
**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

MUNEER AWAD,

Plaintiff-Appellee,

-vs-

PAUL ZIRIAX, Agency Head, Oklahoma State Board of Elections,
THOMAS PRINCE, Chairman of the Board, Oklahoma State Board of Elections,
RAMON WATKINS, Board Member, Oklahoma State Board of Elections, and
SUSAN TURPEN, Board Member, Oklahoma State Board of Elections,

Defendants-Appellants.

**ON INTERLOCUTORY APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
BEFORE THE HONORABLE VICKIE MILES-LaGRANGE, UNITED
STATES DISTRICT JUDGE, District Court No. CIV-10-1186**

PLAINTIFF-APPELLEE AWAD'S RESPONSE BRIEF

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May 9, 2011

ORAL ARGUMENT REQUESTED

*(Admitted in Virginia only; not admitted in D.C.)

(See Page 50 and Tenth Circuit Rule 28.2(C)(4))

(Attachments in Digital Form)

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**STATEMENT OF ALL PRIOR OR RELATED APPEALS
PURSUANT TO TENTH CIRCUIT RULE 28.2(C)(1)**

This is an interlocutory appeal of a Preliminary Injunction Order entered by the District Court for the Western District of Oklahoma on November 29, 2010. *Awad v. Ziriak*, ___ F.Supp.2d ___, 2010 WL 4814077 (Nov. 29, 2010) (Doc. 20) (App. 264-78).

There are no prior or related appeals in this Court involving Muneer Awad and these Defendants.

A nonparty twice sought review:

1. *Risenhoover v. Awad v. Ziriak, et al.*, No. 10-6256, Tenth Circuit (mandamus action denied Nov. 15, 2010; rehearing denied Nov. 18, 2010);
2. *In Re Risenhoover*, No. 10-6261, Tenth Circuit (second mandamus action denied Nov. 19, 2010, and filing sanctions imposed)

Mr. Risenhoover filed numerous documents with this Court. The Court imposed filing sanctions prohibiting further submissions without payment of appropriate filing fees. See Order dated Nov. 19, 2010, No. 10-6251, n. 1 (“The docket for No. 10-6256 shows thirty submissions by Mr. Risenhoover between November 9 and November 18, 2010.”). Few, if any, of the documents were served on Plaintiff’s counsel.

Plaintiff objects to any participation in this matter by Mr. Risenhoover.

INDEX OF ATTACHMENTS TO PLAINTIFF- APPELLEE'S RESPONSE BRIEF PURSUANT TO TENTH CIR. RUL. 28.2(A)(1)

Attachments to **Plaintiff-Appellee's Response Brief** are listed below. "App." refers to Defendants-Appellants' Appendix. Page numbers of the attachments use the numbering of the Appendix.

Attachments are as follows:

- Attachment 1:** Order Granting Plaintiff Awad's Request for Preliminary Injunction, *Awad v. Ziriya*, ___ F.Supp.2d ___, 2010 WL 4814077 (Nov. 29, 2010) (Doc. 20) (App. 264-78).
- Attachment 2:** REDACTED - Plaintiff's Exhibit 8 of Preliminary Injunction Hearing, Last Will and Testament of Muneer Awad. (Part of Doc. 17) (App. 231-33) (unredacted exhibit is sole entry in Defendants-Appellants' sealed Appendix, Volume 2).
- Attachment 3:** State Question 755 - Enrolled House Joint Resolution 1056 (HJR 1056), enacted by Second Regular Session of the 52nd Legislature and as numbered and maintained by the Secretary of State, Plaintiff's Exhibit 1 (App. 166-83).

NOMENCLATURE USED IN THIS BRIEF

Plaintiff will be identified as he was in the District Court as “Awad,” “Mr. Awad,” “Plaintiff,” “Appellee,” or “Plaintiff-Appellee.”

Appellants, other parties, witnesses, or persons involved in this proceeding will generally be referred to by their last names or by a collective name as referenced in the District Court where appropriate (*i.e.*, “Appellants,” “Defendants,” “Oklahoma State Election Board” (or “OSEB”)).

Defendants-Appellants Ziriaux, Prince, Watkins, and Turpen have submitted a Brief-in-Chief which will be referred to as (Aplt. Br. ____).

There was one amicus brief in support of Defendants-Appellants, which was submitted by the Foundation for Moral Law and will be referred to as (Am. Br. ____).

Attachments to this Brief will be referred to as (Attach. ____, p. ____).

References to the District Court Docket Sheet (App. 1-11) and Docket Sheet entries will be identified as follows: (Doc. (Entry Number)).

Citations to the record will be consistent with Fed.R.App.P. 28(e) and Tenth Cir. R. 28.1. Defendants-Appellants have submitted an Appendix containing two Volumes. Citations to the Appendix will be as follows: (App. (page number), additional identification as necessary).

No. 10-6273

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

MUNEER AWAD,

Plaintiff-Appellee,

-vs-

PAUL ZIRIAX, Agency Head, Oklahoma State Board of Elections,
THOMAS PRINCE, Chairman of the Board, Oklahoma State Board of Elections,
RAMON WATKINS, Board Member, Oklahoma State Board of Elections, and
SUSAN TURPEN, Board Member, Oklahoma State Board of Elections,

Defendants-Appellants.

PLAINTIFF-APPELLEE AWAD’S RESPONSE BRIEF

MUNEER AWAD submits the following Response Brief to the Opening Brief of the Secretary Paul ZiriAx and Thomas Prince, Susan Turpen, and Ramon Watkins, members of the Oklahoma State Election Board.¹

¹ Plaintiff’s Complaint (App. 7-14) identified Defendants ZiriAx, Prince, Watkins, and Turpen as members of the “Oklahoma State Board of Elections.” Oklahoma Statutes create a three-person Board. 26 Okla. Stat. §2-101 (1983). Statutes refer to the “Oklahoma State Election Board,” created and identified in the Okla. Const., Art. III, §2. ZiriAx, Secretary of the Senate, serves as Secretary of the State Election Board. 26 Okla. Stat. §2-101.6 (1986). The three current board members are Prince, Turpen, and Watkins.

I. INTRODUCTION

Oklahoma stigmatizes Islam and its adherents.

The State of Oklahoma makes no attempt to defend the practice of singling out one religious faith for official condemnation and disability. Nor could it. Our constitutional commitment to religious liberty necessarily places decisions about whether, when, and how to worship beyond the will of the majority. Stated simply, “we do not count heads before enforcing the First Amendment.” *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring) (citing *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

Rather than embracing such an indefensible practice, the State Defendants in this case essentially disavow State Question 755 (“SQ755”), the so-called “Save Our State Amendment,” repeatedly straining to characterize the measure as a mere “choice of law” provision. Yet the Defendants’ spin ignores the plain text of the proposed amendment, not to mention the climate in which it arose.

The amendment expressly disfavors “Sharia Law”² – defined in the ballot title as “Islamic law,” based on “the Koran and the teaching of Mohammed” – in two independent ways. First, it bars courts in Oklahoma from “consider[ing] international law or Sharia Law.” Second, it permits consideration or use of another state’s law “provided the law of

² Unlike the language of SQ755, Awad used the spelling “Shariah” in his filings. Because the District Court used the spelling Sharia, this Brief will also do so to avoid confusion.

the other state does not include Sharia Law.” Candidly acknowledging, as they must, that there have been no instances of state-court “Sharia” threats from which Oklahoma needs “saving,” the Defendants are unable to explain, let alone justify, the stigma imposed by SQ755 on Muslims across the State.

As the District Court concluded after an evidentiary hearing, the proposed constitutional amendment has harmful, real-world consequences. The measure tramples the free exercise rights of a disfavored minority faith and constrains the ability of Plaintiff Muneer Awad and his fellow Muslims in Oklahoma to execute valid wills, assert religious liberty claims under the Oklahoma Religious Freedom Act, and enjoy equal access to the state judicial system.

The “Save Our State Amendment” also undercuts a central tenet of the Establishment Clause, sending an unmistakable message that Muslims are religious and political outsiders in their own State. The District Court did not abuse its discretion in preliminarily enjoining this unprecedented measure.

II. STATEMENT OF JURISDICTION

Plaintiff initially proceeded *pro se* and invoked the jurisdiction of the District Court pursuant to 28 U.S.C. §1331, alleging violations of the First Amendment. (App. 8).

Plaintiff alleged violations of the Free Exercise and Establishment Clauses. These claim are asserted pursuant to 42 U.S.C. §1983. (App. 7-14). Jurisdiction also lies pursuant

to 28 U.S.C. §1343. Plaintiff's requested relief is additionally available under 28 U.S.C. §2201, §2202, and Fed.R.Civ.P. 65.

The District Court entered a preliminary injunction on November 29, 2010, enjoining the Oklahoma State Election Board from certifying the election results regarding SQ755. (App. 264-78). This Court, therefore, has jurisdiction under 28 U.S.C. §1292(a)(1), which authorizes the courts of appeals to review a district court's interlocutory order granting a preliminary injunction.

Appellants filed a timely Notice of Appeal on December 2, 2010. (App. 225-26).

III. ISSUE PRESENTED FOR REVIEW

Did the District Court abuse its discretion in issuing a preliminary injunction restraining certification of SQ755 where, after holding an evidentiary hearing and considering the parties' briefing, the court found in Plaintiff's favor on standing, ripeness, likelihood of success on the merits, irreparable harm, balance of harms, and the public interest?

IV. STATEMENT OF THE CASE

Muneer Awad filed this action pursuant to 42 U.S.C. §1983 on November 4, 2010. (App. 7-14). Mr. Awad's complaint alleged that certification into law of SQ755, a proposed amendment to the Oklahoma Constitution that would bar state courts and other adjudicatory bodies from considering "Sharia Law" in making judicial determinations, would violate his

rights under the Free Exercise Clause and Establishment Clause of the First Amendment to the U.S. Constitution. Mr. Awad sought a temporary restraining order and a preliminary injunction.

The District Court held a hearing on Plaintiff's request for a temporary restraining order on November 8, 2010. At the conclusion of the hearing, the court orally issued a temporary restraining order, prohibiting Defendants from certifying the results of the vote on SQ755, and consequently enjoining the approved constitutional amendment from taking effect. (App. 40). The court also set a hearing for November 22, 2010 to adjudicate Mr. Awad's request for a preliminary injunction. One day later, on November 9, 2010, the District Court entered a written opinion granting a temporary restraining order, which would remain in effect until the conclusion of the preliminary injunction hearing. (App. 41-49).

During the November 22 preliminary injunction hearing, the District Court heard testimony from Mr. Awad and received Plaintiff's Exhibits 1, 2, and 4-14.³ (App. 91-165, 166-256). The court also extended the temporary restraining order to November 29, 2010. (App. 90, 162-63).

On November 29, 2010, the District Court issued its ruling granting "plaintiff's request for a preliminary injunction" and enjoining Defendants "from certifying the election results for State Question 755 until this Court rules on the merits of plaintiff's claims." (App. 278).

³ At the hearing, Defendants called no witnesses and offered no exhibits.

Defendants' interlocutory appeal followed. (App. 279-80).

V. STATEMENT OF FACTS AND DISPOSITION BY THE DISTRICT COURT

A. The "Save Our State Amendment"

On January 10, 2010, Rep. Rex Duncan introduced House Joint Resolution 1056 ("HJR 1056 ") in the Oklahoma State House. (App. 167-70). Sen. Anthony Sykes sponsored the same measure in the State Senate. (App. 167-70). The resolution proposed placing on the next electoral ballot a state question seeking voter approval of a constitutional amendment, entitled the "Save Our State Amendment," which would prohibit state courts and other adjudicatory bodies from considering "Sharia Law."⁴ (App. 166-70).

Although Defendants admit there is no evidence that any Oklahoma body has ever improperly imposed "Sharia law" in its proceedings (App. 158, 277), the resolution's primary sponsors claimed, without any support or explanation, that it was necessary to preempt the threat posed by Sharia law to what they view as America's Judeo-Christian heritage. (App. 22-23). On May 18, 2010, the House voted to approve HJR 1056. (App. 170). The Senate followed suit on May 24, 2010. (App. 170).

⁴ SQ755 would apply to nearly all adjudicative bodies in the state, including the Senate, sitting as a Court of Impeachment; the Oklahoma Supreme Court; the Court of Criminal Appeals; the Court on the Judiciary; the State Industrial (Workers' Compensation) Court; the Court of Bank Review; the Court of Tax Review; intermediate appellate courts; district courts; municipal courts; and such boards, agencies, and commissions created by the State Constitution or established by statute that exercise adjudicative authority or render decisions in individual proceedings. (SQ755, Section 1(A)) (App. 167-68).

As passed by the Legislature, HJR 1056 provided that, upon approval by Oklahoma voters, Section 1 of Article VII of the Oklahoma Constitution would be amended by adding the following section:

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

(App. 168).

The resolution also provided that the ballot title accompanying the proposed text of the amendment should explain:

This measure amends the State Constitution. It would change a section that deals with the courts of this state. It would make courts rely on federal and state laws when deciding cases. It would forbid courts from looking at international law or Sharia Law when deciding cases. Shall the proposal be approved?

(App. 168-69).⁵

The proposed amendment and ballot title were forwarded to the Secretary of State for placement on the ballot for November 2, 2010 and, as required by state law, the Secretary

⁵ Under Oklahoma law, “. . . when construing a constitutional amendment that was proposed by the Legislature,” courts must “read the ballot title together with the text of the measure, even if the text of the measure contains no ambiguities or absurdities.” *Sw. Bell Tel. Co. v. Okla. State Bd. of Equalization*, 231 P.3d 638, 642 (Okla. 2009).

of State submitted the ballot title to the Attorney General for review.⁶ (App. 171-73). The Attorney General determined the proposed ballot title did not “comply with applicable laws” because it did not “adequately explain the effect of the proposition” in that it failed to define “what either Sharia law or international law is.”⁷ (App. 175). Accordingly, the Attorney General prepared a revised ballot titled to explain how the amendment would operate.⁸ (App. 176-79). The revised ballot title provided:

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

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries,

⁶ Under 34 Okla. Stat. §9(C) (2009), “[w]hen a measure is proposed as a constitutional amendment by the Legislature or when the Legislature proposes a statute conditioned upon approval by the people,” the Secretary of State is required, within five days of passage of a final measure, to submit the proposed ballot title to the Attorney General “for review as to legal correctness.”

⁷ Section 9(C)(1) requires that the Attorney General notify, in writing, “the Secretary of State, the President Pro Tempore of the Senate and the Speaker of the House of Representatives whether or not the proposed ballot title complies with applicable laws” and “state with specificity any and all defects found.” 34 Okla. Stat. §9(C)(1) (2009).

This section has been amended to require that the Attorney General also send such notice to the “principal authors of the bill.” 34 Okla. Stat. §9(C)(1) (2011).

⁸ “The Attorney General shall . . . within ten (10) business days of determining that the proposed ballot title is defective, prepare a preliminary ballot title which complies with the law and furnish a copy of such ballot title to the Secretary of State, the President Pro Tempore of the Senate and the Speaker of the House of Representatives.” 34 Okla. Stat. §9(C)(1) (2009).

states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

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

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

Shall the proposal be approved?

(App. 178-79, 182, 185).

After submission of this revised preliminary ballot title to the Secretary of State, Senate President Pro Tempore, and House Speaker for review, the revised ballot title was placed on the ballot as State Question No. 755.⁹ (App. 178-82, 185).

On November 2, 2010, just over 70% of Oklahomans who cast ballots approved SQ755. (App. 299). The amendment will not officially take effect, however, until after the Defendant Oklahoma State Election Board certifies the results of the election and, as a ministerial act, the Governor proclaims the measure “approved by the people.” (App. 230; Aplt. Br. 4, 6); 34 Okla. Stat. §5 (1992).

⁹ In accordance with Section 9(C)(1), “[t]he Attorney General may consider any comments made by the President Pro Tempore of the Senate or the Speaker of the House of Representatives and shall file a final ballot title with the Secretary of State no sooner than ten (10) business days and no later than fifteen (15) business days after furnishing the preliminary ballot title.” 34 Okla. Stat. §9(C)(1) (2009).

There is no evidence in the record indicating that legislative leaders objected to or expressed any concerns about the proposed revisions to the ballot title, and the Attorney General made no further changes to the preliminary ballot title. (App. 176-79).

B. Mr. Awad's Religion and His Challenge to SQ755

Plaintiff Muneer Awad is an American citizen born in Ann Arbor, Michigan, and a devout, lifelong Muslim. (App. 97-98). As a Muslim, Mr. Awad lives his life in accordance with a set of religious principles set forth in the Quran, the Muslim Holy Book, and the teachings of the Prophet Mohammed, which are collected in religious guides called "Hadiths." (App. 99). Such teachings and Quranic dictates comprise the foundation from which both some clergy and believers have derived the content of their religious obligations. This body of interpretation is referred to as "Sharia law," and it serves as a guide for Muslims to apply and practice their faith in everyday life, covering topics that include dress, grooming, and social interactions. (App. 102-03, 108).

But while Sharia law is defined by reference to certain primary sources, it does not exist in a uniform, monolithic state. There is no single document that exhaustively contains Sharia law. Rather, the meaning and requirements of Sharia law are subject to individual and communal interpretations and thus differ from region to region, across denominations, and among individual Muslims. (App. 102-04). Indeed, one central tenet of Sharia – that Muslims live in accordance with the law of the nation in which they reside – provides for such differences. (App. 101-02). Thus, as Mr. Awad practices his religion, following U.S. and Oklahoma law is paramount to living a virtuous and faith-abiding life. (App. 103-04).

Mr. Awad resides in Oklahoma City, Oklahoma. He is the executive director of the Oklahoma Chapter of the Council on American-Islamic Relations, where he works closely with other Muslims across the State. (App. 96).

Upon learning about the “Save Our State Amendment,” Mr. Awad immediately became concerned that it “was basically going to forbid the consideration of Islam in our courtrooms, and in the process enshrine Islam in a negative light in our State’s Constitution.” (App. 104-05). Specifically, Mr. Awad was disturbed that the measure’s sponsors seemed “to go out of their way to specifically isolate Sharia,” which he observed was the “only religious faith mentioned” in SQ755 and ballot title. (App. 105). He felt that SQ755 and the campaign supporting it denigrated his faith – characterized by proponents “as a threat to the State of Oklahoma” – and effectively erected a wall between him and his own state legislators. (App. 110-11, 116 (testifying that SQ755 “will shine a negative, condemning and demonizing light on my faith” and that, “as Muslims in this community, we felt somewhat attacked by our own politicians”)). Moreover, Mr. Awad was disturbed that the proposed amendment purported to define, or asks Oklahoma courts to define, what constitutes “Sharia Law,” which, as noted above, is religious practice that varies by geography, denomination, and individual adherent. (App. 106). Mr. Awad explained, “I don’t think it’s the place of the court to define what aspects of my religion are Sharia and which parts aren’t.” (App. 106).

In addition, Mr. Awad is deeply concerned that SQ755, once certified, could disable a court from probating his last will and testament, which incorporates by reference aspects of what SQ755 defines as Sharia law. Mr. Awad testified that he believes that Sharia imposes requirements on “every aspect of a Muslim’s life, even up until death.” (App. 124). Accordingly, in drafting his will, Mr. Awad explained, “I specifically wanted to incorporate aspects of my faith that I felt were appropriate upon my death with respect to how I would be buried and also with respect to how to devise my property after I die.” (App. 124).

For example, Mr. Awad’s will directs the executor to donate portions of his estate to “charities that advance the civil liberties of Muslims in a manner that does not exceed the proscribed limitations found in Sahih Bukhari, Volume 4, Book 51, Number 7.” (App. 232, 242; Pl. Ex. 10). Mr. Awad explained that he incorporated by reference this element of Sharia law because, “in line with my faith, I wish to give a significant amount of my property to charity upon my death,” noting that “[i]n Islam, it is mandated how one can give to charity upon his death. There are certain rules. One should not give too much; one shouldn’t neglect their family.” (App. 125). Accordingly, Mr. Awad’s will incorporates by reference an element of Sharia law that directs his executor to give no more than “one-third” of his estate to charity. (App. 231-33).

Mr. Awad’s will also provides that, after death, his body should be prepared in a manner that “comports precisely with the Hadith enumerated in Sahih Bukhari, Volume 2, Book 23, Number 345.” (App. 231, 238; Pl. Ex. 9). It further requests that, “[i]n compliance

with my Islamic faith, the Executor shall also arrange for a burial plot that allows my body to be interned [sic] with my head pointed in the direction of Mecca,” and that a prayer be organized “in accordance with Sahih Al-Bukhari, Chapter 28, Section LIII, Number 1255 and the first paragraph of Section LV.” (App. 231-32).

Mr. Awad explained that these provisions are important to his religious exercise because he believes that Sharia law requires funerals and burials to be conducted in a specific way, adding, “As a Muslim who aspires to live his life in the example that the prophet, peace be upon him, set for us, I would hope that I would be able to choose how to be buried when I die.” (App. 125).

Unwilling to sacrifice his religious exercise and expression in connection with his last will and testament, and unable to sit by while he and his fellow Muslim Oklahomans are officially designated as outsiders in their own state and denied access to the state judicial system on the same terms as others, Mr. Awad filed suit, alleging that SQ755 violates his rights under both Religion Clauses of the First Amendment and seeking to prevent the Oklahoma Board of Elections from certifying the election results for SQ755.

C. The District Court Decision

After considering the pleadings and the evidence presented at a November 22, 2010, evidentiary hearing, Chief Judge Miles-LaGrange granted the requested preliminary injunction one week later. (App. 264-78). *Awad v. Ziriox*, ___ F.Supp.2d ___, 2010 WL 4814077 (Nov. 29, 2010).

The court first considered Plaintiff's standing and determined that SQ755 would cause Mr. Awad injury in fact that is "concrete, particularized and imminent." (App. 268).¹⁰ Noting that an asserted chilling effect on the exercise of First Amendment rights confers standing "as long as it arise[s] from an objectively justified fear of real consequences" (App. 267-68, quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006)), the District Court held that Mr. Awad's allegations of official condemnation of his faith sufficed. (App. 268-69, citing *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 524 F.3d 1043, 1050-51 (9th Cir. 2010) (en banc)).

Plaintiff met his burden, the court concluded, by alleging that "he lives in Oklahoma, is a Muslim, that SQ755 conveys an official government message of disapproval and hostility toward his religious beliefs, that sends a clear message he is an outsider, not a full member of the political community, thereby chilling his access to the government and forcing him to curtail his political and religious activities." (App. 269). The District Court remarked that "it would be incomprehensible if, as plaintiff alleges, Oklahoma could condemn the religion of its Muslim citizens, yet one of those citizens could not defend himself in court against his government's preferment of other religious views." (App. 269).

¹⁰ Defendants have not contested, either in the District Court or in this Court, the second and third requirements of Article III standing – that the Plaintiff's injury is fairly traceable to Defendants' challenged action and likely to be redressed by a favorable decision. The District Court determined that Mr. Awad meets those requirements. (App. 267 n. 2, 270).

Next, the court concluded that Mr. Awad is also injured by his objectively justified belief in the invalidation of his last will and testament, which incorporates various teachings of Mohammed, “what SQ755 would clearly consider Sharia Law.” (App. 270). The court found those religious references, which address the distribution of Mr. Awad’s assets to charity, would prevent the will from being probated in Oklahoma because an Oklahoma court would have to consider “Sharia Law” when issuing an order approving distribution of the assets. (App. 269-70).

The District Court deemed Mr. Awad’s claims to be ripe for review. In evaluating whether a case is ripe, the court explained, the ““central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.”” (App. 271, quoting *Walker*, 450 F.3d at 1097). The court found that “only certification of the election results is required for the amendment to take effect,” and “[o]nce the amendment is in place, any alleged violation of plaintiff’s First Amendment rights would occur.” (App. 271). There are no “uncertain, contingent future events,” the District Court noted, as “the only remaining requirement is the ministerial task certifying the election results.” No party contends this will not occur, and, in fact, the agenda for a meeting of Defendant Oklahoma State Election Board listed certification of election results for SQ755. (App. 271; App. 230, Pl. Ex. 7). Finally, given the nature of Plaintiff’s challenge to SQ755, the court reasoned there was no need to await any state court interpretation of the amendment. (App. 271).

The District Court next considered the four factors governing preliminary injunctions. The court noted that Plaintiff's requested relief was a "disfavored preliminary injunction" and subjected it to a heightened burden. (App. 272-73).

Analyzing the merits, the court first addressed Mr. Awad's Establishment Clause claim, holding that Plaintiff "has made a strong showing of a substantial likelihood of success on the merits" of his claim that the primary effect of SQ755 inhibits religion. (App. 274). The District Court rejected Defendants' argument that SQ755 "is merely a choice of law provision," highlighting the "actual language of the amendment" which expressly imposes two separate, independent restrictions on the use or consideration of Sharia law: "(1) the amendment requires that Oklahoma courts 'shall not consider . . . Sharia Law,' and (2) the amendment allows Oklahoma courts to use/consider the law of another state of the United States but only if 'the other state does not include Sharia Law.'" (App. 274, quoting SQ755 at App. 168).

The court also held that SQ755 likely will "foster an excessive government entanglement with religion" because Oklahoma courts will be faced with determining the content of "Sharia Law" and thus "the content of plaintiff's religious doctrines." (App. 275).

The District Court separately concluded that SQ755 likely violates Mr. Awad's free exercise rights because the actual language of the amendment "specifically singl[es] out Sharia Law (plaintiff's faith) and thus is not facially neutral." (App. 276). The court found "reasonable probability that the amendment would prevent plaintiff's will from being fully

probated by a state court in Oklahoma because it incorporates by reference specific elements of the Islamic prophetic traditions.” (App. 276). The District Court further explained, “Muslims, including the plaintiff, will be unable to bring actions in Oklahoma state courts for violations of the Oklahoma Religious Freedom Act and for violations of their rights under the United States Constitution if those violations are based upon their religion.” (App. 276).

Moreover, the court determined that Defendants “presented no evidence which would demonstrate that the amendment is justified by any compelling interest or is narrowly tailored.” (App. 276).

In its analysis of the remaining preliminary injunction factors, the court reiterated the principle that the loss of First Amendment rights, for even minimal periods of time, constitutes irreparable harm. (App. 276). Balancing the harms, the court held that denial of First Amendment rights outweighs any harm to the State caused by a delay in certifying the election results. (App. 277). The court highlighted the “undisputed fact that the amendment at issue was to be a preventative measure and the concern that it seeks to address has yet to occur.” (App. 277). Finally, the court determined that it is always in the public interest to prevent the violation of a party’s constitutional rights. More specifically, the court reasoned that the State’s enactment of the Oklahoma Religious Freedom Act indicates that it is in the public interest to uphold an individual’s constitutional right to religious liberty. (App. 278).

The court, accordingly, granted the preliminary injunction and enjoined certification of SQ755.

VI. SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in granting a preliminary injunction in this case. The court properly concluded that Mr. Awad has standing to assert his Free Exercise and Establishment Clause claims. SQ755 specifically identifies and singles out “Sharia Law,” and by extension, Mr. Awad as a Muslim, for unfavorable treatment in the State’s judiciary and other adjudicatory bodies. By barring state courts from “look[ing] to” or “considering or using Sharia Law,” the “Save Our State Amendment” imposes on Muslims a special disability not faced by persons of any other faith. Under the amendment, Muslims seeking relief from a state court will have to ensure that their claims, defenses, evidence, and legal arguments are scrubbed of all references to Islamic law and beliefs. Otherwise, courts will be unable to adjudicate their disputes or perform routine judicial functions, such as probating wills.

Under SQ755, Mr. Awad’s last will and testament, which was properly executed in accordance with the laws of Oklahoma, will likely be rendered unenforceable in whole or in part because it incorporates instructions based on his Islamic faith. This injury alone is sufficient to confer standing for Mr. Awad’s Free Exercise and Establishment Clause claims. Mr. Awad’s Establishment Clause claim is also supported by another harm suffered as a result of SQ755: injury attendant to official governmental condemnation of his faith,

rendering him an outsider in his own political community. Mr. Awad will suffer these injuries immediately upon SQ755's certification, and thus his claims are ripe for adjudication.

The District Court also properly held that Mr. Awad satisfies each requirement for a preliminary injunction. He is likely to succeed on the merits of both claims. Because SQ755 is neither neutral nor generally applicable but closes courts to one and only one religion, it is subject to strict scrutiny under the Free Exercise Clause. Defendants have offered no evidence of a compelling interest. Indeed, it is undisputed that Oklahoma state courts have not improperly applied or enforced Sharia law. Nor have Defendants offered any evidence that SQ755 is narrowly tailored to deal with this phantom threat of Sharia law. On the contrary, SQ755 broadly defines "Sharia Law" as all Islamic religious practice and belief, and then bars state courts from referring to or considering it when rendering decisions. Accordingly, Mr. Awad is likely to prevail on his Free Exercise claim.

Mr. Awad is also likely to prevail on his Establishment Clause claim because SQ755 has the effect of inhibiting religion by conditioning Mr. Awad's reliance upon a valid will on his removal of all Islamic terms from the will.

The amendment also violates Mr. Awad's Establishment Clause rights by condemning his faith as a threat to Oklahoma, thereby causing him to become an outcast within his home state. In addition, SQ755 is motivated by an improper anti-Muslim purpose and would result in impermissible entanglement with the Islamic faith.

Mr. Awad meets the remaining requirements for a preliminary injunction. The deprivation of First Amendment rights that he will suffer under SQ755 constitutes an irreparable injury. That injury outweighs the interest of voters in seeing SQ755 — at best, a preemptive measure that does not address any past or current problem in Oklahoma — immediately effectuated. Finally, the injunction is necessary to protect the public interest because, in addition to violating Mr. Awad’s religious freedom rights, SQ755 will likely have other significant and adverse policy and legal implications.

VII. STANDARD OF REVIEW

A. Standing

“Standing is a question of law for the court to determine.” *See Gilbert v. Shalala*, 45 F.3d 1391, 1393 (10th Cir. 1995). Questions of constitutional standing are reviewed *de novo*. *See, e.g., Am. Atheists, Inc., v. Davenport*, No. 08-4061, ___ F.3d ___, 2010 WL 5151630 (10th Cir. Dec. 20, 2010), *cert. pets. pending* (Apr. 15 & Apr. 28, 2011) (Nos. 10-1276, 10A875, 10-1297); *Green v. Haskell County*, 568 F.3d 784, 792-93, *reh’g denied*, 574 F.3d 1235 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1687 (2010).

B. Preliminary Injunction

On an appeal of a preliminary injunction, the court of appeals reviews the district court’s legal rulings *de novo* and its “ultimate decision to issue the preliminary injunction for abuse of discretion.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *see also, e.g., Attorney General of Oklahoma v. Tyson Foods, Inc.*,

565 F.3d 769, 776 (10th Cir. 2009). Under the abuse-of-discretion standard, “a trial court’s decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.” *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

VIII. ARGUMENT

A. PLAINTIFF’S CLAIMS ARE JUSTICIABLE UNDER BOTH STANDING AND RIPENESS DOCTRINES.

The District Court correctly found that Mr. Awad has standing to assert claims under the Free Exercise Clause and the Establishment Clause of the First Amendment.

To have standing, a plaintiff need not show that he will prevail. “That is an issue for the merits.” *Walker*, 450 F.3d at 1088. Rather, as a general matter, a plaintiff may demonstrate standing by showing that “(1) he has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992)); see also, e.g., *Green*, 568 F.3d at 793. Mr. Awad satisfies all three elements.

1. Plaintiff Has Standing to Assert His Free Exercise Claim

Where a plaintiff “allege[s] that her own ‘particular religious freedoms are infringed,’” standing exists to assert a claim under the Free Exercise Clause. *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 71 (2d Cir. 2001) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 224, n. 9 (1963)); *see also, e.g., Littlefield v. Forney Independent Sch. Dist.*, 268 F.3d 275, 292, n. 25 (5th Cir. 2001) (same); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1531 (9th Cir. 1985) (same). Such infringement can appear in various forms of alleged injuries.

Here, in accordance with his religious beliefs, Mr. Awad has executed a last will and testament that expresses his religious devotion and incorporates religious terms that set forth the manner in which his estate is to be settled. (App. 231-33).¹¹ Because Mr. Awad’s will refers to and incorporates his Islamic religious beliefs, however, the “Save Our State Amendment,” once certified, will render those will provisions unenforceable.

In arguing that injury is speculative because the will has not been offered for probate and SQ755 has not been interpreted by a court, Defendants disregard the nature of the challenged amendment, the nature of the harm it causes, and the laws of nature. As the District Court held, the only reasonable interpretation of the plain language of SQ755 is that

¹¹ Wills are legal documents that effectuate the disposition of property after death. Oklahoma law requires that “[a] will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.” 84 Okla. Stat. §151. If a provision cannot be “considered,” it cannot be given effect.

it “would prevent plaintiff’s will from being fully probated by a state court because it incorporates by reference specific elements of the Islamic prophetic traditions.” (App. 276).

Even if a court might ultimately disregard the express language of SQ755 and choose to examine all of the will’s provisions, Mr. Awad will, once SQ755 is certified, still suffer under a cloud of uncertainty over the will’s full enforceability because of its religious references. Either way, he will be put in an untenable dilemma: rewrite his will excluding all Islamic expression and terms in a manner that does not comport with his faith, or suffer the legal uncertainty that his religious beliefs and Islamic charitable intentions will not be carried out upon his death. Thus, even if the challenged amendment could not be said, with absolute certainty, to bar probate of all provisions of the will, a cloud of doubt would nevertheless inhibit or interfere with Mr. Awad’s rights to religious expression via his will and, more importantly, to carry out his religious wishes via his will—injuries that are concrete, particularized, and immediate, and, therefore, sufficient to confer standing under the Free Exercise Clause.¹² *See, e.g., Walker*, 450 F.3d at 1088 (holding that “a chilling effect on the exercise of a plaintiff’s First Amendment rights may amount to a judicially

¹² Because a court cannot “consider” Sharia Law if SQ755 is certified, Mr. Awad suffers a true financial injury in that property he intended for charity in compliance with his faith will fall into his residuary clause. (App. 231, “Article II: General Inheritance”).

Mr. Awad’s citations to the Hadiths meet requirements for incorporation by reference in testamentary instruments recognized in Oklahoma. *See Miller v. First Nat’l Bank & Trust Co.*, 637 P.2d 75, 77, 1981 OK 133 (statute invalidating bequests to now-divorced spouse in will also invalidated similar provisions in trust because trust was referenced in will; instruments construed together).

cognizable injury in fact, as long as it ‘arise[s] from an objectively justified fear of real consequences.’”) (quoting *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)).

The loss of his ability to specify, in his will, his burial arrangements and make testamentary charitable bequests in accordance with his religious faith is an “objectively justified fear of real consequences” from SQ755 faced by Mr. Awad.¹³ Because this injury is sufficient, directly caused by the challenged measure, and redressable by a favorable decision (App. 267 n.2, 270), the District Court’s conclusion that Mr. Awad has standing to challenge SQ755 under the Free Exercise Clause should be affirmed.

2. Plaintiff Has Standing to Assert His Establishment Clause Claim.

“[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed.” *Schempp*, 374 U.S. at 225 n.9. Rather, Establishment Clause plaintiffs may show more broadly that they are “directly affected by the laws and practices against which their complaints are directed.” *Id.*; *see also, e.g., Green*, 568 F.3d at 793; *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1222-23 (10th Cir. 2005). Mr. Awad easily meets this standard.

¹³ As noted, even if a court might, despite the clear language of the amendment, construe the charitable and funeral provisions as enforceable, the amendment creates an objectively reasonable uncertainty as to the will’s full validity. This Court has recognized that present uncertainty over potential future liability can, by itself, constitute injury sufficient to confer standing. *See, e.g., Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1301 (10th Cir. 2008) (holding that contingent liability identified by consultants presented an injury in fact for standing purposes and explaining that “the present impact of a future though uncertain harm may establish injury in fact for standing purposes”).

SQ755 will effectively invalidate Mr. Awad's will, or leave enforcement of his testamentary funeral arrangements and charitable donation provisions in serious doubt. SQ755 will force him to revise his will by eliminating all Islamic references and terms, or risk dying in legal uncertainty that his religious intentions will be carried out. This legal disability is not placed on Oklahoma residents of any other faith, and it is sufficient to confer standing because it violates the core Establishment Clause principle of official neutrality among religions. *See Larson v. Valente*, 456 U.S. 228, 231-33 (1982) (holding that church required to register and report under state solicitation act, which exempted religious organizations that earn 50% or more of funds from member donations, had standing to bring claims under the Establishment Clause).

Moreover, because the measure disfavors one particular faith, Mr. Awad suffers an additional Establishment Clause injury: official condemnation of his religion, which "relegates him to an ineffectual position within the political community." (App. 268).

The few federal courts that have considered the injury that occurs when the government expressly identifies a single faith for official disapprobation¹⁴ generally have concluded that the asserted harm is actionable. The "condemnation injury," as the District Court characterized it, is distinguishable from other types of harm because it more directly affects those targeted. (App. 268-69). The stigma suffered by one whose faith is expressly marked for condemnation and disfavor is more pernicious and deeply felt, and more

¹⁴ The scarcity of case examples is hardly surprising, given how seldom governmental entities in the United States denounce an entire religious faith.

particularized to a follower of that faith, than an injury incurred as a result of general preference granted to one religion. *Cf. Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (“[D]iscrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.”) (internal quotation marks and citation omitted).

The Ninth Circuit recently held, for example, that Catholic residents of San Francisco had a sufficiently concrete injury to challenge a city council resolution criticizing a policy announcement by local Catholic officials regarding adoption by gays and lesbians. *Catholic League*, 624 F.3d at 1053. The court reasoned that “the plaintiffs here are not suing on the mere principle of disagreeing with San Francisco, but because of that city’s direct attack and disparagement of their religion,” concluding that a psychological consequence constitutes concrete harm when it results in the “exclusion or denigration on a religious basis within the political community.” *Id.*; *see also, e.g., Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1525 (11th Cir. 1993) (“The Establishment Clause prohibit[s] the casting of official disfavor upon a particular sect even though its members are not directly regulated. Religious groups and their members that are singled out for discriminatory government treatment by official harassment or symbolic conduct analogous to defamation have standing to seek redress in federal courts.”); *Am. Family Ass’n, Inc. v. City and County*

of *San Francisco*, 277 F.3d 1114 (9th Cir. 2002) (assuming, without comment, standing by evangelical organization to challenge resolution denouncing group’s advertising campaign declaring homosexuality a sin).

As a Muslim resident of Oklahoma, Mr. Awad has standing to challenge the “Save Our State Amendment” based on injuries inflicted by the government’s official condemnation of his faith, which sends a message that Muslims are second-class citizens from whom the State needs saving.

3. Plaintiff’s Claims Are Ripe for Adjudication.

Defendants’ argument that Mr. Awad’s claims are not ripe because “[t]here has been absolutely no judicial construction of the proposed constitutional changes by any court of competent jurisdiction” (Aplt. Br. 15) must be rejected for the same reasons that Defendants’ standing arguments fail. As explained above, the will-related injury occurs as soon as Defendants certify the election results: SQ755 will either operate to render portions of Plaintiff’s will unenforceable, or, at the very least, leave their enforceability in serious doubt. Either way, given the unpredictable but inevitable nature of death, Mr. Awad would be forced immediately to scrub the will of Islamic references and terms if he wants to ensure the effectiveness of his bequests. That harm is imminent enough to create a case or controversy.¹⁵ Likewise, the injury inflicted by the State’s official disapproval of Islam will

¹⁵ A plaintiff need not wait until threatened injury occurs so long as it is “certainly impending.” *Babbitt v. United Farm Workers Nat’l. Union*, 442 U.S. 289, 298 (1979) (“A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. But one does not have to await
(continued...)”)

occur instantly upon certification. As the District Court concluded, Mr. Awad's asserted injuries do not depend on any "uncertain, contingent future events; all that is remaining is the ministerial task of defendants certifying the election results," which indisputably would take place without the injunction. (App. 271).¹⁶

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION ENJOINING CERTIFICATION OF SQ755.

A preliminary injunction is appropriate where "(1) [there exists] a substantial likelihood of success on the merits; (2) irreparable injury [will occur] to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001); *see also, e.g., Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1254-55 (10th Cir. 2006) (citing *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171 (10th

¹⁵(...continued)

the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.") (internal quotation marks and citations omitted). *See also Santa Fe Indep. Dist. v. Doe*, 530 U.S. 290, 316 (2000) ("We need not wait for the inevitable to confirm and magnify the constitutional injury.").

¹⁶ Defendants' reliance on *Diaz v. Board of County Commissioners of Dade County*, 502 F. Supp. 190 (S.D. Fla. 1980) is misplaced. The claims asserted in *Diaz* were unripe because the referendum at issue had not yet been put to a vote. *Id.* at 193. The court explained that a constitutional challenge would not be necessary unless the proposed referendum were actually approved by voters. *Id.* Here, by contrast, the election has occurred and the state question has been approved.

Cir. 1998)).¹⁷ The District Court correctly found that Mr. Awad meets each of these requirements even with a heightened burden.¹⁸

1. The District Court Correctly Held That Plaintiff is Likely to Succeed on the Merits.

Laws disparaging one faith are so deeply antithetical to religious freedom that they are as rare as they are misguided. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) (“The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”). In both *Lukumi* and *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court made clear that such laws violate two core values underpinning the Free Exercise and

¹⁷ Though a district court may apply a “relaxed standard” in its analysis of the likelihood of success, a movant must “meet the traditional ‘substantial likelihood of success’ standard” when seeking, as here, to enjoin enforcement of a statute. *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n. 6 (10th Cir. 2006).

¹⁸ Determining that the “requested preliminary injunction alters the status quo and affords plaintiff all the relief that he could recover at the conclusion of a full trial on the merits,” the District Court ruled that an injunction would be “disfavored” and that Awad “must satisfy a heightened burden.” (App. 272-73). This Court has held that the status quo is “the last peaceable uncontested status existing between parties before [a] dispute developed,” *Beltronics USA, Inc. v. Midwest Inventory Distrib.*, 562 F.3d 1067, 1071 (10th Cir. 2009). In the instant case, the condition prior to certification of SQ755 should be deemed the “status quo,” and so, contrary to the District Court’s conclusion, Plaintiff’s requested preliminary injunction sought to *preserve* the status quo. The requested injunction is not disfavored. In any event, the District Court held Plaintiff met the heightened standard and has “made a strong showing of a substantial likelihood of success on the merits.” (App. 276).

Establishment Clauses: “the fundamental nonpersecution principle” and the “principle of denominational neutrality.” *Lukumi*, 508 U.S. at 523; *Larson*, 456 U.S. at 246.¹⁹

But even these seminal cases did not affront the constitutional guarantee of religious freedom as directly as the “Save Our State Amendment” does because, unlike the sponsors of SQ755, the lawmakers in *Lukumi* and *Larson* at least had the sophistry to pretend their laws were neutral by drafting terms that did not explicitly name the particular sects targeted for disfavor. The text of SQ755 and the ballot title here, which must, under state law, be read together in construing the amendment,²⁰ illustrate Oklahoma’s lawmakers did not bother with a similar pretense.²¹

¹⁹ In *Lukumi*, the challenged ordinance targeted animal sacrifice practiced by adherents of the Santeria faith. 508 U.S. at 534-35. The challenged solicitation statute in *Larson* imposed registration and reporting burdens on churches earning less than 50% of their funds from member donations. Legislators there specifically sought to craft the measure so that it would exempt the Roman Catholic Archdiocese while discouraging members of religious organizations who “are running around airports and running around streets and soliciting people,” particularly members of the Unification Church, which one legislator called “the Moonies.” 456 U.S. at 254.

²⁰ See, e.g., *Sw. Bell Tel. Co.*, 231 P.3d at 642.

²¹ Defendants provide no authority for their suggestion that this Court may revise SQ755 to conform it to constitutional strictures. Federal courts may “impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction.” *United States v. Stevens*, 130 S. Ct. 1577, 1591-92 (2010) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997)). As the Supreme Court explained, “We ‘will not rewrite a ... law to conform it to constitutional requirements,’ for doing so would constitute a ‘serious invasion of the legislative domain,’ and sharply diminish [the legislature’s] ‘incentive to draft a narrowly tailored law in the first place.’” *Id.* (internal citations omitted). In any case, a law that explicitly targets “Islamic law,” “the Koran,” and “the teachings of Mohammed” is not “readily susceptible” to such a “limiting construction.”

a. Plaintiff is Likely to Succeed on His Free Exercise Claim.

The “Save Our State Amendment” will render unenforceable, or at least uncertain, Mr. Awad’s burial instructions and charitable bequests that depend upon Islamic references that SQ755 considers “Sharia Law.” Though Defendants disingenuously argue SQ755 would not bar the probate of Mr. Awad’s will because its probate would not “require application of Sharia law by an Oklahoma court” (Aplt. Br. 34), the amendment and ballot title ban far more than mere “application” of Sharia law: state courts are prohibited from “look[ing] to” or “considering or using Sharia Law.” (App. 168). As Defendants concede, this “plain and ordinary language” of SQ755 must be interpreted according to its “ordinary meaning.” (Aplt. Br. 27-28). Ordinary meaning could not be clearer: state courts may not consider, or resort or refer to, Sharia law in any context.

The definition of “Sharia Law” as “Islamic law” “based on two principal sources, the Koran and the teaching of Mohammed” is sweeping and supports the conclusion that Mr. Awad’s burial instructions and charitable bequests could not be probated or considered if SQ755 takes effect. Indeed, as explained above, even if a court might hold that the amendment does not preclude probate of religious references in Mr. Awad’s will, uncertainty over the will’s status burdens Mr. Awad’s religious practice. To ensure legally enforceable burial instructions and charitable bequests, he would be forced to rewrite the will, eliminating all religious expression and Islamic references.

Either way, the challenged amendment imposes a special disability on Mr. Awad and other Muslims seeking relief in the state courts in a variety of contexts. While citizens of other faiths need not scrub religious expression and terms from their legal documents to protect their enforceability, Muslims must.

Indeed, while citizens of other faiths are free to bring claims in state court asserting the right to practice their religion under the Free Exercise Clause, the Oklahoma Religious Freedom Act,²² or the Religious Land Use and Institutionalized Persons Act (RLUIPA),²³ SQ755 leaves Muslims without judicial recourse unless they can closet their faith by devising a way to assert free exercise rights without reference to their religion.²⁴

Finally, while citizens of other faiths may seek judicial recognition of their religious principles and practices in child custody, divorce, and other family law matters, the courts will be forced to ignore such facts pertaining to Muslims.

²² The Oklahoma Religious Freedom Act provides, consistent with the Free Exercise test in *Sherbert v. Verner*, 374 U.S. 398 (1963), that “no governmental entity shall burden a person’s free exercise of religion even if the burden results from a rule of general applicability” unless the government “demonstrates that application of the burden to the person is” both “[e]ssential to further a compelling governmental interest” and “[t]he least restrictive means of furthering that compelling interest.” 51 Okla. Stat. §253 (2000) (See App. 246, excerpt of Pl. Ex. 11).

²³ 42 U.S.C. §§2000cc-1 to 2000cc-5 (2000). (App. 137).

²⁴ Even when applying a rational basis standard, it is impermissible to strip a disfavored class of citizens of legal protection under anti-discrimination laws. *See Romer v. Evans*, 517 U.S. 624 (1996).

i. SQ755 is subject to strict scrutiny because it is neither neutral nor generally applicable.

The Supreme Court has recognized that “[t]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs.” *Lukumi*, 508 U.S. at 532. To avoid strict scrutiny review under the Free Exercise Clause, a law must be both neutral and generally applicable. *Id.* at 531 (“Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.”). The “Save Our State Amendment” is neither neutral nor generally applicable.

By expressly singling out “Sharia Law” in two independent provisions,²⁵ SQ755 fails the neutrality test because it is facially discriminatory against Islam. *Id.* at 533 (“The minimum requirement of neutrality is that a law not discriminate on its face.”) The definition of “Sharia Law” in purely religious terms²⁶ – with no secular context or link to secular concepts, such as the civil law of a foreign nation – further illustrates SQ755’s lack of neutrality. *Id.* (“A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.”). No other faith or religious law is mentioned or, even implicitly, receives similar treatment.

²⁵ SQ755 prohibits state courts from “consider[ing] international law or Sharia law,” and separately bars reliance on any other state’s law if it “include[s] Sharia law.” (App. 168).

²⁶ The revised ballot title states: “Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.” (App. 178-79). “Islamic,” “Koran,” and “Mohammed” are religious terms.

SQ755 is likewise not a law of general applicability, notwithstanding Defendants' claim that the "reference to 'international law or Sharia law' is merely a subset of the reference to 'precepts of other nations or cultures.'" (Aplt. Br. 28) Defendants' argument fails to account for the first provision of SQ755, which bars courts from upholding and adhering to the laws of other states that "include Sharia Law." This provision stands alone and contains no generalizing reference to "other nations or cultures."

Defendants' proposed interpretation also ignores the final ballot title,²⁷ which identifies two distinct mechanisms by which SQ755 will operate to ensure that "courts rely on federal and state law when deciding cases": "It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law."²⁸ SQ755 cannot reasonably be construed to treat its subjects as subsets by implication, when its plain text does not do so but other State Questions do so by express language defining subsets in a variety of contexts. *See, e.g.*, Okla. Const. Art. 10, Sec. 6, amended by State Questions 582, 591, 848, and 696; Art. 8, Sec. 1, amended by State Question 429; Art. 28, Sec. 8, added by State Questions 563 and amended by State Question 638.

²⁷ Because it is the actual question submitted to the voters, the final ballot title is an equally important text for a court's interpretation of a constitutional amendment. *See supra* notes 5, 20, 39.

²⁸ The initial HJR 1056 ballot title approved by recorded legislative votes was similarly confined to the topics of Sharia law and international law, making no reference to the "legal precepts of other nations or cultures." App. 168-69 ("It would forbid courts from looking at international law or Sharia Law when deciding cases.").

When the ballot title and the amendment are read together, it is clear that “international law” and “Sharia law” are not meant to be a subset or illustrative of a wide range of other “legal precepts” to be barred, but instead are to be banned co-equally.²⁹ As Sharia law is the only religious doctrine subject to SQ755, the amendment on its face cannot credibly be viewed as generally applicable.

ii. The State has failed to show that SQ755 is narrowly tailored to serve a compelling governmental interest.

In *Lukumi*, the Supreme Court explained that “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546.³⁰ The law “must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Id.* (internal quotation marks and citations

²⁹ At several points, Defendants also appear to argue that “Sharia Law” is merely an example or subset of “international law.” See Aplt. Br. at 38 (“State Question 755 therefore has a legitimate secular purpose in that it merely bans the use in Oklahoma courts of the laws of other nations, including Sharia law.”); *id.* at 30 (“Several nations are governed by Sharia Law and State Question 755 rightly includes Sharia law as based on the precepts of other nations and cultures.”). But this characterization is belied by the text of SQ755 and its ballot title, which treat “Sharia Law” and “international law” in the disjunctive, as independent doctrines or bodies of law. See App. 167-68 (“Specifically, the courts shall not consider international law *or* Sharia Law.”) (emphasis added); App. 178-79 (defining and treating “international law” and “Sharia Law” separately).

³⁰ *Lukumi* and strict scrutiny provide the appropriate framework for analyzing Plaintiff’s Free Exercise claim, not *Locke v. Davey*, 540 U.S. 712 (2004), as Defendants argue. (Aplt. Br. 35-36). The program challenged in *Locke* neither targeted one specific faith for disfavor nor imposed any appreciable burden on religious exercise. See *id.* at 720 (“The State has merely chosen not to fund a distinct category of instruction.”). Strict scrutiny is triggered here precisely because SQ755 targets Islam and imposes real burdens – access to state courts – on adherents of that disfavored faith.

omitted). Accordingly, “[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Id.* By this standard, it is not surprising the “Save Our State Amendment” fails to pass constitutional muster.

Defendants have not shown any compelling interest in limiting courts from looking to or considering Sharia law as SQ755 defines it. The State offers only one reason for rejecting Islamic law: Because the legal systems of Saudi Arabia, Sudan, and Indonesia are “based on Sharia law” (Aplt. Br. 30, n. 7), Defendants argue, SQ755 is necessary to ensure that, in cases that might involve such legal systems, “there is no entanglement between the State and a particular faith.” *Id.* at 31 (“Several nations are governed by Sharia Law and State Question 755 rightly includes Sharia law as based on the precepts of other nations and cultures.”). But even if preventing religious entanglement constitutes a compelling interest as a general matter, Defendants have shown no special or compelling interest in preventing such entanglement with only those foreign legal systems allegedly based on Sharia law, while disregarding other foreign legal systems that incorporate tenets of other faiths.³¹

Even if Defendants could show a compelling interest that is specific to this case, SQ755 is not narrowly tailored to achieve the asserted end. As noted above, SQ755 defines

³¹ In the free exercise context, “broadly formulated interests” will not suffice to overcome strict scrutiny. *Gonzales*, 546 U.S. at 431. Rather, the government must assert a compelling interest that is specific to the challenged application. *See id.* at 430-31 (rejecting government’s generalized claim that protecting public health and safety constituted a compelling state interest that justified denial of religious exemptions to Controlled Substance Act, and noting that asserted interest must be specific to claimant and context of the case).

“Sharia Law” simply as religious practices and beliefs, untethered from the law of foreign nations such as Saudi Arabia with civil legal systems that actually incorporate Sharia law. Rejecting Sharia law for its religious origins is also not justified by the State’s asserted interest because the Establishment Clause already places sufficient limitations on the ability of courts to adjudicate religious doctrine. Similarly, to the extent Defendants are concerned about courts applying Islamic law where it conflicts with public policy, Oklahoma courts are already authorized, and indeed required, to reject such claims, as Appellants concede. (Aplt. Br. 35) (“For example, if Sharia law so provided, Mr. Awad could not provide in his will for his wife to receive none of the property they acquired during their marriage. Oklahoma law would override provisions of plaintiff’s will and his wife would receive her statutory share . . .”).³²

b. Plaintiff Is Likely to Succeed on His Establishment Clause Claim.

If “the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,” *Larson*, 456 U.S. at 244, it follows that officially disfavoring one religious denomination is equally prohibited. The second prong of the tripartite Establishment Clause test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)³³ embodies this constitutional mandate.

³² See also *Restatement (Second) of Conflict of Laws*, § 117, *Comment c* [1971] (noting that states may decline to enforce or recognize a foreign judgment “on the ground that the original claim on which the judgment is based is contrary to its public policy”).

³³ See *Lemon*, 403 U.S. at 613 “First, the statute must have a secular legislative (continued...)”

Because SQ755 imposes special disabilities only on Muslims, the District Court correctly found SQ755 fails the “effects” prong of *Lemon*. The District Court also properly held SQ755 violates the entanglement prong of the *Lemon* test. Though the Court did not address SQ755’s constitutionality under *Lemon*’s purpose prong, SQ755 likewise fails that test as explained below.

i. SQ755 has the impermissible effect of inhibiting the practice of Islam.

Under *Lemon*, the “principal or primary effect [of a law] must be one that neither advances nor inhibits religion.” *Lemon*, 403 U.S. at 612-13. As this Court recently explained, the effects prong reflects the principle that:

Governments may not “mak[e] adherence to a religion relevant in any way to a person’s standing in the political community.” *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. [668] at 687 [(1984)](O’Connor, J., concurring)). And actions which have the effect of communicating governmental endorsement or disapproval, “whether intentionally or unintentionally, . . . make religion relevant, in reality or public perception, to status in the political community.” *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

Green, 568 F.3d at 799.

³³(...continued)

purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”) (internal quotation marks and citation omitted).

This Court has explained that the effects prong should be interpreted through Justice O’Connor’s “endorsement patina,” which examines the challenged action “through the eyes of an objective observer who is aware of the purpose, context, and history....” *Green*, 568 F.3d at 799.

But the amendment does just what the Supreme Court and this Court have recognized governments may not do. If SQ755 is certified, Muslims will, at a minimum, be denied access to the state judiciary on the same terms as every other citizen; in some cases, such as those in which Muslims seek to assert their free exercise rights under the First Amendment, federal statutes (*e.g.*, RLUIPA), or the Oklahoma Religious Freedom Act, the courthouse doors will be completely shut to them. SQ755 thus impermissibly renders Muslims outsiders to the state judicial system. Placing such special legal burdens on one faith violates the Establishment Clause’s neutrality principle. *See Larson*, 456 U.S. at 244.

SQ755 also labels Oklahoma’s Muslims as outsiders of the political and social communities by defining Sharia law to include all Islamic practice and belief, whether or not tied to the civil legal system of a foreign nation. It characterizes such Sharia law to be a threat from which Oklahoma must be “saved,” and then bars it – but not the laws, practices, or beliefs of any other religion – from the purview and protection of the courts. An objective observer aware of these facts would reasonably conclude that SQ755 sends a “message of disapproval of plaintiff’s faith.” (App. 274).³⁴

ii. SQ755 has the principal purpose of inhibiting the practice of Islam.

The District Court’s holding rested solely on the effect and entanglement prongs of *Lemon*. (App. 273-74). The court did not rule on or address whether SQ755 also violates *Lemon*’s purpose prong. If this Court affirms, it also need not make a purpose inquiry. The

³⁴ For example, the State’s *amicus*, the Foundation for Moral Law, clearly perceives SQ755 as a referendum on Sharia Law. (*See Prop. III(C) and (D)*, Am. Br. 19 - 23).

Lemon test is disjunctive, so that failure to satisfy any one prong constitutes an Establishment Clause violation. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir. 1995). But because this Court may affirm the lower court decision on any applicable ground,³⁵ Plaintiff nevertheless addresses the purpose prong here.

Though the District Court did not discuss “purpose” in the preliminary injunction, Defendants inexplicably devote several pages in their brief to arguing that “[t]he trial court erroneously relied upon statements made in the press by the authors of the resolution to put State Question 755 to a vote of the people, and emails received by Mr. Awad, as evidence the measure does not have a secular legislative purpose.” (Aplt. Br. 26). There is no such finding in the District Court ruling.

Courts may properly consider legislators’ statements to the media and others as evidence of purpose in Establishment Clause cases.³⁶ In addition, the reaction of the public

³⁵ “We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.” *Cohon v. State of New Mexico Dept. of Health*, No. 10-2002, ___ F.3d ___ (10th Cir. May 9, 2011) (slip op., p. 12) quoting *United States v. Lott*, 310 F.3d 1231, 1242 n. 7 (10th Cir. 2002); *see also Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

³⁶ *See, e.g., Green*, 568 F.3d at 801-02 (citing “[n]umerous quotes . . . [by defendant commissioners] in news reports, ranging from statements reflecting their determination to keep the [Ten Commandments] . . . to statements of religious belief); *see also, e.g., McCreary*, 545 U.S. at 851 (citing statements made by a county official and his pastor at a religious dedication ceremony); *Edwards v. Aguillard*, 482 U.S. 578, 587, 590-93 (1987) (treating legislators’ statements as compelling evidence that challenged statutes had been enacted for improper purpose).

to a particular measure can provide valuable context for the purpose inquiry.³⁷ Both provide abundant contextual evidence of an impermissible anti-sectarian purpose here.³⁸ This Court need not decide whether the trial court properly admitted these exhibits, however, because the District Court did not rely on them in any aspect of its decision.

Though federal courts will generally defer to a legislature's stated reasons for undertaking a challenged action, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864. As Defendants note, sometimes "there is 'no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.'" (Aplt. Br. 26) (quoting *United States v. Am. Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940)).

³⁷ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 107-09 & n.16 (1968) (pointing to letters from the public and advertisements used to secure adoption of an Arkansas anti-evolution statute to highlight the statute's improper religious aims).

³⁸ For example, a reasonable observer "aware of the history and context of the community," *McCreary*, 545 U.S. at 866, would find it hard to ignore public statements by the principal author of SQ755, Rep. Rex Duncan, that "America was founded on Judeo-Christian principles," and that the amendment would be a "preemptive strike" in a "cultural war, a social war, a war for the survival of our country" against Islamic traditions embodied in Sharia Law. (App. 22; see also App. 23) (statements by co-authors to the same effect). In addition, public reaction to the measure—including anti-Muslim hostility directed at Mr. Awad for challenging SQ755 and a resolution passed by the University of Oklahoma Student Association condemning SQ755—confirms that many Oklahomans on both sides of SQ755 understood its anti-Muslim purpose. (App. 186-217, Pl. Ex. 4; App. 218-21, Pl. Ex. 5).

Furthermore, a reasonable observer could hardly "turn a blind eye," *Santa Fe*, 530 U.S. at 315, to the state legislature's contemporaneous approval of the erection of a Ten Commandments monument on state capitol grounds. See Ten Commandments Monument Display Act, 74 Okla. Stat. 4110 (App. 253-256, Pl. Ex. 13 and 14). Oklahoma's arrangement to erect a monument to the laws of its majority religion at the seat of state government, while banishing the laws of a minority religion from its court system, supports the inference that the purpose of SQ755 is constitutionally impermissible.

When read together as required by state law,³⁹ the amendment and ballot title reveal the alleged purposes or interests asserted by the State are a pretext to disguise the measure's true discriminatory aim.

The State's alleged purpose to prevent courts from considering laws of other nations and cultures is a solution in search of a problem: As the State concedes, there have been no instances in Oklahoma of courts improperly considering or using Sharia law, nor are there any indications that the courts would choose to apply Sharia law in contravention of state public policy. *Cf. Romer*, 517 U.S. at 632 (concluding that the "sheer breadth" of Colorado's Amendment 2, stripping state and local anti-discrimination protection from an entire class of persons, "is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

iii. SQ755 would foster excessive entanglement between the government and religion.

Because SQ755 defines Sharia law in a broad manner that reaches not just the civil law of a foreign nation, but also the personal "religious traditions that differ among Muslims, . . . 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." (App. 275).

For example, SQ755 puts courts in the position of having to make a preliminary determination prior to applying another state's law. They must ensure that the other state's law does not "include Sharia law." As Mr. Awad testified, however, Sharia law is not a

³⁹ See, e.g., *Sw. Bell Tel. Co.*, 231 P.3d at 642.

monolithic religious doctrine upon which all Muslims around the world agree. (App. 100-02, 105). Thus, to make this preliminary determination, courts will be forced to delve deeply into religious doctrine and resolve a fundamental religious question: What constitutes Sharia law?

SQ755, then, goes well beyond constitutional strictures that prohibit courts from resolving religious questions or controversies. *See, e.g., Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 444, n. 3 (1969) (declining to decide a church property dispute that would have required the court to determine whether one party had “deviat[ed] from the faith and practice of the Presbyterian Church in the United States”); *Watson v. Jones*, 80 U.S. 679, 733 (1872) (“[I]t is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,-a matter over which civil courts exercise no jurisdiction,-a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,- becomes the subject of . . . [an] action.”).

Accordingly, the District Court’s finding that SQ755 fosters an excessive entanglement was proper.

2. Plaintiff Will Suffer Irreparable Harm Once SQ755 Takes Effect.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976);

see also, e.g., Pacific Frontier v. Pleasant Grove City, 414 F.3d 1221, 1235-36 (10th Cir. 2005) (noting presumption of irreparable harm where First Amendment rights are implicated).

This principle applies equally to alleged violations of the Free Exercise Clause and the Establishment Clause. *See, e.g., Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 178 (3d Cir. 2002) (“Limitations on the free exercise of religion inflict irreparable injury.”), citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (“[T]he denial of the plaintiff’s right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily.”) (internal quotation marks omitted); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (“[W]here a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.”).

As explained above, once SQ755 takes effect, Mr. Awad will be irreparably injured because burial instructions and charitable bequests in his last will and testament will be excluded from judicial consideration and unenforceable precisely because they refer to and incorporate Sharia religious tenets.

Moreover, SQ755 will cause irreparable harm to Mr. Awad and other Muslims by characterizing their faith as a threat to the State and conveying the unmistakable message that their faith is officially disfavored by the State generally, and the judicial system, in particular.

Accordingly, the District Court's determination of irreparable harm was not an abuse of discretion.

3. The Balance of Harms Weighs in Favor of Plaintiff.

The District Court properly found that “that the weighing of the harms involved in this case clearly would favor protecting plaintiff's First Amendment rights over the will of the voters.” (App. 277). Any harm to the electorate that may result from an injunction here will be minimized by key two facts. First, as the District Court held, it “was an undisputed fact that the amendment at issue was to be a preventative measure, and the concern that it seeks to address has yet to occur.” (App. 158, 277).

Second, while voters have an interest in seeing their will effectuated generally, they have no cognizable interest in or claim to stripping minority groups of constitutionally protected rights. (App. 277) (citing *Barnette*, 319 U.S. at 638). The irreparable injury that Plaintiff will suffer once SQ755 takes effect outweighs any harm to the voters.

4. Enjoining SQ755 Serves the Public Interest.

The preliminary injunction would not be adverse to the public interest. Quite the contrary – as the District Court acknowledged, “[i]t is always in the public interest to prevent the violation of a party's constitutional rights.” (App. 278, quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

SQ755's rejection of Sharia law will impair, if not preclude entirely, Muslims' ability to access and benefit from the judicial system in Oklahoma. Under SQ755, Muslims will

be barred in state court from asserting religious freedom rights or bringing any other claims that reference their faith whether under state or federal law. For example, as previously noted, certification of SQ755 would prohibit Muslims from seeking relief under the Oklahoma Religious Freedom Act, 51 Okla. Stat. §253(A) (2000) (*See* App. 246, an excerpt of Pl. Ex. 11; App. 243-251). It also would impair Muslims' ability to assert claims in state court under the Free Exercise Clause of the First Amendment and comparable provisions in the Oklahoma Constitution, as well as other statutes, such as RLUIPA (42 U.S.C. §§2000cc-1 to 2000cc-5).

In addition, SQ755's international and foreign law provision implicates fundamental rights by limiting state courts' jurisdiction to enforce treaty obligations and even consider international and foreign law. The Supreme Court has held that "a narrow class of international norms" remains enforceable in domestic courts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004). "[B]ecause some international law is part of the federal law that state judges and justices are bound to enforce," *e.g.*, treaties and customary international law, SQ755 will likely undermine longstanding principles of federalism. *See* Martha F. Davis & Johanna Kalb, *Oklahoma State Question 755 and An Analysis of Anti-International Law Initiatives*, Am. Constitution Soc'y for Law & Policy Issue Br. (Jan. 2011)⁴⁰ at 6; *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . .

⁴⁰ Available online at http://www.acslaw.org/sites/default/files/davis_and_kalb_anti-international_law.pdf. (last accessed May 5, 2011).

.”); *see also First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622-23 (1983).

For example, by prohibiting state courts from considering ratified treaties⁴¹ of the United States and instructing state courts on how to interpret federal law, SQ755 likely violates the Supremacy Clause, which “was adopted to provide the federal government with a check against state laws that run counter to the national interest.” *See Penny Venetis, The Unconstitutionality of Oklahoma’s SQ755 and Other Provisions Like It Which Bar State Courts from Considering International Law*, 59 Clev. St. L. Rev. 13 (forthcoming Spring 2011), 13 (“One of the Supremacy Clause’s specific targets was states’ failure to adhere to U.S. treaty obligations.”); *see* U.S. Const. Art. VI, Sec. 1, Cl. 2.⁴²

Prohibiting Oklahoma courts from considering foreign law also flies in the face of centuries of American jurisprudence, and the well-established principles of parol evidence

⁴¹ SQ755 is contradictory on whether treaties could be enforced in Oklahoma. The ballot title specifies “treaties” as a source of prohibited international law, but does not identify treaties as federal law. (App. 168, 178, 182, 185) (“Sources of international law also include international agreements, as well as treaties.”) So SQ755 arguably forbids Oklahoma from following treaties which are “. . . the Supreme Law of the Land.” U. S. Const. Art. VI, Section 1, Cl. 2.

⁴² SQ755 is likely also unconstitutional under the Supremacy Clause because it impairs remedies provided by federal statutes. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) (Wisconsin notice-of-claim statute pre-empted when federal civil rights action brought in federal court because state statute conflicts in its purpose and effects with remedial objectives of federal civil rights law and enforcement would produce different outcomes in §1983 litigation based solely on whether claim was asserted in state or federal court). (A copy of the forthcoming law review article referenced here will be provided to counsel contemporaneously with this brief and to the Court as supplemental authority pursuant to Fed.R.App.P. 28(j)).

and international comity, “put[ting] an end to a common practice in Oklahoma courts that dates back to this country’s founding.” Davis & Kalb, at 8.⁴³

This development could have a number of troubling, real-world implications for Oklahoma citizens. For instance, in the area of family law, Oklahoma presently gives full effect and recognition to foreign adoption decrees “issued by a court or other governmental authority with appropriate jurisdiction in a foreign country.” See 10 Okla. Stat. §7502-1.4(A) (2009), *invalidated in part by Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (provision denying recognition of final adoption orders of other states granted to same-sex couples violates Full Faith and Credit Clause). It also accepts foreign adoption decrees when the adoptive parents request an American birth certificate for the adopted child. 10 Okla. Stat. § 7502-1.4(B). However, with the prohibitions of SQ755, Oklahoma courts would be prevented from recognizing these adoptions, thereby calling into doubt their validity under state law.

Similarly, Oklahoma courts would be unable to determine if a lawful foreign marriage existed in cases where an Oklahoma couple were married outside the U.S. and sought to have their marriage legally recognized in Oklahoma. See, e.g., U.S. Department of State,

⁴³ The provision of SQ755 barring courts from granting comity to the laws of other U.S. states if they “include Sharia law” likely violates the Full Faith and Credit Clause of the U.S. Constitution, which prohibits state courts from “disregard[ing] a judgment rendered in another state, regardless of the law the other state applied.” Venetis, *supra*, at 20; U.S. Const. Art. IV, Sec. 1. SQ755 is also arguably unconstitutional because that clause gives to Congress, not Oklahoma, the right to “prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof.” See *Id.*

Marriage of U.S. Citizens Abroad⁴⁴ (“The validity of marriages abroad is not dependent upon the presence of an American diplomatic or consular officer, but upon adherence to the laws of the country where the marriage is performed.”).

SQ755’s international and foreign law restrictions also would adversely affect Oklahoma businesses because it could prevent an Oklahoma court from recognizing foreign judgments when not contrary to Oklahoma public policy and it could impair freedom of contract,⁴⁵ as courts would be unable to enforce choice-of-law provisions often elected in business contracts. It also could deter foreign businesses from transacting with Oklahoman individuals and companies because state courts “are unwilling to uphold their obligation to apply international law” which contains important safeguards for international companies. Davis & Kalb, at 9 (citing as an example the United Nations Convention on Contracts for the International Sale of Goods).

Finally, SQ755 is likely to have an unprecedented impact on “the independence and autonomy of the state’s judiciary.” *Id.* at 10. As legal scholars have explained:

By directing judges how to decide the cases before them, these proposals purport to constrain judges in their decision-making in a way that is historically unprecedented in this country and threatens the core value animating our judicial system. Moreover, these proposals handicap state judges and justices from considering potentially informative sources in order to reach the best outcomes in the cases before them. . . The amendment cuts

⁴⁴ Available online at: http://travel.state.gov/law/family_issues/marriage/marriage_589.html (last visited May 9, 2011)

⁴⁵ The Oklahoma Constitution prohibits passage of “any law impairing the obligation of contracts.” Okla. Const. of 1907, art. II, § 15.

Oklahoma's jurists off from the world of comparative experience, impoverishing the development of the state's statutory law, as well as its constitutional and common law jurisprudence.

Id. at 10-11.

SQ755, if permitted to take effect, would directly infringe the religious freedom rights of Mr. Awad and other Muslims. This fact, combined with the numerous other constitutional harms created by the amendment, as well as its likely negative policy implications, support the conclusion that the preliminary injunction was in the public interest.

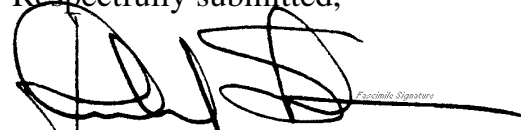
IX. CONCLUSION

For the foregoing reasons, the District Court did not abuse its discretion in preliminarily enjoining the "Save Our State Amendment," and this Court should affirm.

X. STATEMENT REGARDING ORAL ARGUMENT

In accordance with **Tenth Circuit Rule 28.2(C)(4)**, Plaintiff-Appellee respectfully suggests that oral argument is not necessary but may be helpful in addressing the important issues raised by this action and therefore is requested by Plaintiff-Appellee.

Respectfully submitted,



Facsimile Signature

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**CERTIFICATE OF COMPLIANCE WITH
FED.RUL.APP.PRO. 32(a)(7)**

As required by **Fed.Rul.App.Pro. 32(a)(7)(B)** this is to certify that this Brief uses proportionately spaced fonts and contains **13,642** words.

I relied on a wordprocessor to obtain the count (WordPerfect X4). The count was run from page 1 through page 51 inclusive, and exclusive of the style of the case and Title on page 1, the statement regarding oral argument, and the closing signature of counsel.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.


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(AND CERTIFICATION OF DIGITAL SUBMISSION)**

This is to certify that a true and correct copy of the following instruments:

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