No. 10-6273

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MUNEER AWAD,
Plaintiff-Appellee,

v.

PAUL ZIRIAX, et al.,
***Defendants-Appellants*.**

On Appeal from the United States District Court for the
Western District of Oklahoma
Case No. CIV-10-1186-M

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANT-APPELLANTS, IN SUPPORT OF REVERSAL

Roy S. Moore
Benjamin D. DuPré
John A. Eidsmoe*
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, Alabama 36104
Phone: (334) 262-1245
**Counsel of Record*
Attorneys for Amicus Curiae

April 4, 2011

CORPORATE DISCLOSURE STATEMENT

MUNEER AWAD,
Plaintiff/Appellee,
v.

PAUL ZIRIAX, et al.,
Defendants/Appellants.

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

/s/John A. Eidsmoe
John A. Eidsmoe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions & Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, the saying of the Pledge of Allegiance, and other public acknowledgments of God.

In 2007 and 2008 the Foundation spearheaded the drafting and promotion of the Constitution Restoration Act, a proposal that, if enacted, would have prohibited American courts from considering foreign law. This proposal did not mention Sharia Law and was presented before Sharia Law became a major issue in America, demonstrating that concerns about foreign law preceded and were not just a pretext for concerns about Sharia Law.

The Foundation has an interest in this case because it believes that American

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[1] Pursuant to Rule 29(c)(5), Fed. R. App. P., *Amicus* states: No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that

federal and state constitutions and statutes should be interpreted according to their plain meaning and the intent of their framers, that Sharia Law is a legal system based upon the Islamic religion and is in many respects antithetical to the philosophy of law that underlies American law, that Sharia Law is based upon the acknowledgement of a god named Allah who is not the same God that America's founding fathers acknowledged, and that to preserve our constitutional system of government neither Sharia Law nor any other foreign law should be employed in legal and constitutional interpretation.

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was intended to fund preparing or submitting this brief.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The federal and state constitutions and statutes of the United States should be interpreted strictly according to their plain wording and the intent of their framers. Except as contemplated by the framers of our constitutions and statutes, foreign law and international law should not be used in interpreting American law. Relying upon foreign law and international law does a disservice to American constitutions and statutes, to those who drafted them, and to the people who ratified them.

The people of the State of Oklahoma, by adopting or amending their state constitution, are entitled to establish standards by which their constitution and statutes are to be interpreted. They are entitled to establish in their constitution the principle that their courts may not use foreign law and international law in interpreting their constitution and statutes. If the amendment framed by State Question 755 and adopted by the ratification of seventy percent of the voters in the 2010 election had only forbidden the use of foreign and international law without mentioning Sharia Law, there is little doubt that it would have been held constitutional. In fact, nothing in Plaintiff/Appellee's Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction even suggests that the amendment is in any way unconstitutional except for its references to Sharia Law.

Why, then, does the amendment refer to Sharia Law? Amicus suggests that it refers to Sharia Law for three reasons: (1) Sharia Law is a legal system that is spreading throughout the world, and adherents of Sharia Law have been and are aggressively pushing for its adoption in Europe, North America, and elsewhere. (2) Sharia Law is antithetical to commonly-accepted principles of American law in numerous respects. (3) Proponents of Sharia Law argue, as does Plaintiff/Appellee in this case and as did the District Court in its opinion, that Sharia Law is not really a legal system but rather is part of the Islamic religion. To the extent that there is doubt as to whether Sharia Law is a legal system, there would be doubt as to whether the prohibitions in the amendment included Sharia Law. It was therefore necessary to specifically refer to Sharia Law to eliminate any doubt as to its application.

The United States Declaration of Independence and Constitution were based upon the "Laws of Nature and of Nature's God," and the constitutions of all fifty states contain acknowledgements of God. To the extent that an antithetical system is used in interpreting American constitutions and laws, it will distort and destroy the true meaning of those documents.

ARGUMENT

I. THE DISTRICT COURT'S RULING FAILS TO CONSIDER THE ESTABLISHMENT CLAUSE PROBLEMS THAT WOULD ARISE IF THE COURTS WERE TO USE SHARIA LAW.

The District Court's opinion focuses entirely upon the religion clauses of the First Amendment, concluding that the Save Our State Amendment would violate the Free Exercise Clause by not allowing Plaintiff/Appellee to have his last will and testament probated because it incorporates provisions of Sharia Law, and would violate the Establishment Clause by communicating a message of disfavor toward Plaintiff/Appellee's Islamic religion by singling it out for exclusion from the courts' consideration. The Establishment Clause argument is not even based upon the text of the First Amendment itself, but rather upon a strained reading of the second prong of the *Lemon* test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[2]

The District Court opinion does not even consider the First Amendment problems that would arise if the Oklahoma courts were to consider Sharia Law: giving adherents of Islam and Sharia Law a preferred position in society, endorsing Sharia Law, advancing Sharia Law and Islam while inhibiting other religions, and excessively entangling the courts with the provisions of Sharia Law. These Establishment Clause problems far outweigh any that might arise from the courts not considering Sharia Law because of the Save Our State Amendment.

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[2] The District Court actually cited the *Lemon* test as it is found in *Weinbaum v.*

In fact, the District Court Opinion unwittingly presents a constitutional dilemma: (1) If Sharia Law is (as Plaintiff/Appellee argues and as the District Court concludes) a religious system rather than a legal system, then its use in American courts is banned by the Establishment Clause, based upon *Everson v. Board of Education*, 330 U.S. 1 (1947), which cited Thomas Jefferson's much-misused metaphor which we modify herein as separation of mosque and state. (2) If, on the other hand, Sharia Law is a legal system, then the people of Oklahoma are entitled to restrict its use in Oklahoma courts.

II. IF THE "SAVE OUR STATE AMENDMENT" RATIFIED BY OKLAHOMA VOTERS HAD NOT CONTAINED REFERENCES TO SHARIA LAW, IT UNDOUBTEDLY HAVE BEEN HELD CONSTITUTIONAL.

Neither the Plaintiff/Appellee in his Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, nor the District Court in its decision, even suggests that the "Save Our State Amendment" would be unconstitutional without the references to Sharia Law. Both Plaintiff/Appellee and the District Court focus their arguments entirely on the references to Sharia Law.

Without the references to Sharia Law, the "Save Our State Amendment" ratified by the voters as State Question 755 would simply prohibit the Oklahoma courts from using international law or foreign law in rendering decisions. This, the

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City of Las Cruces, N.M., 541 F.3d 1017, 1-30 (10th cir. 2008).

citizens of Oklahoma clearly have a right to do.

The Oklahoma State Constitution, Article II § II-1, provides that

> All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change shall not be repugnant to the Constitution of the United States.

By means of Article VII, and later VII-A and VII-B of the Oklahoma Constitution, the people of Oklahoma have established the state judiciary, created various levels of courts within that judiciary, and set forth the various powers and limitations of those courts. By approving the Save Our State Amendment, the people of Oklahoma placed a limit on the judicial system they created: the courts of the judiciary may not employ international law or foreign law.

The people of Oklahoma had valid reasons for enacting this restriction. Years before the use of Sharia Law became an issue, there was widespread concern that the courts were using the laws of foreign jurisdictions to force the various states of the United States to adopt policies that they found repugnant. Judge Robert Bork expressed these concerns as early as 2003:

> The fever for internationalizing law through national judiciaries surfaced at the American Bar Association's annual meeting in 2000, which was held in London. Four American Supreme Court justices were present, but Anthony Kennedy bore the brunt of the attack on the Court's alleged "insularity." A prominent London barrister rose to accuse the United States Supreme Court of "turning its back on the Continent," noting that the justices rarely cite the decisions of European courts: "Your system is quite certain it has nothing much to

> learn from us." Some Americans rose to promise that our courts would do better in future. The dean of a major law school said that several justices had been active in moving the Court to a more internationalist approach, which "has begun to permeate the entire system." The mayor of Detroit was even more defensive: "We're not as parochial as one might think." While British courts might be in the forefront now in citing European decisions, he promised American lawyers and judges will eventually take the lead so that, "at the end of the day, we will be ahead."[3]

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the U.S. Supreme Court struck down a sodomy statute of Oklahoma's neighboring State of Texas, citing the changing laws of Europe as a basis for doing so. And in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court struck down the juvenile death penalty policy of Oklahoma's neighboring State of Missouri, again citing the changing laws of Europe and other nations as evidence of a growing consensus that the execution of persons under the age of eighteen was cruel and unusual. Oklahoma's law on sodomy was similar to that of Texas, and its policy on juvenile executions was similar to that of Missouri.[4]

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[3] Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* 24-25 (AEI Press 2003). Whether one agrees with Judge Bork on this issue is irrelevant. The point is that concerns about the use of foreign law and international law predate concerns about Sharia Law and are not just a pretext for concerns about Sharia Law.

[4] Justice Scalia, in a dissenting opinion in *Roper* joined by the Chief Justice and Justice Thomas, observed that "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage." *Roper*, 543 U.S. at 622. He further noted that the various Justices are highly selective in applying foreign law, freely applying the laws of other nations on sodomy and capital punishment but ignoring the laws of other nations on the establishment of religion, abortion,

Oklahomans were justifiably concerned that they could be forced to change their laws, not because of provisions in the U.S. Constitution or the Oklahoma Constitution, but because of the laws of other nations. The Save Our State Amendment was the people of Oklahoma's legitimate means of preventing that from happening.

III. THE PEOPLE OF OKLAHOMA HAD VALID REASONS FOR INCLUDING THE REFERENCES TO SHARIA LAW IN THEIR "SAVE OUR STATE AMENDMENT.

As we have seen, Plaintiff/Appellee has not even contested the constitutionality of any portion of the Save Our State Amendment except for its references to Sharia Law. Without the Sharia Law references, the Save Our State Amendment is undoubtedly a legitimate exercise of the power of the people of Oklahoma to regulate their judiciary.

The question, then, is whether the references to Sharia Law render an otherwise-constitutional provision unconstitutional. To answer this question, we need to consider the reasons the Sharia Law references were included as part of the Amendment.

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and criminal procedure matters such as double jeopardy. They are also highly selective in determining which nations' laws to follow and which to ignore. One can only imagine how the Justices would have decided *Lawrence* if they had chosen to apply the laws of Saudi Arabia and Iran. Justice Scalia's dissent certainly speaks for many and probably most Oklahomans: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry." *Id.* at 627.

A. The Sharia references are necessary to establish that Sharia Law is a legal system.

Why is it necessary to establish that Sharia Law is a legal system covered by the Amendment's prohibition of consideration of international law and foreign law?

The obvious reason is that some will argue, as Plaintiff/Appellee did and as the District Court ruled, that Sharia Law is religion rather than a legal system and therefore would not be covered by the Amendment if it did not specifically refer to Sharia Law. The court below reasoned as follows:

> ...[P]laintiff has presented testimony that "Sharia Law" is not actually "law", but is religious traditions that provide guidance to plaintiff and other Muslims regarding the exercise of their faith. Plaintiff has presented testimony that the obligations that "Sharia Law" imposes are not legal obligations but are obligations of a personal and private nature dictated by faith. Plaintiff also testified that "Sharia Law" differs depending on the country in which the individual Muslim resides. For example, plaintiff stated that marrying more than one wife is permissible in Islam but in the United States, where that is illegal, Muslims do not marry more than one wife because Sharia in the United States mandates Muslims to abide by the law of the land and respect the law of their land. Based upon this testimony, the Court finds that plaintiff has shown "Sharia Law" lacks a legal character, and, thus, plaintiff's religious traditions and faith are the only non-legal content subject to the judicial exclusion set forth in the amendment. As a result, the Court finds plaintiff has made a strong showing that the amendment conveys a message of disapproval of plaintiff's faith and, consequently, has the effect of inhibiting plaintiff's religion.

Awad v. Ziriax, No. CIV-10-1186-M, 2010 W.L. 4814077, at *6 (W.D. Okla. Nov. 29, 2010).

Had the references to Sharia Law not been included in the Save Our State Amendment, a plaintiff might argue, and a court might agree, that the Amendment does not apply to Sharia Law because Sharia Law is not a legal system. To ensure that no party or court will conclude that the Amendment does not apply to Sharia Law, its framers specifically said the Amendment does apply to Sharia Law. The District Court's ruling below is itself ample proof that the references were necessary.

This does not mean the Amendment was aimed more at Sharia Law than at any other foreign law. Sharia Law was mentioned to eliminate any doubt that the Amendment does cover Sharia Law.

B. The Oklahoma Legislature and the people of Oklahoma reasonably concluded that Sharia Law is a legal system.

Although Sharia Law is tied to the Islamic religion, it has from its inception and continues to be a legal system as well. This may be difficult for Westerners to understand, because the Western concept of the "two kingdoms" of church and state has no counterpart in Islam. Ibn Warriq has written,

> ...[W]e must look to the founder of Islam to understand why there was never any separation of state and church. Muhammad was not only a prophet but also a statesman; he founded not only a community but also a state and a society. He was a military leader, making war and peace, and a lawgiver, dispensing justice. Right from the beginning, the Muslims formed a community that was at once political and religious, with the Prophet himself as head of state.[5]

[5] Ibn Warraq, *Why I Am Not a Muslim* 164 (Amherst, New York: Prometheus

Ibn Mohamad Jawad Chirri concurs:

> It is a well-known fact that Islam concerns itself with both spiritual and worldly aspects of man's life. The Prophet founded a Moslem state of which he was the head. He administered all religious, political and social affairs. He never showed his companions any sign of separation of church and state.[6]

Dean Wigmore wrote of the Prophet, "It is certain that Mohammed had a profound instinct for law and order, almost Roman in its spirit."[7] Duncan B. MacDonald, Professor of Semitic Languages at Hartford Theological Seminary, in his classic *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, wrote in 1903:

> How, indeed, can we meet a legal code which knows no distinction of personal or public, of civil or criminal law; which prescribes and describes the use of the toothpick and decides when a wedding invitation may be declined, which enters into the minutest and most unsavory details of family life and lays down rules of religious retreat? ... While Muslim theology defines everything that a man shall *believe* of things in heaven and in earth and beneath the earth -- and this is no flat rhetoric -- Muslim law prescribes everything that a man shall *do* to God, to his neighbor, and to himself. It takes all duty for its portion and defines all action in terms of duty. Nothing can escape the narrow meshes of its net.[8]

Books 1995).

[6] Ibn Mohamad Jawad Chirri, *Inquiries About Islam* 167 (Islamic Center of Detroit 1965).

[7] John Henry Wigmore, *A Panorama of the World's Legal Systems* 548 (West Publishing Company 1928).

[8] Duncan B. MacDonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory* 66-67 (New York: Charles Scribner's Sons 1903) (emphasis original). MacDonald's masterpiece discusses the influence of Biblical law and

Not every majority-Muslim nation has adopted Sharia Law in its entirety. Theoretically, Sharia Law applies to every aspect of life: religious, moral, civil, and criminal. But in order for Sharia Law to apply in an independent nation, that nation must adopt Sharia Law. Saudi Arabia, where Islam originated, has no civil code and follows Sharia Law almost totally (as England once followed its unwritten common law) as have some of the Persian Gulf nations and some of the northern states of Nigeria. Other Muslim nations have adopted Sharia Law in varying degrees. As Susan Steiner observes, Sharia Law "is adopted by most Muslims to a greater or lesser degree as a matter of personal conscience, but it can also be formally instituted as law by certain states and enforced by the courts. Many Islamic countries have adopted elements of Sharia Law, governing areas such as inheritance, banking and contract law."[9] The District Court's conclusion that Sharia Law "differs depending on the country in which the individual Muslim resides," does not mean Sharia Law is not a legal system, any more than the Anglo-American common law is not a legal system merely because its meaning and provisions have varied over the centuries and in the various localities of its

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Roman law upon the development of Islamic law, the various categories of Islamic law, and the various schools of Islamic jurisprudence.

[9] Susan Steiner, *Sharia law: Susie Steiner explains the Islamic legal system which has sentenced a Nigerian woman to be stoned to death* (August 20, 2002), *available at* http://www.guardian.co.uk/world/2002/aug/20/qanda.islam.

application.

Within a few centuries after the rise of Islam in the Seventh Century, various schools of Islamic Sharia Law arose and continue today. Among Sunni Muslims four schools of law prevail:

(1) The *Hanafi* school, named after Abu Hanifi an-Numan (699-767 AD), has a large following in Turkey, the Balkans, Central Asia, India, Afghanistan, and Egypt. More than the others, the Hanafi school empahasizes analytical reasoning in legal interpretation, but stresses that the Quran is the highest legal authority, followed by the Hadith (collected sayings of Mohammed).

(2) The *Maliki* school, named after Malik ibn Anas (711 – 795 AD), prevails in North and West Africa, Kuwait, the United Arab Republics, and Bahrain. The Maliki school agrees with the others that the Quran is the highest legal authority but argues that the next level of authority is the Sunna, which includes not only the Hadith but also the fatwas (legal/theological opinions) of the early Caliphs, and also looks to the practice of the Muslim community of Medina.

(3) The *Shafii* school, named after Imam ash-Shafii (767 – 820 AD), has a strong following in Yemen, Southern Iran, Southeast Asia, Egypt, the Maldive Islands, and southern India. The Shafii school agrees that the Quran, the Sunna, and consensus of Muslim scholars, in that order, are the main authorities of law, but in cases in which these authorities are unclear, reasoning by analogy should

prevail. In the fourteenth century AD, a Shafii scholar named Ahmad ibn Naqib al-Misri wrote a comprehensive treatise on Sharia Law titled "The Reliance of the Traveller and Tools of the Worshipper" which is available today in both Arabic and English.[10]

(4) The *Hanbali* school, named after Imam Ahmad ibn Hanbal (c. 780 – 855 AD), is popular in Saudi Arabia and Qatar. It contends that where the Quran and the Hadith are silent, a consensus of Muslim scholars should govern.[11]

Shiite Muslims are more likely to follow the *Jafari* school of jurisprudence, named after Jafar ibn Mohammed al-Sadiq (702-765 AD), which emphasizes the Quran and the Hadith as the most authoritative sources of law but places greater emphasis on the use of independent reason where the Quran and the Hadith are silent.

The Shiite Grand Ayatolla of Iraq, Ali Husaini Sistana, has issued a lengthy and detailed fatwa setting forth a comprehensive statement of Sharia Law from a Shiite standpoint.[12] Some provisions of his treatise concern primarily private

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[10] Ahmad ibn Naqib al-Misri, *The Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (Nuh Ha Mim Keller trans., Amana Publications 1991).

[11] Wael B. Hallaq discusses the four schools of Sunni Islamic legal thought in *A History of Islamic Legal Theories* (Cambridge University Press 1997), as does MacDonald, *supra*, n. 6.

[12] Ayatollah Ali Husaini Sistani, *Islamic Laws*, *at* http://www.al-islam.org/laws/ (last visited Mar. 28, 2011); *cf* http://islamic-laws.com/tawzeh/3.html (last visited Mar. 28, 2011).

conduct, such as the distinction between clean and unclean things (Rain Water §§ 37-43) and ritual cleansings (Ghusl [ritual washing] for Touching a Dead Body §§527-538). Others promulgate detailed rules for commercial transactions; for example, § 2132 sets forth grounds for canceling a transaction:

> (i) If the parties to the transaction have not parted from each other, though they may have left the place of agreement. This is called Khiyarul majlis.
> (ii) If the buyer or the seller has been cheated in a sale transaction, or in any other sort of deal, either of the parties has been deceived, they have a right to call off the deal. This is called Khiyar of Ghabn. ...
> (iii) If while entering into a transaction, it is agreed that up to a stipulated time, one or both the parties will be entitled to cancel the transaction. This is called Khiyarush Shart.
> (iv) If one of the parties presents his commodity as better than it actually is, and thereby attracts the buyer, or makes him more enthusiastic about it. This is called Khiyar tadlis.
> (v) If one of the parties to the transaction stipulates that the other would perform a certain job, and that condition is not fulfilled. ... This is called Khiyar takhallufish shart.
> (vi) If the commodity supplied is defective. This is called Khiyarul 'aib.
> (vii) If it transpires that a quality of the commodity under transaction is the property of a third person. In that case, if the owner of that part is not willing to sell it, the buyer can cancel the transaction, or can claim back from the seller the replacement of that part, if he has already paid for it. This is called Khiyarush shirkat.
> (viii) If the owner describes certain qualities of his commodity which the buyer has not seen, and then the buyer realizes that the commodity is not as it was described, the buyer can rescind the deal. ...
> (ix) If the buyer does not pay for the commodity he has bought for three days, and the seller has not yet handed over to him the commodity, the seller can cancel the transaction. But this is in the circumstance when the seller had agreed to allow him time for deferred payment, without fixing the period. ... If the commodity is perishable, like fruits, which would perish or decay if left for one day, and the buyer without any prior condition, does not pay till nightfall,

> the seller can cancel the transaction. This is called Khiyarut ta'khir.
> (x) A person who buys an animal, can cancel the transaction within three days. And if a person sold his commodity in exchange for an animal, he can also cancel the transaction within three days. This is called Khiyarul haywan.
> (xi) If the seller is unable to deliver possession of the thing sold by him, like, if the horse sold by him runs away and disappears, he can cancel the transaction. This is called Khiyarut ta'azzurit taslim.[13]

Still other provisions of Sharia Law apply to criminal law. Three categories of criminal offenses are prescribed: (1) *Hadd* or hudud, the most serious crimes including murder and apostasy from Islam, robbery, theft, adultery, defamation, and drinking alcohol, all of which are punishable by death; (2) *Quesas,* intermediate crimes such as killing that falls short of murder or various forms of assault, which are punishable by the *lex talionis* principle of like punishment, and (3) *Tazir,* misdemeanors not mentioned in the Quran that can be punished at the discretion of a judge.

This evidence barely scratches the surface, but it amply demonstrates that the Oklahoma Legislature and the people of Oklahoma had legitimate reasons to conclude that Sharia Law is, or at least can be, a legal system. Maria Reiss, writing in the *Arizona Journal of International & Comparative Law,* describes Sharia Law as "a collection of Islamic principles by which Muslim societies abide."[14] The Save Our State Amendment was Oklahomans' way of saying they do

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[13] *Id.* § 2132.

[14] Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a*

not want that legal system to take effect in Oklahoma.

C. Sharia Law is in many respects contrary to the laws and values of Oklahomans.

As noted above, the classical Western distinction between the two kingdoms of church and state is utterly foreign to Sharia Law. In many other ways Sharia Law is contrary to the laws and values of Oklahomans:

* Most forms of Sharia Law prohibit lending money at interest; therefore banks that do extensive business with Muslims commonly offer "Sharia-complaint loans."[15]

* Under Sharia Law of inheritance, a female descendent receives about half what a male descendent would receive.[16]

* Under most forms of Sunni Sharia Law a husband can divorce his wife simply by telling her he is divorcing her; under Shiite Sharia Law the husband must do so in the presence of four witnesses.[17] Sharia Law also permits or requires husbands to treat their wives and daughters in ways that most Americans would

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Council Decisions Should be Non-Binding, 26 Ariz. J. Int'l & Comp. L. 739, 742 (2009).

[15] Hesham M. Sharawy, *Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation Between the Islamic and Western Worlds*, 29 Ga. J. Int'l & Comp. L. 153, 153 (2000).

[16] Chris Horrie & Peter Chippindale, *What Is Islam? A Comprehensive Introduction* 52 (Virgin Books 1991); *cf.* Reiss, *supra*, at 756-57.

[17] Id.

consider cruel and unacceptable.

* Under American law, child custody is usually determined according to the best interests of the child. In contrast, Sharia Law considers the father the natural guardian of his children, and if he is unable to care for the child, the paternal grandfather is next in line, followed by others on the paternal side of the family.[18]

* The right to counsel and trial by jury as recognized in the Sixth Amendment do not exist in Sharia Law. Sharia Law also generally rejects forensic evidence and circumstantial evidence, testimony of women is given only half the weight of testimony of men, and testimony of non-Muslims is often excluded altogether.[19]

D. The Oklahoma Legislature and the people of Oklahoma had reasonable grounds for believing there is a danger that Sharia Law could be imposed in Oklahoma.

Islam is the second largest religion in the world, numbering more than a billion followers, and its numbers are rapidly increasing. As their numbers increase, so does their influence. Lord Chief Justice Nicholas Phillips of Britain caused concern in 2008 when he stated, "...there is no reason why Shari'a

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[18] Reiss, *supra*, at 753-54. Reiss notes, however, that despite this rule the child often remains in the physical custody of the mother "until the child reaches the age of custodial transfer."

[19] Alhaji A.D. Ajijola, *Introduction to Islamic Law* 133 (Karachi, Pakistan: International Islamic Publishers 1989); Mohammad Hashim Kamali, *Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia* 203-34 (Arab Law Quarterly 1988).

principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution [with the understanding] ... that any sanctions for a failure to comply with the agreed terms of mediation would be drawn from the Laws of England and Wales."[20]

The number of Muslims in the United States is subject to dispute, but all agree that Islam is growing rapidly in the United States. There are more than 3,000 mosques in the United States,[21] over half of these having been established after the year 2000.

As the Muslim populace has grown in the United States, the influence of Islam has grown as well, and with it the threat of Sharia Law. Consider, for example:

On November 1, 2010, the day before Oklahoma voters ratified the Save Our State Amendment, CNN carried a story about a New Jersey case in which

> ...[A] Muslim woman went to a family court asking for a restraining order against her spouse claiming he had raped her repeatedly. The judge ruled against her, saying that her husband was abiding by his Muslim beliefs regarding spousal duties. The decision was later overruled by an appellate court, but the case sparked a firestorm.[22]

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[20] Reiss, *supra*, at 739.

[21] David Johnson, *Islam in America: Muslims Move to the Mainstream* (2007), *at* http://www.infoplease.com/spot/muslims1.html.

[22] Laurie Ure, *Oklahoma Voters Face Question on Islamic Law*, CNN Politics (November 2010), *at* http://www.cnn.com/2010/POLITICS/10/28/oklahoma.sharia.question/index.html.

The CNN article further related that a group called Act for America sponsored a one-minute radio ad that aired across Oklahoma, describing the case and saying that this happened not in Saudi Arabia or Iran, but in New Jersey.[23]

On March 3, 2011, the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, granted an emergency motion to enforce an arbitrator's award, stating:

> 1. This case will proceed under Ecclesiastical Islamic Law.
> 2. Under Ecclesiastical Islamic Law, pursuant to the Qu'ran, Islamic brothers should try to resolve a dispute among themselves. When the brothers are unable to do so, they can agree to present the dispute to the greater community of brothers within the mosque or the Muslim community for resolution. If that is not done or does not resolute in a resolution of the dispute, the dispute is to be referred to an Islamic judge for determination, and that is or can be an A'lim [Muslim legal scholar].[24]

In an earlier case, an immigrant from Iraq was convicted of first degree sexual assault on a child for having sexual relations with his 13-year-old wife. He argued that his actions were legal and proper under Islamic law and that he did not know this was not allowed in America. The court in this instance rejected his argument, but it is another attempt to bring Sharia Law into American courts. *State*

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[23] Id.

[24] *Ghassan Mansour, Abbas Hashemi, Hamid Faraji, and Dr. Sam Hakki, collectively as the Trustees of the Islamic Education Center of Tampa, Inc., v. Islamic Education Center of Tampa, Inc., a non-profit corporation,* Case No.: 08-03497 Division:L. The case number indicates that this case was pending when Oklahoma Voters ratified the Save Our State Amendment in 2010.

v. Al-Hussaini, 579 N.W.2d 561 (Neb. Ct. App. 1998). For a different result see *State v. Kargar*, 679 A.2d 81 (Sup. Jud. Ct. of Me. 1996), in which the Supreme Judicial Court of Maine set aside an Afghan immigrant's conviction for child abuse because his actions were consistent with customary practices in Afghanistan and there was no evidence of actual harm to the child; note, however, that this Afghan custom does not appear to have been based on Sharia Law.

In still another instance, in 2008 Safoorah Khan, a middle school teacher in Berkeley, Illinois, asked for three weeks of unpaid leave to undertake a pilgrimage to Mecca, Saudi Arabia, in fulfillment of her duty of *hajj* (pilgrimage to a sacred shrine), the Fifth Pillar of Islam. When the school district refused to grant the leave, Khan filed a complaint with the U.S. Equal Employment Opportunity Commission. The EEOC found that reasonable cause existed to believe discrimination had occurred in violation of the Civil Rights Act of 1964, and forwarded the case to the U.S. Justice Department, which is now suing the local school board and asking the school board to adopt policies that reasonably accommodate employees' religious beliefs and practices, and to reinstate Khan with back pay and compensatory damages.[25]

These and numerous other instances gave Oklahoma voters reasonable cause

[25] Pete Yost, *Muslim School Teacher Denied Hajj, US Sues Illinois School District,* Associated Press December 14, 2010, http://www.csmonitor.com/USA/Latest-News-Wires/2010/1214/Muslim-school-teacher-denied-hajj-US-sues-Illinois-

to be concerned that Sharia law was making inroads into, first, Europe, and second, the United States. Whether this court agrees with their concerns or not, they were reasonable concerns, and they provide a genuine secular purpose for the Save Our State Amendment.

E. Allowing the imposition of Sharia Law in Oklahoma would cause, rather than prevent, problems with the Establishment Clause of the First Amendment.

The District Court concluded that the prohibition on Sharia Law in the Save Our State Amendment violates the Establishment Clause of the First Amendment, because, "to comply with the Amendment, Oklahoma courts will be faced with determining the content of Sharia Law, and, thus, the content of plaintiff's religious doctrines." *Awad*, 2010 W.L. 4814077 at *6.

Amicus urges the Court to decide this case according to the original meaning of the Establishment Clause of the First Amendment, rather than judicial tests like *Lemon* created by court opinions. However, any entanglement between government and religion caused by the Save Our State Amendment pales into insignificance compared with the entanglement and establishment problems that will arise *without* the Amendment. As the influence of Islam generally and Sharia Law specifically spreads throughout the United States, and as the courts are faced with cases in which litigants seek to assert Sharia Law, the courts will be forced to

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school-district (accessed April 4, 2011).

not only decide what is and is not Sharia Law, but also which interpretation of Sharia Law to use and how best to implement it. Amicus can think of no situation in which tension with the Establishment Clause would be greater with the Amendment than without it.

As for the Free Exercise argument, if the District Court is correct in stating that "Sharia in the United States mandates Muslims to abide by the law of the land and respect the law of their land," *Awad*, 2010 W.L. 4814077 at *6, it is difficult to understand how a prohibition on using Sharia Law in the courts would violate Plaintiff/Appellee's right to free exercise of religion.

The Plaintiff/Appellee argued, and the District Court agreed, that the Save Our State Amendment would prohibit the Oklahoma courts from admitting his last will and testament into probate, because his will directs that some of his property be bequeathed according to Sharia Law. This may or may not be true, depending in part upon the wording of Plaintiff/Appellee's will.

Suppose a Christian testator had directed in his will that his property be distributed "according to the Bible," or, in the case of a Jewish testator, "according to the Torah and the Talmud." To give effect to this will, the probate court would have to examine the Bible, determine which passages of Scripture apply to the distribution of testator's estate (or, in the case of a Jewish testator, whether to apply the Babylonian Talmud or the Jerusalem Talmud, and what passages), interpret

those passages, and implement them. Courts have neither the jurisdiction nor, in many cases, the competence to make these determinations. This would especially be true if a rival beneficiary were to claim that, according to his interpretation of Scripture, he was entitled to the bequest.

In *The Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), church documents provided that local church property is held by the local church in trust for the parent denomination, and if the local church leaves the parent denomination, the church property reverts to the parent denomination unless the parent denomination has departed from the Presbyterian faith. A jury held that the parent denomination had departed from the faith, but the U.S. Supreme Court reversed, saying courts do not have jurisdiction to determine a matter of church doctrine. Likewise, in *Thomas v. Review Board*, 450 U.S. 707 (1981), Thomas claimed that his refusal to work on the building of military tank turrets was based upon his Jehovah's Witness convictions. The Indiana Supreme Court denied his claim, noting that another Jehovah's Witness worked for the same company and testified that building tank turrets did not violate his convictions. But the U.S. Supreme Court reversed, holding that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural

interpretation." *Thomas*, 450 U.S. at 716.

Suppose a Muslim testator directed that a portion of his estate be paid as a *zakat* (almsgiving, the Third Pillar of Islam) in accordance with Sharia Law. The court would have to look to Sharia Law to determine how that *zakat* should be distributed. But what school of Sharia Law should the court follow? According to Ahmad ibn Naqib al-Misri's treatise on Sharia Law, previously cited, there are eight categories of recipients of the *zakat:* the poor, those who need funds but are not destitute, *zakat* workers who are involved in collecting charitable funds, those whose hearts are to be reconciled, those who are purchasing their freedom, those who are in debt, those fighting for Allah, and travelers needing money. According to the Hanafi school of Sharia Law, al-Misri's treatise says, "it is valid for the giver to distribute his zakat to all of the categories, some of them, or to confine himself to just one of them."[26] But according to the Shafii school, "Each category of recipients must receive an equal share, one-eighth of the total."[27] As for the portion that goes to "those fighting for Allah," al-Misri says,

> The seventh category is *those fighting for Allah,* meaning people engaged in Islamic military operations for whom no salary has been allotted in the army roster (O: but who are volunteers for jihad without remuneration). They are given enough to suffice them for the operations, even if affluent; of weapons, mounts, clothing, and

[26] *Reliance of the Traveler*, *supra*, at *267*.

[27] *Id.* at 273.

expenses....[28]

In interpreting this bequest, should the court follow Sharia Law as set forth by the Hanafi school, the Shafii school, or another? If the court follows the Shafii school, as it gives one-eighth of the bequest to "volunteers for jihad without remuneration," does the court direct that this money be bequeathed to terrorists? Giving effect to such a provision would involve a Pandora's box of problems similar to those which arise when the courts try to interpret the scriptures and doctrines of other religions.

However, the Muslim testator, like the Christian or Jewish testator, can avoid this problem simply by providing specific directions for the bequest. The fact that those directions are consistent with Sharia Law, or with the dictates of any other religion, would not invalidate them. In *Harris v. McRae*, 448 U.S. 297, 320 (1980), the Court stated that the fact that a statute "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[29]

CONCLUSION

Article I, § 8 of the U.S. Constitution delegates to Congress the power "To define and punish ... Offences against the Law of Nations... ." It delegates no such

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[28] *Id.* at 272 (emphasis original).

[29] See also, *McGowan v. Maryland,* 366 U.S. 420, 446 (1961).

power to the Judiciary. The Save Our State Amendment is consistent with this separation of powers.

Alarmed by disturbing instances of American courts basing their decisions on foreign law and international law, the people of Oklahoma have chosen to prohibit their courts from doing so. And to forestall confusion as to whether Sharia Law constitutes foreign law, they made clear in the Amendment that it does constitute foreign law.

For all of the above reasons, Amicus urges this Court to reverse the District Court's ruling and uphold the constitutionality of the Save Our State Amendment.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in *Times New Roman* size 14.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the most recent version of AVG Anti-Virus, version 10.0.1209, updated on April 4, 2011, and are free of viruses as reported by the software program.

Respectfully submitted this 4th day of April, 2011.

/s/John A. Eidsmoe
John A. Eidsmoe*

Roy S. Moore
Benjamin D. DuPré
Foundation for Moral Law
One Dexter Avenue
Montgomery, Alabama 36104
Phone: (334) 262-1245
Fax: (334) 262-1708
eidsmoeja@juno.com
Counsel for *amicus curiae*
Foundation for Moral Law
**Counsel of Record*

CERTIFICATE OF SERVICE

I certify that on April 4, 2011, I transmitted a digital submission of the foregoing to the Court for filing and transmittal of Notice of Electronic Filing in compliance with the Court's Emergency General Order of October 20, 2004, as last amended March 18, 2009: In Re: Electronic Submission of Documents and Conversion to Electronic Case Filing.

Micheal C. Salem
Direct: 405/366-1234
Email: msalem@msalemlaw.com
Salem Law Offices
Firm: 405/366-1234
101 East Gray, Suite C
Norman, OK 73069-7257

Scott D. Boughton
Direct: 405/521-4274
Email: scott.boughton@aog.ok.gov
Attorney General for the State of Oklahoma
Firm: 405/521-3921
313 N.E. 21st Street
Oklahoma City, OK 73105

/s/John A. Eidsmoe
John A. Eidsmoe
Counsel for Amicus
Foundation for Moral Law