

MAY 2012

REPORT



ISPU

A First Amendment Analysis of Anti-Sharia Initiatives

Asma T. Uddin (ISPU Fellow) and Dave Pantzer



Institute *for* Social Policy *and* Understanding

NOTE: This paper is an earlier draft of a paper being published by the First Amendment Law Review. Asma Uddin, A First Amendment Analysis of Anti-Sharia Initiatives, 10 First Amend L. Rev. ____ (forthcoming Winter 2012).



© 2012 Institute for Social Policy and Understanding. All rights reserved.

No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Institute for Social Policy and Understanding. The Institute for Social Policy and Understanding normally does not take institutional positions on public policy issues. The views presented here do not necessarily reflect the views of the institute, its staff, or trustees.



About The Authors



Asma T. Uddin

ISPU Fellow

Asma T. Uddin is a legal fellow at ISPU and the founder and editor-in-chief of altmuslimah.com. She is also an international law attorney with The Becket Fund for Religious Liberty, a non-profit, non-partisan, public interest law firm based in Washington, D.C. Prior to joining The Becket Fund, she practiced commercial litigation at Morgan, Lewis & Bockius in Philadelphia and corporate real estate at Greenberg Traurig in Miami. As Associate Editor and legal columnist for *Islamica Magazine*, Asma focused her writings on how American Muslims can rethink their social position within the American legal framework. Asma's writing has appeared in *Muslim Girl Magazine*, *altmuslim*, *beliefnet*, and in the *Guardian's Comment is Free*. She is also an expert panelist for the *Washington Post/Newsweek* blog, *On Faith*, and a contributor to *Huffington Post Religion*, *CNN's Belief Blog*, and *Common Ground News*. Her more scholarly work has been published in the *Rutgers Journal of Law and Religion*, *The Review of Faith & International Affairs* and the *St. Thomas University Law Journal*. She is a 2005 graduate of The University of Chicago Law School, where she was a member The University of Chicago Law Review.



Dave Pantzer

Dave Pantzer is a Maryland attorney and a judicial law clerk to the Honorable Michael J. Stamm. Prior to his current position, Dave served as a law clerk at *Schlachman, Belsky & Weiner, P.A.* in Baltimore and as a summer fellow at *Civil Justice* in Baltimore.

Dave is a former board member of the *Maryland Public Interest Law Project*, a member of the *Christian Legal Society*, and a pupil in the *American Inns of Court of Southern Maryland*.

He is a 2011 honors graduate of the *University of Maryland School of Law*. During law school, Dave studied mediation and was a national champion in the 2010 *ABA Representation in Mediation* competition.

Table of Contents

5	Executive Summary
8	Introduction
10	Part I: The Islamophobia Industry
	The Impact of Islamophobia
13	Part II: Islamophobia and the Law: Anti-Sharia Bills
	Oklahoma's "Save Our State Amendment"
19	The Constitutional Context: The Religious Liberty Protections of the First Amendment
	Introduction
	Awad v. Ziriax, et al.: Facts of the Case
	Awad v. Ziriax, et al.: Analysis
38	Conclusion



Executive Summary

Ten years after September 11, 2001, the American Muslim community continues to be surrounded by a fear created and promoted mostly by a small group of anti-Muslim organizations and individuals. Collectively, these groups have spread their message in twenty-three states through books, reports, websites, and blogs. Other anti-Islam grassroots organizations have utilized this propaganda to “educate” their constituency. The Center for American Progress defines *Islamophobia* as an “exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America’s social, political, and civic life.” This Islamophobia movement’s ability to influence politicians’ talking has made mainstream that which was once considered marginal, extremist rhetoric.

*Approximately half
of all Americans
hold an unfavorable
view of Islam.*

The impact of the Islamophobia campaign upon the American public’s perception of Islam and Muslims has been very negative. Approximately half of all Americans hold an unfavorable view of Islam. To date, dozens of bills have been introduced in more than half of the states to ban Sharia and/or international law. Some of these bills are overly broad, and some in essence would outlaw any organization that adhered to any Islamic jurisprudential school. The Muslim community pushed back, specifically because the regulations on common activities such as how to wash before prayer or how much money to give to the poor emanate from these same schools of thought and would cause great restrictions on their ability to practice their faith.

This report describes the broader climate of anti-Muslim sentiment, as promoted by anti-Islam grassroots organizations, and examines the various manifestations of this hate in light of the First Amendment. More specifically, this report analyzes the anti-Sharia bills and ballot measures proposed by numerous states and determines the extent to which they comply with free exercise and establishment principles and jurisprudence.

Key Findings

The American legal system has built-in safeguards

The crucial feature of any kind of arbitration is that an arbitrator, whether religious or not, has no ability to enforce the arbitral decision; only state or federal courts have that power. Moreover, there is an array of carefully crafted safeguards in place to protect individuals. For

example, arbitral decisions are annulled when there is evidence that the arbitrator completely disregarded the law or when the arbitrator refused to consider material evidence. Courts also review the arbitral decision to ensure that arbitrators are neutral, that the resulting arbitral decisions are neither grossly unfair nor undermine public policy, and that the parties agreed to take part in the arbitration of their own free will.

The anti-Sharia laws violate constitutional principles

The First Amendment to the American Constitution includes two Religion Clauses, the Establishment Clause and the Free Exercise Clause. Together, these Clauses provide guidelines for the relationship between the government and religion.

For one, the government may not officially choose among religions, or between religion and non-religion, in creating law. A significant purpose of the Religion Clauses is to protect religious groups from the overreaching of the state. They protect minority religions from state interference, which could arise where a religious (or secular) majority uses the democratic process to punish a minority, and they protect all religions, popular or unpopular, from state encroachment into purely religious matters. Moreover, the government may not generally prevent a person from believing and advocating a religious message; nor may the government prevent behavior simply because it is religious in nature.

Oklahoma's "Save Our State Amendment," the only anti-Sharia initiative to be challenged in court thus far, is a good example of how these laws violate the above-mentioned constitutional principles. The legislative history and the actual text of the Amendment make clear that its purpose is to treat Muslims differently than members of other faiths—it seeks to outlaw use of Sharia principles but does not mention principles of any other faith. It also places numerous burdens on Muslims' religious exercise. For example, if the Amendment were to become law, it would be impossible to enforce a will that is based on Sharia principles or to engage in Sharia-based arbitration. This unequal treatment of Muslims and burdens on their free exercise contradict core Religion Clause principles.

Broader Implications

When religious freedom is limited for one group, it necessarily affects religious freedom for all groups. Although anti-Sharia measures name Sharia specifically, if allowed to stand, they can limit the freedoms of Christians, Jews, and other faith groups in the United States who turn to religious arbitration as the preferred method of dispute resolution.

Recommendations

1. Clarify the meaning of Sharia: The American Muslim community should engage the broader public on Sharia's meaning and role. It should articulate what this word means generally and what it means to them specifically—that is, the articulation of the concept should not be merely theoretical but explained in concrete terms.
2. Differentiate Sharia from laws in Muslim-majority countries: Even more to the point, the American Muslim community should differentiate the ways Sharia is applied in differing cultural contexts. It is important to emphasize that the way it is applied in some Muslim-majority countries is very different than what is possible, or even preferable, in the American context. How does the American legal and social framework shape the application of Sharia law?
3. Disseminate information on religious arbitration and the First Amendment: Legal think tanks should organize lay-accessible information sessions on the First Amendment and religious arbitration. Many Americans are unaware that religious law is incorporated into the American legal system. How does this work in the case of Sharia? In the case of other religious laws? Americans need answers to these questions.

For one, the government may not officially choose among religions, or between religion and non-religion, in creating law.

Introduction

Ten years after September 11, 2001, the American Muslim community continues to be surrounded by a climate of fear and distrust largely created and promoted by a small group of anti-Muslim organizations and individuals. While small in number, they are nonetheless highly influential in the national and international perception of Muslims. A recent report by the Center for American Progress, “Fear, Inc.: The Roots of the Islamophobia Network in America,” examines these groups in detail, describing their sources of funding and the media enablers who help amplify their hateful message.¹

The individuals highlighted in the report run blogs promoting anti-Muslim sentiment and have co-founded the Stop Islamization of America (SIOA; <http://stopislamizationofamerica.blogspot.com/>) organization, which is entirely devoted to publicizing a supposed Islamic conspiracy to take over the country and deprive Americans of the fundamental rights granted them by the American Constitution.

This theme of an overpowering Islamic threat is also described in detail by another Islamophobia-promoting organization, the Center for Security Policy (CSP; www.centerforsecuritypolicy.org), run by a well-known anti-Muslim activist. CSP’s report, “Sharia: The Threat to America,”² is used to promote the sort of fear that has led several state legislatures to consider anti-Sharia bills and ballot measures that seek to block American judges from considering Sharia, defined here as “Islamic law.”³

The anti-Muslim rhetoric and fear-mongering is thus not without on-the-ground ramifications, several of which are manifesting in the legal or policy arena as anti-Sharia initiatives and a widespread resistance to building or expanding mosques. In some cases, such as the resistance facing the Islamic Center of Murfreesboro in Murfreesboro, TN, the hatred has resulted in serious cases of arson and vandalism.⁴

Part I of this report describes the broader climate of anti-Muslim sentiment, as promoted by the Islamophobia cottage industry, and Part II examines the manifestations of this hate through the lens of the First Amendment. More specifically, Part II analyzes the anti-Sharia bills and ballot measures proposed by numerous states and determines the extent to which they comply with free exercise and establishment principles and jurisprudence.



(٦) سورة التوبة

لَيْسَ لِيُذَكِّرَ اللَّهُ لِيُعَذِّبَهُمْ يَسَاءَ فِي الْحَيَاةِ
الدُّنْيَا وَتَزْهَقَ أَنْفُسُهُمْ وَهُمْ كَافِرُونَ

① وَيَخْلِفُونَ بِأَلْسِنَتِهِمْ لِيَنْكُرَهُ
وَمَا هُمْ بِبَرِّينَ وَلَا يَتَّقُونَ الْقَوْمَ

② لَوْ يَجِدُونَ مَلْجَأًا أَوْ مَقْرَنًا
أَوْ مَدَنًا لَوَلَّوْا إِلَيْهِ وَهُمْ
يَجْمَحُونَ

③ وَمِنْهُمْ مَن يَلْتَمِسُ فِي الصَّدَقَاتِ فَإِنْ
أَعْطُوا مِنْهَا رَضُوا وَإِنْ لَمْ يُعْطُوا

مِنْهَا إِذَا هُمْ يَسْتَغْطُونَ

④ وَلَوْ أَنَّهُمْ رَضُوا مَا آتَيْنَاهُمْ
مِنْهُنَّ وَقَالُوا خَشِينَا إِنَّ اللَّهَ

سَمِيعٌ عَلِيمٌ
وَرَسُولُهُ يُبَيِّنُ الْآيَاتِ وَاللَّهُ

39. ...thee : in reality
...lan is to punish them
...ese things in this life, ...s
...their souls may perish
...ery) denial of God.

by God
indeed
...y are not
...are afraid
...r true colours).

57. If the
A place
Or caves, or
Of concealment
Turn straightway
With an obstinate

8. And among them are men
Who slander thee in the matter
of (the distribution of) the alms
they are given part thereof,
...y are pleased, but if not,
...ld! they are indignant!

they had been content
t God and His Apostle
and had said,
nto us is God!
Apostle will soon
bounty :
urn our hopes ! "—
been the right
course). 1319

to run like a runaway
given in God's name
verse but one. Zaid
2½ per cent. of me
re on this subject.
All.
are fair game for rascals
such standards is alwa
r for his strictness to prin
e principles or those who
d are given to all, whether
excellent advice to say : de

PART I

The Islamophobia Industry

The Islamophobia campaign is led primarily by five key individuals and their organizations.

The Center for American Progress defines *Islamophobia* as an “exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America’s social, political, and civic life.”⁵ The Islamophobia campaign is led primarily by five key individuals and their organizations. While the names of these “misinformation experts” may be unknown to many Americans, their collective efforts have yielded them great influence in shaping the national and international political debate surrounding Islam, its teachings, and its followers.⁶

These misinformation experts are advancing a notion of Islam as an intrinsically violent ideology, the goal of which they say is to achieve dominance over the United States and all non-Muslims worldwide. They seek to define Sharia as a “totalitarian ideology” and “legal-political-military doctrine” committed to annihilating western civilization as we know it today.⁷

The network of experts is not a new fledgling group whose ideas are beginning to take root; rather, the group has exhibited a remarkable ability to organize, coordinate, and propagate its message through grassroots organizations that have increased in strength considerably over the past ten years. Such organizations include ACT! For America (www.actforamerica.org), the Stop Islamization of America (SIOA) group and a variety of more general organizations that have echoed their messages. SIOA in particular seeks to incite the public’s fears by constantly maligning Islam and avowing the existence of an Islamic conspiracy bent on destroying “American values.”⁸ Collectively, the groups have spread their message in twenty-three states through books, reports, websites, blogs, and carefully crafted talking points. Other anti-Islam grassroots organizations have utilized this propaganda to “educate” their constituency.⁹ Moreover, the Islamophobia movement’s ability to influence politicians’ talking points and ancillary issues for the upcoming 2012 elections has made mainstream that which was once considered marginal, extremist rhetoric.¹⁰

As strong as the grassroots organizations have become, the Islamophobia campaign is not being waged solely on a grassroots level; other organizations are working to promote misinformation about Islam and Muslims. Many of their leaders are well-versed in the art of capturing the press’ attention and have accessed a platform in the media.¹¹

The Impact of Islamophobia

The group galvanizing the Islamophobia movement has had, and continues to have, a visible impact upon the United States' national discourse on Islam and what it teaches. The misinformation experts' writings on Islam and multiculturalism seem to have helped create a worldview that paints Islam as being at war with the West and the West as needing to protect itself.¹² The group's players are steering the national and global debates on Islam, and the ideas they put forth have real consequences on the public dialogue about Muslims in this country.

The influential reach of Islamophobia's proponents into the legal and policy sphere can be seen in their campaign against what they allege to be a threat of Sharia's infiltration into American law. The first seeds in the anti-Sharia movement were planted in January 2006 when an attorney started the Society of Americans for National Existence (SANE). On its website, the attorney proposed a law that would make observing Sharia, which he compared to sedition, a felony punishable by twenty years in prison. He also began raising money to study whether there is a link between "Shariah-adherent behavior" in American mosques and support for violent jihad. The project, called "Mapping Shariah," connected him to a network of former and current government officials, security analysts, and grassroots political organizations. In the summer of 2009, he began writing "American Laws for American Courts," a model statute that would prohibit state judges from considering foreign laws or rulings that violate constitutional rights in the United States.¹³ Since then, his "model statute" has been cut and pasted into bills in South Carolina, Texas, and Alaska.¹⁴

To date, approximately seventeen states have either proposed or passed legislation to ban Sharia or, in a less direct fashion, "foreign law."¹⁵ An Oklahoma State Representative authored State Question 755, a constitutional amendment that appeared on the Oklahoma ballot of November 2, 2010.¹⁶ The bill, which required courts to only look to federal and state laws in deciding cases and explicitly prohibited the use of international and Sharia law, passed.¹⁷ When advertising his amendment, the Representative frequently referred to it as part of "a war for the survival of America" and "a pre-emptive strike," words voters likely recognized as part of the "war on terror."¹⁸ In a show of support, the non-profit organization Florida, Act! For America paid for over 600,000 telephone calls to voters. The "caller" was a former CIA Director and Oklahoma native who endorsed the amendment.¹⁹

The influential reach of Islamophobia's proponents into the legal and policy sphere can be seen in their campaign against what they allege to be a threat of Sharia's infiltration into American law.

The Oklahoma Representative was not the only politician endorsing Islamophobic rhetoric and proposing anti-Sharia bills. A Tennessee Senator of the Thirteenth District is also advocating the “war on Sharia.” It is no secret that his home district has been struggling with a heated debate: whether to allow a mosque to be built in Murfreesboro.²⁰ To many, his bill represented complete ignorance of Sharia and Islam, primarily because “it uncritically condemns Sharia and asserts that it represents a major threat to Tennessee,”²¹ a totally baseless and unfounded statement. The Senator’s bill equated Sharia with terrorism, without any evidence to corroborate the accusation, and relied on the rhetoric of the likes of Osama bin Laden to justify its necessity.²²

The impact of the Islamophobia campaign upon the American public’s perception of Islam and Muslims is evident as well. A *Washington Post-ABC News* poll taken in September 2010 showed that 49 percent of Americans held an unfavorable view of Islam, a substantial increase from 39 percent in October of 2002.²³ In a survey conducted as part of a report by the Public Religion Research Institute and the Brookings Institution, “What it Means to Be American: Attitudes in an Increasingly Diverse America 10 Years after 9/11,” 47 percent of respondents said Islam’s values are at odds with American values.²⁴ Respondents appeared divided over Sharia law, with 61 percent disagreeing that Muslims want to establish Sharia law in the United States. Regarding whether Americans believe that Muslims want to establish Sharia law here, the report quotes Robert P. Jones (CEO, Public Religion Research Institute): “2011 has been an enormously active year for this question.” Jones went on to say: “Forty-nine bills have been introduced in 29 states to ban Sharia law. We asked the same question back in February, and only 23 percent of Americans agreed Muslims want to establish [S]haria as the law of the land. That number has gone up to 30 percent, so still a minority, but the minority has grown.”²⁵

The American public, even if it is now divided on this issue, might not be split for much longer, as the Islamophobia campaign continues to spread the fear of Sharia contagion. Part II of this paper looks at how the movement has infiltrated not only the media, but also the institutions by which our laws are made and enforced. The language used by anti-Sharia campaigners in bills and ballot measures are discussed, as are the degree to which these measures accord with free exercise and establishment principles and jurisprudence.

PART II

Islamophobia and the Law: Anti-Sharia Bills

To date, dozens of bills across almost half of the states have sought to ban the use of Sharia and/or any category of international law.²⁶ Louisiana and Tennessee were among the first states to propose such bills.²⁷ When the Tennessee bill was first introduced to the floor, it was overly broad; it allowed the state's attorney general to outlaw any "Sharia organization"; defined Sharia as "any rule, precept, instruction, or edict arising directly from the extant rulings of any of the authoritative schools of Islamic jurisprudence of Hanafi, Maliki, Shafi'i, Hanbali, Ja'afariya, or Salafi"; and stated that these terms constitute "prima facie²⁸ Sharia without any further evidentiary showing."²⁹ In essence, this bill would outlaw any organization that adhered to any Islamic jurisprudential school. As expected, the Muslim community pushed back, specifically because the regulations on common activities such as how to wash before prayer or how much money to give to the poor emanate from these same schools. Since the bill was introduced and failed to pass, it has now been amended into an anti-terrorist bill prosecuting those who offer material or financial support to terrorist entities;³⁰ *Sharia* and *Islam* are not mentioned.

Unfortunately, dozens of other states have followed the growing trend of considering anti-Sharia legislation, taking cues from the Tennessee legislature. Nationwide, of all such bills proposed, only the ones in Arizona and Oklahoma have progressed.³¹ While the Arizona law has not been challenged, a federal district judge suspended Oklahoma's constitutional amendment before the State Election Board could certify the results, thus stopping the ballot initiative from becoming law until the conclusion of the lawsuit.³² The Tenth Circuit upheld the district court on January 12, 2012. The amendment explicitly sought to prohibit the consideration of Sharia and international law by the state's judges. All others bills have died in either the House or Senate of each state's respective Congress.³³

The proposed legislation fits into three general categories. The first category is the set of bills that single out Sharia law from all other legal traditions and describe it as treasonous and anti-American, similar to the first Tennessee bill introduced. A prime example of this type of legislation is Alabama's proposed (but now dead) bill:

The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.³⁴

Iowa, Missouri, and New Mexico’s bills incorporated the exact same language in their text,³⁵ whereas Wyoming outlaws Sharia law and prohibits the judiciary from citing other states that may permit its use.³⁶

The second category consists of those that list Sharia as only one of several other traditions it is outlawing—traditions the legislature believes are at odds with the American legal system (this version eventually died in Congress).

The bill stated that Arizona:

Prohibits courts from implementing, referring or incorporating or using “a tenet of any body of religious sectarian law” and specifically includes sharia law, canon law, halacha and karma, but exempts decisions based on Anglo-American legal tradition, laws or case law from Great Britain prior enactment of the statute, or the definition of marriage as between one man and one woman, “and the principles on which the United States was founded.”³⁷

It further prohibits Arizona courts from considering any church, mosque, or synagogue governance standards to resolve any issues regarding ownership of the house of worship and selection of ministers and congregation leaders.³⁸

The last category of bills is the most frequently proposed type, the “foreign or international law bill,” which refers to foreign laws broadly and do not mention Sharia specifically. Indeed, it is this kind of legislation that is under consideration by Michigan and has passed in Arizona.

Arizona’s law:

Defines “foreign law” as “any law, rule or legal code or system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this state....a court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States or conflict with the laws of the United States or of this state.”³⁹

In addition to its implied impact on the use of Sharia law, this law raises a concern regarding international treaties the United States may have signed or any agreements it has executed with Native American tribes.

Florida's proposed (but now dead) bill was similarly vague and overly broad in nature, for it blatantly prohibited any decisions "rendered under" a "foreign law, legal code, or system."⁴⁰ Iowa's definition of foreign law included "a religious law, legal code, accord, or ruling promulgated or made by an international organization, tribunal, or formal or informal administrative body." Any treaties to which the United States has agreed through the United Nations or the World Trade Organization would be subject to question under this bill. Michigan's proposed bill includes language identical to Iowa's legislation.⁴¹ South Carolina, South Dakota, Texas, and Missouri also had proposed bills with very similar wording.⁴²

Oklahoma's "Save Our State Amendment"

The Oklahoma constitutional amendment, upon which this paper primarily focuses, falls in the first category, singling out Sharia law (and Islam) for disfavor.

On May 25, 2010, the Oklahoma legislature adopted a resolution to place before the voters a proposed amendment to the state's constitution. The amendment would enumerate and restrict the sources of law that Oklahoma courts are permitted to consider in deciding cases. Specifically, they would be forbidden from "consider[ing] international law or Sharia Law." The resolution laid out the text of the proposed constitutional amendment, titled State Question No. 755, the final version of which reads:

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. **It forbids courts from considering or using Sharia Law.**

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

SHALL THE PROPOSAL BE APPROVED?

FOR THE PROPOSAL — YES AGAINST THE PROPOSAL — NO

The two subsections sought to be added to the Oklahoma Constitution provide as follows:

B. Subsection C of this section shall be known as the “Save Our State Amendment”.

C. The Courts provided for in subsection A of this section when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. **Specifically, the courts shall not consider international law or Sharia Law.** The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.

The House and Senate bills creating Question 755 passed in those bodies by overwhelming and bipartisan margins, while those few House members who voted against placing the initiative on the ballot faced tremendous hostility.⁴³ A July 2010 poll found that nearly half of likely voters favored the measure, and that over a quarter were undecided.⁴⁴ When presented on the ballot, however, the State Question passed by a wide margin. Nearly 700,000 Oklahomans voted “Yes,” while fewer than half that number voted “No.”

Like all anti-Sharia initiatives, the Oklahoma ballot initiative is not only deeply problematic from the perspective of social and political hostility toward Muslims, but also because the government's involvement in such acts violates constitutional principles of religious liberty.



The Constitutional Context: The Religious Liberty Protections of the First Amendment

Introduction

The First Amendment to the American constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴⁵ The very first words create what are known as the Establishment Clause and the Free Exercise Clause. These two clauses set up the guidelines that represent the United States’ commitment to the relationship between the authority of civil government and the religious commitments of its people.

The guidelines these provisions create work like this: The Establishment Clause says that the government may not officially choose among religions—and in some interpretations, between religion and non-religion—in creating law. The Free Exercise Clause says that the government may not generally prevent a person from believing and advocating a religious message; nor may the government prevent behavior simply because it is religious in nature. Both of these provisions, originally binding only upon the federal government, now bind state governments as well, due to the Fourteenth Amendment.

The Establishment Clause

The Establishment Clause seeks to prevent the spheres of civil government and religion from exerting improper influence on each other. Thomas Jefferson famously referred to its effect as the erection of “a wall of separation between church and State.”⁴⁶ The metaphor of a wall suggests symmetry—the barrier that keeps religion from unduly interfering with the state likewise keeps the state from meddling in religious matters.

Michael McConnell has defined an establishment as “the promotion and inculcation of a common set of beliefs through governmental authority.”⁴⁷ At this point in time, “[m]odern constitutional doctrine stresses the ‘advancement of religion’ as the key element of establishment.”⁴⁸ Historically, however, religious groups experienced a great deal of government control, largely through the legislation of religious doctrine and the government’s power to appoint religious leaders.⁴⁹ Thus, a significant purpose of the Establishment Clause is to protect religious groups from the overreaching of the state. In various ways, the Establishment Clause protects both minorities and majorities. It protects minority religions from state interference, which could arise where a religious (or secular) majority uses the democratic process to punish

The metaphor of a wall suggests symmetry—the barrier that keeps religion from unduly interfering with the state likewise keeps the state from meddling in religious matters.

a minority, and it protects all religions, popular or unpopular, from state encroachment into purely religious matters.

The Supreme Court has explained that even laws that do not “establish” a state religion may offend the First Amendment by “being a step that could lead to such establishment.”⁵⁰ Three factors, called the *Lemon* test, have been used to determine whether a law passes muster under the Establishment Clause.⁵¹ “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”⁵²

The Free Exercise Clause

The Free Exercise Clause also protects important rights of members of religious groups. While free exercise protections protect individuals, they also operate on the basis of the individual’s association with a religious group. The collective is especially important in persuading courts about the validity of one’s religious beliefs.⁵³

This clause provides different levels of protection to different religious rights. Absolute protection is given to propositional religious belief. “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such.”⁵⁴ The right to advocate religious beliefs, while not absolute, is also strongly protected, in much the same way as speech in general is protected.⁵⁵

While the right to believe as one chooses and to proselytize are important religious rights, the greatest tension arises in the question of the extent to which religiously motivated *actions* are protected from government intrusion. One way the government may seek to reconcile its general laws with its citizens’ religious convictions of its citizens is through the provision of religious exemptions to certain legal requirements. The Free Exercise Clause provides certain guidance regarding such exemptions.

At one extreme, the Supreme Court has made it clear that the Free Exercise Clause does not give religiously motivated individuals *carte blanche* to break the law. Neutral, generally applicable laws must be followed, even if they limit religious practice in some way.⁵⁶ The Constitution, however, does protect individuals from government discrimination on the basis of religion

by allowing for religious exemptions provided on an individualized basis. If the government provides for a system of exemptions from a neutral, generally applicable law, it “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”⁵⁷

Further, in determining whose interests are sufficient to warrant a departure from a common legal scheme, when the government favors secular motivations over religious ones, “the government’s actions must survive heightened scrutiny.”⁵⁸ And if the government specifically restricts a practice because of its religious nature, “the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”⁵⁹ Notably, one significant interpretation of the First Amendment has been advanced that gives a higher level of protection to individual behavior motivated by religious belief. This interpretation would demand strict scrutiny of any law burdening religious practice.⁶⁰

Thematically, the Free Exercise Clause evidences recognition by the state that, to the extent that government allows citizens discretion in ordering their lives and absent a compelling government interest to the contrary, government should allow individuals to order their lives according to their religious beliefs.

The Religious Question Doctrine

The First Amendment can be thought of as recognizing two separate spheres in which the separate demands of government and religion operate. “[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”⁶¹ There are, however, limits to this separation. At one end of the spectrum, courts have to engage in fact-finding in order to determine whether a specific practice or doctrine is in fact “religious.”⁶² Jared Goldstein points out that “[f]actual inquiry into the meaning and content of religious doctrines and practices thus cannot plausibly be prohibited as long as courts are called upon to construe and apply the Religion Clauses and myriads of statutes giving special treatment to religion.”⁶³ At the other extreme, courts may not decide the validity of religious truth. This, of course, would be a direct violation of the Establishment Clause.

The intermediate case of a court’s competence to adjudicate the content of a religious doctrine is more complex. Early on, the Supreme Court stated that American judges cannot be considered as competent in the area of religious practice and doctrine as are the experts

The right to advocate religious beliefs, while not absolute, is also strongly protected, in much the same way as speech in general is protected.

within those religious communities.⁶⁴ More recently, a class of cases has arisen in which courts have been asked to decide between competing views of orthodoxy. When a local church and its denomination disagree over matters of doctrine, a local church will sometimes break away from its denomination. This can produce a property dispute, as when the property on which the local church is built is owned by one party and held in trust for the other party.

A Georgia case that came before the United States Supreme Court involved such an instance.⁶⁵ The case “was submitted to the jury on the theory that Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches.”⁶⁶ Enforcement of that principle required a jury to decide “whether the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the (general church), so that the new tenets and doctrines are utterly variant from the purposes for which the (general church) was founded.’”⁶⁷ Although the jury found for the local churches, the Supreme Court held that the First Amendment does not permit civil courts to engage in religious questions for the purposes of resolving property disputes.⁶⁸ Civil courts cannot become involved in religious questions, nor should they determine the importance of those questions to the religion.⁶⁹

What allows the court to look into the content of a religion in the context of assessing a free exercise claim on the one hand, but prohibits it from deciding a property dispute on the other hand? Kent Greenawalt argues that the difference is in the selection among competing religious claims. If a court delved into religious doctrines to resolve an internal property dispute, it would necessarily privilege one religious interpretation over another by virtue of ruling in favor of one and against another. But merely assessing whether a given belief has religious content does not mean that the court is deciding among competing religious interpretations.⁷⁰

This analysis makes sense in light of conceptualizing the free exercise rights as individual rights enjoyed on the basis of membership in a religious group. The court needs to test the claim of the individual against the backdrop of the group, but may not prefer the understanding of one group to that of another.

However, Goldstein has argued that a court should be free to examine the existence and content of doctrines in a manner that does not pass judgment on their actual truth.

[J]udicial examination of positive questions about religion is *not* akin to judicial examination of normative religious questions. To describe is not to judge, and the determination of what beliefs people hold does not require a determination of whether those beliefs are correct. Judicial examination of the content of religious doctrine is more akin to judicial determinations of the content of foreign law: when a court determines what the law of England or Italy is, it does not judge the validity of those countries' laws or endorse the policies behind those laws. Courts are just as capable of determining what Judaism or Hinduism have to say as they are at determining what the laws of Israel or India are.⁷¹

The question of what religious determinations a court may make presents a challenge. As the Supreme Court indicated, religious experts are presumably more competent in religious questions than civil judges. Goldstein, however, argues that judges are intellectually just as competent to ascertain the content of religious doctrine as they are any other kind of law.

Questions of competence aside, however, the very intrusion of civil authorities into matters of religious doctrine can lead to an imposition of one interpretation or version of the religion on members of the faith who may disagree with that interpretation.⁷² As such, while courts routinely make certain basic determinations regarding the religious status of doctrines, they are hesitant to settle disputes internal to a religion.

Awad v. Ziriax, et al.: Facts of the Case

Challenging Oklahoma's "Save Our State Amendment"

On Tuesday, November 2, 2010, Oklahoma held its statewide general election. State Question 755, the ballot initiative presenting the "Save Our State Amendment" (SOS Amendment) passed by a wide margin. On Thursday, November 4, Oklahoma City resident Muneer Awad and executive director of the Oklahoma chapter of the Council on American Islamic Relations (CAIR), filed suit against members of the State Board of Elections to prevent them from certifying the election results for that question.⁷³

On November 29, the judge granted Awad's request for a preliminary injunction. Thereafter, defendants appealed to the Tenth Circuit Court of Appeals.⁷⁴

In his case against the SOS Amendment, Awad argues that the amendment violates his rights under both the Establishment Clause and the Free Exercise Clause.

1. The Establishment Clause Claim: The amendment sends an official state message of disfavor for Awad's faith

As stated above, the SOS Amendment provides that Oklahoma courts "shall not consider international law or Sharia Law" and that the courts may not look to the laws of other states if those laws "include Sharia Law." The State Question described Sharia law in definite religious terms, as "Islamic Law" based on "the Koran and the teaching of Mohammed." Thus, Sharia law is the only particular body of law specifically proscribed by the amendment.

Awad argues that the SOS Amendment labels him as a political and social outsider because of his Islamic practice and belief; characterizes his Islamic religious beliefs as a threat from which Oklahoma must be saved; and conveys "the unmistakable message that [his Muslim] faith is officially disfavored by the State generally, and the judicial system, in particular."⁷⁵ As such, he argues, the state has made an official choice of a religion to treat with special disfavor. Since the Establishment Clause prohibits the state from favoring any particular religion, it follows logically that the state may not disfavor a particular religion.

2. The Free Exercise Clause Claim: The amendment makes Awad uniquely unable to draft a reliable will without "scrubbing" it of religious terms

Awad's last will and testament provides for certain charitable allotments to be made "in a manner that does not exceed the proscribed limitations found in Sahih Bukhari, Volume 4, Book 51, Number 7."⁷⁶ It also provides for the preparation of Awad's corpse in a manner that "comports precisely with the hadith enumerated in Sahih Bukhari, Volume 2, Book 23, Number 345,"⁷⁷ and for "a burial plot that allows my body to be interned [sic] with my head pointed in the direction of Mecca."⁷⁸ These deeply significant instructions flow from "what [the SOS Amendment] defines as Sharia law."⁷⁹

Awad argues that the SOS Amendment interferes with his ability to make a will that reflects his wishes for his final affairs upon his death. Since his will "refers to and incorporates his Islamic

religious beliefs,” the amendment “will render those portions unenforceable.”⁸⁰ Even though it is impossible to know, before his will is probated, how a court will handle the portions of the will incorporating these religious beliefs, the amendment’s very presence creates a “cloud of uncertainty over the will’s full enforceability because of its religious references.”⁸¹

As such, Awad argues, it “imposes a special disability on Mr. Awad and other Muslims seeking relief in the state courts in a variety of contexts. While citizens of other faiths need not scrub religious expression and terms from their legal documents to protect their enforceability, Muslims must.”⁸² This disability represents a burden placed on Awad by the state, in contravention of the Free Exercise Clause, simply because of the particular religious nature of his activities.

Awad v. Ziriaux, et al.: Analysis

A First Amendment Analysis of Ballot Measures: Additional Considerations

The First Amendment analysis of Oklahoma’s anti-Sharia initiative raises a few issues unique to voter-approved ballot measures. Unlike anti-Sharia bills proposed and passed by the legislature, the intent behind ballot measures is more difficult to ascertain, as thousands of voters are ultimately responsible for enacting a ballot referendum. As a general rule, voter animus is difficult to prove and the law discourages any such probing. As the Ninth Circuit has noted in such cases, “[i]f the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.”⁸³

There are, however, cases where the Court has permitted inquiry into the legislative intent behind ballot referendums. In *Reitman v. Mulkey*, the Supreme Court held that inquiry into voter intent is permissible if the “only ‘conceivable’ purpose” was racial discrimination.⁸⁴ The Court also stated, in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, that if the ballot initiative has been enacted, then courts can assess the “statements made by decision makers or referendum sponsors during deliberation over a referendum” to determine whether the referendum was intended to be discriminatory.⁸⁵ The Oklahoma anti-Sharia initiative is an enacted referendum, and it is thus entirely appropriate to inquire into the intent of referendum sponsors.

Moreover, as described above, a law is subject to attack under the Establishment Clause not just if it fails to have a secular purpose, but also if its primary effect is to advance or inhibit

“While citizens of other faiths need not scrub religious expression and terms from their legal documents to protect their enforceability, Muslims must.”

religion. In addition, if the law encourages excessive entanglement between the state and religion, it is equally open to attack.⁸⁶ As such, regardless of whether legislative bias can be proven, the Oklahoma measure remains vulnerable to First Amendment critique if it fails to satisfy the remaining two prongs of the *Lemon* test.

Threshold Inquiries: Standing, Ripeness, and Irreparable Harm

Some of the primary issues on appeal are whether Awad has standing to bring his First Amendment claims, whether his claims are ripe for adjudication, and whether the harms he claims are irreparable.

The case was appealed to the Tenth Circuit, where the defendants argued that, as of the date he filed his case, Awad did not suffer an immediate injury.⁸⁷ Rather, Awad's claim that the anti-Sharia amendment condemned his religion was, according to the defendants, merely a personal opinion and did not establish imminent injury.⁸⁸

They also argued that feelings of offense and alienation do not constitute injuries in fact, and thus Awad is in no position to bring a case.⁸⁹ Furthermore, on Awad's Establishment claim, the defendants contend that until Oklahoma courts interpret the amendment, any assertion that it leads to excessive entanglement between religion and state is mere speculation.⁹⁰

Similarly, on the question of whether Awad's claim was ripe for adjudication, the defendants asserted that he and the district court were speculating as to the judicial interpretation of the anti-Sharia bill, construing its meaning in only one way, that is, as limiting the practice of Islam.⁹¹ The defendants argued that this was neither the meaning nor the intent of the law, and that Oklahoma courts could feasibly interpret the bill in a manner that would not violate any citizen's First Amendment freedoms.⁹²

Finally, they contend that Awad failed to make a showing that he would suffer irreparable harm by virtue of the bill being enacted into law. They agreed with the District Court that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."⁹³ However, they argued that the court failed to find that the plaintiff would suffer a clear and definite injury, aside from the bill's potential to "villainize and demonize the Muslim community of Oklahoma."⁹⁴

The Tenth Circuit heard oral arguments in the case on September 13, 2011, and on January 12, 2012, upheld the lower court’s ruling. During arguments, the judges focused on one primary question to the defendants: Does this law not single out Muslims and disfavor Islam as a religion?⁹⁵ The defendants argued that it would not because the law was not intended to be discriminatory and seeks to address only those portions of Sharia that would trump American law.⁹⁶

A First Amendment Analysis of the SOS Amendment

Now that the Tenth Circuit has confirmed that Awad has standing to bring the suit, the district court will evaluate his claims in light of the First Amendment’s Establishment Clause and Free Exercise Clause. Further, in addition to the specific claims set forth by Awad, the SOS Amendment raises several other issues requiring First Amendment analysis.

1. Mr. Awad’s Claims

A. Awad’s Establishment Clause Claim: State Disfavor of Islam

As explained above, Awad’s Establishment Clause argument is that the SOS Amendment sends an official state message of disfavor for his faith. As discussed below, more important than any claims of stigmatization is the effect that this unique disfavoring has on Muslims selecting desirable arbitration options and seeking to enforce legal documents based on Sharia principles.

Moreover, to pass Establishment Clause muster, a law must pass each prong of the *Lemon* test. First, it “must have a secular legislative purpose.” While the provisions of the SOS Amendment relating to international law may be entirely motivated by secular considerations, it is implausible that the repeated references to Sharia law are so motivated. In defining Sharia law for voters, the ballot language stated simply: “Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.” Indeed, legislative sponsor Duncan’s view of the effect of the bill was that it would close a “back door way to get Sharia law in the courts” by preventing parties from “say[ing] we want to be bound by Islamic law and then ask[ing] the courts to enforce those agreements.”⁹⁷ In fact, dispute resolution based on the principles of a variety of religions is common in the United States.⁹⁸ Seeking to prevent parties from using Islamic principles in particular—but not those of any other faith—demonstrates a sectarian, and not a secular, purpose.⁹⁹

Seeking to prevent parties from using Islamic principles in particular—but not those of any other faith—demonstrates a sectarian, and not a secular, purpose.

B. Awad's Free Exercise Clause Claim: Enforcement of Islamically-based Will

Awad's Free Exercise Clause argument is that the amendment makes him uniquely unable to enforce his will without "scrubbing" it of religious terms. The reason for this is that his will makes reference to religious instructions contained in sources that, under the SOS Amendment, would be classified as Sharia law. These instructions involve, among other things, the distribution of Awad's assets and the preparation and interment of his corpse. The instructions flow from specific sources within the corpus of Sharia law, and verifying the proper execution of the instructions could require a court to make a basic analysis of the sources.

The defendants disagree, stating: "The measure is merely a choice of law provision, applicable to the courts of Oklahoma. It neither favors nor discriminates against any religion. The measure bans Oklahoma courts from considering the laws of other nations and cultures, regardless of the religious origins of such laws, if any. It is therefore a neutral law of general applicability and does not raise free exercise concerns."¹⁰⁰ But as the lower court pointed out, "the actual language of the amendment reasonably, and perhaps more [than?] reasonably, may be viewed as specifically singling out Sharia Law (plaintiff's faith) and, thus, is not facially neutral."¹⁰¹ Indeed, their argument that the amendment merely bans consideration of "the laws of other nations and cultures, regardless of the religious origins of such laws, if any" does not make sense. By its own terms, the amendment takes aim at exactly two sources of law: "international law" and "Sharia law." Sharia law is defined, in the language of the ballot initiative, in purely religious terms. Far from being the law of another nation or culture, Sharia represents the religious convictions of many Americans, including Awad.

Under current First Amendment jurisprudence, "if the object of a law is to infringe upon or restrict practices because of their religious motivation," the government will have the last word only in cases where it can show a compelling interest in its desired purpose and where it narrowly tailors a legal requirement to that interest.¹⁰² And because the amendment's plain language and legislative history show that the object of the Sharia provision is to create a restriction based solely upon religious (Islamic) consideration, the compelling interest/narrowly tailored test is appropriate to the SOS Amendment.

Significantly, the district court found that the defendants "presented no evidence which would show that the amendment is justified by any compelling interest or is narrowly tailored."¹⁰³ It

would, of course, be possible for Sharia law, in certain situations, to require results that the government has a compelling interest in preventing. (A hypothetical conflict between the laws of Oklahoma and Sharia law posited by the defendants gives an example: “if Sharia law so provided, Mr. Awad could not provide in his will for his wife to receive none of the property they acquired during their marriage.”¹⁰⁴) But even in the face of a compelling interest, a state may not infringe the Free Exercise rights of its citizens by a law that is not narrowly tailored to protecting that interest. Considering the wide range of application of Sharia principles in the lives of Muslims, a blanket ban of all Islamic law is plainly not narrowly tailored.

To the extent that enforcing Awad’s will would require the court to decide a contest between two interpretations of Islam, the religious question doctrine, described above, already acts to prevent that. But where a court simply looks for guidance to clear principles of law or religion referenced in a will, nothing should prevent the implementation of Awad’s desires. To deny him the ability to make these important decisions with reference to the principles of his religion flies in the face of the religious freedom guaranteed by the First Amendment.

2. Further Issues Requiring First Amendment Analysis

The SOS Amendment, if implemented, would have a wide range of effects. Awad identified two, discussed just above. Beyond these two, and suggested by them, a host of other effects remain to be considered, such as preventing judges from properly considering factors relevant to a dispute’s background, limiting their ability to craft equitable remedies, and providing unequal protection for persons who make use of private Islamic arbitration.

Due to the “wall of separation” created by the Establishment Clause, the only way in which American citizens may become bound by religious law or any non-American law is by their own choice. Parties constantly submit to private or religious law in our society. Every valid contract entered into by two parties becomes, as between them, a source of private law. The law embodied in private contracts is neither federal nor state law; rather, it is a binding agreement entered into freely. Similarly, when Awad made out his will and incorporated specific provisions motivated by his Islamic faith, he made a free choice as to the disposition of his assets and the manner of his burial. That Americans have the freedom to make such choices, where the choices themselves do not conflict with society’s greater interests, is beyond debate.

A. The Relevance of Sharia Law to the Background of a Dispute

If two Muslims enter into a contract that requires one to do something that makes reference to an Islamic concept, a court might need to examine what each party believed the import of the contract to be. Examples could include an employment contract under which an employer agrees to allow an employee to perform daily prayers, make a hajj pilgrimage, or to come to work at a different time during Ramadan. If the Muslim party seeks to enforce this contract, there may be no dispute about the appropriate interpretation of the religious doctrines implicated. Rather, the dispute may be about whether the two parties ever had a meeting of the minds with regard to the contract. In order to ascertain what was in the mind of the parties, the court might find it necessary to examine basic Sharia law concepts.

Alternatively, if one party contracted to provide for the other party to make the hajj pilgrimage and defaulted, the court might order the defaulting party to pay to the other party an amount of money that would allow him/her to make such a pilgrimage. Such a calculation would not entail the decision of a religious dispute, but would require the court to have a basic understanding of what a hajj pilgrimage is. In these cases, in order to understand what parties meant to contract for as well as to give effect to such a contract, even in the absence of any dispute as to the religious doctrines or definitions implicated, the court would need to make minimal findings of fact about Sharia principles. Under the Oklahoma law, such findings of fact would be prohibited if, and only if, they relied upon Sharia. In contrast, if a company violated a contract provision allowing an employee to take time off to observe a non-Islamic religious holiday, like Yom Kippur or Good Friday, the court would not be prevented from making a finding of fact regarding, for instance, the date of the holiday.

With regard to this effect of the legislation, it is not clear whether the legislators or people of Oklahoma intended to disfavor Islam with the absurd consequences that flow from the amendment. Rather, the disability imposed on courts to make factual inquiries into basic cultural ideas underlying Sharia law is likely an unforeseen consequence. This effect, however, does place an unreasonable strain on the religious liberty values underscored by the Establishment Clause and Free Exercise Clause by failing to reasonably accommodate the desire of individuals to order their lives according to their religious beliefs.

B. The Relevance of Sharia Law to a Judge's Decision-making Process

A troubling effect of the legislation is that it would deny judges the discretion to consider the Sharia-based beliefs of litigants as they craft equitable remedies or sentences. “Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”¹⁰⁵ A denial of consideration of those private needs, simply because they belong to Muslims, is antithetical to the United States’ commitment to protect its religious citizens.

For example, if a judge seeks to impose community service hours on a Muslim or to craft a visitation order in a custody dispute between two Muslims, fairness to the litigants suggests that the timetables of their needs to perform religious duties be considered. Yet the amendment would disallow even such basic Sharia-based considerations. As in the discussion relating to the judge’s need to consider a dispute’s background facts, so too in crafting equitable remedies a judge needs to make at least a basic examination of the content of Sharia law.

Again, it is unlikely that the legislators or people of Oklahoma purposed to disfavor Islam with the absurd consequences that flow from the amendment. Rather, these burdens were likely unforeseen. As before, this effect places an unreasonable burden on American religious liberty values by failing to reasonably accommodate the desire of individuals to order their lives according to their religious beliefs.

C. Unequal Protection of the Courts for Sharia-based Arbitration Tribunals

As explained above, one of the SOS Amendment’s stated objectives was to prevent Islamic religious arbitration. In fact, the amendment would provide a substantially inferior level of court protection to litigants who use Sharia-based alternative dispute resolution than to litigants who use Alternative Dispute Resolution (ADR) options based in Christian or Jewish religious principles. As such, it would provide unequal protection under the law based solely on litigants’ choice of religious principles.

Representative Duncan, then chair of the Oklahoma House Judiciary Committee and author of the resolution, discussed the application of Sharia law by foreign courts during a Fox News interview with Sean Hannity. Responding to a question about Sharia law in Great Britain,

Duncan replied:

Well, it's not unprecedented, and that's the problem. People will not open their eyes, or they choose to look the other way. Sharia law has come to Great Britain. I've described it as a cancer upon Great Britain's survivability. It is that serious. There are dozens of Sharia type courts there. . . .¹⁰⁶

Duncan went on to describe the British situation as follows:

Well, what it would entail is, say, a domestic case, a family, a divorce or child custody, arbitration. These parties would come to the court and say we want to be bound by Islamic law and then ask the courts to enforce those agreements. That is a back door way to get Sharia law in the courts. Now there will be efforts, have been some efforts, I believe, to explore bringing that to America, and it's dangerous. It would be the same cancer upon American courts it is in Great Britain.¹⁰⁷

The examples Duncan gives are illustrative of the provision's intent as it relates to Sharia law. It appears that this provision was intended to foreclose parties' ability to invoke Sharia law in agreements in several areas. Duncan talks about arbitration and enforcing agreements, giving specific examples from the family law context.

His view of the bill's effect was that it would close a "back door way to get Sharia law in the courts" by preventing parties from "say[ing] we want to be bound by Islamic law and then ask[ing] the courts to enforce those agreements."¹⁰⁸ Interpreted in light of this background, the amendment would operate to delegitimize agreements made by private parties on the basis of Sharia law principles by refusing those agreements the protection of court enforceability. It is a current practice among some American Muslims to use arbitration clauses providing that Islamic tribunals arbitrate disputes under the contract.¹⁰⁹ Examples of disputes submitted to imams at local American mosques include "family disagreements, inheritance, business disputes, marriage, and divorce issues."¹¹⁰ While nothing in the Oklahoma provision prevents Muslims from contracting with such arbitration provisions, or in fact from using Islamic or

Sharia-based dispute resolution, the provision apparently seeks to prevent courts from taking any action that requires consideration of the Sharia principles underlying an arbitral decision.

Two examples show how a court might be called upon to enforce an agreement in a way that “considers” Sharia law. In the first, two parties simply write a contract and state that the contract is to be interpreted in light of Sharia law. When seeking to enforce the contract, one party sues the other in an Oklahoma court. Both parties agree that the contract is binding, but present alternative views on their responsibilities under the contract due to their different views of Sharia law. The court is forced to examine Sharia law and to decide which view represents a more valid interpretation. Such a court decision would certainly necessitate a “consideration” of Sharia law, which would not be permitted by the Oklahoma provision. But such a decision might be disallowed already by the religious question doctrine. If it is, the Oklahoma amendment would be duplicative and without effect in this area.

At the outset, as argued above, a court is *intellectually* competent to decide what is required under any legal system, religious or otherwise. Yet because they are not *institutionally* competent to settle disputes internal to a religion, the decision in this example might look no different if the litigants were Christian or Jewish and the contract called for interpretation according to the dictates of those religions. Since under the religious question doctrine the courts would be no more constrained with respect to Sharia law than to any other religious law, it appears that the Oklahoma provision would have no effect in this example beyond expressing the kind of disfavor discussed above.

In the second example, two parties write a contract and include an arbitration clause that states that Sharia law will govern the arbitration and that a specific Islamic arbitration tribunal will perform it. Both parties again admit the force of the contract but litigate their separate views of their obligations before the designated tribunal. This time, a religious tribunal to which both parties have submitted themselves chooses the prevailing interpretation and makes its award. The losing party then asks an Oklahoma court to vacate, or annul, that award.

A civil court can annul an arbitral award only under certain, limited circumstances, such as when the arbitrator demonstrated a “manifest disregard of the law.”¹¹¹ This standard covers

*...this effect places
an unreasonable
burden on American
religious liberty
values by failing
to reasonably
accommodate the
desire of individuals
to order their lives
according to their
religious beliefs.*

cases where the arbitrator did something more than err in applying governing principles of American law; rather, it covers cases where the “arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.”¹¹²

While manifest disregard for American law provides a clear basis for annulling an award, the situation becomes trickier when an arbitrator in an Islamic tribunal may have manifestly disregarded a principle of Islamic law. In this case, establishing grounds for annulment in court would require establishing a clearly governing legal principle of Sharia, which would be impossible to accomplish without offending the Oklahoma anti-Sharia amendment. In this instance, the Islamic tribunal’s unjust decision would not be subject to annulment because the court would be prevented from the required review of Sharia.

As with the first example, it is necessary to determine whether the religious question doctrine would prevent such a review regardless of the religion involved. In this instance, it appears that the religious question doctrine would not prevent such a review. As discussed above, courts frequently have to make evaluations of religious doctrine to determine which beliefs warrant First Amendment protection. For instance, a court has decided that it is constitutionally necessary to allow prison inmates access to prohibited literature because of its religious content.¹¹³ Such evaluations are necessary in order for the court to provide the religious protections called for by the Constitution. Given that establishing “manifest disregard for the law” is fairly difficult, and given that the court can remand such cases either to the same arbitrator or a new arbitrator, the risk of the state making legal decisions that impermissibly affect religious practice are mitigated.

Another possible ground of annulment under Oklahoma law is that an arbitrator failed to consider evidence that was relevant to the controversy.¹¹⁴ Michael Grossman points out that “[i]n religious tribunals, rulings on admissibility of evidence are determined by religious law.”¹¹⁵ Thus, it might seem that in examining the admissibility of evidence, a reviewing court might get involved impermissibly in a religious question. However, again it appears that this situation does not present an impermissible religious question. If the court decides that a tribunal refused to consider relevant evidence, it can remand the matter to the tribunal. If the evidence is not admissible under religious law, then the tribunal, in showing that it has considered the evidence, only needs to explain why it is not admissible as such.

In cases where neither party asks the court to vacate the arbitral award, the prevailing party in the arbitration can apply to a court to confirm the award.¹¹⁶ Confirmation provides the prevailing party with an enforceable judgment and does not require the court to decide religious questions.¹¹⁷

In short, it appears that the level of consideration necessary for a court to review the award of a religious arbitral tribunal, whether to confirm or vacate it, does not rise to the level of implicating the religious question doctrine. Thus, it would not prevent the full and free use of religious arbitration to Christian, Jewish, or other religious litigants. But the Oklahoma amendment goes further than the religious question doctrine by forbidding any court consideration of Sharia law. As such, it would disallow court vacation of even the clearest cases of abuse by a tribunal, even though Islam is not the only religion to offer religious arbitration.¹¹⁸ The fact that court protection in such a scenario would be available to a Christian, a Jew, or any other religious litigant other than a Muslim (or any individual electing arbitration under Sharia law) shows that the effect of the amendment would be to deny Muslims equal protection under the law in the context of arbitration.

Since the Oklahoma amendment forbids any court consideration of Sharia law, it would disallow Muslim litigants court protection in certain cases of arbitral abuse. It is possible, though not certain, that courts would see this as a due process violation and simply disallow the confirmation of such arbitral awards. Muslim litigants will, as such, find themselves caught between a rock and a hard place: they will either have access to court-enforceable Islamic arbitration, but no protection in case of an unfair award given in manifest disregard of the law, or they may be denied any binding Islamic arbitration option.

This dilemma, based as it is on religious status, offends First Amendment religious liberty values. First, part of the purpose of the Oklahoma amendment, as explained by its author Rex Duncan, was to prevent parties from being able to enter into court-enforced arbitration agreements in order to be bound by Islamic law. The law was not designed to prevent any other form of religious arbitration. Christian, Jewish, and Islamic groups all provide religious arbitration. In fact, some Christians and Muslims practice religious arbitration of one kind or another as a tenet of their faith.¹¹⁹ Thus, it appears the government of Oklahoma has acted with the purpose of disfavoring one religion: Islam. Even if this purpose was a secondary

purpose, the Supreme Court has stated that “if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”¹²⁰ In the case of the Oklahoma amendment, Muslims are forced to choose between religiously mandated behavior and receipt of a government benefit: the court enforcement and procedural protection of Sharia-based arbitration.

It might be argued that Oklahoma’s complete hands-off policy toward Sharia law represents an appropriate deference to religious authorities in religious matters. Certainly, by the terms of the amendment, the state refuses to arrogate to itself any authority on matters of Sharia law. But since the amendment strips away the benefit of religious arbitration rights for all Muslims, the state cannot be said to be deferring to religious authorities so much as to decimating the weight of that authority as it pertains to agreements between Muslims. If Muslims are denied the right afforded to other religious groups, that of having have fair and court-enforceable religious arbitration, one of three results may obtain: they must forego civilly binding appeals to religious authority, risk submitting to Islamic tribunals without the due process protections given to all other parties to arbitration, or Islamic tribunals must seek to enforce their decisions themselves. If Muslims know that they cannot seek either enforcement or protection from an Islamic tribunal’s manifest disregard of the law, many may simply stop using them. This result would not represent government deference to religious authority, but rather government destruction of religious authority. Islamic tribunals, like Christian and Jewish tribunals (and arbitration tribunals generally), have very few tools of enforcement.

Another First Amendment argument against destroying Islamic arbitration recognizes the importance of allowing all religions to provide and communicate their distinctive solutions to life’s problems. One of the freedoms protected by the Free Exercise Clause is the “right ... to disseminate religious views.”¹²¹ If Muslims do not have access to arbitration on the same terms as other religions, they cannot fairly demonstrate in the public square the merits of their distinctive normative solutions to life’s problems. The reason for this is that religious arbitration provides a government sanctioned and protected safe space in which to attempt and demonstrate the effectiveness and attractiveness of a religion’s norms. Under the Oklahoma amendment, Islamic norms simply cannot be demonstrated and attempted on equal terms with those afforded to other religions.

This, in turn, works against the Establishment Clause value that government should neither adopt nor reject laws solely on the basis of their religious merit or status. When Muslims are denied the ability to demonstrate the appeal of their normative religious solutions, they operate at an explicit and unfair disadvantage in seeking the legislative enactment of their ideas. In short, because Muslims are prevented from demonstrating their best ideas solely on the basis that they are tainted by the label of “Sharia,” the government is indirectly rejecting laws solely on the basis of their religious status.

Finally, and perhaps most obviously, denying Muslims equal protection in the context of arbitration tribunals directly impedes their ability to order their lives according to their religious beliefs. When Islamic tribunals are denied government protection, either of enforcement or of annulment in the face of manifest disregard of the law, they lose legitimacy and adjudicative power. Muslims are then forced to choose between deficient religious tribunals or the legal standards of outsiders to their faith. While not all personal desires for methods of obtaining justice are likely to be met in any governmental system, the emphasis that the United States has traditionally placed on religious liberty demands that religious groups be provided a more effective system.

Conclusion

In the short term, these laws threaten the American Muslims' religious liberty; however, their broader implications affect the religious freedom of all Americans.

As demonstrated by Part II's extensive discussion of religious arbitration and how civil courts deal with arbitral decisions, there are numerous safeguards against would-be infringements on constitutional rights embedded in the American legal system. As discussed above, arbitral decisions are annulled when, for example, there is evidence that the arbitrator completely disregarded the law or when the arbitrator refused to consider material evidence.

The crucial feature of any kind of arbitration is that an arbitrator, whether religious or not, has no ability to enforce the arbitral decision; only state or federal courts have that power. In deciding whether to enforce arbitral awards, civil courts first review whether the parties agreed to take part in the arbitration of their own free will. Courts also review the arbitral decision to ensure that arbitrators are neutral and that the resulting arbitral decisions are neither grossly unfair nor undermine public policy. There is thus already an array of carefully crafted safeguards in place to protect individuals.

These built-in protections of the American legal system expose the rhetoric invoked by anti-Sharia campaigners as nothing more than mythical. Such baseless rhetoric is not only creating fear about a largely innocent religious minority, it is also helping translate that fear into problematic laws. In the short term, these laws threaten the American Muslims' religious liberty; however, their broader implications affect the religious freedom of all Americans.

Anti-Sharia bills are based on and galvanized by fear of the Muslim other—a conception of Sharia as a swamp creature of sorts. Images of public floggings, the stoning of adulterers, and the amputation of thieves' hands enliven the fantasies of the average American when he/she thinks of "Sharia." In order to combat the confusion and fear that make anti-Sharia initiatives possible, it is important to engage in the following:

1. The American Muslim community should engage the broader public on the Sharia's meaning and role. It should articulate what this word means generally and what it means to them specifically—that is, the articulation of the concept should not be merely theoretical but explained in concrete terms.
2. Even more to the point, the American Muslim community should differentiate the ways Sharia is applied in differing cultural contexts. It is important to emphasize that the way it

is applied in some Muslim-majority countries is very different than what is possible, or even preferable, in the American context. How does the American legal and social framework shape the application of Sharia law?

3. Legal think tanks should organize lay-accessible information sessions on the First Amendment and religious arbitration. Many Americans are unaware that religious law is incorporated into the American legal system. How does this work in the case of Sharia? In the case of other religious laws? Americans need answers to these questions.

Endnotes

1 Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes & Faiz Shakir, “Fact, Inc.: The Roots of the Islamophobia Network in America,” Center for American Progress, August 2011, at 9, available at www.americanprogress.org.

2 http://familysecuritymatters.org/docLib/20100915_Shariah-TheThreattoAmerica.pdf.

3 Although the term “Sharia” refers to much more than Islamic law, it is limited to that definition here because that is how anti-Sharia proponents define it. See “Setting the Record Straight on Sharia: An Interview with Intisar Rabb,” Center for American Progress, Mar. 8, 2011, http://www.americanprogress.org/issues/2011/03/rabb_interview.html (last visited October 20, 2011) (“Sharia is the ideal law of God according to Islam. Muslims believe that the Islamic legal system is one that aims toward ideals of justice, fairness, and the good life. Sharia has tremendous diversity, as jurists and learned scholars figure out and articulate what that law is. Historically, Sharia served as a means for political dissent against arbitrary rule. It is not a monolithic doctrine of violence, as has been characterized in the recently introduced Tennessee bill that would criminalize practices of Sharia.”)

4 Murfreesboro Islamic Center Vandalized, Jan. 18, 2010, <http://www.newschannel5.com/story/11839442/murfreesboro-islamic-center-vandalized?redirected=true!>; Fire at Tenn. Mosque Building Site Ruled Arson, Aug. 30, 2010, <http://www.cbsnews.com/stories/2010/08/28/national/main6814690.shtml>; Incidents at Mosque in Tennessee Spread Fear, Aug. 30, 2010, <http://www.nytimes.com/2010/08/31/us/31mosque.html>.

5 Wajahat Ali, Eli Clifton, Matthew Duss, Lee Fang, Scott Keyes & Faiz Shakir, “Fact, Inc.: The Roots of the Islamophobia Network in America,” Center for American Progress, August 2011, at 9, available at www.americanprogress.org.

6 *Id.* at Fast facts on the Islamophobia Network page.

7 *Id.* at 27-28.

8 *Id.* at 2.

9 *Id.* at 2.

10 *Id.* at 2.

11 *Id.* at 3, 6.

12 *Id.* at 2.

13 Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. Times, July 30, 2011, available at <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>.

14 *Id.*

15 Anver Emon, *Banning Shari’a*, The Immanent Frame, Religion & American politics, September 6, 2011, <http://blogs.ssrc.org/tif/2011/09/06/banning-shari%E2%80%98a/>.

16 The final text of the State Question that appeared on the ballot is as follows:

STATE QUESTION NO. 755 LEGISLATIVE REFERENDUM NO. 355

This measure amends the State Constitution. It changes a section that deals with the courts of this

state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

SHALL THE PROPOSAL BE APPROVED?

FOR THE PROPOSAL — YES AGAINST THE PROPOSAL — NO

17 *Id.*

18 James C. McKinley, *Judge Blocks Oklahoma's Ban on Using Sharia Law in Court*, N.Y. Times (Nov. 29, 2010), <http://www.nytimes.com/2010/11/30/us/30oklahoma.html>.

19 *Id.*

20 John Esposito and Sheila Lalwani, *Fear of Sharia in Tennessee*, Guardian (Mar. 25, 2011), <http://www.guardian.co.uk/commentisfree/belief/2011/mar/25/islam-religion>.

21 *Id.*

22 *Id.*

23 *Id.*

24 Eric Marrapodi, *Poll: Many Americans uncomfortable with Muslims*, CNN Belief Blog, September 6, 2011, <http://religion.blogs.cnn.com/2011/09/06/poll-many-americans-uncomfortable-with-muslims/>.

25 *Id.*

26 Bill Raftery, *Bans on court use of sharia/international law: 38 of 47 bills died or rejected this session; only 1 enacted into law*, Gavel to Gavel (Jun. 3, 2011), <http://gaveltogavel.us/site/2011/06/03/bans-on-court-use-of-shariainternational-law-38-of-47-bills-died-or-rejected-this-session-only-1-enacted-into-law/>.

27 Abraham H. Foxman, *Shut down the Sharia Myth Makers*, Jewish Telegraph Agency (Aug. 10, 2011), <http://www.jta.org/news/article/2011/08/10/3088943/op-ed-shout-down-the-sharia-myth-makers>.

28 That is, these sources constitute adequate evidence of Sharia.

29 Joshua Rhett Miller, *Tennessee Lawmaker Renews Fight to Make Supporting Sharia Law a Felony in the U.S.*, Fox News (Mar. 2, 2011), <http://www.foxnews.com/politics/2011/03/02/tennessee-lawmaker-continue-push-make-following-shariah-felony/>.

30 *Id.*

31 Raftery, *supra* note 15.

32 Ian Millhiser, *Federal Appeals Court to Hear Challenge to Oklahoma Anti-Sharia Amendment*, Think Progress (Sept. 12, 2011), <http://thinkprogress.org/justice/2011/09/12/316430/federal-appeals-court-to-hear-challenge-to-oklahoma-anti-sharia-amendment/>.

33 *Id.*

34 Alabama HB 597 (Constitutional Amendment).

35 Iowa HJR 14 (Constitutional Amendment), Missouri HJR 31 (Constitutional Amendment), New Mexico SJR 18 (Constitutional Amendment).

36 Wyoming HJR 8 (Constitutional Amendment). The Wyoming legislation affects not only Muslim Americans, but such other minority groups as Native Americans. Gabriel Galanda, a member of the Round Valley Indian Tribes and partner in the law firm Galanda Broadman of Seattle, argues that anti-Sharia legislation “threatens American Indian sovereignty, law and the government-to-government relationship between indigenous nations and state and federal governments.” He goes on to add that “the various state laws being passed or proposed would quite literally prevent any state court judge from ever considering the laws of sovereign Indian nations, including tribal common law,” and that “anti-Sharia laws also fly in the face of the United States’ recent adoption of the [U.N. Declaration on the Rights of Indigenous Peoples], especially insofar as such laws could disallow state courts from ever considering the declaration and its import domestically.” Gale Courey Toensing, *Campaign Against Sharia Law a Threat to Indian Country*, Indian Country Today Media Network (Sept. 6, 2011), <http://indiancountrytodaymedianetwork.com/2011/09/the-racists-are-coming-campaign-against-sharia-law-a-threat-to-indian-country/>.

37 Arizona HB 2582. This particular piece of legislation hit a roadblock with another concerned community, namely, the Orthodox Jewish community. The Jewish community uses the *beit din* system to resolve issues arising under *halacha*, the body of law supplementing the scripture and forming the legal part of the Talmud. Ron Kampeas, *Anti-Sharia Laws Stir Concerns that Halachah Could Be Next*, The Jewish Week (May 1, 2011), http://www.thejewishweek.com/news/national/anti_sharia_laws_stir_concerns_halachah_could_be_next.

38 *Id.*

39 Arizona HB 2064.

40 Florida HB 1273.

41 Michigan HB 4769.

42 Raftery, *supra* note 15.

43 <http://e-lobbyist.com/gaits/116779/view>.

44 http://www.capitolbeatok.com/_webapp_3337864/State_Question_755_would_ban_use_of_foreign_judicial_rulings.

45 U.S. Const. Am. I.

46 *Everson v. Board of Education*, 330 U.S. 1 at 16 (1947).

47 Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 at 2131 (2003).

48 *Id.* at 2131.

49 *Id.* at 2132.

50 *Lemon v. Kurtzman*, 403 U.S. 602 at 612 (1971).

51 More recent Establishment Clause cases have used other related tests, including the Endorsement Test, which comprises the “primary effect” and “secular legislative purpose” prongs, but excludes the “excessive government entanglement” prong, of the *Lemon* test; and the Coercion Test, which proscribes “an attempt to employ the machinery of the State to enforce a religious orthodoxy,” *Lee v. Weisman*, 505 U.S. 577 at 592 (1992). Although it has been criticized, it has never been overruled, and courts continually return to it when presented with Establishment Clause cases. Asma T. Uddin points out that “the concern motivating each [of the tests] is whether a given government act has the purpose and/or effect of favoring or disfavoring religion.” Asma T. Uddin, *Evolution Toward Neutrality: Evolution Disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted Fruits of a Poisonous Tree*, 8 Rutgers Journal of Law and Religion 12 (2007).

52 *Lemon v. Kurtzman*, 403 U.S. 602 at 612-13 (1971) (internal quotations and citations omitted).

53 Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and their History*, 47 B.C.L. Rev. 275 at 285 (2006), <http://lawdigitalcommons.bc.edu/bclr/vol47/iss2/2>.

54 *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 at 877 (1990) (internal quotations and citations omitted) (emphasis in original).

55 Religious freedom and free speech intersect in numerous ways, one of them being the right to preach one’s religious beliefs. Like the state’s relationship with other aspects of religious practice, the right to preach cannot be wholly denied. It can, however, be regulated in certain limited ways, such as by restricting not the content of the speech but the time, place, or manner in which it is delivered. *Cantwell v. State of Connecticut*, 310 U.S. 296 at 304 (1940).

56 *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 at 879 (1990) (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”)

57 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 at 537 (1993) (internal citations and quotations omitted).

58 *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999). The court in *FOP v. City of Newark* stated its assumption “that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department’s actions cannot survive even that level of scrutiny.” *Id.* at FN7.

59 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 at 533 (1993) (internal citations omitted).

60 Justice O’Connor’s concurrence in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (“The compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.” *Id.* at 903.) In 1993, Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. The Act restores the pre-*Smith* strict scrutiny standard, stating, inter alia, “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except

[where the government can demonstrate that the law passes strict scrutiny].” 42 USCS § 2000bb-1 (a). In the case of *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court declared the Act unconstitutional as against the states (but not the federal government). However, several states have since enacted their own versions of the Act.

61 *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 at 212 (1948).

62 Jared A. Goldstein, *Is There A “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 *Cath. U. L. Rev.* 497, 538 (2005).

63 *Id.*

64 *Watson v. Jones*, 80 U.S. 679 (1871).

65 *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

66 *Id.* at 443.

67 *Id.* at 443-44.

68 *Id.* at 447.

69 *Id.* at 450.

70 Kent Greenawalt, *Symposium: The Supreme Court’s Hands-off Approach to Religious Doctrine: Hands Off: When and About What*, 84 *Notre Dame L. Rev.* 913 at 913-14 (2009).

71 Jared A. Goldstein, *Is There A “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 *Cath. U. L. Rev.* 497, 538 (2005) (italics in original)

72 *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 717 (1981) (“When state conditions receipt of important benefit upon conduct proscribed by religious faith, or when it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on adherent to modify his behavior and to violate his beliefs, a burden upon religion exists; while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”).

73 Entry of Appearance, Case 5:10-cv-01186-M, Document 16, Filed 11/22/10.

74 On December 1, 2010, defendants filed a Notice of Appeal in the District Court case. The case was docketed in the Tenth Circuit on the following day.

75 Plaintiff-Appellee Awad’s Response Brief, in the United States Court of Appeals for the Tenth Circuit, Appellate Case Number 10-6273, at 44.

76 Redacted Last Will and Testament of Muneer Awad, in the United States Court of Appeals for the Tenth Circuit, Appellate Case Number 10-6273, Document Number 01018637146, filed May 9, 2011.

77 *Id.*

78 *Id.*

79 Plaintiff-Appellee Awad’s Response Brief, in the United States Court of Appeals for the Tenth Circuit, Appellate Case Number 10-6273, at 12.

80 *Id.* at 22.

81 *Id.* at 23.

82 *Id.* at 32.

83 *Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291, 295 (9th Cir. 1970).

84 387 U.S. 369, 381 (1967).

85 538 U.S. 188, 198 (2003) (emphasis added).

86 *Lemon v. Kurtzman*, 403 U.S. 602 at 612-13 (1971).

87 *Id.* at 14.

88 *Id.*

89 *Id.* 8-9.

90 *Id.*

91 *Id.* at 5.

92 *Id.* at 5.

93 *Id.* at 17.

94 *Id.* at 18.

95 John Ingold, *Denver's 10th Circuit Court in Spotlight as it Considers Oklahoma's Shariah-law Case*, Denver Post (Sept. 13, 2011).

96 *Id.*

97 <http://articles.latimes.com/2010/nov/10/opinion/la-oe-helfand-oklahoma-20101110>.

98 "In reality, such arbitration is well established. For nearly half a century, Jewish, Christian and Muslim tribunals have operated in the United States in concert with government courts." <http://articles.latimes.com/2010/nov/10/opinion/la-oe-helfand-oklahoma-20101110>.

99 In contrast, see *Catholic League for Religious & Civ. Rights v. City & County of San Francisco*, 624 F.3d 1043 (9th Cir. Cal. 2009). In this case, the court held that the City of San Francisco did not violate the Establishment Clause in passing a non-binding resolution opposing a Vatican directive that the Catholic archdiocese stop placing children in need of adoption with homosexual households. Although the resolution on its face opposed a Catholic measure, the court held that the primary purpose of the resolution was not to express disapproval of Catholic beliefs; instead, the "objective outsider would conclude that purpose was to promote equal rights for same-sex couples in adoption and to place the greatest number of children possible with qualified families, considering resolution in context of San Francisco's well-known and lengthy history of promoting gay rights and Catholic Church's unabashed efforts to frustrate same sex-adoption in that area." *Id.* at 1060. A similarly secular purpose is unavailable in the case of the Oklahoma State Question 755, and the objective outsider could not conclude otherwise.

100 Defendants' Tenth Cir. Appeal Brief, at 36. Appellate Case: 10-6273; Document: 01018611371.

101 *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).

102 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 at 533 (1993) (internal citations omitted).

- 103 *Awad v. Ziri*, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).
- 104 Defendants' Tenth Cir. Appeal Brief, at 35. Appellate Case: 10-6273; Document: 01018611371.
- 105 *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955).
- 106 <http://www.youtube.com/watch?v=ummRXdDgFgl>.
- 107 *Id.*
- 108 <http://articles.latimes.com/2010/nov/10/opinion/la-oe-helfand-oklahoma-20101110>.
- 109 The following example of such an arbitration clause appears in the facts of the Minnesota Court of Appeals case A03-1736:

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to and settled by arbitration before the Arbitration Court of an Islamic Mosque located in the State of Minnesota pursuant to the laws of Islam (or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or Federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the costs of its own experts, evidence, and counsel.

<http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031736-0601.htm> Accessed April 2, 2011.

- 110 Michael C. Grossman, "Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process," *Columbia Law Review*, Vol. 107:169 at 179 (quoting Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, at http://www.hiiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm).
- 111 *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 at 584 (2008).
- 112 *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd.*, 888 F.2d 260 at 265 (2nd Cir. 1989) (internal citations and quotations omitted).
- 113 *Sutton v. Rasheed*, 323 F.3d 236, 241 (3d Cir. 2003).
- 114 Okla. Stat. Ann. tit. 12, § 1874 (West).
- 115 Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 *Colum. L. Rev.* 169, 195 (2007)
- 116 Okla. Stat. Ann. tit. 12, § 1873 (West).
- 117 *Id.*
- 118 A Christian conciliation clause providing for Christianity-based arbitration follows:

The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian church (see Matthew 18:15-20; Corinthians 6:1-8). Therefore the parties agree that any claim or dispute arising from or related to

this agreement shall be settled by biblically based mediation and, if necessary, legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries.

<http://www.privatedisputeresolutionservices.com/christianmediation.html> Accessed April 2, 2011.

119 In the Christian context, see the following biblical quotation:

If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord's people? Or do you not know that the Lord's people will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? Do you not know that we will judge angels? How much more the things of this life! Therefore, if you have disputes about such matters, do you ask for a ruling from those whose way of life is scorned in the church? I say this to shame you. Is it possible that there is nobody among you wise enough to judge a dispute between believers? But instead, one brother takes another to court—and this in front of unbelievers!

1 Corinthians 6:1-6, New International Version.

In the Muslim context, see the following quotation from a Florida trial court order:

Based upon the testimony before the court at this time, under ecclesiastical law, pursuant to the Qur'an, Islamic brothers should attempt to resolve a dispute among themselves. If Islamic brothers are unable to do so, they can agree to present the dispute to the greater community of Islamic brothers within the mosque or the Muslim community for resolution. If that is not done or does not result in a resolution of the dispute, the dispute is to be presented to an Islamic judge for determination, and that is or can be an A'im.

"Opinion," Ghassan Mansour, Abbas Hashemi and Hamid Faraji, and Islamic Education Center of Tampa, Inc., vs. Islamic Education Center of Tampa, Inc., 08-CA-3497, Division L, Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, Civil Division, linked from <http://mirrorofjustice.blogs.com/mirrorofjustice/2011/03/helfand-on-the-florida-sharia-case.html>, accessed on April 16, 2011.

120 *Sherbert v. Verner*, 374 U.S. 398 at 404 (1963) (internal citations and quotations omitted).

121 *Cantwell v. State of Connecticut*, 310 U.S. 296 at 304 (1940).

Institute *for* Social Policy *and* Understanding

The Institute for Social Policy and Understanding (ISPU) is an independent nonprofit think tank committed to education, research, and analysis of U.S. domestic and foreign policies issues, with an emphasis on topics related to the American Muslim community.

Since its inception in 2002, ISPU has built a solid reputation as an organization committed to objective, empirical research and continues to be a valuable source of information for policy makers, scholars, journalists and the general public. Our research aims to increase understanding of Muslims in the United States while also tackling the many policy issues facing all Americans. We provide cuttingedge analysis and policy recommendations through publications, conferences, government briefings and media commentary. ISPU firmly believes that optimal analysis and treatment of social issues mandates a comprehensive study from several different and diverse backgrounds. As social challenges become more complex

and interwoven, ISPU is unique in its ability to bring this new approach to the human and social problems facing our country. Our multidisciplinary approach, in partnership with universities, think tanks and other research organizations, serves to build understanding and effect lasting social change.

Further information about ISPU can be obtained from our website at www.ispu.org.



Institute *for* Social Policy *and* Understanding

43151 Dalcoma, Suite 6, Clinton Twp., Michigan 48038 | 1.800.920.ISPU (4778) | info@ispu.org

www.ispu.org

