity, )  
 )  
Defendants. )

**NO. CIV-05-406-WH**

**FILED**  
**MAR 24 2006**  
By \_\_\_\_\_  
William B. Guthrie  
Clerk, U.S. District Court  
Deputy Clerk

**PLAINTIFFS MOTION IN LIMINE AND BRIEF IN SUPPORT**

Plaintiffs, by and through their attorneys, respectfully move this Court for an Order prohibiting Defendants or Defendants' witnesses from making any reference to the following matters whether such reference is made directly or indirectly, through testimony of witnesses, statements to the Court or jury, or questions of counsel, argument, or otherwise, the subjects described below:

- A. Limited reference by Defendants or their counsel to the American Civil Liberties Union (ACLU) and/or the American Civil Liberties Union of Oklahoma (ACLU-OK) or its policies that are inflammatory, prejudicial, and not relevant to the issues pending before this Court;
- B. Reference to lawsuits or advocacy efforts by the ACLU and/or ACLU-OK;
- C. Any testimony relating to affirmative defenses waived due to failure to timely raise in Defendants' Answer and disclosures.

**STATEMENT OF FACTS**

1. On October 6, 2005, Plaintiffs filed their complain, initiating this action herein. The complaint included the ACLU-OK as a secondary party, raising representative organizational standing. During the course of discovery, the ACLU-OK<sup>1</sup> identified a representative member and disclosed the representative member to Defendants.
2. On November 2, 2005, Defendants filed a Motion for Extension of Time to Answer. Defendants' motion was granted on November 2, 2005.
3. On November 17, 2005, Defendant Board of County Commissioners of the County of Haskell ("Haskell County") filed its Answer. Defendant Haskell County's Answer did not raise any affirmative defenses pertaining to private speech, public forum, or any other First Amendment speech defense.
4. On November 17, 2005, Defendant, Sam Cole, Chairman of the Board of County Commissioners of the County of Haskell ("Commissioner") filed his Answer. Defendant Commissioner's Answer did not raise any affirmative defenses pertaining to private speech, public forum, or any other First Amendment speech defense.
5. Alliance Defense Fund, the organization that is lead counsel for Defendants, has published a book entitled *The ACLU vs. America*. (Exhibit 1).
6. Pursuant to LCVR 7.1, counsel conferred with Defendants' counsel. Defendants' counsel objects to the filing of this motion.

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<sup>1</sup> Hereinafter references to "ACLU", include both the ACLU and ACLU-OK.

**ARGUMENT AND AUTHORITY**

Rules 401, 402, and 403<sup>2</sup> set basic standards for the admissibility of evidence. Pursuant to Rules 401 and 402, only evidence that tends to prove a material fact (i.e., relevant evidence) is admissible. Pursuant to Rule 403, even relevant evidence may be precluded if its prejudicial impact outweighs its probative value. The ACLU's policies and its advocacy are not at issue here and they do not prove any material point, and are therefore wholly irrelevant. While ACLU is a party to the case, it is only through its representative capacity for its members. A representative member has been identified and deposed by Defendants. Thus, any relevance of the mention of the ACLU would be only in narrow circumstances. Inflammatory statements pertaining to the ACLU and its policies would have a far greater prejudicial than probative impact. This is a case about specific facts, not ideological issues. Moreover, the Supreme Court has held that evidence of a party's association with a controversial organization is properly excluded under the First Amendment when the membership is extraneous to the decision before the jury. Accordingly, this Court should preclude Defendants and their counsel from identifying Plaintiffs' counsel as being from the ACLU and from referencing the ACLU or its policies during trial.

**I. REFERENCE TO THE ACLU'S POLICIES, AND ADVOCACY EFFORTS IS INADMISSIBLE PURSUANT TO FEDERAL RULES OF EVIDENCE 401, 402, AND 403 BECAUSE IT IS IRRELEVANT AND POTENTIALLY PREJUDICIAL.**

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<sup>2</sup> Unless stated otherwise, all citations herein to "the Rules" refer to the Federal Rules of Evidence.

Evidence is relevant only if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401. Only relevant evidence is admissible. Rule 402. The ACLU’s role in this litigation is utterly irrelevant to the issues in this case. The outcome of this action depends on a showing that Defendants violated Plaintiffs’ First and Fourteenth Amendment rights and the Oklahoma Constitution. The ACLU’s participation does not make the facts showing that Defendants violated Plaintiffs’ rights any more or less probable.

This case should not turn on whether the jury approves of any party’s attorneys, the ACLU, nor any perceived or alleged “liberal agenda.” Nor should the case turn on the kinds or cases or perceptions of the kinds of cases that Defendants believe that the ACLU is involved in.

Alliance Defense Fund’s book *The ACLU vs America* claims it “tells the truth about the American Civil Liberties Union’s war on religious freedom.” ( Exhibit 1). Given that Defendants’ counsel is the Alliance Defense Fund, there is a likely expectation that Defendants’ counsel and/or Defendants will reference this book in an inflammatory way to the jury. The Defendants should be prohibited from turning the trial into a referendum on the jury’s opinion of the ACLU or the policy goals it supports.

Moreover, the ACLU disputes the claims made in the book (of which it is aware) and the veracity of those claims. The ACLU’s appearance in this case is limited to raising representative organizational standing of the members that have standing. A representative member has been identified and deposed, making any alleged need to mention the ACLU limited at best and certainly would not include litigating the veracity of the allegations made in ADF’s book.

As a non-partisan organization, the ACLU takes positions across a range of issues and ideologies, creating allies and antagonists along the way – but none of these positions is at issue in this case. The fact that the ACLU and its co-counsel are Plaintiffs' attorneys is irrelevant to any claim in this case and is thus excludable under Federal Rules of Evidence 401, 402, 403. For these reasons, the Court should preclude the Defendants and their counsel from making reference to the policies and goals of the ACLU during trial.

Reference to any lawsuits or advocacy efforts by or that the ACLU is involved are irrelevant to the pending lawsuit. The ACLU's advocacy activities, including the bringing of impact litigation, are constitutionally protected. *In Re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

The First Amendment and Rule 403 (evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time) also preclude mention of the ACLU for purposes of impeaching witnesses. In *Dawson v. Delaware*, 503 U.S. 159 (1992), a nearly unanimous (8-1) Supreme Court ruled that evidence of an individual's membership in a racist prison gang, the Aryan Brotherhood, violated a criminal defendant's First Amendment rights of association under the U.S. Constitution. The Court recognized that the evidence proved nothing more than the defendant's abstract political beliefs and had no relevance to the issues being decided by the jury.

A perceived affiliation with the ACLU and all of its lawsuits, policies, and advocacy efforts could well stir bias in the jury. The ACLU has often defended the rights of individuals aligned with unpopular causes and is frequently—and quite publicly—involved in debates of the most controversial issues in the country. Many people associate ACLU membership with

specific political beliefs and opinions. Defendants' counsel's book, *The ACLU vs. America*, reveals the potential to imbue its role here with larger social, cultural, and political meanings. (Exhibit 1 ). This is precisely the kind of prejudicial evidence that Rule 403 is designed to exclude. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985) ("Rule 403 is designed to exclude evidence that has 'an undue tendency to suggest decision on an improper basis . . .'" (quoting Rule 403 advisory committee note)). This evidence would also confuse and mislead the jurors by unduly suggesting that they should decide this case based on their own agreement or disagreement with the causes espoused by the ACLU. *See* Rule 403. Accordingly, reference to the ACLU or its policies should be excluded as irrelevant and overly prejudicial.

Questioning witnesses about their association with the ACLU, support for its general policy goals, or their views about other advocacy efforts in which the ACLU is involved would invite the jury to draw an inference about constitutionally protected associations that "tend[] to prove nothing more than the abstract beliefs" of the witnesses. *Dawson*, 503 U.S. at 167.

Defendants should not be permitted to question witnesses about their association with, or support for, the ACLU.

II. REFERENCE TO ANY AFFIRMATIVE DEFENSES WAIVED BY DEFENDANTS ARE INADMISSIBLE PURSUANT TO FEDERAL RULES OF EVIDENCE 401, 402, AND 403 BECAUSE IT IS IRRELEVANT AND POTENTIALLY PREJUDICIAL.

Any testimony relating to affirmative defenses waived due to failure to timely raise in Defendants' Answer and disclosures. The general rule is that affirmative defenses are waived when not pled. *See* Fed. R. Civ. P. 8(c) and Fed. R. Civ. P. 12(b). These rules require a party responding to an initial pleading to set forth all all affirmative defenses that the party intends to use as an avoidance or as a affirmative defense. If the defenses are not affirmatively pled nor are

they raised in a 12(b) motion or by express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case. *See also Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1209 (10<sup>th</sup> Cir. 2003); *Radio Corp. of America v. Radio Station KYFM, Inc.*, 424 F.2d 14, 17 (10<sup>th</sup> Cir. 1970)(internal citations omitted).

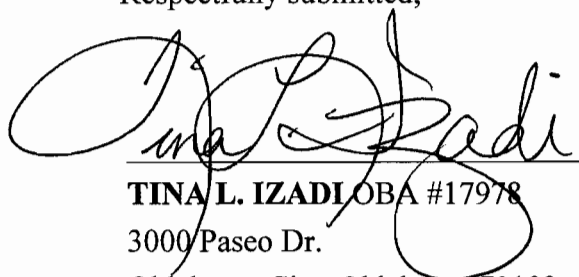
Defendants failed to raise any affirmative defense pertaining to issues of private speech, public forums, or any other First Amendment speech claims as an affirmative defense in any answer filed herein. Moreover, the disclosures made by Defendants and its witness and exhibit list fail to raise any indication that Defendants intended to use any affirmative defense that included claims of private speech, or that the courthouse lawn is a public forum or any other First Amendment speech claim.

Defendants effectively waived any affirmative defenses that are not identified in their answers and thus, should be prohibited and barred from referencing any affirmative defenses that are deemed waived during the course of the trial.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court prohibit Defendants from making reference to the ACLU or making reference to the ACLU's general and specific policy goals as identified herein and from making reference to any affirmative defenses deemed waived.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tina L. Izadi", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

**I hereby certify** that the above and foregoing instrument to which this certification is attached was transmitted via email or fax by 5:00 PM on the date of filing and mailed or served on the following:

**Christopher J. Wilson**

District Attorney  
202 E. Main  
Stigler, OK 74462

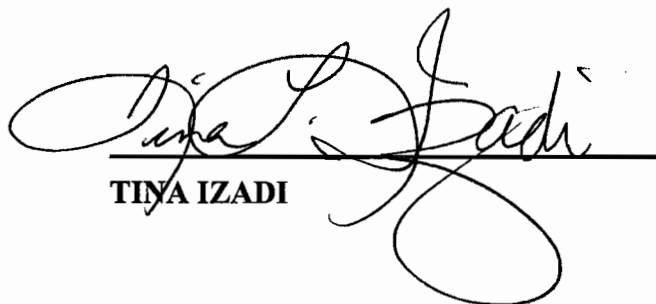
**Kevin Theriot**

**Joel Oster**

**David C. LaPlante**

Alliance Defense Fund  
15192 Rosewood  
Leawood, Kansas 66224

on this 24<sup>TH</sup> Day of MARCH, 2006.



TINA IZADI



### The ACLU vs America

*Exposing the Agenda to Redefine Moral Values*

A new book from ADF, *The ACLU vs America*, tells the truth about the American Civil Liberties Union's war on religious freedom, traditional values, marriage, the sanctity of life, and the United States of America.



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ADF's Alan Sears and Craig Osten lay bare the subversive plans, deceitful tactics, and shocking goals of the Left's leading legal powerhouse. Far from the noble protector of our constitutional rights many Americans believe it to be, the ACLU has from its earliest days deliberately and patiently chipped away at the legal, moral, and religious foundations of our Republic.

This book, which includes a long-term battle plan for victory, is must reading for every American committed to restoring our nation's Godly heritage and values.

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