CASE NO. 10-6273

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MUNEER AWAD,
PLAINTIFF-APPELLEE

v.

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;
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

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE SUBMITTED BY THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and THE ISLAMIC LAW COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

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AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE MUNEER AWAD

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and the **ISLAMIC LAW COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION**, by their attorneys, Robert E. Michael & Associates PLLC, respectfully submit this Brief in opposition to the appeal from the Order of Hon. Vicki Miles-LaGrange, Chief United States District Judge, W.D.Ok., dated November 29, 2010 (the "Order").

PRELIMINARY STATEMENT

This Amicus Curiae Brief is respectfully submitted by The Association of the Bar of the City of New York (the "ABCNY"). The ABCNY is one of the oldest lawyers associations in the U.S., with over 23,000 members nationwide and worldwide. It was founded in 1870 in large part to fight political interference with an independent and fair judiciary. Of almost equally longstanding tradition is the Association's commitment to the Rule of Law and to the fundamental principle that our courts must be able to make their determinations with regard only to the facts and law relevant to the dispute at hand. This fundamental principle is violated by the "Save Our State Amendment" to the Oklahoma Constitution, which was approved in a referendum as State Question 755 (hereafter "SQ755").

This Brief is joined in by the Islamic Law Committee of the American Branch of the International Law Association (the "ILC," and together with the

ABCNY, hereafter the "Amici"). The International Law Association (the "ILA"), founded in 1873 and now headquartered in London, England, is the preeminent international non-governmental organization for developing and restating international law. Individuals and organizations join the ILA by joining one of its branches; the American Branch, which was organized in 1922, is one of the largest. The ILA has consultative status in the United Nations and plays a unique role in drafting treaties, resolutions, and other international instruments. The ILA often influences debates in the United Nations General Assembly and the overall development of public and private international law. SQ755 is in direct conflict with virtually everything the ILA has stood for throughout its history.

The Amici submit this Brief in support of the Order of the United States District Court for the Western District of Oklahoma dated November 29, 2010 (the "Order," to which Amici respectfully refer the Court for the facts and statement of the case) and in opposition to Defendants-Appellants' (hereafter "the State") Proposition III. C., that Plaintiff-Appellee Muneer Awad (hereafter "Citizen Awad") "failed to show that the injunction would not be adverse to the public interest." The Amici respectfully submit that in our Republic there is no greater public interest than in the support of the Rule of Law as embodied in the Constitution of the United States (the "US Constitution"). As shown by the Amici hereinbelow, SQ755, if allowed to become effective as part of the Oklahoma State

Constitution, would violate the Supremacy, Full Faith and Credit, Contract, and Due Process Clauses of the US Constitution, in addition to the patent violation of the Establishment and Equal Protection Clauses, as accurately set forth in the Order. In addition, the essential commercial interests of the citizens of Oklahoma would be severely jeopardized by enabling parties outside of Oklahoma to refuse to honor contracts and decisions governed by Oklahoma law, due to the lack of comity and reciprocity.

FEDERAL RULE OF APPELLATE PROCEDURE 29 STATEMENTS

The filing of this Brief is with the consent of all parties.

No party's counsel authored this Brief in whole or in part; and neither any party nor any party's counsel contributed money that funded or was intended to fund the preparation or submission of this Brief; and no person — other than the amici curiae, their respective members, or their counsel – contributed money that funded or was intended to fund the preparation or submission of this Brief.

SUMMARY OF THE ARGUMENTS

By its own terms, SQ755 "forbids courts from considering or using international law." It also defines "international law" as being "formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties." The Supremacy Clause of the US Constitution expressly makes treaty obligations of the United States the supreme

law of the land.[1] In essence, SQ755 impermissibly conflates foreign law, the law of foreign nations that is not binding in this country, and international law, which is or might be part of the supreme law of the land.

SQ755 permits Oklahoma state courts to "uphold and adhere to … the law of another state of the United States provided the law of the other state does not include Sharia Law." The US Constitution requires that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."[2] Congress alone is authorized to "prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." A sweeping interdiction against the law of any State whose laws or decisions have incorporated any element of the inaccurate concept of "Sharia Law" or the almost equally vague term to which SQ755 equates it, "Islamic law," is patently in violation thereof.

Article I, Section 10 of the US Constitution states: "No State shall ... pass any ... Law impairing the Obligation of Contracts ..." By making it impossible to enforce any choice of law clause that would require the application of the law of any of the United States or any foreign country whose laws or judicial decisions might have any element of the exceedingly broad terms of "Sharia Law" and "Islamic law," SQ755 clearly impairs all contracts that fall within that scope.

[1] U.S. Const. Art. VI, Cl. 2.
[2] U.S. Const. Art. IV, §1

Similarly, by prohibiting the application of mandatory and voluntarily assumed elements of international law, SQ755 would render critical aspects of contracts unenforceable or indeterminable.

One of the quintessential elements of due process of law, as guaranteed by the Fourteenth Amendment to the US Constitution,[3] is that governmental prohibitions and limitations on personal freedom must not be too vague to allow for reasonable guidance of their limits. No public interest is greater than ensuring that the exercise of majority will through governmental action by States is required to be sufficiently clear to prohibit usurpation through subjective enforcement. SQ755 fails in achieving that goal. Its sweeping condemnations of such vague and practically meaningless terms as "Sharia Law" and "Islamic law" clearly violate the requirement for due process of the 14th Amendment.

Nor is the public interest of the citizens and residents of Oklahoma benefitted by rendering their choice of Oklahoma law worthless outside of the State. Since international law as defined in SQ755 would include such critical legal structures as the European Union treaties[4] that are interwoven throughout the

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[3] U.S. Const. Amend. XIV, §1.

[4] *Treaty On European Union (Treaty of Maastricht)*, Official Journal of the European Union ("OJC") C 83/13 of 30.3.2010, and *Treaty on the Functioning of the European Union,* OJC C 83/47 of 30.3.2010, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF (the "EU Functioning Treaty," and together with the Maastricht Treaty, the "EU Treaties").

jurisprudence of the Member States of the European Union and the United Nations Convention on Contracts for the International Sale of Goods,[5] Oklahoma courts would be barred from applying the law of at least a substantial portion of the major trading partners of American companies. Those countries in turn would then be justified in refusing to apply the law of Oklahoma in their courts.

ARGUMENT

POINT I

SQ755 VIOLATES THE SUPREMACY CLAUSE OF THE US CONSTITUTION

While there is no single valid construction of the concept of the public interest, there is surely no higher expression of it than the US Constitution. Any governmental action that violates its core principles cannot be in the public interest. And there is no more crucial aspect of the US Constitution than the grant of sovereignty by the States to the Federal Government that is embodied in the Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

[5] http://www.cisg.law.pace.edu/cisg/text/treaty.html.

SQ755, if permitted to become effective, would instantaneously create an irreconcilable conflict with the express terms of the Supremacy Clause by prohibiting all state courts in Oklahoma from being bound by a host of "Treaties made, or which shall be made, under the Authority of the United States."

The critical distinction SQ755 ignores is that between "foreign law" and "international law." The language to be added to the Oklahoma State Constitution by SQ755 prohibits the use or consideration of "international law" and "Sharia Law," terms, as discussed below, that are opaque and vague. In fact, the Attorney General of the State of Oklahoma (the "AG") concluded that the amendatory language did "not adequately explain the effect of the proposition because it [did] not explain what either Sharia Law or international law is."[6] The AG therefore, in conformity with Oklahoma law,[7] prepared the text of the Ballot Title which ultimately became a part of SQ755, and included:

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

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[6] Letter of the Attorney General of the State of Oklahoma to the Secretary of State, Senate President Pro Tempore and Speaker of the House of Representatives of the State of Oklahoma, dated June 2, 2010, https://www.sos.ok.gov/documents/questions/755.pdf, p. 10.

[7] *Id.*

> 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.[8]

This is in clear distinction from the reference in SQ755 to "legal precepts of other nations," which must be understood to be foreign law. Foreign law is simply the law in effect in non-U.S. jurisdictions. It includes foreign legislation; jurisprudential law established by foreign tribunals; law as interpreted by the multinational tribunals of which the United States is NOT a party, such as the European Court of Justice; and international conventions to which the United States is NOT a party to the extent those conventions are incorporated into domestic law or interpreted or construed by the courts of foreign nations, as with the EU Treaties in the European Union Member States.[9]

If the SQ755's prohibition only covered the general statement in the Amendment about "legal precepts of other nations" and did not refer to "international law," it could arguably be construed to apply only to foreign law. In that event, its repugnance to the Constitution might be limited. Since there is a

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[8] Executive Proclamation, Governor Brad Henry, August 9, 2010; Letter from W.A. Drew Edmondson, Attorney General of the State of Oklahoma, to M. Susan Savage, Secretary of State, et. al, June 4, 2010, and subsequent official correspondence. *Id.* pp. 11-17.

[9] *See, e.g.*, EU Functioning Treaty, supra n.4, Article 2, §1: "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

wide and longstanding body of law that imposes limits on exactly those foreign law obligations, primarily over due process and other public policy concerns,[10] by itself it might not be so clearly unconstitutional. However, neither the proposed Amendment nor, *a fortiori*, SQ755 permit any such interpretation. As noted above, the official explanatory text unambiguously defines "international law" explicitly as the "law of nations" and expressly identifies "treaties" as a principal source thereof.

SQ755 thus expressly includes treaties within the scope of international law that Oklahoma courts are barred from considering or using.[11] However, treaties are expressly made "the supreme Law of the Land" by the Supremacy Clause.

The United States is party to many treaties that have a clear and substantial impact domestically. A strong example of the immediate conflict between a treaty and Oklahoma law should SQ755 become law is the *United Nations Convention*

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[10] *See, e.g., Small v. United States*, 544 U.S. 385, 125 S. Ct. 1752; 161 L. Ed. 2d 651 (2005) (Court refused to consider conviction by Japanese (i.e., foreign) court as within the phrase "convicted in any court" in a Congressional statute); *Societe Internationale Pour Participations v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087; 2 L. Ed. 2d 1255 (1958) (failure of company to produce records for fear of violating foreign law was insufficient basis for non-production as such a result would undermine the policy behind the Trading with the Enemy Act).

[11] *See* Executive Proclamation, Governor Brad Henry, August 9, 2010. https://www.sos.ok.gov/documents/questions/755.pdf, p. 17.

on Contracts for the International Sale of Goods (the "CISG").[12] Article 1 of the CISG shows the difference between it and other treaties, which generally establish obligations between or among States:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
>
> (a) when the States are Contracting States; or
>
> (b) when the rules of private international law lead to the application of the law of a Contracting State.

(Emphasis added.) Since the United States is a Contracting State, by its terms, the CISG applies directly to all of the citizens and residents of Oklahoma who enter into contracts for the sale or purchase of goods with a party in another Contracting State -- which includes such likely trading partners as Canada, Mexico and China.[13] In addition, the CISG's application is mandatory unless the parties expressly opt out of it. CISG Article 6.

Accordingly, an Oklahoma Court adjudicating a dispute between, for example, an Oklahoma purchaser of goods and a Mexican seller would be required by the Supremacy Clause to apply the CISG -- a quintessential part of "international law." In such a case, an Oklahoma court would face the

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[12] http://www.cisg.law.pace.edu/cisg/text/treaty.html

[13] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

irreconcilable conflict of having to either violate the Oklahoma State Constitution or the Constitution of the United States of America.[14]

Therefore, it is inescapable that SQ755, if it becomes law in Oklahoma, would constitute a direct affront to and violation of the Supremacy Clause.

POINT II

SQ755 VIOLATES THE FULL FAITH AND CREDIT CLAUSE

Article IV §1of the US Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." It is unquestionably one of the cornerstones of the US Constitution.[15]

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[14] Other critical international treaties to which the United States is a party that would become unenforceable in an Oklahoma state court include, e.g., *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention"), *http://www.uncitral.org/pdf/english/texts/arbitration/NY conv/1958_NYC_CTC e.pdf* (codified at 9 U.S.C. § 201 et seq.); and *The Convention for the Unification of Certain Rules for International Carriage by Air* (the "Montreal Convention"), *http://www.jus.oiu.no/lm/air.carriage.unification.convention.montreal.1999/plain.txt*.

[15] *See, e.g.*, *Allstate Insurance v. Hague*, 449 U.S. 302, 322, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (Stevens, J., concurring) ("The Full Faith and Credit Clause is one of the several provisions in the Federal Constitution designed to transform the several states from independent sovereignties into a single unified nation." *See also*, *Baker v. General Motors Corp.,* 522 U.S. 222, 234, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998) ("The Full Faith and Credit Clause is one of the provisions incorporated into the Constitution by the framers for the purpose of transforming an aggregation of independent, sovereign states into a nation," quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948)).

The Full Faith and Credit Clause, *inter alia*, requires that "[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Nevada v. Hall*, 440 U.S. 410, 421, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). (Emphasis added.)[16] SQ755 unconstitutionally limits Oklahoma's duty to give full faith and credit to the judicial decisions of the other States.

SQ755's direction to "uphold and adhere to … the law of another state of the United States" applies only as long as "the law of the other state does not include Sharia Law." The Full Faith and Credit Clause does not allow states courts to pick and choose which decisions they will "uphold" and "adhere to." As the Supreme Court has held:

> Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.
>
> …
>
> [O]ur decisions support no roving "public policy exception" to the full faith and credit due *judgments*. … "[The] Full Faith and Credit Clause ordered submission … even to hostile policies reflected in the

[16] Case law does differentiate the credit owed to laws (legislative measures and common law) and to judgments. As the Supreme Court said in *Baker v. GMC, supra,* at 232**:** "'In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.' The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes **dealing with a subject matter concerning which it is competent to legislate**.'" (Internal citations omitted.) (Emphasis added.)

> judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."

Baker v.GMC, 522 U.S. at 233 (1998) (internal citations omitted).

This Court has been equally clear and firm. In a case with striking similarities to the instant one, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), this Court applied the Full Faith and Credit Clause to hold unconstitutional an Oklahoma statute that prohibited Oklahoma courts from enforcing out-of-state adoption decrees in favor of same sex couples. This Court noted that the statute at issue in *Finstuen* "is a state statute <u>providing for categorical non-recognition</u> of a class of adoption decrees from other states." *Id*. at 1156 (emphasis added). "Categorical non-recognition" is also a perfect description of the offending clause of SQ755.

SQ755's plain text brooks only two possible interpretations, both clearly unconstitutional. The literal reading of SQ755 compels the conclusion that Oklahoma courts may never "uphold" or "adhere" to the law of another State, if that State <u>has</u> <u>ever</u> used "Sharia Law" either in a judicial decision or explicitly or implicitly in legislation (*e.g.*, requiring public schools or prisons to provide for religious dietary rules in their cafeterias). However, even the more restrictive interpretation of SQ755 would be that Oklahoma courts are not empowered to enforce a judgment duly entered in another State if the decision in question was based in any way on an application or inspection of the rules or requirements of a

Muslim's religious beliefs. Even the latter is unquestionably within the purview of the holdings in *Baker* and *Finstuen*.

POINT III
SQ755 VIOLATES THE CONTRACTS CLAUSE OF THE US CONSTITUTION

The injunction properly balances the public interest because it prevents the adoption of an amendment that impairs the obligation of contracts in violation of Article I, Section 10, of the US Constitution. It is indisputable that a substantial portion of contracts entered into in the United States and in Oklahoma contain choice-of-law clauses that provide that interpretation of the contract will be governed by the law of a particular state, foreign country or international convention. See, e.g., Restatement (Second) of Conflict of Laws §187 (1971).[17] It is also indisputable that it is customary for contracts to contain choice-of-forum or mandatory arbitration clauses in which parties agree to submit disputes under the contracts to a particular federal state or foreign forum or to arbitration. See, e.g., 7 Williston on Contracts §15:15 (4th ed.).

[17] In pertinent part:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied ... unless ... application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Under SQ755, however, if parties choose the law of any state that might in some fashion "include Sharia Law," the law of "other nations or cultures" or "international law or Sharia Law," Oklahoma courts will be forbidden from interpreting or enforcing the contract in the manner to which the parties agreed. Similarly, if parties have agreed to a particular forum that, in its determination of the dispute under the contract, refers to or enforces the prohibited areas of law, Oklahoma courts will have to decline to enforce the adjudications of those forums. [18]

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[18] Oklahoma normally enforces the parties' choice of law or forum, unless the results of application of the law are repugnant to Oklahoma's public policy, a determination that must be made on a case by case basis. *See, e.g.*, *Oliver v. Omnicare, Inc.*, 103 P.3d 626, 628 (Okla. Ct. App. 2004):

> The general rule is that a contract will be governed by the laws of the state where the contract was entered into unless otherwise agreed *and* unless contrary to the law or public policy of the state where enforcement of the contract is sought. *Telex Corporation v. Hamilton,* 1978 OK 32, 576 P.2d 767; *Williams v. Shearson Lehman Brothers, Inc.,* 1995 OK CIV APP 154, 917 P.2d 998 Because the parties "otherwise agreed" to being governed by Ohio law, the issue becomes whether its application to the Employment Agreement's non-competition provision would violate the law or public policy of Oklahoma.

As to the general treatment of choice of forum clauses in Oklahoma courts, *see, e.g.*, *Adams v. Bay, Ltd.*, 60 P.3d 509, 510 (Okla. Ct. App. 2002):

> A forum selection clause acts as a stipulation wherein the parties ask the court to give effect to their agreement by declining to exercise its jurisdiction. Absent compelling reasons otherwise, forum selection clauses are enforceable. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 595, 111 S.Ct. 1522, 113 L.Ed.2d 622, (1991). See also *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 1916, 32

Thus, by singling out certain types of law or forums, SQ755 substantially impairs the freedom parties would otherwise have to contract as they choose.

Our founders elevated the freedom to contract to the status of a constitutionally protected right. Our courts have allowed substantial intrusion on that right only when "the State, in justification, [has] a significant and legitimate public purpose behind the [law], … such as the remedying of a broad and general social or economic problem." *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983) (internal citation omitted). In its opposition to the Order, the State has made absolutely no showing to support the proposition that Oklahoma is dealing with any "general social or economic problem." In *Energy Reserves,* the Court found that the Kansas Act at issue qualified, in large part because it was promulgated "in direct response to" the passage by Congress of the Natural Gas Policy Act of 1978. *Id*. at 407, 413. This result was the opposite of that reached in the case it relied on, *Allied Structural Steel Co. v. Spannaus*, 438 U.S 234 (1978).

The *Spannaus* decision includes a detailed analysis of the historical precedents and the essential elements of a Contracts Clause violation. Most significantly:

L.Ed.2d 513 (1972) (party resisting the forum selection clause must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching")

> [A]lthough the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' … necessarily reserved by the States to safeguard the welfare of their citizens," … that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[legislation] adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

Id. at 244 (internal citations omitted). It is important to note that any valid concerns reflected in SQ755 as to the importation into Oklahoma jurisprudence by private contracting parties of precepts accepted in classical Islamic law, assuming, *arguendo*, that they were still valid in some Islamic societies, <u>are unquestionably clearly and fully protected by existing law</u>. A marriage contract that, for example, allows for polygamy, is no less valid today in Oklahoma than it would be were SQ755 to become law. In other words, any valid, i.e., constitutional, application of SQ755 would be meaningless – another proof that the public benefit is only favored by the continuance of the injunction against the implementation of SQ755.

On the other hand, the adverse impact on constitutional rights of SQ755 is evident. For example, a hypothetical Oklahoma company specializing in curing meats may be eager to hire a French marketing company to market its products to high-end specialty retailers throughout Europe. After lengthy negotiations, the parties might well agree that French law will govern their contract but that claims against the Oklahoma company must be brought in Oklahoma state courts. Under

SQ755, the Oklahoma courts apparently cannot apply French law since it constitutes both "the legal precepts of [another] nation" and, based on the EU Treaties, "international law," thus impairing the obligation of a key contractual term. Further, suppose that the meat curing company is also eager to sell domestically to members of religious communities that have special dietary laws. Under SQ755, an Oklahoma court could not enforce a provision in sales contracts providing that the meat will conform to halal or kosher restrictions, since the restrictions would require an Oklahoma court to not only "look to the legal precepts of other … cultures" but also "Sharia Law," once again impairing the contractual obligations of the parties. Nor could an Oklahoma court adjudicate a dispute between that company and an employee it fired over the employee's alleged breach of an employment agreement that required him or her to comply with Muslim dietary rules in handling their products.

It is precisely this kind of unreasonable interference with parties' contractual expectations that the US Constitution prohibits.

POINT IV

SQ755 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE US CONSTITUTION

The preliminary injunction issued by the District Court additionally furthers the public interest because SQ755 would, if implemented, violate the Due Process

Clause of the US Constitution.[19] This is because it would deprive the citizens, residents and any others with property rights subject to enforcement in Oklahoma courts with any ability to have their rights adjudicated in a fair and consistent manner.

Due process requires that a statute "provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). SQ755, however, provides no meaningful guidance to judges or the public as to what "Sharia Law" is. Due process mandates that a statute not be "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.*

Because "Sharia Law" is not a legally cognizable body of law, SQ755 is "standardless" and invites the confusion and possible discriminatory application that the Due Process Clause prohibits. The AG's interpretation of SQ755 formally defines "Sharia Law" as "Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed." This is analogous to saying that "American law" is based on the Constitution, the Federalist Papers and the Judiciary Act of 1789. While it is accurate, it is clearly insufficient to provide a jurist with any meaningful basis for adjudicating any specific case or controversy.

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[19] U.S. Const. Amend. XIV, §1, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The term "Sharia Law" raises even more difficulties. Shari'a literally means the "way" or the "path," and is a process of ascertaining divine will so as to provide guidance as to conduct that will comply with the divine will.[20] Shari'a applies in all aspects of life -- whether a commercial transaction, a divorce settlement or one's relationship with parents and children. It is the compendium of multiple sources accumulated in various societies and polities over more than 1400 years, from at least seven different Islamic legal subdivisions. In practice, it was overlaid with different national laws in each country in which Muslims lived, for the majority of the past 600 years. Accordingly, the law under which even a wholly observant Muslim lives in any country may have some aspect of some version of classical Islamic law, or Shari'a, but probably most, if not all, of the law that governs his or her life will be the law of the geographical polity.[21] In that regard, it is comparable to Jewish Halakhic law and Christian Ecclesiastical and Canonical law. But unlike Jewish and Christian law, there has never been either a single authoritative compilation of Shari'a, or any judicial or legislative body with jurisdiction over anything remotely constituting even a majority of Muslims.[22]

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[20] See, e.g., N. Calder and M.P. Hooker, "Shari'a" in The Encyclopaedia of Islam, Volume IX, at 321-328 (C.E. Bosworth, E. van Donzel, W.P. Heinrichs and G. Lecomte, eds.) (Leiden: Brill, 1997).

[21] *Id.*

[22] *Id.*

As such, the term "Sharia Law," including as is does religious traditions and practice guides, is both overly broad and much too vague to be a judicially cognizable body of law. There are two reported cases that have already so held: *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.*, Court of Appeal (Civil Division), [2004] EWCA CIV 19. [2004] All ER (D), 1072, 2004 WL 62027 (approved judgment) (choice of law clause's reference to "principles of … Sharia" insufficient to govern contract because of inability to define any rules or provisions of Sharia that could be incorporated into the contract, ¶¶ 52,55); *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 2003 WL 22016864 (Del. Supr.)(unpublished opinion) (discussing difficulties of determining a provision of Saudi law because of undefined nature of Islamic law).

As a result the prohibition of "Sharia Law" is too vague to be of any valid application as a matter of due process. It simply gives an Oklahoma judge "unfettered discretion in interpreting what conduct is prohibited." *Chatin v. State*, 1998 WL 196195, *6 (S.D.N.Y 1998), *aff'd, sub nomine Chatin v. Coombe*, 186 F.3d 82 (2d Cir. 1999) (unpublished opinion) (prison rule prohibiting unauthorized religious services did not provide reasonable notice to prisoners or corrections officers that solitary, silent prayer constituted a religious service). For example, consider a Muslim who is charged with public nuisance because he has washed his feet in a public fountain in order to pray in a park. There is no question that any

legitimate public health concerns could be invoked – with or without SQ755 – to enable the State or its political subdivisions to ban or limit such conduct. However, under SQ755 an Oklahoma court would not be able to consider testimony as to the reasonableness or valid religious basis of his belief as a factor in determining his intent or as a mitigating factor. What if a caterer brings an action for fraud against a seller who misrepresented that meat was slaughtered in accordance with Islamic dietary rules? Must the court refuse to hear the action because to do so would require it to consider "Sharia Law"? In each of these cases, the ability of an Oklahoma court to enforce or defend valuable rights would have been permanently deprived.

The term "Sharia Law" is therefore too vague to give sufficient guidance to the judges who must interpret SQ755 and the members of the public who find themselves before those judges.

POINT V

SQ755 IS NOT IN THE PUBLIC INTEREST BECAUSE IT WOULD CAUSE MATERIAL HARM TO THE LEGAL AND BUSINESS INTERESTS OF THE CITIZENS AND RESIDENTS OF OKLAHOMA

In addition to the harm that SQ755 would have on the public interest of Oklahoma's citizens and residents in maintaining their personal freedom and constitutionally guaranteed rights, it is unquestionably likely to harm a wide area of their legal, commercial and business interests as well. While the express

prohibition in SQ755 of considering "the legal precepts of other nations," and the inclusion of foreign law within the term "international law," may not have raised Supremacy Clause issues, as noted above, they certainly will impair the legal and business interests of Oklahomans.

As the Supreme Court has warned: "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). SQ755 would seriously damage the health of international commerce for parties doing business in Oklahoma and of Oklahomans engaged in international commerce.

SQ755's turn away from consideration of other forums' laws violates the long-recognized principle of international comity and reciprocity. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 9, 92 S.Ct. 1907,32 L.Ed.2d 513 (1972) (also reported as "*M/S Bremen v. Zapata Off-Shore Company*"). See also *Vimar Seguros Y Reaseguros*, 515 U.S. at 538; *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 429 (10th Cir. 2006). As the Supreme Court observed, more than a century ago: "The

general comity, utility, and convenience of nations have … established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, …" *Hilton v. Guyot*, 159 U.S. 113, 166, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (internal quotations omitted). This principle is also part of the supreme law of the land as enacted in 11 U.S.C. §1508 ("In interpreting this chapter [Chapter 15 of the Bankruptcy Code], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.")

Consequently, should Oklahoma throw comity aside, it risks its residents' international business partners reciprocating by disregarding choice of law and forum agreements that select Oklahoma law. This stalemate could cause confusion over legal rights, increased multi-forum litigation, and even decreased international trade as actors no longer have the certainty needed to conduct cross-border transactions. Many of our trading partners have a reciprocity requirement for honoring foreign judgments, including countries in the Middle East.[23] Customarily, these countries, including some of the largest exporters of oil to the United States, accept the choice of U.S. law and U.S. courts in all major contracts. Since these countries generally incorporate at least some elements of Shari'a in

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[23] *See, e.g*, Mohammed Hassouna, *Egypt – The Enforcement of Money Judgments* (Juris Publishing, Inc. April 2008)

their law, they could reasonably refuse to accept U.S. law and courts going forward. This would result in a costly breakdown of the existing mechanism for the resolution of cross-border trade disputes.

The courts have encouraged respect for choice-of-law and choice-of-forum clauses as a way to lend certainty to commercial dealings, including among international parties. The alternative is chaos and, potentially, the breakdown of international commerce:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.
>
> …
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [orderliness and predictability], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. … [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (footnote omitted). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *The Bremen*, 407 U.S. at 13 n.15; *Yavuz*, 465 F.3d at 430.

This respect for parties' decisions as to governing law and forum has manifested in Oklahoma, as in other parts of the country. In *Yavuz*, this Court

remanded a controversy to the Northern District of Oklahoma to allow the parties to present their proofs on an issue of Swiss law, which governed the contract in the dispute. *Yavuz* dealt with a dispute over title to real property in Tulsa implicated in a business transaction between plaintiff, a Turkish citizen, and defendants, an Oklahoma partnership, a Swiss corporation, and a Syrian/Swiss citizen. The agreement's choice-of-law clause selected Swiss law, and it was this law, this Court held, that the District Court should apply to determine the meaning of the agreement's forum selection clause. In finding that Swiss law, which the parties bargained for under the agreement, should control, rather than Oklahoma law, this Court expressed "respect for the parties' autonomy and the demands of predictability in international transactions." *Yavuz*, 465 F.3d at 430. Since Swiss law undoubtedly includes "the legal precepts of" at least one other nation, and if one substitutes Germany or France or any other European Union Member State for Switzerland, it would, due to the EU Treaties, include "international law" as well, under SQ755 all Oklahoma courts would be prohibiting from applying the choice of law clause.

While the results of the implementation of SQ755 on the legal, commercial and business interests of citizens and residents of Oklahoma are yet to be realized, they are sufficiently foreseeable to have been a cognizable factor in establishing the public benefit of enjoining temporarily, preliminarily, and ultimately

permanently the installation of the Save Our State Amendment into the Oklahoma State Constitution.

CONCLUSION

For the foregoing reasons, Amici the Association of the Bar of the City of New York and the Islamic Law Committee of the American Branch of the International Law Association respectfully request that the Court (A) deny the relief sought by the State in its entirety and (B) given the patent unconstitutionality of SQ755 as a matter of law, remand the proceeding to the United States District Court for the Western District of Oklahoma with either instructions to permanently enjoin the implementation of SQ755 or with findings and conclusions of law sufficient to enable the court below to permanently enjoin the implementation of SQ755 without the need for additional proceedings.

Respectfully submitted,

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