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9-2013

## The New Facially Neutral “Anti-Shariah” Bills: A Constitutional Analysis

Amara S. Chaudhry-Kravitz

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### Recommended Citation

Amara S. Chaudhry-Kravitz, *The New Facially Neutral “Anti-Shariah” Bills: A Constitutional Analysis*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 25 (2014).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol20/iss1/6>

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# The New Facially Neutral “Anti-Shariah” Bills: A Constitutional Analysis

Amara S. Chaudhry-Kravitz\*

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Mrs. Chaudhry-Kravitz would like to thank her former law professors Ann McLean Massie, Brian Murchison, and Joan Shaughnessy, for their continued support over the years. In particular, Ms. Chaudhry remembers the upper-level seminar course she took which dealt exclusively with the religion clauses of the First Amendment. To that end, Mrs. Chaudhry-Kravitz would like to thank Professor Massie for teaching her “everything she needed to know” in order to analyze the legal issue at the heart of these bills.

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### I. Introduction

In recent years, a series of bills have been introduced in various states here in the United States which seek to protect states from the perceived threat that “Islamic Shariah law” is “creeping” into our nation through the American court system.<sup>1</sup> These bills, aimed at preventing the “creeping threat”<sup>2</sup> of “Islamic Shariah law,”<sup>3</sup> are generally referred to as “anti-Shariah bills.”<sup>4</sup>

These so-called “anti-Shariah” bills can be divided into two broad categories. The first category consists of bills, which are overtly discriminatory on their face, and the second category consists of bills, which contain no explicit references to “Shariah law” in their text and are, therefore, “facially neutral.” After an overtly discriminatory “anti-Shariah” bill in Oklahoma was ruled unconstitutional by federal courts,<sup>5</sup> the proponents of “anti-Shariah” legislation switched political strategies in favor of facially neutral bills which contained no explicit references to “Shariah law.”<sup>6</sup> The model legislation for this new “facially neutral”

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1. See American Public Policy Alliance, *American Laws for American Courts*, <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/> (last visited Oct. 12, 2013) (“Unfortunately, increasingly, . . . Shariah law principles[ ] are finding their way into US court cases.”).

2. Christian Broadcast Network, *Report: U.S. Ignoring Creeping Threat from Sharia Law* (Sept. 19, 2010), <http://www.cbn.com/cbnnews/us/2010/September/Report-US-Ignoring-Creeping-Threat-from-Sharia-Law/>; see also Matt Duss, *Creeping Sharia ‘Team B’ Report Presented to Congress*, THINK PROGRESS (Sept. 15 2012, 4:10 PM), <http://thinkprogress.org/security/2010/09/15/176274/creeping-sharia-team-b-report-presented-to-congress/> (quoting U.S. House Representative Trent Franks as saying “It’s clear that the creeping threat of [S]haria poses a threat to the Constitution”).

3. See American Public Policy Alliance, *supra* note 1 (explaining the need “to protect American citizens[ ] . . . [from] Islamic Shariah Law”).

4. Reference the American Public Policy Alliance (APPA) web page for references to “creeping threat” and “Islamic Shariah law” and reference CAIR-National materials, or general media materials, for their common usage of the phrase “anti-Shariah.”

5. See *infra* Part II.

6. See *infra* Part II.

strategy goes by the name “American Laws for American Courts”<sup>7</sup> and is more commonly known by the acronym ALAC.<sup>8</sup>

As these new facially neutral ALAC bills have been passed into law in several states,<sup>9</sup> there has been no ensuing litigation that has challenged the constitutionality of these new facially neutral bills. Both proponents of “anti-Shariah” legislation, as well as adversaries, seem to have accepted the legal principle that these facially neutral ALAC bills are somehow immune from constitutional scrutiny.<sup>10</sup> The proponents of the new facially neutral ALAC bills have expressed a belief that the language contained in the plain text of these bills is the legally relevant inquiry, and a bill that contains no explicit references to “Shariah law” is therefore immune from constitutional scrutiny.<sup>11</sup> The litigants who opposed “anti-Shariah” legislation in Oklahoma, based upon the arguments asserted in that litigation, have seemingly taken the position that the crucial legal inquiry is whether particular “anti-Shariah” legislation has a detrimental effect upon individuals’ ability to practice their faith, in accordance with “Shariah” principles, in the relevant jurisdiction.<sup>12</sup> The unstated premise underlying this articulated legal argument is that because facially neutral ALAC bills do not specifically reference “Shariah,” these bills have no detrimental effect upon individuals’ ability to practice their faith in accordance with “Shariah,” and because the bills do not effect individuals’ ability to practice their faith, the bills are therefore immune from constitutional scrutiny.

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7. See *supra* note 1 (“By promoting American Laws for American Courts, we are preserving *individual* liberties and freedoms . . .”).

8. See Louis Palme, *CAIR-FAIL: Analysis of CAIR’s 2013 Report on Islamophobia in the U.S.*, THE COUNTER JIHAD REPORT (Sept. 22, 2013), <http://counterjihadreport.com/tag/alac/> (noting that anti-Islam legislation is better known as “American Laws for American Courts”).

9. See Council on American-Islamic Relations, *A Brief Overview of the Pervasiveness of Anti-Islamic Legislation* (Jan. 2013), <https://www.cair.com/images/pdf/Pervasiveness-of-anti-Islam-legislation.pdf> (providing succinct data on the status of ALAC, or other “anti-Shariah” bills, introduced in state legislatures nationally); see also Bill Raftery, *Bans on Court Use of Sharia/International Law: Signed into Law in Kansas, Sent to Study Committee in New Hampshire, Still Technically Alive in MI, NC, PA, & SC*, GAVEL TO GAVEL (May 29, 2012), <http://gavelto.gavel.us/site/2012/05/29/bans-on-court-use-of-shariainternational-law-signed-into-law-in-kansas-sent-to-study-committee-in-new-hampshire-still-technically-alive-in-mi-nc-pa-sc/> (detailing the few states that have introduced bills to ban the use of Sharia law in their courts).

10. See *infra* Part III.

11. See *infra* Part III.

12. See *infra* Part III.

This article challenges both of these legal theories and boldly asserts that the new facially neutral ALAC bills remain unconstitutional for the exact same reasons that the overtly discriminatory Oklahoma legislation was unconstitutional. In so doing, this article takes a legal position contrary to the positions held by both parties involved in the seminal “anti-Shariah” case involving the “Save Our State Amendment” in Oklahoma (“SOS Amendment”).

This article will demonstrate that the Oklahoma SOS Amendment was found to be unconstitutional primarily because it was enacted with the intent to politically marginalize a subset of Americans, based upon religious affiliation,<sup>13</sup> in violation of the Establishment Clause of the United States Constitution. Notably, the author of this article asserts that the tangible effects of the SOS Amendment upon the lead plaintiff’s ability to practice his faith were wholly irrelevant, as a legal matter, to the courts’ analysis of the constitutionality of the amendment. Furthermore, this article asserts that the language contained in the plain text of the bills is legally irrelevant if there is other evidence of intent to marginalize the affected community.

This article is divided into two broad categories. To provide a factual and contextual background, Part II of this article will describe the phenomenon of “anti-Shariah” bills by defining the term “anti-Shariah,” documenting the prevalence of “anti-Shariah” bills, and distinguishing between “overtly discriminatory” bills and “facially neutral” bills. Part II will also document the litigation concerning the Oklahoma SOS Amendment and the ensuing shift from overtly discriminatory bills to facially neutral bills, focusing particularly on the American Laws for American Courts (“ALAC”) model legislation and the ALAC bill introduced in Pennsylvania. Following this factual background, Part III of this article will focus upon legal analysis of these bills pursuant to the United States Constitution. To that end, Part III will more carefully examine the Oklahoma litigation, the arguments asserted therein, and the courts’ ultimate rulings. Part III will also apply the courts’ rulings in the Oklahoma litigation to the facially neutral ALAC legislation, using the Pennsylvania ALAC bill as an example, and will ultimately conclude that these rulings are as applicable to ALAC legislation as to overtly discriminatory “anti-Shariah” legislation. In so doing, Part III will demonstrate that the legal theories advanced by both the proponents of the

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13. “Religious affiliation,” as referenced herein, is separate and distinct from religious practice. It is my argument that facially neutral “anti-Shariah” legislation does not merely affect persons who actively practice their faith, but also equally impacts all Americans with a Muslim identity.

facially neutral ALAC legislation and the plaintiff in the Oklahoma litigation rely upon factors that are legally irrelevant. Finally, Part IV will conclude by asserting that the crucial legal inquiry, in analyzing the constitutionality of facially neutral ALAC legislation, is the intent to politically marginalize persons affiliated with a particular faith or faiths. The effect of the legislation upon individuals’ ability to engage in religious practices is legally irrelevant, and the neutrality of the language used in the statute is legally irrelevant, provided that there is other evidence of intent to marginalize.

## *II. Overview of “Anti-Shariah” Bills and the Strategic Shift toward the “Facially Neutral” American Laws for American Courts (ALAC) Model*

### *A. Overview of “Anti-Shariah” Bills and Legislation*

This article will use the phrase “anti-Shariah bills” or “anti-Shariah legislation” as this is the nomenclature most frequently used to describe such bills.<sup>14</sup> The term “anti-Shariah bill(s)” will be used to describe proposed legislation, or to describe the phenomenon generally; whereas the term “anti-Shariah legislation” will be used to describe a particular bill that has been passed into law, such as the Oklahoma SOS Amendment. Notably, the term “anti-Shariah” will remain in quotation marks to denote the author’s discomfort with this term. The Council on American-Islamic Relations (CAIR), as a national organization, has adopted the phrase “anti-Islam bills” or “anti-Islam legislation”<sup>15</sup> in an effort to describe these bills as attacking an entire religion, Islam, rather than attacking a particular subset of that religion as expressed in a body of law, code of religious conduct, or set of religious beliefs. To a certain degree, the Philadelphia Office of CAIR has used the phrase “anti-Muslim bills” or “anti-Muslim

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14. See Alicia Gay, *ACLU Lens: The Truth Behind the Anti-Sharia Movement*, AMERICAN CIVIL LIBERTIES UNION (Aug. 1, 2011, 2:52 PM), <https://www.aclu.org/blog/national-security-religion-belief/aclu-lens-truth-behind-anti-sharia-movement> (discussing, and referring to the “anti-Sharia” movement); *but see* Council on American-Islamic Relations, *supra* note 9, at 1 (alternately referring to such legislation as “anti-Islam” bills); Council on American-Islamic Relations, *Securing Religious Liberty Handbook* (Feb. 2012) <http://www.cair.com/images/pdf/CAIR-Securing-Religious-Liberty-Handbook.pdf> (alternately referring to such legislation as “anti-Muslim” bills). The author of this article was one of the CAIR employees who suggested that the term “anti-Muslim” most accurately describes this legislation.

15. CAIR formally began using the term “anti-Islam” in January 2013.

legislation”<sup>16</sup> to reflect the fact that I, as the author of this article, believe that these bills are targeted at a particular subset of the American people and therefore, are designed to target a people, not an obscure set of religious laws or any set of religious beliefs. Nonetheless, as the author of this article, I maintain my position regarding the true target of the so-called “anti-Shariah bills,” I will use the phrase “anti-Shariah” throughout this article—always in quotation marks—to reflect the most commonly used description of these bills.

“Anti-Shariah” bills are an incredibly common phenomenon in the United States today. As of the end of 2012, seventy-eight (78) such bills had been introduced in thirty-one (31) states.<sup>17</sup> Furthermore, six (6) states had passed such bills into law: Arizona, Kansas, Louisiana, Oklahoma, South Dakota, and Tennessee.<sup>18</sup> At the time I became involved in challenging such legislation, in late 2011, more than fifty (50) bills had been introduced in twenty-three (23) states.<sup>19</sup> Furthermore, four (4) states had passed such bills into law (Kansas and South Dakota had not yet passed “anti-Shariah” bills into law).<sup>20</sup>

#### *B. The Oklahoma “Save Our State” Amendment, Litigation, and Outcome*

An example of an overtly discriminatory “anti-Shariah” bill is Oklahoma’s “Save Our State” Amendment.<sup>21</sup> This amendment to the

16. See Council on American-Islamic Relations, *What Happens Without CAIR*, <http://pa.cair.com/news/what-happens-without-cair/> (last visited Oct. 12, 2013) (stating that, at the time the article was written, North Carolina passed “anti-Muslim” legislation).

17. See Council on American-Islamic Relations, *supra* note 9, at 1 (“In 2011 and 2012, 78 bills or amendments aimed at interfering with Islamic religious practices or vilifying Islam were considered in 31 states and the U.S. Congress.”).

18. *Id.*

19. See Memorandum from the Council on American-Islamic Relations Pa., Phila. Office to the Pa. Gen. Assemb., H.R., Judiciary Comm. 3 (Jan. 27, 2012), *available at* <http://pa.cair.com/files/cr/Memo%20in%20opposition%20to%20HB%202029.pdf> (citing the prevalence of ALAC bills and legislation in a memorandum opposing a similar bill in the Pennsylvania legislature).

20. *Id.* The original memorandum incorrectly asserted that Texas had passed an “anti-Shariah” bill into law prior to the submission of that memorandum. That was inaccurate. At the conclusion of 2012, prior to the symposium presentation at which this material was first presented, Texas had not passed an “anti-Shariah” bill into law.

21. See *Awad v. Ziriax*, 670 F.3d 1111, 1117 (10th Cir. 2012) (“On May 25, 2010, the Oklahoma House of Representatives and Senate House passed House Joint Resolution 1056 (“HJR 1056”) [which] directed ‘the Secretary of State to refer to the people for their approval or rejection a proposed amendment to Section 1 of Article VII of the [Oklahoma] Constitution . . . [known as] the Save Our State Amendment.’”).

Oklahoma constitution was posed directly to the voters of that state through a ballot initiative known as “State Question 755.”<sup>22</sup> Initially, the Oklahoma House of Representatives and Senate passed a joint resolution directing the Secretary of State to refer to the people of Oklahoma a proposed amendment to be titled the “Save Our State Amendment” (referred to herein as the “SOS amendment”).<sup>23</sup> The explicit language of the proposed SOS Amendment would add to the Oklahoma constitution two explicit references to “Sharia Law.”<sup>24</sup> In the first instance, the amendment indicated that Oklahoma courts may apply the law “of another state of the United States provided [that] the law of the other state does not include Sharia Law, [sic.] in making judicial decisions.”<sup>25</sup> In the second instance, the amendment explicitly stated that “the courts shall not consider . . . Sharia Law.”<sup>26</sup> In addition to these explicit references to “Sharia Law,” the Oklahoma Attorney General added a definition of “Sharia Law” which demonstrated a more overt intention of targeting Islam and Muslims: “Sharia Law is Islamic law [sic.]. It is based on two principal sources, the Koran and the teachings of Mohammed.”<sup>27</sup>

In addition to these overt references to “Sharia Law” in the plain text of the SOS Amendment, there was also non-textual evidence of an anti-Muslim discriminatory intent. As noted in the federal district court decision enjoining the SOS Amendment, one of the authors of the amendment had publicly acknowledged that the purpose of the amendment was to target “Shariah Law.”<sup>28</sup> More precisely, the amendment was proposed “to establish a legal impediment against the ‘looming threat’ of Sharia Law in the United States.”<sup>29</sup> More disturbingly, however, the same sponsor also indicated that the bill was designed to target “Shariah Law” in an effort to target American Muslims, whose “principles,” he believed, were contrary to the “Judeo-Christian” principles upon which America was founded.<sup>30</sup>

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22. *Id.* at 1118.

23. *Id.* at 1117.

24. *Id.* at 1118.

25. *Id.*

26. *Id.*

27. *Awad v. Ziriax*, 670 F.3d 1111, 1118 (10th Cir 2012).

28. *Awad v. Ziriax*, 2010 U.S. Dist. LEXIS 11960, at 8 (W.D. Okla. 2010).

29. *Id.* at 9.

30. *See id.* at 8–9 (“Specifically, plaintiff asserts that State Question 755’s origins establish that the amendment’s actual purpose is to disapprove of plaintiff’s faith. In support, plaintiff cites to one of the authors of State Question 755, Representative Rex Duncan’s, statement that ‘America was founded on Judeo-Christian principles’ and the amendment’s purpose was to ensure that Oklahoma’s courts are not used to ‘undermine those founding



After the SOS Amendment was approved by the voters of the State of Oklahoma, but before the bill went into effect, a lawsuit was filed challenging its validity on constitutional grounds.<sup>31</sup> More specifically, an Oklahoma Muslim, Muneer Awad, who at the time was employed as the Executive Director of the Oklahoma chapter of the Council on American-Islamic Relations, filed a lawsuit alleging that the SOS Amendment violated his constitutional rights under the Establishment Clause and Free Exercise Clause of the First Amendment.<sup>32</sup> This lawsuit was ultimately successful. A federal district court judge ruled in Mr. Awad's favor on CAIR initiated litigation on November 29, 2010,<sup>33</sup> the United States Court of Appeals for the Tenth Circuit affirmed on January 10, 2012,<sup>34</sup> and the federal district court ultimately granted a motion for summary judgment in Mr. Awad's favor on August 15, 2013.<sup>35</sup>

*C. The After-Effects of Oklahoma: The New "Facially Neutral" American Laws for American Courts Model*

The ALAC model legislation was created as a direct result of the legislation involving the Oklahoma SOS Amendment. In fact, the author of the ALAC model legislation, Brooklyn-based attorney David Yerushalmi,<sup>36</sup> has explained that model ALAC legislation "differ[s] from the failed Oklahoma amendment in one key way: They don't mention Sharia."<sup>37</sup> Moreover, he opined, at the time that the model legislation was created and being introduced to the public that, because the bills are "facially neutral," i.e., contain no explicit references to "Sharia," they can "avoid[ ] *the sticky problems of our First Amendment jurisprudence.*"<sup>38</sup> The American Public

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principles,' and Representative Duncan's further statement that the purpose of the measure was to establish a legal impediment against the 'looming threat' of Sharia Law in the United States.").

31. See *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1302 (challenging the validity of the bill on constitutional grounds).

32. *Id.*

33. *Id.*

34. *Awad v. Ziriox*, 670 F.3d 1111 (10th Cir. 2012).

35. *Awad v. Ziriox*, 2013 U.S. Dist. LEXIS 115397 (W.D. Okla. 2013).

36. See Memorandum from the Council on American-Islamic Relations Pa., *supra* note 19 (noting that although Yerushalmi has not always openly acknowledged that he is the author (or primary author) of the ALAC legislation, he is widely believed to be the author and he openly acknowledges his interest in the success of ALAC).

37. *Id.* at Ex. G (citing Tim Murphy, *Meet the White Supremacist Leading the GOP's Anti-Sharia Crusade* (published Mar. 2, 2011)).

38. *Id.*

Policy Alliance (APPA),<sup>39</sup> the organization created by Yerushalmi and others to promote the ALAC model legislation, has continued to assert that the facial neutrality of ALAC renders these bills immune from constitutional scrutiny. In a statement issued on August 19, 2013, the APPA reported the successful passage of an ALAC bill in Oklahoma on that same date in the following manner: “Fortunately, there is an effective and constitutional alternative to measures such as SQ755[,] and . . . [t]hat law is called American laws for American Courts (ALAC).”<sup>40</sup> As of the date of the submission of this article for publication, there have been no court rulings regarding the constitutionality of the new ALAC legislation in Oklahoma.

Though the APPA, and other ALAC supporters, have publicly praised the facial neutrality of the model legislation, none has denied that ALAC’s primary purpose is to marginalize Islam and Muslims. The APPA has asserted that the ALAC model legislation was created specifically to guard against “the infiltration and incursion of foreign laws and foreign legal doctrines, *especially Islamic Shariah Law*.”<sup>41</sup> In addition to its explicit reference to the word “Islamic,” the APPA has further acknowledge its intent to target Islam and Muslims, and no other Abrahamic faiths and their adherents by clarifying that the model ALAC legislation does not interfere with “Jewish law or Catholic Canon Law” because these religious laws do

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39. The APPA, the official creators and promoters of ALAC legislation, is an intriguing organization. As one report notes: “The American Public Policy Alliance is responsible for American Laws for American Courts, the anti-Islam template legislation that has been considered by lawmakers across the nation. While the organization has a professional-looking website, it’s Washington, DC [sic] address is a UPS Store.” See *Legislating Fear: Islamophobia and its Impact in the United States*, Council on American-Islamic Relations 2013 Report, at p.20. Notably, as of the date this article was submitted for publication, the APPA’s website lists no staff members and no members of a Board of Directors. Despite these presumptive limitations, however, the APPA has created model legislation which has been introduced in state legislatures nationwide and has been signed into law in several states. In other words, though the 2013 Report, *supra*, seeks to discredit the APPA, the APPA has arguably been more successful in its advocacy on this issue than those who oppose it (including the authors of the 2013 Report).

40. See *ALAC Protects Constitutional Rights Against Foreign Law*, APPA, Aug. 19, 2013 (referring to an article in *American Thinker* which analyzed the weaknesses of the SOS Amendment and which is publicly available at [http://www.americanthinker.com/2011/09/american\\_laws\\_for\\_american\\_courts.html](http://www.americanthinker.com/2011/09/american_laws_for_american_courts.html)), available at <http://publicpolicyalliance.org/category/american-laws-for-american-courts>.

41. Memorandum in Opposition, Ex. C (citing American Laws for American Courts, public policy alliance).

not pose the same threat to constitutional rights or public policy as “Islamic Shariah Law.”<sup>42</sup>

The nativist rhetoric that seems to underlie ALAC is not surprising in light of statements reportedly made by the model legislation’s purported author, David Yerushalmi. The *New York Times* has reported that the author of the ALAC model legislation has been quoted as saying that “most of the fundamental differences between the races are genetic” and that “there’s a reason the founding fathers did not give women or black slaves the right to vote.”<sup>43</sup> The Anti-Defamation League has quoted him as saying that African Americans are a “relatively murderous race killing itself.”<sup>44</sup> He has also been quoted as saying that Jews “destroy their host nations like a fatal parasite” and that “America was the handiwork of faithful Christians, mostly men, and almost entirely white.”<sup>45</sup>

Despite this, rather alarming, history of ALAC, I first became aware of the “anti-Shariah” movement in November 2011 when ALAC legislation was introduced in the Commonwealth of Pennsylvania’s General Assembly.<sup>46</sup> At the time, the Oklahoma SOS Amendment had been defeated at the federal district court level but the appellate court had not yet issued a ruling on appeal. “Anti-Shariah” bills had been passed in four (4) states, and the new “facially neutral” ALAC legislation was relatively new.

The fact that ALAC legislation was introduced in Pennsylvania is interesting in light of Pennsylvania’s history of religious plurality. The Commonwealth of Pennsylvania was established as William Penn’s “Holy Experiment” after he came into possession of the territory in 1681. When the Pennsylvania constitution was drafted in 1776, it included both a Free Exercise Clause and an Establishment Clause in order to protect its citizens’ religious liberty. The religion of Islam, which “anti-Shariah” legislation aims to target, was specifically discussed during debates regarding the precise language of these religious clauses. In that particular debate, the appropriately named “Constitutionalists,” who favored religious freedom and pluralism, eventually won the debate against the equally aptly named

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42. *Id.* at Ex. D.

43. *Id.* at Ex. E (citing Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 30, 2011).

44. *Id.* at Ex. F, (citing *David Yerushalmi: A Driving Force Behind Anti-Sharia Efforts in the U.S.*, Anti-Defamation League, Jan. 13, 2012).

45. *Id.* at Ex. G.

46. The bill, known as House Bill 2029, was actually introduced on June 14, 2011, with little public awareness of its existence. The bill came to my attention when it was referred to committee, specifically the House Judiciary Committee, on November 18, 2011.

“Anticonstitutionalists,” who advocated for governmental reliance only upon Protestant values. As an enduring sign of its dedication to religious pluralism, Pennsylvania continues to have large populations of minority religions that are much less frequently found living in cohesive communities in other parts of the country. Well-known examples of this phenomenon include the Amish and the Quakers, but there are also less well-known religious communities, an example of which can be seen at the “Ephrata Cloisters,” which advertise themselves as the “home of the wooden pillow.” Minority faiths have even affected generally applicable laws in Pennsylvania. For example, Pennsylvania marriage law allows for what is known as “self-executing” marriage licenses to accommodate the Quaker faith. In light of this history of religious pluralism, the introduction of ALAC legislation in Pennsylvania raised concerns among Pennsylvanians that, if an ALAC bill can pass in Pennsylvania, then it can pass anywhere.

The ALAC bill, which was introduced in Pennsylvania, House Bill 2029 (HB 2029), was titled “American and Pennsylvania Laws for Pennsylvania Courts” and closely followed the “facially neutral” mandate of the APPA and its model ALAC legislation.<sup>47</sup> Though the bill was, in fact, “facially neutral,” the political context surrounding the bill made it evident that the bill was designed to marginalize Islam and Muslims.

The strongest evidence that HB 2029 was designed to target Muslims, and Pennsylvanians associated with the Islamic faith, is the bill’s original co-sponsorship memorandum entitled “American and Pennsylvania Laws for Pennsylvania Courts—*Shariah Law*,” thereby plainly indicating, in its title no less, the bill’s primary purpose of targeting “Shariah law”—*not* all foreign laws.<sup>48</sup> The memo continued to mention “Shariah law” multiple times throughout its text terms, as something which is “foreign,” ominous, and menacing.<sup>49</sup> Copying, almost verbatim, the language used by the APPA in describing the model ALAC legislation, the memo warns that “[u]nfortunately, increasingly, foreign laws and legal doctrines—including and especially Shariah law—are finding their way into U.S. court cases.”<sup>50</sup> Most alarmingly, this co-sponsorship memo singles out Islam as the target of HB 2029 and specifically warns of “Shariah law, which *is inherently*

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47. The bill’s sponsor acknowledged that HB 2029 was based upon the model ALAC legislation proposed by the APPA. See Memorandum in Opposition, *supra* note 36, at 3.

48. *Id.* at Ex. I.

49. *Id.*

50. *Id.* at Ex. C.

*hostile to our constitutional liberties.*”<sup>51</sup> Because “Shariah” is a common reference to the Islamic faith, and its adherents, the allegation that “Shariah” is “inherently hostile to our constitutional liberties” should be understood as an assertion that the bill’s sponsor is asserting a belief that both the Islamic faith and its adherents are inherently “hostile” to the United States Constitution and the cultural values reflected therein.

Perhaps admonished by the APPA, and other creators of the model ALAC legislation, the bill’s sponsor appeared to have realized the constitutional problems created by blatant references to “Shariah law” and circulated a second co-sponsorship memorandum regarding HB 2029 on October 18, 2011.<sup>52</sup> This second memorandum is a more sanitized version of her original co-sponsorship memorandum and makes no explicit references to “Shariah law.”<sup>53</sup> The omission of explicit references to Islam, Muslims, or “Shariah,” in the second memorandum did not negate the earlier evidence of intent to target Islam, Muslims, and “Shariah” expressed in the previous memo.

In addition to the co-sponsorship memoranda, there was other evidence of the APPA’s intent to target Muslims through its ALAC legislation in Pennsylvania. First, the plain text of the bill created a carve-out exception for businesses so that “foreign law” could still be applied to business entities in certain circumstances. This carve-out exception, once again, demonstrated that HB 2029 was not designed to target *all* foreign law, just “Islamic Sharia law.” The second example is the public hearing on the bill, which was scheduled for December 2012 when there were no remaining voting days in the legislative session. Without any remaining voting days scheduled before the bill was scheduled to expire, the only plausible explanation for the public hearings is that the hearings were planned to serve as a forum, taking place within a state governmental institution, in which Muslims were to be publicly portrayed as “inherently hostile to our constitutional liberties.” Finally, it is plausible that the non-binding “Year of the Bible Resolution,”<sup>54</sup> which was passed by a unanimous vote in the Pennsylvania House of Representatives in January 2012, was motivated, in some extent, by the then-current political history

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51. *Id.* (emphasis added).

52. *Id.* at Ex. J.

53. See Memorandum in Opposition, *supra* note 36, at Ex. J.

54. See H.R. 535, 196th Gen. Assemb., Reg. Sess. (Pa. 2012), available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=R&billNbr=0535&pn=2983> (passing the Resolution by unanimous vote).

surrounding the anti-Shariah bills in Oklahoma and Pennsylvania. Coincidentally, or not, also in January 2012, the Tenth Circuit issued its ruling against the SOS Amendment in Oklahoma and, in its opinion, opined that the SOS Amendment would have passed constitutional scrutiny of ripeness grounds if it had been passed by the Oklahoma legislature as a non-binding resolution.<sup>55</sup>

Ultimately, the Pennsylvania resolution expired as an operation of law when the governor did not sign it into law before the end of the legislative session.

### *III. Constitutional Analysis of “Anti-Shariah” Legislation*

#### *A. Overview of Relevant Constitutional Law*

To understand how and why “anti-Shariah” bills, including ALAC, violate the religion clauses of the First Amendment, it is necessary to review the particular case law that is most relevant to a “facially neutral” “anti-Shariah” bill. As described in further detail below, I believe that the model ALAC legislation violates the Establishment Clause because it constitutes a government disapproval of Islam and therefore fails the “endorsement test.” I further believe that the bills’ facial neutrality are insufficient to confer constitutionality because there is such overwhelming extrinsic evidence of discriminatory intent that ALAC bills cannot be understood to be a “neutral law of general applicability” that would avoid implication of the Free Exercise Clause.

The Supreme Court has determined that a government action violates the Establishment Clause of the federal constitution if it has either the intended purpose or the effect of advancing or inhibiting religion.<sup>56</sup> Moreover, Justice O’Connor describes an analytic framework for applying the “Lemon test” which has become known as the “endorsement test.”<sup>57</sup> Pursuant to this “endorsement test,” a government action will fail the “Lemon test” if that action conveys a message of government endorsement or disapproval of a particular religion.<sup>58</sup> In her articulation of the

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55. *See* *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (discussing the viability of the bill if it were non-binding).

56. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (describing the “excessive entanglement” between government and religion).

57. *See* *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring) (explaining the endorsement test for applying the Lemon test).

58. *Id.* at 688.

“endorsement test,” Justice O’Connor articulates the reason why government approval or disapproval violates the Establishment Clause. According to Justice O’Connor, government endorsement or disapproval of religion results in political alienation of adherents of the disfavored faith, and it is this political alienation, which is not permitted by the federal Establishment Clause. As stated by Justice O’Connor:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of [the Establishment Clause] in two principal ways.... The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>59</sup>

Justice O’Connor’s clarification, which would later become known as the “endorsement test,” prohibits governmental “disapproval” of religion because of the effect that such government disapproval has upon the political standing of both adherents and “nonadherents” of a particular religion. Pursuant to O’Connor’s analysis, the danger of “anti-Shariah” bills generally, ALAC bills in particular, and HB 2029 as an individual example is that these bills create *an official government disapproval of a particular religion, Islam*, which sends a message that the identified “adherents” of the Islamic religion, Muslims, are outsiders, not full members of the political community.

The proponents of ALAC, in arguing the undefeatable merits of “facially neutral” legislation, have seemingly (and wrongfully) assumed that a “facially neutral” bill is, by definition, a “neutral law of general applicability.” However, whereas the latter is immune from Free Exercise Clause scrutiny, the Supreme Court has clarified that the former is not.<sup>60</sup> In determining whether legislation is a “neutral law of general applicability,” the Court has specifically indicated that courts may consider *all* evidence of discriminatory intent, including extrinsic evidence, and is not limited to the plain text of the legislation itself:

We reject the contention advanced by the city that our inquiry must end with the text of the laws at issue. *Facial neutrality is not determinative.*

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59. *Id.* at 687–88 (emphasis added).

60. *See* *Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 560 (1993) (explaining that facially neutral legislation may still be subject to Free Exercise Clause scrutiny).

The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. *The Clause “forbids subtle departures from neutrality” and “covert suppression of particular religious beliefs.”* Official action that targets conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. *The Free Exercise Clause protects against governmental hostility which is masked as well as overt.*<sup>61</sup>

Pursuant to this analysis, ALAC’s facial neutrality will not render these bills immune from constitutional scrutiny if there is extrinsic evidence of intent to target Islam and Muslims.

The Free Exercise Clause is relevant to analysis of ALAC bills for another reason as well. Contrary to the arguments asserted by the proponents of ALAC legislation, and contrary to the stated purpose of HB 2029, the U.S. Supreme Court has repeatedly indicated that religion cannot be used as an excuse to circumvent generally applicable laws. For example, the U.S. Supreme Court has held that the Free Exercise Clause cannot be used to circumvent generally applicable criminal laws relating to bigamy<sup>62</sup> and ingestion of controlled substances.<sup>63</sup> The Free Exercise Clause also cannot be used to circumvent laws designed for the protection of children,<sup>64</sup> the regulation of business,<sup>65</sup> the payment of taxes,<sup>66</sup> and issues involving national security and the regulation of the military.<sup>67</sup> Given the plentitude of these cases, it is undisputable that, under existing Supreme Court jurisprudence, no law (foreign or otherwise) which violates the constitution can be upheld by any court in the United States. Therefore, the ALAC laws, which seek to prevent the same harm already prevented by a body of law originating in 1878, cannot be intended to prevent the same harm. Instead, the laws exist for one primary purpose: to label American Muslims

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61. *See id.* at 534 (internal citations omitted) (emphasis added).

62. *See Reynolds v. United States*, 98 U.S. 145, 164–67 (1878) (disallowing the use of the Free Exercise Clause to defend against the criminal charge of bigamy).

63. *See Emp’t Div. v. Smith*, 494 U.S. 872, 889–90 (1990) (holding that “because respondents’ ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from the use of the drug”).

64. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) (affirming appellant’s conviction for violating the state child labor laws for engaging her child in street preaching).

65. *See Braunfeld v. Brown*, 366 U.S. 599 (1961) (relating to Sunday closing laws).

66. *See United States v. Lee*, 455 U.S. 253 (1982) (relating to Social Security taxes).

67. *See Gillette v. United States*, 401 U.S. 437, 461 (1971) (relating to registration with Selective Service).



as political outsiders, not full members of the political community, whose values are “inherently hostile” to traditional American values.

*B. Legal Analysis of the Oklahoma “Save Our State” Amendment Litigation and (Lack of) Similar Lawsuits*

In his lawsuit against the State of Oklahoma, Muneer Awad raised claims under both the Establishment Clause and the Free Exercise Clause.<sup>68</sup> He claimed that the SOS Amendment affected him as a Muslim citizen of Oklahoma for two distinct sets of reasons. First, he asserted that the amendment constituted an official governmental disapproval of his religion and was therefore unconstitutional under the Establishment Clause.<sup>69</sup> Second, he asserted that the amendment would directly affect the validity of both his will and his marriage, both of which invoked “sharia law.”<sup>70</sup> The courts, in considering Mr. Awad’s claims on the merits, also had to render decisions on threshold issues such as ripeness and standing.<sup>71</sup>

Though the courts ultimately ruled in Mr. Awad’s favor on all legal issues raised in the case, it is the court’s holding on the issue of standing that is perhaps the most interesting. In ruling that Mr. Awad’s non-economic injuries were sufficient to confer standing upon him, the court held the following:

Like the plaintiffs who challenged the highway crosses in *American Atheists*, Mr. Awad suffers a form of “personal and unwelcome contact” with an amendment to the Oklahoma Constitution *that would target his religion for disfavored treatment*. As a Muslim and *citizen of Oklahoma*, Mr. Awad is “directly affected by the law[. . .].”<sup>72</sup>

This language, on the issue of standing, goes to the heart of the harm of the anti-Shariah movement. The critical harm is the political marginalization of the American Muslim community—the official message

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68. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

69. *Id.* at 1119.

70. *Id.*

71. Ripeness was an issue in the case because Mr. Awad initiated legal action after the voters of Oklahoma had approved the amendment—but, importantly, before the amendment actually went into effect. Standing became an issue in the case because the state argued that, because Mr. Awad’s injuries were non-economic in nature, those injuries were insufficient to confer standing.

72. *Awad*, 670 F.3d at 1122.

from American Muslims’ own government that they are not “full members of the political community.”<sup>73</sup>

This language, from the highest court to rule on the Oklahoma SOS Amendment, is particularly interesting when conducting a strategic analysis of “anti-Shariah” bill litigation. The Oklahoma litigation was the first lawsuit directly opposing anti-Shariah legislation and has been the only such lawsuit as of the date of the submission of this article. The Council on American-Islamic Relations (CAIR), which employed Mr. Awad at the time the lawsuit was initiated, has launched a far-reaching legislative and public education campaign against these bills—but has never initiated legal action against any of the bills passed into law in other states. In addition, no other legal organization, including CAIR’s co-counsel in the Oklahoma litigation, has challenged “anti-Shariah” legislation in any other state. The SOS Amendment litigation was successful at every level, every contested hearing, and on every legal issue raised. However, to date, it has been the only litigation on this issue.

*C. Legal Analysis of the “Facially Neutral” American Laws for American Courts Legislation*

As the author of this article, I am also employed by CAIR and I have also advocated against “anti-Shariah” legislation, an ALAC bill introduced in Pennsylvania, both through media and public education campaigns and through direct legislative advocacy. Furthermore, I have benefited from the knowledge and experience of other CAIR chapters, and CAIR-National, while engaging in these efforts.

What has fascinated me during this process is the extent to which CAIR (and, presumably, other opponents of “anti-Shariah” legislation, including its co-counsel in the Oklahoma legislation) has seemingly bought into the APPA’s stated belief that “facially neutral” ALAC bills are immune from constitutional scrutiny.

Litigation was initiated in Oklahoma for two reasons: (1) because Oklahoma was a state in which “anti-Shariah” legislation passed which also had a CAIR chapter in the state, and (2) because Oklahoma was a state in which CAIR found a plaintiff, Mr. Awad, who would be directly affected if courts could not consider “Shariah law.” This direct effect would occur because Mr. Awad, rather unusually for an American Muslim, had both a marriage and a will that directly invoked “Shariah law.” CAIR was

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73. See *Lynch v. Donnelly*, 465 U.S. 668, 688–89 (1984) (O’Connor, J., concurring).

specifically looking for a plaintiff who could assert such a direct effect, presumably because it believed that “anti-Shariah” legislation could only be successfully challenged in a court of law if it directly effected individuals’ ability to practice their faith.

Therefore, when the facially neutral ALAC bill was introduced in Pennsylvania, many of my colleagues (including persons, associated with both CAIR and its co-counsel, who were involved in the Awad litigation) expressed concerns that the facially neutral ALAC legislation could not support an effective constitutional challenge. However, if my legal analysis is correct, the new facially neutral “anti-Shariah” bills are not immune from constitutional challenge simply because they fail to produce plaintiffs who experience a “direct effect” upon their ability to practice their faith. If the bills are unconstitutional because they label Muslims as political outsiders, as not full members of the political community, then this labeling process violates the Establishment Clause as understood through the “endorsement test.” This labeling process would adversely affect all Muslims, regardless of an individual’s degree of religiosity or religious observance, because the label would attach to all persons who are identified as “adherents of the disfavored religion.”

Therefore, notwithstanding the apparent consensus between the “anti-Shariah” movement’s proponents and opponents, I contend that the “facially neutral” ALAC legislation is unconstitutional for the exact same reasons as Oklahoma’s SOS amendment. As noted in *Lukumi Babalu Aye*,<sup>74</sup> when determining whether a bill was enacted with discriminatory purpose, “[f]acial neutrality is not determinative.” Courts may consider extrinsic evidence of discriminatory purpose and is not limited to the plain text of the statute. As described above, there is ample evidence of ALAC’s intended purpose to target “Shariah law” and the adherents of that faith. In fact, the APPA has made no secret of its intended purpose. And, it is this purpose—the intention to convey a governmental “disapproval” of the Islamic faith and to communicate to American Muslims that they are “outsiders, not full members of the political community—which renders ALAC unconstitutional.

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74. See *Lukumi Babalu Aye v. Hileah*, 508 U.S. 520, 560 (1993) (explaining that facially neutral legislation may still be subject to Free Exercise Clause scrutiny).

#### IV. Conclusion

It is possible that this Conclusion should be more appropriately named an Epilogue. The research contained in this article was orally presented at a symposium at Washington & Lee University School of Law on February 15, 2013. However, shortly before the submission of this article—on April 19, 2013, to be exact—a new chapter was written on the status of the ALAC movement. On that date, ALAC legislation was signed into law in Oklahoma. The APPA bragged on its website, in a post published that same date, that the facially neutral ALAC which had just passed into law possessed none of the constitutional vulnerabilities that the SOS Amendment had possessed—all while simultaneously acknowledging that the facially neutral ALAC legislation had the exact same intended purpose as the SOS Amendment.

It will be interesting to see what will become of this new ALAC bill in Oklahoma. To date, both CAIR and its co-counsel in the SOS litigation have seemingly agreed with the APPA regarding the legal significance of ALAC’s facial neutrality. Following the enactment of the Oklahoma ALAC bill, CAIR told an interviewer at the *Huffington Post*: “These bills don’t have any real-world effect. Their only purpose is to allow people to vilify Islam,” said Corey Saylor, CAIR’s legislative affairs director, of the more recent bills.<sup>75</sup> However, the same *Huffington Post* article also opined, “The new bills, however, are more vague and mention only foreign laws, with no references to Shariah or Islam . . . All of that makes them harder to challenge as a violation of religious freedom.”<sup>76</sup>

The question I would like to leave the reader with, at the end of this article, is not whether opinion stated in this *Huffington Post* article is correct—I have already posited to you that it is not. My question is whether any litigants, or their counsel, will rise to the challenge of contesting these bills in court? This is a rhetorical question, of course, but one which deserves to be asked. Because the APPA, Yerushalmi, and other proponents of the “anti-Shariah” movement have demonstrated no intention to surrender. In fact, they have displayed a remarkable audacity to admit to using legal trickery in an effort to circumvent constitutional law (the Establishment Clause and Free Exercise Clause) while simultaneously

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75. Omar Sacirbey, *Anti-Shariah Movement Gains Success*, HUFFINGTON POST (May 17, 2013), available at [http://www.huffingtonpost.com/2013/05/17/anti-shariah-movement-gains-success\\_n\\_3290110.html](http://www.huffingtonpost.com/2013/05/17/anti-shariah-movement-gains-success_n_3290110.html).

76. *Id.*

achieving its stated goal of passing admittedly discriminatory anti-Muslim violation.

The question is whether anyone else will have the necessary audacity to try to stop them.