No. 10-6273

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MUNEER AWAD,
Plaintiff-Appellee,

v.

PAUL ZIRIAX, THOMAS PRINCE, RAMON WATKINS, and SUSAN TURPEN,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Oklahoma
(Hon. Vicki Miles-LaGrange)

BRIEF OF AMICI CURIAE THE AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE ANTI-DEFAMATION LEAGUE, THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE CENTER FOR ISLAMIC PLURALISM, INTERFAITH ALLIANCE, AND THE UNION FOR REFORM JUDAISM IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The American Jewish Committee has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

Americans United for Separation of Church and State has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

The Anti-Defamation League has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

The Baptist Joint Committee for Religious Liberty has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

The Center for Islamic Pluralism has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization. Its parent organization is The Interfaith Alliance, Inc., which is a 501(c)(4) organization. No publicly held corporation owns 10% or more of The Interfaith Alliance Foundation or The Interfaith Alliance, Inc.

The Union for Reform Judaism has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

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INTEREST OF AMICI CURIAE[1]

The American Jewish Committee ("AJC") is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of Americans of all faiths are equally secure. AJC maintains 26 regional offices in major cities nationwide and has participated as amicus curiae in numerous cases throughout the last century in defense of religious liberty for all. AJC is strongly committed to religious freedom in this country. This necessarily includes supporting an individual's right to participate in society in a manner consistent with his or her religious beliefs or practices. As Americans of faith, AJC has a direct interest in the religious freedom guaranteed by the religion clauses of the First Amendment and in an interpretation of the Establishment Clause in a manner that permits the Government to accommodate the practice of *all* religions.

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free exercise right of individuals and

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[1] All parties have consented to the filing of this amicus brief. 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 the brief, and no person (other than amici, their members, or their counsel) contributed money that was intended to fund preparing or submitting the brief.

religious communities to worship as they see fit; and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in numerous church-state cases throughout the country.

The Anti-Defamation League (ADL) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state and through the right to the free exercise of religion. In support of this principle, the League has previously filed briefs as a friend of the court in numerous cases dealing with the religious liberty clauses of the First Amendment. The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Baptist Joint Committee for Religious Liberty ("BJC") is a 75 year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state

separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

Founded in Washington, DC in 2004, the Center for Islamic Pluralism (CIP) is a think tank that challenges the dominance of American Muslim life by militant Islamist groups. Specifically, CIP's mission is to foster, develop, defend, protect, and further mobilize moderate American Muslims in their progress toward integration as an equal and respected religious community in the American interfaith environment; define the future of Islam in America as a community opposed to the politicization of our religion, its radicalization, and its marginalization, which has taken place because of the imposition on Muslims of attitudes opposed to American values, traditions, and policies; and educate the broader American public about the reality of moderate Islam and the threat to moderate Muslims and non-Muslim Americans represented by militant, political, radical, and adversarial tendencies. CIP's activities include media activity in print, websites, radio and television; conferences bringing together outstanding representatives of moderate Islam from throughout the Western world; publications, including papers, newsletters, books, videos, and, eventually, a regular journal; maintenance of a website: www.islamicpluralism.org; and outreach to the international Muslim community.

Interfaith Alliance celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy.

The Union for Reform Judaism ("Union") is the congregational arm of the Reform Jewish Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The Union comes to this issue out of our longstanding belief that religious freedom and the separation of church and state stand as the cornerstone of American democracy. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights and opportunities than have been known anywhere else throughout history. The Union also stands in opposition to efforts to enshrine in law intolerance, religious or otherwise.

QUESTION PRESENTED

While appellants' brief presents a number of questions for this Court's review, this brief focuses on a single one of those: whether the Save Our State Amendment, which twice singles out Islam for disapproval without reference to

any other religious faith or tradition, violates the First Amendment's Establishment Clause.

SUMMARY OF ARGUMENT

The Save Our State Amendment violates the Establishment Clause for two independent reasons.

First, to a reasonable observer, the amendment's purpose plainly is to disapprove of the Islamic tradition. The circumstances surrounding its legislative passage and popular approval – encompassing numerous public statements by its legislative proponents and private supporters – could only lead such an observer to conclude that the amendment's purpose was to target one particular religion. Exactly the same conclusion flows from the text of the amendment itself, which twice mentions Sharia – defined for voters as "Islamic law" – without mentioning any other religious tradition by name. The Save Our State Amendment therefore violates the purpose prong of the *Lemon* test by disfavoring Islam.

Second, the Save Our State Amendment fares just as poorly under the effect prong of *Lemon*. The amendment's dual specific references to Sharia law – and to no other religious tradition – have the unambiguous effect of communicating official disapproval of Islam. That effect is only underscored by the campaign to pass the Save Our State Amendment – a campaign that, again and again, focused on the need to combat a threat that Muslims and Islamic law supposedly posed to

Oklahoma. Because a reasonable observer would perceive the amendment as communicating a message of official disapproval of Islam, it violates the effect prong of the *Lemon* test.

Finally, the Supreme Court has never held that government action violating the *Lemon* test can be saved through the application of strict scrutiny. But even if that is theoretically possible, this Court certainly cannot uphold the Save Our State Amendment on such a basis. The state does not even attempt to argue that strict scrutiny is satisfied, so it has waived any such contention. And in any event, the Save Our State Amendment is not narrowly tailored to a compelling government interest. To the contrary, it is devised to combat a problem that Oklahoma has never even encountered – and it does so in a manner that brands members of a tiny religious minority as pariahs.

ARGUMENT

The test for whether government action violates the Establishment Clause is well-settled. To pass constitutional muster, government action "must have a secular legislative purpose"; "its principal or primary effect must be one that neither advances nor inhibits religion"; and it "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal quotation marks omitted); *see Green v. Haskell County Board*

of Comm'rs, 568 F.3d 784, 796 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

The "clearest command of the Establishment Clause," the Supreme Court has explained, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687, 696 (1994). To similar effect, this Court has noted the constitutional imperative for "equal treatment of all religious faiths without discrimination or preference." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). Indeed, *Colorado Christian* emphasized that such discrimination is forbidden even in the absence of "discriminatory animus, hatred, or bigotry." *Id.* at 1260; *see id.* at 1258-59 (finding Establishment Clause command violated even by discrimination between "sectarian" and "pervasively sectarian" institutions). A fortiori, of course, such discrimination is forbidden where "animus, hatred, or bigotry" *does* exist.

With respect to both the purpose prong and the effect prong of the *Lemon* test, the Save Our State Amendment's singling out of Sharia law – and, thus, its violation of the core nondiscrimination command of the Establishment Clause – renders the provision unconstitutional.

I. THE SAVE OUR STATE AMENDMENT'S LANGUAGE AND HISTORY DEMONSTRATE THAT IT SINGLES OUT SHARIA LAW.

A. The Amendment's Language.

Oklahoma's Save Our State Amendment, according to the ballot title presented to voters, "forbids courts from considering or using Sharia law." The ballot title explained that "Sharia law is Islamic law" and "is based on two principal sources, the Koran and the teaching of Mohammed." The amendment approved by voters permits Oklahoma courts to uphold and apply the laws of other states only if those laws do not incorporate Sharia:

> 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.

Op. 3 (quoting Enr. H.J.R. No. 1056, at 2) (emphasis added). The amendment singles out Sharia once more in its prohibition on Oklahoma courts' use of law other than United States law:

> 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.

Id. (quoting Enr. H.J.R. No. 1056, at 2) (emphasis added).

B. The Amendment's History.

The amendment's dual condemnations of Sharia are no accident. In the lead-up to the November 2010 referendum on SQ 755, the authors of the underlying bill, House Joint Resolution 1056 ("HJR 1056"), repeatedly made clear that the law was meant to stave off the perceived threat posed by Islamic law.

1. Statements By The Amendment's Legislative Proponents.

State Representative Rex Duncan, the primary author of HJR 1056, was outspoken in its support. For instance, Representative Duncan "encouraged" Oklahomans to read a report published by the Center for Security Policy entitled "Sharia – The Threat to America," which concluded that "[t]he enemy's explicit goal is to establish a global Islamic state, known as the caliphate, governed by Sharia." Mark Schlachtenhaufen, *Report: Radicals Seek Global Sharia-Governed State*, Edmond Sun (Okla.), Sept. 24, 2010. And, days before Oklahomans voted on SQ 755, Duncan noted in a public appearance that Sharia law's prevalence in the United Kingdom was "a cancer upon the survivability of the UK." Gale Courey Toensing, *Oklahoma Lawmakers Aim to Ban International and Sharia Law from State Courts*, Indian Country Today, Oct. 27, 2010. He claimed that "SQ 755 will constitute a pre-emptive strike against Sharia law coming to Oklahoma," and

that "[w]hile Oklahoma is still able to defend itself against this sort of hideous invasion, we should do so." *Id.*[2]

As SQ 755 attracted national attention, Duncan took to the airwaves to tout his proposed amendment. Although the Save Our State Amendment prohibits the use of any law of "other nations or cultures," Duncan's statements focused almost entirely on its prohibition of Sharia law. In an interview on MSNBC, he said that "Oklahomans recognize that America was founded on Judeo-Christian values, and we're unapologetically grateful that God has blessed America and blessed Oklahoma. . . . [S]tate [Q]uestion 755, the Save Our State Amendment, is just a simple effort to ensure that our courts are not used to undermine those founding principles and turn Oklahoma into something that our founding fathers and our great-grandparents wouldn't recognize." Federal News Service, MSNBC Interview with State Rep. Rex Duncan, June 11, 2010 ("Duncan MSNBC Interview"). Duncan added: "It's the face of the enemy, and we need to call it what it is." *Id.* Oklahoma voters, Duncan asserted, "understand that this is a war for the survival of America. It's a cultural war, it's a social war, it's a war for the survival of our country." *Id.*

[2] Duncan had previously expressed his distaste for Islam: in 2007, he refused to accept a complimentary copy of the Koran offered to all Oklahoma legislators, asserting that the Koran espoused violence and that "most Oklahomans do not endorse the idea of killing innocent women and children in the name of ideology." Sandhya Bathija, *Politicians Fan Fear to Win Ballot Approval for Oklahoma Ban on Islamic Law*, 63 Church & State 13 (2010).

Then, in the first of two interviews with Fox News, Duncan claimed that without the Save Our State Amendment, Muslims would find a "backdoor way to get Sharia Law into the courts." *Oklahoma Lawmaker Wants Sharia Law Banned*, FoxNews.com (June 21, 2010), http://www.foxnews.com/story/0,2933,595026,00.html. After being shown a video of Muslim protests in Great Britain, Duncan stated that it was a "movie trailer" of "what is coming to America," and that "[t]hese people . . . are the same people [who] are coming to take away our liberties from your children, my children, and our grandchildren." *Id.* Duncan reiterated those views in his second interview, asserting that Muslims were "not here just to be one of many religions, but to be the dominant religion." Douglas Kennedy, *Sharia (Islamic Law) Not O.K. in Oklahoma*, FoxNews.com (June 25, 2010), http://liveshots.blogs.foxnews.com/2010/06/25/ sharia-islamic-law-not-ok-in-oklahoma (video at 1:25).

Other co-authors of the Save Our State Amendment provided similar justifications for the law. Appearing in a story on the law on CNN's Situation Room, State Senator Anthony Sykes claimed that "fear" of Sharia law was "real" because "it's already happened in America and we want to make sure it doesn't happen here in Oklahoma." *Sharia Law on Ballot in Oklahoma*, CNN.com (Oct. 28, 2010), http://www.cnn.com/2010/POLITICS/10/28/oklahoma.sharia.question/index.html. That statement echoed Sykes's earlier claim that "Sharia law coming

to the U.S. is a scary concept," and his hope that "the passage of the constitutional amendment will prevent it in Oklahoma." Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, Edmond Sun (Okla.), June 4, 2010.

Another co-author of the law, Representative Lewis Moore, said that HJR 1056 was necessary to rebuff the "onslaught" of Sharia that was coming Oklahoma's way. *Id.* He added, "I don't think we should accept or encourage Sharia law in any way, shape or form." *Id.* Even the Director of Committee Staff for Oklahoma's State Representatives, Rick Farmer, publicly admitted in a question-and-answer session that the sole purpose of SQ 755 was "more or less to keep Sharia Law out of Oklahoma's judicial system." Randy Mitchell, *State Question 755 Says No Sharia Law*, Ada Evening News (Okla.), Oct. 18, 2010.

2. The Media Campaign Supporting The Amendment.

The media campaign in support of the Save Our State Amendment underscored that it was intended solely to combat the supposed threat posed by Sharia law. In the days leading up to the vote, ACT! For America ("AFA") – an advocacy group dedicated to fighting "Islamofascism" – conducted an extensive and well-financed media campaign to encourage passage of the proposed amendment. *See* Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, FoxNews.com (Oct. 20, 2010), http://www.foxnews.

com/politics/2010/10/20/anti-islamic-group-launches-media-blitz-oklahoma-anti-shariah-ballot-initiative.

AFA's president and CEO, Brigitte Gabriel, asserted that "the [proposed] constitutional amendment will prevent the takeover of Oklahoma by Islamic extremists who want to undo America from the inside out." *Id.* Gabriel co-wrote an op-ed piece in *The Oklahoman* declaring that "sharia law is penetrating America," and claiming that Islamic leaders wanted Islam to "be the highest authority in America." Brigitte Gabriel & Lauren Losawyer, *SQ 755 Merits Support: Sharia Law Creeping into U.S. Courts*, The Oklahoman, Oct. 16, 2010, at 9A. AFA also ran radio advertisements warning listeners that "Islamic Sharia law has begun to penetrate America," and asking them to "help us stop Sharia law from coming to Oklahoma . . . [by] vot[ing] yes on State Question 755." ACT! For America, *The Threat of Sharia Law*, YouTube (uploaded Oct. 15, 2010), http://www.youtube.com/watch?v=onGxKNSDT3Q; *see also* Ben Smith & Byron Tau, *Anti-Islamic Groups Go Mainstream*, Politico, Mar. 7, 2011 (describing AFA's radio advertisements). It also targeted voters with 600,000 robo-calls voiced by James Woolsey, the former director of the CIA. *See* ACT! For America, *Oklahoma Voters Overwhelmingly Say NO to Sharia Law*, http://www.actforamerica.org/index.php/learn/email-archives/2149-oklahoma-voters-overwhelmingly-say-no-to-sharia-law (last visited May 10, 2011); Laurie Ure,

Oklahoma Voters Face Question on Islamic Law, CNN.com (Oct. 28, 2010), http://www.cnn.com/2010/POLITICS/10/28/oklahoma.sharia.question/index.html.

The *New York Times* reported that AFA "played a key role in passing [the] constitutional amendment in Oklahoma banning the use of Sharia." Laurie Goodstein, *Drawing U.S. Crowds with Anti-Islam Message*, N.Y. Times, Mar. 8, 2011, at A1. AFA claimed victory as well, stating on its website that the "overwhelming [electoral] margin sends an unequivocal message to Islamic organizations and Muslims such as Ground Zero Mosque Imam Rauf, who advocate sharia law for America – sharia law is not welcome here!" *Oklahoma Voters Overwhelmingly Say "NO" to Sharia Law*, *supra*.

3. The Perception Of Oklahomans.

In light of the rhetoric of SQ 755's authors and the supporting media blitz, it is no surprise that Oklahomans perceived SQ 755 as a question about Sharia law, and not non-United States law generally. In letters to the editors of Oklahoma's major newspapers, both supporters and opponents of the Save Our State Amendment almost uniformly made their case in terms of the Sharia law issue. Supporters viewed the amendment's focus on Sharia as its primary selling point. One wrote that "Oklahomans don't need nor want any part of Sharia law, now or in the future, as evidenced by our vote on SQ 755." Bob Merrill, Letter to the Editor, *SQ 755: Longtime Tensions*, The Oklahoman, Nov. 12, 2010, at 9A. Another

claimed that "a 'no' vote [on SQ 755] assists Islamists in their 'stealth jihad,' an ongoing, insidious effort to surreptitiously retool the United States into an Islamic nation." Joe A. Putnam, Letter to the Editor, *SQ 755 Supported*, Tulsa World, Oct. 27, 2010, at A16. Echoing the claims of AFA's radio advertisements, the author concluded, "[s]ince Shariah is already creeping into the United States, it is only a matter of time until it comes to Oklahoma – unless we vote 'Yes' on SQ 755." *Id.* And yet another Oklahoman observed that Sharia law already "is allowed for Muslims in England and several other countries in Europe," and that the Save Our State Amendment is "the first step to prevent Shariah law and international law from being honored here." Phil Essley, Letter to the Editor, *Shariah Law is a Problem*, Tulsa World, Nov. 13, 2010. He ended his letter ominously, "[m]ay God help us if the Muslims win this fight." *Id.*

Opponents of the amendment, for their part, observed: that "Muslims in Oklahoma are responsible and model citizens," and to "antagonize them is bad politics," Isaac Samuel, Letter to the Editor, *SQ 755 Ill-Considered*, Tulsa World, Nov. 18, 2010, at A18; that SQ 755 is bad policy because it "singles out one religion for disparate treatment," Daniel DiGriz, Letter to the Editor, *SQ 755 Must Go*, Tulsa World, Nov. 14, 2010, at G2; that the "singling out of Sharia law . . . in the amendment can be regarded as nothing more than a poke in the eye to the Oklahoma Muslim community, a community that obeys the law, participates

robustly in society and has done nothing to deserve such vitriol," Adam Bates, Letter to the Editor, *Disheartening Result*, The Oklahoman, Nov. 7, 2010, at 17A; and that SQ 755 "is pure and simple religious bigotry, disguised as patriotism." Tedd Adams, Letter to the Editor, *Bigotry Disguised*, Tulsa World, Aug. 8, 2010, at G2.

4. The Perception Of Media Outlets.

Local and national media outlets also recognized the Save Our State Amendment for what it was: a law targeting the Islamic tradition. Within Oklahoma, a staff editorial from the *Journal Record*, an Oklahoma City paper, stated that "[b]latant anti-Muslim sentiment is behind SQ 755, an ill-conceived pandering to the ultra-right and ill-informed." Editorial, *Taking Issue with Selective Friendliness*, Journal Record (Okla.), Sept. 22, 2010. An op-ed piece in the *Tulsa World* similarly commented that support for SQ 755 was being driven by the "fear-mongers behind the Great Sharia Law Panic of 2010," Wayne Greene, *Panic!*, Tulsa World, Sept. 26, 2010, at G6, and an earlier editorial in that paper described the amendment's goal as "stop[ping] state courts from considering Shariah Law, something that has never happened before and wasn't going to happen." Editorial, *3 Challenges*, Tulsa World, Nov. 11, 2010, at A18. Finally, an *Oklahoma Daily* editorial stated: "Oklahoma couldn't miss out on the Islamophobia in America. . . .The idea that these courts use or could use Sharia is

ridiculous, and the measure implies Oklahoma's Muslims are all extremists trying to subvert U.S. laws. Let's not marginalize the state's Muslim population." Editorial, *Our View: State Questions 754, 755*, Oklahoma Daily, Oct. 27, 2010, http://oudaily.com/news/2010/oct/27/our-view-state-questions-754-755/.

Outside Oklahoma, a *New York Times* columnist reflecting on SQ 755's popular approval wrote that "Shariah is the new hot-button wedge issue . . . mobiliz[ing] conservative Americans against the supposed 'stealth jihad' of Muslims in the United States." Roger Cohen, Editorial, *Shariah at the Kumback Café*, N.Y. Times, Dec. 6, 2010. Michael Gerson, a columnist for the *Washington Post*, observed that the Save Our State Amendment is "a novel use of American law – not to actually address a public problem, but to taunt a religious minority." Michael Gerson, Editorial, *Baiting a Faith in Oklahoma*, Wash. Post, Nov. 16, 2010, at A31. Gerson added, "What Oklahoma has done is faith-baiting – taking the least attractive elements or excesses of a religious tradition and symbolically legislating against them." *Id.* And the *Los Angeles Times* decried "Oklahoma lawmakers, who put State Question 755 on the ballot, [and] found a cheap way to appeal to voters' worst instincts by fanning deep-seated antipathy toward a tiny religious minority – one that poses no real threat to the state's laws or way of life." Editorial, *Overwrought in Oklahoma*, L.A. Times, Nov. 11, 2010, at A30.

Even supporters of the law, such as the *Washington Times*, described its merits solely in terms of its impact on Sharia law. In an editorial echoing the terms Representative Duncan used to justify the Save Our State Amendment, the *Times* applauded passage of the law and wrote that "Oklahomans showcased their independent streak on Election Day by launching a pre-emptive strike against the creeping influence of Shariah in their state." Editorial, *Sooner State Shariah: Oklahoma Leads the Charge to Preserve Constitutional Law*, Wash. Times, Nov. 17, 2010, at B2.

5. The Perception Of Oklahoma's New Governor.

In the aftermath of the district court's decision to enjoin the amendment, the newly elected Governor of Oklahoma provided a remarkably candid assessment of the Save Our State Amendment's purpose. In response to the district court's injunction order, Oklahoma legislators introduced House Bill 1552, a measure that prohibited courts from relying upon any form of foreign or international law, but did not mention Sharia law specifically. Governor Mary Fallin said she supported the new measure because "[t]he people of Oklahoma spoke pretty clearly when there was a vote . . . on Sharia law." Michael McNutt, *Fallin Supports Intent of Bill to Ban Foreign Law in Courts*, The Oklahoman, Mar. 22, 2011, at 1A (alteration in original).

II. THE SAVE OUR STATE AMENDMENT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT WAS SPURRED BY THE IMPERMISSIBLE PURPOSE OF DISAPPROVING OF A SINGLE RELIGIOUS TRADITION.

The Tenth Circuit applies the "purpose" prong of *Lemon* "in light of Justice O'Connor's endorsement test." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005). As to purpose, the *Lemon*/endorsement test asks "whether government's actual purpose is to endorse or disapprove of religion." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); *see O'Connor*, 416 F.3d at 1224 ("A government action is examined under this standard regardless of whether it is alleged to endorse or disparage religion."); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

It is not enough for a state simply to articulate a secular purpose by way of a litigation defense. Rather, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864 (2005); *see id.* at 871 (noting that "new statements of purpose were presented only as a litigating position"). In *Edwards v. Aguillard*, for instance, the challenged statute itself articulated the ostensibly secular governmental purpose of protecting "academic freedom." 482 U.S. 578, 586

(1987). The Supreme Court rejected that proffered purpose, observing that the legislative history demonstrated a purpose of advancing "a particular religious viewpoint" – namely, creationism. *Id.* at 593-94.

Both the content and the context of a government action, moreover, are relevant to the inquiry into governmental purpose. *See O'Connor*, 416 F.3d at 1225 & n.2; *McCreary County*, 545 U.S. at 874 ("purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context"); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) ("In deciding whether the government's *purpose* was improper, a court must view the conduct through the eyes of an 'objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.' " (quoting *McCreary*, 545 U.S. at 862) (internal quotation marks omitted)). In *Santa Fe Independent School District v. Doe*, for example, the Supreme Court considered the constitutionality of a school district policy permitting student-led and student-initiated invocations at football games. *See* 530 U.S. 290, 297-301 (2000). In ruling the policy unconstitutional, the Court looked not only to its content but also to its history. The court found it "[m]ost striking" that the policy's history demonstrated that it was intended "to preserve the practice of prayer before football games," which amounted to impermissible "[s]chool sponsorship of a

religious message." *Id.* at 309. Similarly, in *McCreary County*, the Supreme Court did not limit its purpose inquiry to consider only "the latest news about the last in a series of government actions." 545 U.S. at 866. Rather, the Court observed that "the world is not made brand new every morning," and proceeded to undertake a detailed inquiry into the history of a challenged Ten Commandments display. *Id.*; *see id.* at 869-74. In light of that history, the Court held the display unconstitutional, even though it might have been permissible in a vacuum. *See id.* at 873-74.

Here, as set forth in detail in Part I.B above, the history of the challenged provision's adoption by the Legislature, and of the campaign to pass the provision by popular referendum, compels the conclusion that the amendment's purpose was to express government disapproval of the Islamic tradition. Time and again, the measure's principal legislative proponents made clear – in language apparently calculated to instill fear – that its chief purpose was to prevent consideration of Sharia by Oklahoma courts. *See, e.g.*, Toensing, *supra* (declaration of Representative Duncan that "SQ 755 will constitute a preemptive strike against Sharia law coming to Oklahoma"); Duncan MSNBC Interview (declaration of Representative Duncan that "it's a war for the survival of our country"). That same purpose was reflected in the statements of other supporters of SQ 755, including some who advocated widely for its popular approval. *See, e.g.*, ACT!

For America, *The Threat of Sharia Law*, *supra* (imploring voters to "help us stop Sharia law from coming to Oklahoma . . . [by] vot[ing] yes on State Question 755"). And official denunciation of Islam certainly was the purpose perceived by observers inside and outside Oklahoma – including both those who hailed the Save Our State Amendment and those who condemned it. *See, e.g.*¸ Editorial, *Taking Issue with Selective Friendliness*, *supra* (stating that "[b]latant anti-Muslim sentiment is behind SQ 755, an ill-conceived pandering to the ultra-right and ill-informed"); Editorial, *Sooner State Shariah*, *supra* (applauding the decision to "launch[] a pre-emptive strike against the creeping influence of Shariah").

The state, for its part, denies that any of this is relevant. State Br. 26-27. Instead, it focuses narrowly on the fact that the Save Our State Amendment broadly proscribes "look[ing] to the legal precepts of other nations or cultures." State Br. 27-28 (footnotes omitted). In the state's view, the *only* guide to purpose is the amendment's text. The Establishment Clause does not permit that sort of blinkered approach. *See, e.g.*, *McCreary County*, 545 U.S. at 874 ("purpose . . . needs to be understood in light of context"); *Weinbaum*, 541 F.3d at 1031 (similar).

But even on its own terms, the state's argument fails – for the same impermissible purpose is evident from the very face of the Save Our State Amendment. In two separate places, the amendment singles out Islamic tradition for disapproval. *First*, while the amendment does generally forbid "look[ing] to

the legal precepts of other nations or cultures," that prohibition also states that "[s]pecifically, the courts shall not consider international law or Sharia Law." Op. 3 (quoting Enr. H.J.R. No. 1056, at 2) (emphasis added). No other faith or religious tradition is mentioned; rather, with respect to the prohibition on "look[ing] to the legal precepts of other nations or cultures," Islam is uniquely targeted for disapprobation.

Second, with respect to consideration of the law of other states, the Save Our State Amendment broadly directs courts to "uphold and adhere to . . . the law of another state of the United States" – but only as long as "the law of the other state does not include Sharia Law." *Id.* (quoting Enr. H.J.R. No. 1056, at 2). The amendment does not except a state's law that includes, for instance, canon law or Jewish law. Thus, if it were not already clear, the amendment *again* singles out Islamic tradition for disfavored treatment. Were the state's purpose truly a secular one, it is hard to imagine that the Save Our State Amendment would target Islam in this manner.

The Save Our State Amendment's focus on Sharia is consistent with the ballot title. The ballot title stated that the measure, if approved, would "forbid courts from considering or using Sharia Law" – which, the ballot title explained, "is Islamic law." Op. 2 (quoting ballot title). Like the amendment itself, the ballot mentioned no other faith or religious tradition. *See id.*

To be sure, the state professes to have a secular purpose – namely, to "ban Oklahoma courts from 'look[ing] to the legal precepts of other nations or cultures.'" State Br. 25. Yet the history outlined above – not to mention the Save Our State Amendment's text – belies the notion that this ostensibly neutral purpose really was what animated the amendment. The desire to effect a broad prohibition on judicial consideration of "the legal precepts of other nations or cultures" scarcely merited mention by the measure's proponents – and was, at most, an afterthought. To the extent that any secular purpose existed here, it was "secondary to a religious objective," *McCreary County*, 545 U.S. at 864, and thus cannot save the Save Our State Amendment. Indeed, in light of the history outlined above, it is virtually inconceivable that SQ 755 would have come into being at all were it not for the focus on Sharia.

Any argument that the Save Our State Amendment passes constitutional muster because its purpose is to target Sharia, rather than Islam per se, misses the point. The ballot title specifically defined Sharia as "Islamic law." And under the amendment, consideration of *any* Sharia is categorically prohibited, without regard to its content. The *only* question is whether what is sought to be considered is Sharia – *i.e.*, Islamic law. For purposes of the Establishment Clause, there simply is no meaningful distinction between a purpose of targeting Islam and a purpose of targeting Islamic law.

III. THE SAVE OUR STATE AMENDMENT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT HAS THE IMPERMISSIBLE EFFECT OF CONVEYING OFFICIAL DISAPPROVAL OF A SINGLE RELIGIOUS TRADITION.

The Save Our State Amendment's manifest lack of a secular purpose is itself sufficient reason to conclude that it violates the Establishment Clause. But the amendment also lacks a primary effect that "neither advances nor inhibits religion" – an infirmity that provides an independent reason to invalidate the provision. *Lemon*, 403 U.S. at 612.

As with the purpose prong of *Lemon*, this Court applies the effect prong in light of Justice O'Connor's endorsement test. Here, the question is whether, regardless of its underlying purpose, the challenged provision "conveys a message of endorsement or disapproval" of religion. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *accord American Atheists, Inc. v. Davenport*, No. 08-4061, 2010 WL 5151630, at *17 (10th Cir. Dec. 20, 2010), *petition for cert. filed*, __ U.S.L.W. __ (Apr. 20, 2011) (No. 10-1297). That inquiry looks to how a reasonable observer would perceive the challenged government action. Importantly, the inquiry does not consider the challenged provision in a vacuum. Rather, it encompasses the provision's history and context, with which the reasonable observer is presumed to be familiar. *See, e.g.*, *Green*, 568 F.3d at 803; *Weinbaum*, 541 F.3d at 1037; *O'Connor*, 416 F.3d at 1227-28 (question is "whether a reasonable observer aware

of the history and context . . . would find the [challenged action] had the effect of favoring or disfavoring a certain religion").

There can be little doubt that, to a reasonable observer, the Save Our State Amendment "conveys a message of . . . disapproval" of Islam. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). *First*, on its face, the amendment impermissibly expresses government disapproval of Islam, targeting Sharia by name in two places. As noted above, with respect to the prohibition on courts "look[ing] to the legal precepts of other nations or cultures," the amendment states that "[s]pecifically, the courts shall not consider international law *or Sharia Law*." Op. 3 (quoting Enr. H.J.R. No. 1056, at 2) (emphasis added). And the amendment mandates adherence to "the law of another state of the United States" only as long as "the law of the other state does not include Sharia Law." *Id.* (quoting Enr. H.J.R. No. 1056, at 2). To a reasonable, objective observer, the text of the Save Our State Amendment – which twice mentions Islamic law yet refers to no other religious tradition – unmistakably conveys a message of government disapproval of Islam.

Second, the history of SQ 755 – with which, again, the reasonable observer is presumed to be familiar – only accentuates this message of disapproval. As explained in detail in Part I.B above, the Save Our State Amendment's principal legislative proponents repeatedly made clear, in statements aired widely, that it was

targeted specifically at the supposed menace of Sharia (described by the ballot title as "Islamic law"). *See, e.g.*, Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, *supra* (statement of Representative Lewis Moore that the Save Our State Amendment was necessary to prevent an "onslaught" of Sharia in Oklahoma). So did private citizens who supported SQ 755. *See, e.g.*, Joe A. Putnam, Letter to the Editor, *supra* ("a 'no' vote [on SQ 755] assists Islamists in their 'stealth jihad,' an ongoing, insidious effort to surreptitiously retool the United States into an Islamic nation"). And national and local media alike well apprehended that this was an anti-Sharia provision – and not, for instance, an anti-laws-of-other-nations-or-cultures provision. *See, e.g.*, Wayne Greene, *supra* (describing SQ 755 as part of the "Great Sharia Law Panic of 2010"). In view of the circumstances surrounding legislative passage and popular approval of the Save Our State Amendment, it is hard to imagine how *any* observer – reasonable or not – could fail to perceive the state's official disapproval of the Islamic tradition.

It is with good reason, of course, that the Establishment Clause condemns this sort of official government disapproval of religion: a provision like the Save Our State Amendment communicates to Muslims that they – and they alone – are likely to receive inferior treatment on account of their religion. *See, e.g.*, *American Atheists*, 2010 WL 5151630, at *20 (noting that cross displays on Utah highways "may lead the reasonable observer to fear that Christians are likely to receive

preferential treatment from the [Utah Highway Patrol] – both in their hiring practices and, more generally, in the treatment that people may expect to receive on Utah's highways"). Indeed, as noted above, this Court has recognized that the principle of non-discrimination among religious faiths lies at the very core of both of the Constitution's Religion Clauses. *See Colorado Christian*, 534 F.3d at 1257.

And this particular instance of religious discrimination is especially troublesome: If the Save Our State amendment takes effect, official disapproval of Islam will be written into the principles an Oklahoma court is to apply *in each and every case* when determining the rules of decision. With official disapproval of Islam so enshrined, many Muslims inevitably will perceive that, whatever the substance of their particular cases, the courts will not afford them equal treatment. As a result, they may well become more reluctant to make recourse to the courts in the first place. It is hard to imagine any setting where official disapproval of one religion would provide greater cause for alarm.

IV. THE SAVE OUR STATE AMENDMENT CANNOT SURVIVE STRICT SCRUTINY.

The Supreme Court has never held that the application of strict scrutiny can save government action violating the *Lemon*/endorsement test. Nonetheless, this Court has suggested that governmental action discriminating against a particular religion is not categorically unconstitutional but, rather, may be permissible if it

satisfies strict scrutiny. *See Colorado Christian* , 534 F.3d at 1256. Even if that is so, the Save Our State Amendment cannot possibly pass constitutional muster.

As an initial matter, the state has made no argument at all that the Save Our State Amendment can satisfy strict scrutiny. *Compare* State Br. 36 (arguing, with respect to the Free Exercise Clause, only that SQ 755 "is rationally related to Oklahoma's legitimate governmental interest in banning consideration in its courts of the laws of other nations and cultures"). Any argument that the amendment satisfies strict scrutiny has therefore been waived. *See, e.g., City of Colorado Springs v. Solis*, 589 F.3d 1121, 1135 n.5 (10th Cir. 2009) (arguments not raised in opening brief are waived).

Yet the Save Our State Amendment cannot survive strict scrutiny in any event. The amendment is not narrowly tailed to a compelling government interest; instead, it addresses a "problem" that is pure fiction. There is no indication, of course, that any court in Oklahoma, where Muslims represent a tiny minority, has *ever* decided a case on the basis of Sharia. Representative Duncan even conceded as much. *See* Kennedy, *Sharia (Islamic Law) Not O.K. in Oklahoma*, *supra* (interviewer: "Are there any judges here in Oklahoma currently using Sharia?" Representative Duncan: "Not yet, and you know what, there won't be any with passage of 755."); *see also* Editorial, *3 Challenges*, Tulsa World, Nov. 11, 2010, at A18 (noting that Oklahoma courts' consideration of Sharia "has never happened

before ”). Nor, with the exception of a very few aberrant cases, have courts in other states sought to decide cases on the basis of Sharia. Finally, even though there surely are circumstances where a court’s use of religious law would itself violate the Establishment Clause, there is no reason to believe that Oklahoma courts would be any more likely to impermissibly decide cases based on Sharia than on other religion’s legal precepts.

* * *

While the state maintains that this challenge is premature because no state court has yet construed the Save Our State Amendment, the reality is that no construction could rewrite the amendment’s history and excise the profoundly anti-Islamic rhetoric that animated its legislative passage and popular approval. Nor could any construction do away with the fact that, on its face, the amendment twice singles out Islam for disapproval, without mentioning any other faith. No matter how its particulars are construed, the Save Our State Amendment violates the Establishment Clause.

CONCLUSION

For the foregoing reasons, the district court’s decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because it contains 6,873 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii), according to the word-count function of Microsoft Office Word 2007.

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I hereby certify that on this 16th day of May, 2011, I filed a true and exact copy of this brief using the Court's ECF system, which will effect service on all counsel registered with the system. I also caused one copy of the brief to be mailed to each of the following, postage prepaid:

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Pursuant to the Tenth Circuit General Order filed March 18, 2009, I hereby certify that:

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