2017 HOUSE JUDICIARY

HB 1425

2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1425
2/8/2017
28059

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Smeiath

Explanation or reason for introduction of bill/resolution:

Act to protect the rights and privileges granted under the US Constitution.

Minutes: 1-3

Vice Chairman Karls: Opened the hearing on HB 1425.

Chairman K. Koppelman: From district 13 West Fargo. Introduced the bill.

Rep. Hanson: What problem is this trying to solve?

Chairman K. Koppelman: I think this is just good public policy. This bill just clarifies that if they are asked to enforce some other law they will enforce the law that we make because we are the policy making branch of the government to ensure that we use American laws in American courts.

Rep. Hanson: Our courts already look at the North Dakota and U. S. Constitution when they are making their discussions? Why put this into our century code when they already are doing this.

Chairman K. Koppelman: I don't think they should be looking at foreign law and international law. They should be looking at American law and North Dakota to decide North Dakota cases.

Paul Deckard: Attorney: (#1) Went over the handout and the bill. (6:00-12:50) States legislatures have a role to play in preserving constitutional rights in American values of liberty and freedom.

Rep. Hanson: You said there are increasing more foreign laws finding their way into US court cases, can you provide examples of cases that this happening?

Paul Deckard: As far as North Dakota I do not know of anything other than the of Berks versus Berks case which was involving the removal of a child from the United States.

"Discussed the case in depth". The broader examples that come through this is out Maryland. That had to do with a complete custody hearing in asthenia. The parents split up.

Rep. Hanson:(16:42) They already do hold fundamental rights in both North Dakota and the U.S. Constitution so they hold our fundamental rights.
Why restate this in our century code when our judicial system already takes this into account?

Paul Deckard: The Hague convention and the civil aspects of child abduction which North Dakota is a signatory to and those implementations of those implication international rules and guidelines and the degree to which North Dakota does or doesn't follow is based only to pertaining is where this comes into effect. Because without clear guidance on public policy and the will of the people in the state of North Dakota a judge is left and connect all the dots and explain why these actions should take place. Because of the lack of guidance in regard to what constitutes a violation of human rights on a case involving any of those cases involving family law North Dakota is silent on this. The state has no clear guidance on how to go on this. How many children are at risk, I don't know?

Rep. Hanson: You mentioned international law. Can you explain to the committee about international law and foreign law?

Paul Deckard: Foreign law would be of any given county and international law would be generally comes from some sort of cross border recognized body.

Rep. Hanson: How do we treat those differently today in the court?

Paul Deckard: Sometimes we don't. The international ones are often negotiated more than foreign laws are.

Rep. Hanson: In section 3 why would you limit our freedom of contracting for individual's?

Paul Deckard: I don't read it that way.

Rep. Hanson: It looks like a contract amongst each other?

Paul Deckard: I don't read it that way.

Rep. Nelson: You spoke about the principals on which our laws are founded. Many of our laws have in their foundation English common law. I have always heard that Louisiana is founded on some other common law which is that?

Paul Deckard: That is both true and false as a member of the Louisiana bar I should tell you it is true.

Rep. Nelson: We have constitutions and treaties as the supreme laws of the land. What we do here is not going to have any effect on any treaties? Those are the supreme laws of the land.

Paul Deckard: That is not true, the State Department puts forward the different legal committees when it comes to things like the international conventions in order to prevent conflicts of law down the road.
US Constitution does not address and the feds have no play there. It is a state by state thing.

Rep. Nelson: 24:33 North Dakota here are really from the five nations that exist in this state

Paul Deckard: They are accepted in this. I believe it is in there are as a line item.

Rep. Vetter: When you talk about foreign laws; are you talking about other states too?

Paul Deckard: It would be the North Dakota Constitution and the US.

Rep. Klemin: In the Senate side we have a couple of bills passed that are uniform law condition bills. One of them relates to foreign money judgements and the other one relates to enforcement of Canadian domestic violence protection orders. What extend does this bill here effect this kind of things?

Paul Deckard: Only to the extent that a citizen presenting themselves to a court here involving one of those topics had a fundamental right as mentioned in the bill violated to one extend or another.
This isn't a block or acceptance to either of those two topics.

Rep. Klemin: what is jaundice eye?

Paul Deckard: If there was a foreign court who did a foreign judgement as one of the topics that you raised. The party for whom the judgement was rendered was not represented.

Rep. Klemin: There is a difference between being served with a law suit and defaulting verses not being represented by an attorney.

Paul Deckard: You are skipping steps and going with some assumptions.

Rep. Klemin: Somebody may claim that from foreign court lack of jurisdiction for some reason and bring that to a North Dakota court.

Paul Deckard: I couldn't make it to Guatemala for the hearing because I have a dead warrant against me.

Rep. Klemin: I am more concerned about the Canadian relationships. To what extent does this bill have?

Paul Deckard: 29:15 If one party could prove that there was a violation there. Canada very similarly with its links common law principals as a founding for North Dakota.

Rep. Klemin: I didn't hear you say anything about the code in Napoleon? Is that still in effect in Louisiana?

Paul Deckard: We are on our sixth version of the code of 1803.

Rep. Klemin: When you talk about The Hague Convention. You said North Dakota is signatory to The Hague Convention which I recall and it sounded to me like you were saying there are some things in The Hague Convention that be not enforceable under this bill in North Dakota?

Paul Deckard: It's not that they wouldn't be enforceable. It's that like so many international agreements the vacuities are such that when you take them from the international community can we all agree on this? It would not reverse The Hague Convention.

Rep. Klemin: (34:12) The fact that North Dakota is a signatory to The Hague Convention Would this have an effect of reversing?

Paul Deckard: No it would not.

Rep. Klemin: How do we opt out now**?** You said there is an exemption with religious laws on certain things? Is that on page 3 subsection 6?

Paul Deckard: It is an incident by incident bases it's not the state removing itself. We follow this up until this set of facts hits this hits this sets of principal. That begins on page 1 line 21.

Rep. Klemin: There has been some discussion in this country about the application of serial law in some other states or some other courts is this have something to do with serial law?

Paul Deckard: The application of serial law or communist law out of China that was in place in the Soviet Union or aspects of the new civil law and the Czech Republic any of those doctrines that do not fit with North Dakota and the U.S. Constitutional law would be an issue with this bill.

Rep. Klemin: What does this bill have to do with serial law?

Paul Deckard: No as long as there is no contradiction with the U.S. Constitution and the State of North Dakota.

Rep. Klemin: If there were a contradiction? Common law of the catholic church? How does that effect this?

Paul Deckard: Then there would be a problem? The common law of the catholic church is not affected.

Rep. Hanson: In your written testimony you talk about America has unique values and rights. Right now what are some examples that are hostile to our rights today?

Paul Deckard: some of what was pointed out earlier like of what we have seen in Maryland where was no clear guidance, and in Ohio where there were no clear guidelines we see in other countries doctrine applied in the area of family law.

Rep. Paur: Lines 6-11 on page 1 the legislative assembly finds that it is the public policy of this state to protect the citizens from application of foreign laws and on line 10," the right to keep and bear arms" any right of privacy or marriage as defined by the constitution of North Dakota. The constitution of North Dakota defines marriage between man and a woman that seems to me to get messy when a good part of the world doesn't follow that.

Paul Deckard: He states a fact. The laws of North Dakota are laws of North Dakota there are a conflict with something else beyond the legislation to resolve.

Chairman K. Koppelman: Is there any greater conflict if this bill passes?

Paul Deckard: None that I am aware of. It is there regardless.

Rep. Jones: You mentioned in regards to "Jewish Law mitzvah" what does that refer to?

Paul Deckard: They have a system within the Jewish Community where they handle matters in their religious system.

Rep. Jones: Is there anything they do that is against the rule of law in the US?

Paul Deckard: Not that I am aware of. One of the things that is not recognized is anything due to child custody They cannot go into the system for child custody.

Rep. Jones: I want to verify through you that that religious exemptions. If you have a marriage under common law under that law and then they come to the U.S. and the husband can abuse his wife as part of punishment. I want to ensure that we do not allow those types of abuses to go on in the U.S.

Paul Deckard: In what you just laid out this would prevent someone from saying I' m authorized to do that.

Rep. Jones: Are you familiar where we have large areas that are considered no go zones because of religious laws?

Paul Deckard: I would not say yes or I can't say no. This is an attempt that that sort of thing does not happen.

Rep. Jones: How long ago has this been implemented? so we know the history behind this?

Paul Deckard: 2012 in Kansas, 2013 in Oklahoma, Washington state, 2014 for Florida.

Chairman K. Koppelman: Montana passed their state Senate last week.

Rep. Hanson: My question has to do with the testimony you provided that foreign would also mean non North Dakota state laws is that what you said?

Paul Deckard: Yes

Rep. Hanson: Would this also impact how North Dakota recognizes not only marriage but also the right to keep and bear arms, the right to privacy which is also sighted off hand in abortion rights. Could North Dakota use this bill to change how it addresses the way it looks at abortions and or the right to bear arm?

Paul Deckard: Creatively lawyering knows no limit.

Rep. Hanson: How do you see the supremacy law working with the constitution?

Paul Deckard: I don't see any conflict.

Rep. Klemin: Going back to Page 1, lines 10 & 11; it talks about marriage and the right to privacy defined in the constitution of North Dakota and that would be if there is something about the right of privacy is defined there?

Paul Deckard: That is the way I read it.

Rep. Klemin: On page 3 section 6 no court may interrupt this section to require or authorize any court to adjudicate or prohibit any religious organization from adjudicating, ecclesiastical matters. Does this apply only where congress has made this kind of law?

Paul Deckard: What is the question?

Rep. Klemin: Page 3, Section 6, (56:17) Went over this section. So this would only apply where congress has made this kind of law? Where does this exemption really go?

Paul Deckard: Here is a Hague answer. Sometimes there will be an issue where their church means the building more than a domination. The people at that building hire and fire pastors. For reason or another they may get disappointed with that hire and decide to terminate them. The reason if a contractual matter so there is no attempt by the government to step into the establishment of religion when the court is asked to rule on employment contract and the courts are prohibited from saying who is the most religious of them all under any given set of circumstances.

Rep. Klemin: (1:00:00) I read this that it didn't have the last clause on 11-13 it would be a much boarder exemption because it is a boarder on any kind of court action where it would violate the establishment clause?

Paul Deckard: I am not seeing this?

Chairman K. Koppelman: If there were a period after organization on line 11 it wouldn't muddy the water in the establishment clause is that right?
It appears the bill doesn't limit any of that unless it conflicts with constitutional rights? Am I seeing this correctly?

Paul Deckard: That is my interpretation as well.

Christopher Holton: North Dakota legislation does not apply to international law, it applies to foreign law International treaties and with federal law in this case and a passage in the legislation that clarifies that.

Chairman K. Koppelman: Is international law seminomas with treaties?

Christopher Holton: They can be referring to international law that is not part of a treaty. In the beginning of this bill foreign law by the definition of the bill does not include other states.

Chairman K. Koppelman: I was going to mention that. On lines 13-14 of page 1 members of the committee it says foreign law legal code or system "means any law, legal code, or a system of a jurisdiction outside any state or territory of the United States including international organizations and tribunals applied by that jurisdictions courts.

Christopher Holton: There is no single Hague Convention.

Chairman K. Koppelman: (1:08:00) Read page 3, line 3-7? Does it apply only to clergy or members? Nothing prohibits the church from doing that kind of thing. Opposition to HB 1425?

Christopher Dodson: With the North Dakota ND Catholic Conference: The Catholic opposes HB 1425 because it unduly interferes with the freedom to contract and upends well established law. (1:11:00-124:45 (attachment2) We ask for a do not pass recommendation.

Representative Hanson: You mentioned it could infringe on separation of powers Many member of the legislative body is concerned with the separation of powers between the executive judicial and legislative branches, can you explain a little more about how common it is for the state legislature it is to dictate what legal sources are judicial branch can use when interrupting the law?

Christopher Dodson: The legislative body makes laws, but it is the job of the courts to interrupt and apply the laws.

Chairman K. Koppelman: Did the Catholic Church oppose some of this in the 10 states that passed it?

Christopher Dodson: I know the diocesan attorneys did. This has been on our radar for years as a concern to diocesan attorneys and cannon lawyers.

Chairman K. Koppelman: Have they challenged any of those laws? You said the examples of the lower court cases were not upheld in the court of further review.

Christopher Dodson: I don't think so. Not in the court of further review.

Rep. Klemin: The part about the contract provisions. It seems to say a person can enter into a contract that contains choice of law provisions and other things if later on if I didn't wish to be bound by the contract I could claim that they violated some constitutional principal and if the court agreed then the contract is void and not enforceable.

Christopher Dodson: If you win that case yes that is correct.

Representative Klemin: All of that could go out the window; if it violates some constitutional principles?

Christopher Dodson: It goes both ways also.

Chairman K. Koppelman: If the bill would give a greater standing or enhance someone's rights under the constitution would they have that same argument absent in this bill now?

Christopher Dodson: We are assuming so many things in this. You have a right to contract into arbitration agreements.

Chairman K. Koppelman: There is nothing threading in that part of the bill?

Christopher Dodson: It doesn't apply here at that particular case.

Chairman K. Koppelman: I am looking at page 2, line 15 of the bill where it talks about it being void and unenforceable if the entire contract is void. What if it said "that" instead of "if"?

Christopher Dodson: I would check that out later and read through the whole bill. That would make the bill meaningless. It would not change any existing laws now. It is part of the ND Supreme Court Constitution.

Jennifer Cook, Policy Director for ACLU: (attachment 3) (1:37:00-1:49:07) We are in opposition of HB 1425. This may have serious unintended consequences.

Rep. Hanson: Did you say earlier that there are challenges on bills passed in other states?

Jennifer Cook: I did say that in Oklahoma had a slightly different band it was targeting in the language of it.

Chairman K. Koppelman: You mentioned an Oklahoma law that was challenged successfully do you know what the Oklahoma law is today?

Jennifer Cook: I do not know. I do know it was a successful challenge.

Chairman K. Koppelman: Has the ACLU testify against it in Montana. You talked about the bill impeding other states? Where are you seeing that?

Jennifer Cook: Under Section 1, lines 12-14. Other states will recognize so if a state court recognizes a judgement. It is based on the judgement and if the state court recognizes the judgement based on a foreign law then when an individual comes to North Dakota and resides here and goes to court, the judgment of the other state.

Rep. Nelson: This starts out when it really applies on foreign laws and then it has all these exemptions? Evidently a corporation can violate fundamental rights do you know of cases where're laws exempt entities?

Jennifer Cook: I am not familiar with specific cases? If there is a corporation that is sued by an individual; if it is a contract agreement or a business's partnership, if there is some type of constitutional concern our courts already have the ability to look at that law and apply it. The concerns if we are not recognizing corporation laws they might not come into the state.

Rep. Jones: Could it operate the other way in order to avoid our laws?

Jennifer cook: They could attempt to do. The courts already have a system in place if there are constitutional concerns.

Rep. Jones: You say the first amendment already prohibits the U.S. courts from imposing religious laws. Can you tell me what that refers to?

Jennifer Cook: Our constitutional already prevents the entanglement of religion.

Rep. Jones: But that doesn't approach the concept if the religion is violating somebody's constitutional rights to protect them abuses that has to be dealt somewhere else.

Jennifer Cook: Our courts do handle that. It is a neutral analysis of the law not a religious one.

Chairman K. Koppelman: Recessed the meeting.

2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1425
2/8/2017 PM
28243

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Act to protect the rights and privileges granted under the US Constitution.

Minutes:

Chairman K. Koppelman: Reopened the hearing on HB 1425.

Rep. Carlson: The intent of the law is that no law of the US should be mingled with the law of other countries. No matter what happens no court may be interrupted this bill to enforced from other countries. It does not infringe on any one's liberties or religion. Other states have taken the lead on this thing. This says when you come to ND you will abide by the laws of ND and the US of America. It is protecting the laws here.

Representative Jones: When immigrants come into the US don't they have a test and isn't it a commitment they make to live under our laws?

Rep Carlson: Immigrant resettlements have different requirements. They are following the different channels.

Chairman K. Koppelman: New American's taking that oath to become a citizen is really a moving ceremony. We passed legislation last session that our high school students before they graduate have to take the same test as people becoming American citizens.

Representative Jones: There is nothing that you are aware with the resettlement program; there is no promise they are making?

Rep. Carlson: Those people are sometimes coming directly from refugee camps and they are not waiting to be received. Referees have a different method.

Hearing closed.

2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1425
2/15/2017
28423

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Dr Lora Thomek

Explanation or reason for introduction of bill/resolution:

Act to protect the rights and privileges granted under the US Constitution.

Minutes:

Chairman K. Koppelman: Opened the meeting on HB 1425.

Do Not Pass Motion Made by Representative Klemin: Seconded by Representative Paur

Discussion:

Representative Klemin: I don't think it is necessary to put in a bill that says that other countries laws when somebody immigrates to this country that they have to abide by our laws and constitutions. That applies all the time. This is the worst written bill I have seen in a long time. There are problems with contract law and arbitration and that sort of thing. I can't support this bill.

Representative Simons: I was undecided on this bill and late last night I woke up and checked my phone. On Facebook was a family that went in to watch a movie and one of their children to watch a movie. They estimated they had been there about two and a half hours. One of their children was in the van. Everywhere in this country that is against the law. Their excuse was in their country they did not know it was against the law. That just happened. They were not charged because of that. But their law supersedes ours?

Representative Vetter: I have problems with the arbitration part. I understand what it is trying to accomplish, but when you get rid of that you will affect all the other religious organizations. I am going to support the do not pass.

Representative Paur: I have trouble with the group that was pushing this. They are basically a hate group. I would oppose this bill like I would a bill from the Klu Klux Klan.

Chairman K. Koppelman: We tried to find things that had worked elsewhere that had been successful. This pasted in 10 different states. If the problem did not exist, then we would not need the bill. It may not be written well. It is just insuring American laws are applied and enforced here. I heard court decision before law using a foreign country in the supreme court.

Representative Jones: Did we have specific cases stated?

Chairman K. Koppelman: I don't know if any were sited specifically. The general understanding was that it is occurring.

Representative Hanson: I will be agreeing with the do not pass recommendation. The American Bar Association I heard they passed a resolution and they oppose this. They said this is not necessary so we don't need to insert ourselves into the judiciary branch. This bill limits our freedom of contract. We did hear testimony that it might impact our living wills.

Chairman K. Koppelman: They might be looked at by way of amendment.

Representative Vetter: On the page 2 it is stating the right to bear arms; right of privacy or marriage as specified by defined in the constitution of ND. So if the law of ND changes their law and says OK marriage is between whoever; can they come in then and say you can't have your own laws. This is what our laws said and it could be infringing on a lot of these religious organizations.

Chairman K. Koppelman: I don't think that is true at all. I think it protects those religious laws.

Representative Klemin: Any right of privacy specifically defined by the constitution of ND, I don't think there is one.

Roll Call Vote on a do not pass recommendation: 7 Yes 8 No Failed.

Do Pass Motion Made by Representative Magrum: Seconded by Rep. Johnston

Roll Call Vote: 8 Yes 7 No 0 Absent Carrier: Rep. Jones

Closed.

Date: 2-15-17
Roll Call Vote : 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1425

House **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Klemin Seconded By Paur

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman		✓	Rep. Hanson	✓	
Vice Chairman Karls		✓	Rep. Nelson	✓	
Rep. Blum		✓			
Rep. Johnston		✓			
Rep. Jones		✓			
Rep. Klemin	✓				
Rep. Magrum		✓			
Rep. Maragos	✓				
Rep. Paur	✓				
Rep. Roers-Jones	✓				
Rep. Satrom		✓			
Rep. Simons		✓			
Rep. Vetter	✓				

Total (Yes) 7 No 8

Absent _____

Floor Assignment : _____

If the vote is on an amendment, briefly indicate intent:

Failed

Date: 2-15-17
Roll Call Vote : 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1425

House **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Magrum Seconded By Johnston

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman	✓		Rep. Hanson		✓
Vice Chairman Karls	✓		Rep. Nelson		✓
Rep. Blum	✓				
Rep. Johnston	✓				
Rep. Jones	✓				
Rep. Klemin		✓			
Rep. Magrum	✓				
Rep. Maragos		✓			
Rep. Paur		✓			
Rep. Roers-Jones		✓			
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter		✓			

Total (Yes) 8 No 7

Absent 0

Floor Assignment : Rep. Jones

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1425: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO PASS** (8 YEAS, 7 NAYS, 0 ABSENT AND NOT VOTING). HB 1425 was placed on the Eleventh order on the calendar.

2017 SENATE JUDICIARY

HB 1425

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1425
3/22/2017
29555

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to protect the rights and privileges granted under the United States Constitution.

Minutes: **Testimony attached #** 1,2,3,4

Chairman Armstrong called the committee to order on HB 1425. All committee members were present.

Kim Koppelman, North Dakota State Representative District 13 (:10 – 3:40), testified in support of the bill. No written testimony.

"This has been dubbed the American laws for American courts bill. It basically ensures that North Dakota laws take precedent, and US laws take precedent. Likewise, North Dakota courts take precedent and US courts take precedent. A big reason for this bill is there are some judges who make decisions based on a foreign country's law, instead of US law."

Senator Nelson: "This is version 3, what did it start out looking like?"

Representative Koppelman: "I'm trying to remember what we changed but I can't recall an amendment. Oh never mind, I do remember, there were a couple lines we had to modify with Legislative Council."

Paul Deckert, Center for Security Policy (4:45 – 9:55), testified in support of the bill. No written testimony.

Paul Deckert discussed how America was founded on individual rights and liberties and how constitutional rights must be upheld. He argued that if states don't have a role to play in constitutional rights, why then do states echo and reinforce statutes from the US constitution? He said America has freedom and rights that many nations do not. Including, freedom of speech, freedom of religion, due process, right to privacy, etc.

"We are a nation of laws, and unfortunately, foreign laws are making their way into US court systems. Invoking foreign laws in American courts circumvents the constitution since the US constitution does not recognize foreign laws as our own."

Senator Myrdal: "I'm assuming you worked on this in other states as well? Has there been emphasize on feminists and women's groups supporting this, because I see many nations don't have similar rights to women as the united states does?"

Paul Deckert: "Periodically, there have been some female oriented organizations that have seized on opportunities here and some other lies we have been behind. That has started some time ago."

Senator Larson (12:15): "This bill is extremely wordy. Have people asked you in other states if you can pair this down? There seems to be a lot of redundancy making it a difficult piece of legislation to stay focused on."

Paul Deckert: "To be honest, as a Louisiana lawyer, we're used to use the code and shorten to a paragraph but I know people who want to define it to an extreme length. So I understand your point but I think people want it both ways."

William Jeynes, Professor (16:25 - 26:20), testified in support of the bill via PowerPoint. (see attachment 1)

Christopher Doddson, North Dakota Catholic Conference (29:16 – 44:10), testified in opposition of the bill. (see attachment 2)

Jennifer Cook, Policy Director for American Civil Liberties Union of North Dakota (45:20 - 55:50), testified in opposition of the bill. (see attachment 3,4)

Senator Luick (55:50): "When our people go to their countries what laws do they have to follow?"

Jennifer Cook: "I'm not familiar, but I imagine they go by that countries laws."

Senator Luick: "We allow freedoms from all countries to come here and some are extreme. Do you feel its proper for a 9-year-old girl to marry a 60-year-old man, or some kind of case like that?"

Jennifer Cook: "That's a good question and I'm glad you raised it. There have been other courts who had cases whose defense was religion and the courts have rejected those types of defenses if the specific case is deemed reprehensible."

Senator Luick: "How can they do that?"

Jennifer Cook: "Because the courts already ascribe to our constitution and the fundamental rights under that constitution, and there is already precedent that religious laws, like in the case of honor killings, wouldn't constitute a defense in US law."

Senator Myrdal (58:40): "To your organization, is the constitution a solid document or is it malleable?"

Jennifer Cook: I don't particularly know the answer to it, but as we know the courts base their opinions on the fundamental ideas that this country was founded on. It is important to note at every point it is the courts that usually get it right.

Senator Luick (1:00:40): "At what point do you draw the line, where should religious law and/or statute law have control?"

Jennifer Cook: "We would advocate that religious law should never trump constitutional or common law."

Chairman Armstrong closed the hearing on HB 1425.

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1425 Committee Work
3/29/2017
29796

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to protect the rights and privileges granted under the United States Constitution.

Minutes: **Attachments** 1

Chairman Armstrong began the discussion on HB 1425. All committee members were present.

The proposed amendment was reviewed by the committee. (see attachment 1)

Chairman Armstrong: "Let's set this aside for a while and work on 1216 while we wait for Senator Luick."

Senator Myrdal motioned to Adopt the Amendment. **Senator Larson** seconded.

Senator Larson: "There's still a lot with this bill that I don't like. But Senator Myrdal has kind of persuaded me that this is something that is important to someone who immigrates here. They know our laws, and that's one of the reasons they want to immigrate here. She also said if this passes and goes to conference committee there can even be more clean up that can happen on this."

Chairman Armstrong: "I think the amendments do make the bill better. I don't have a problem with that. It takes out a lot of the redundancy and reads less of a uniform bill and more like the North Dakota Century Code."

A Roll Call Vote was taken. Yea: 6 Nay: 0 Absent: 0.
The motion carried.

Senator Myrdal motioned for Do Pass as Amended. **Senator Luick** seconded.

Senator Myrdal: "There were two groups that stood in opposition to this. One I have respect for but I disagree with on this particular issue. The other one, I don't have much respect for. Although I am not an attorney, when I took that oath to become a citizen of this nation I fully

expected not only to obey those laws in the constitution, but also be protected by them. And though we may not have seen any cases come to court in North Dakota, yet, or a lot across the nation. There is a prevailing national type of thing also, whether it's through theocracies around the world or immigration to this country. There is a prevailing thing that I think we need to create with legislation like this to make sure we stay (indistinguishable) on the side of entry. For me, this crosses over to immigration but also the sovereignty of our nation. I think Senator Luick had a very valid question during the hearing. Which was, if I move to a different nation whose laws am I under, and Jennifer answered their laws. And I'm not under Norwegian law anymore I am under American law. I think we are at a place where we need to see something like this. Is it redundant? Maybe. If it doesn't do anything, then it just accentuates the need for it."

Chairman Armstrong: "I pretty much disagree with all of that. I get a little concerned when one of the cases the proponent sites for the bill is actually an area where international law is not only important but incredibly essential. I also get a little concerned when national people come in and testify to a bill and not know what cases they are siting in support of the bill. I would argue that North Dakota and US law applies in total, and incompletion yesterday, and it will tomorrow whether this law passes or not."

A Roll Call Vote was taken. Yea: 4 Nay: 2 Absent: 0.
The motion carried.

Senator Myrdal carried the bill.

Chairman Armstrong ended the discussion on HB 1425.

17.0697.03002
Title.04000

Adopted by the Senate Judiciary Committee

March 29, 2017

CR 3/29/17

AMENDMENTS ADOPTED TO HOUSE BILL NO. 1425

Page 1, remove lines 6 through 11

Page 1, line 12, remove "As used in this section:"

Page 1, line 13, remove "a."

Page 1, line 13, remove ", legal code, or system"

Page 1, line 17, replace "act" with "section"

Page 1, remove lines 19 through 24

Page 2, remove lines 1 and 2

Page 2, line 7, remove "following"

Page 2, line 8, remove ": due"

Page 2, remove lines 9 and 10

Page 2, line 11, remove "Constitution of North Dakota"

Page 2, line 18, remove "following"

Page 2, line 19, remove ": due process, equal protection,"

Page 2, remove line 20

Page 2, line 21, remove "privacy or marriage as specifically defined by the Constitution of North Dakota"

Page 2, line 26, remove "of the nonclaimant in the foreign forum"

Page 2, line 27, replace "with respect to the matter in dispute, then it is the public policy of this state that" with an underscored comma

Page 3, line 14, replace "statute" with "section"

Renumber accordingly

Date:3/29/17
Roll Call Vote # 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1425

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 17.0697.03002

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Myrdal Seconded By Senator Larson

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson	X	
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date:3/29/17
Roll Call Vote # 2

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1425

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 17.0697.03002

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Myrdal Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong		X	Senator Nelson		X
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 4 No 2

Absent 0

Floor Assignment Senator Myrdal

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1425: Judiciary Committee (Sen. Armstrong, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1425 was placed on the Sixth order on the calendar.

Page 1, remove lines 6 through 11

Page 1, line 12, remove "As used in this section:"

Page 1, line 13, remove "a."

Page 1, line 13, remove ", legal code, or system"

Page 1, line 17, replace "act" with "section"

Page 1, remove lines 19 through 24

Page 2, remove lines 1 and 2

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Page 3, line 14, replace "statute" with "section"

Renumber accordingly

2017 TESTIMONY

HB 1425

Paul Weckard

HB 1
1425
2-8-17

WHY AMERICAN AND NORTH DAKOTA LAWS FOR NORTH DAKOTA COURTS?

• Some 235 years ago, America's forefathers gathered in Philadelphia to debate and write a unique document. That single-page document announced the formation of a new country—one that would no longer find itself in the clutches of a foreign power. That document was the Declaration of Independence. Eleven years later, many of those same men gathered again to lay the foundation for how the United States of America was to be governed: The US Constitution, a form of government like no other *by the people, of the people and for the people.*

• For more than two centuries, hundreds of thousands of courageous men and women have given their lives to protect America's sovereignty and freedom.

• American constitutional rights must be preserved in order to preserve unique American values of liberty and freedom.

• State legislatures have a role to play in preserving constitutional rights and American values of liberty and freedom.

• If States did not have such a role to play, why then do states have constitutions which often mirror, echo and reinforce the US constitution?

• America has unique values of liberty which do not exist in some foreign legal systems. Included among, but not limited to, those values and rights are:

- Freedom of Religion
- Freedom of Speech
- Freedom of the Press
- Due Process
- Right to Privacy
- Right to Keep and Bear Arms

• Civil and Criminal Law Serve as the Bedrock for American Values: We are a nation of laws.

• Unfortunately, increasingly, foreign laws and legal doctrines are finding their way into US court cases.

• Invoking foreign laws and foreign legal doctrines, especially in family law cases, is a means of imposing an agenda on the American people while circumventing the US and

state constitutions by using foreign laws which do not recognize our constitutional rights and liberties in US courts.

• The potential impact of using foreign and international laws and legal doctrines in US courts on the liberty of ordinary American citizens are as profound as they are despairing. The embrace of foreign legal systems, some of which are inherently hostile to our constitutional liberties, is a violation of the principles on which our nation was founded.

• The founders of our nation believed that the United States of America and its individual states should never be subservient to any foreign power, country or legal system and that no foreign power, country or legal system should be allowed to encroach upon our rights under the Constitution.

• The purpose of American and North Dakota Laws for North Dakota Courts is to preserve the sovereignty of the US and North Dakota and their respective Constitutions by preventing the encroachment of foreign laws and legal systems that run counter to our individual constitutional liberties and freedoms.

• By passing American and North Dakota Laws for North Dakota Courts, we will be preserving *individual* liberties and freedoms which become eroded by the encroachment of foreign laws and foreign legal doctrines.

• It is imperative that we safeguard our Constitutions' fundamentals, particularly the individual guarantees in the Bill of Rights, the sovereignty of our Nation and its people, and the principles of the rule of law—*American and North Dakota laws, not foreign laws.*

• It is VERY IMPORTANT to note that virtually identical legislation has passed in Tennessee, Louisiana, Arizona, Kansas, Mississippi, Alabama, Oklahoma, North Carolina and Washington and there has been NO IMPACT on business, commerce, or international relations of any kind.

#2
1425
2-8-17

North Dakota Catholic Conference

Representing the Diocese of Fargo and the Diocese of Bismarck

Christopher T. Dodson
Executive Director and
General Counsel

To: House Judiciary Committee
From: Christopher T. Dodson, Executive Director
Subject: HB 1425 — Enforcement of Foreign and Religious Laws
Date: February 8, 2017

The North Dakota Catholic Conference opposes HB 1425 because it unduly interferes with the freedom to contract and upends well-established law. To understand the bill's problems, it helps to look at existing law and the bill's language.

The American legal system has well-established principles regarding the application of religious legal systems. Put simply:

(1) Courts will enforce contracts and other legal instruments that are secular on their face, even if they incorporate, in whole or in part, religious laws;
(2) Courts will not enforce contracts or other legal instruments that require interpretation of religious doctrine; and
(3) Courts will not enforce contracts or other legal instruments in a manner that violates the state or U.S. constitutions.[1]

This means that courts can enforce contracts and other legal instruments that are motivated by or an incorporate religious law. For example:

- An employee and a business might negotiate a contract that gives a day off for a religious holiday.
- A lender and a borrower may structure a financial transaction in a way that complies with religious law related to financing and insurance.
- People may contract for binding arbitration of their agreements under religious law.
- An employee's contract might incorporate canon law.
- A health care directive may require a health care decisions be made in accordance with a religious law.
- Instructions for funerals and burials could require adherence to religious laws.

American courts can and do enforce these types of contracts. If, however, any of these legal instruments required the interpretation of religious law or violated the U.S. or state constitutions, the contract would not be enforceable.

Courts can also consider the law of foreign countries that apply religious law. In such cases they are not interpreting religious law. Instead, they merely identify

[1] North Dakota, like other jurisdictions, accepts these rules of law. See, e.g., *State v. Burckhard*, 1999 ND 64, 592 N.W.2d 523 (1999) and *State v. Burckhard*, 1998 ND 121, 579 N.W.2d 194 (1998).

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what law would be applied by the courts of the foreign country. That law might be based on a religious law. This happens in the areas of tort law, such as when an American would sue a hotel in another country for an injury, or family law, such as when immigration law must determine whether a couple is legally married. Here again, the court cannot apply the foreign law if it violates rights under the state or U.S. constitutions.

The committee should keep another legal principle to keep in mind when looking at HB 1425. Statutes that are generally applicable and neutral toward religion on their face can, constitutionally, substantially infringe upon religious freedom.[2] Unless the jurisdiction has accommodation laws, employees and parties to a contract might seek application of religious law in their agreements to provide religious protections not afforded by the U.S. or state constitutions.

Supporters of House Bill 1425 may claim that it only restates existing law and that application of religious law like that described will not be affected. The North Dakota Supreme Court, however, holds that the legislature is presumed to not engage in idle acts.[3] In other words, courts must presume that HB 1425 is meant to change existing law. Moreover, a close reading of the bill indicates that it would, in fact, change existing law and prohibit enforcement of legal agreements.

The heart of the bill is the two sections on page 2, lines 3 through 21. At first glance, these sections appear to say that a court cannot enforce a religious law if doing so would violate one of the constitutional rights listed. That is not, however, what the sections say. What they actually say is that a court cannot enforce a religious or foreign law if *any part* of that law would violate one of those fundamental rights of American law, even if those parts of the foreign or religious law are not applicable to the legal question at issue.

As conservative journalist Matthew Schmitz wrote in the *National Review* about identical legislation in Kansas:

> Sharia, of course, does not grant all the rights that the U.S. Constitution does; neither does Christian canon law or Jewish Halakhic law (or English or French law, for that matter). But why should this fact prevent a court from honoring a contract made under the provisions of one of these "foreign" legal systems if the contract does not itself violate any U.S. or state

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[2] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

[3] *Chamley v. Khokha*, 2007 ND 69, 730 N.W.2d 864 (2007).

> regulations, laws, or constitutional provisions? Under one reading of the Kansas law, a contract that makes reference to canon law or sharia — but is otherwise perfectly legal — would be thrown out, while an identical one that makes no such reference would be upheld.[4]

We must assume that the bill is purposely written in this way because a decision that violated any of the constitutional rights listed would already be void under existing law. Any other interpretation of the sections would make them meaningless.[5] Remember, the presumption in North Dakota courts is that the legislature does not engage idle acts.[6]

Section 5 of the proposed law (page 2, line 29 - page 3, line 2) appears to give a right to contract despite the above-cited sections. However, this carve-out is limited in two respects. First, it only applies to legal entities, such as corporations. It does not allow individuals who contract with each other or with a legal entity, such as in an employee and corporate employer relationship, the freedom to contract in a manner that reflects their religious beliefs.[7] Second, it only applies when a legal entity chooses to subject itself to a foreign law "in a jurisdiction." It does not apply to other types of foreign laws in the bill's definitions, such as religious laws.

The next section of the bill states: "No court or arbitrator may interpret this section to limit the right of any person to the free exercise of religion as guaranteed by the first amendment to the United States Constitution and by the Constitution of North Dakota." This may sound good until we remember that under the *Smith* decision a statute that is generally applicable — like HB 1425 — and is not discriminatory toward religion on its face — also like HB 1425 — is constitutional. In short, relying on religious protections in the constitutions fails to extend much in the way of religious protection. It is as if the bill is purposely written limit religious freedom.

That section also states that no court can adjudicate "ecclesiastical matters" if adjudication would violate the Establishment Clause of the U.S. Constitution or the North Dakota Constitution. "Ecclesiastical matters" is not defined except that it "includes" ministerial hiring

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[4] Matthew Schmitz, "Fears of 'Creeping Sharia;'" National Review Online, June 13, 2012, available at at http://www.nationalreview.com/article/302280.

[5] Douglas Laycock, perhaps the nation's preeminent religious law scholar, came to the same conclusion. http://townhall.com/columnists/stevechapman/2012/06/10/the_bogus_threat_from_shariah_law

[6] The section on page 4, lines 22-28, is also meaningless since this is already established law.

[7] American Laws for American Courts, which drafted the bill, expressly acknowledges on its website that this section purposely does not cover individuals. http://americanlawsforamericancourts.com/faqs/

and termination decisions. As to ministerial decisions, this provision means nothing. The U.S. Supreme Court ruled unanimously in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* that religious bodies have an absolute right to make such decisions regarding ministerial positions.[8] The second part of the sentence says that a court may not adjudicate a decision that requires interpretation of doctrine. This is already well-established law.[9]

What is important is what is left out of this section; namely, non-doctrinal matters, matters involving non-ministerial positions, and subjects that are not "ecclesiastical matters". According to sections two and three of the bill those types of matters could never be enforced if the court found that any part of the referenced religious system did not give the same fundamental rights that are provided by the U.S. and North Dakota constitutions.

When we put all this together it is clear that HB 1425 interferes with the freedom to contract in a manner that an individual believes furthers their religious beliefs, like the examples listed at the beginning of this testimony.

My own employment contract with the North Dakota Catholic Conference incorporates Catholic canon law. I am a lay person. I might not hold a ministerial position.[10] I am not a legal entity. As already noted, Catholic canon law does not provide all the rights delineated under the U.S. and North Dakota constitutions. I chose, however, to exercise my freedom to contract and incorporate canon law in the agreement. Under existing law my rights under canon law and my employer's rights under canon law can be enforced so long as they do not require courts to interpret religious doctrine and so long as they do not violate the U.S. or state constitutions. Under HB 1425, we could lose those rights. If that is not the intent of HB 1425, this bill is not needed.

House Bill 1425 could also interfere with a person's right to make health care decisions. Under North Dakota law, these are legal documents. Health care directives often require that health

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[8] 565 U.S. ___ (2012).

[9] *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

[10] The *Hosanna-Tabor decision left open what is a "ministerial" position.*

care decisions be made for an incapacitated individual according to prescribed religious beliefs. Sometimes those directions involve doctrine. A court could not enforce those instructions.

Sometimes, however, they involve religious law that could be enforced. For example, it might say that a "Catholic priest of the Diocese of Bismarck" be consulted or that a Mormon with a "temple recommend" be in attendance. These may not be doctrinal questions, but they would require a court, if necessary, to apply religious laws, which was the wish of the individual who executed the directive.

Christians and Jews have long depended on the freedom to contract in a manner that reflects their religious beliefs. Well-established legal precedents have formed to respect that right. The same practice should apply to Sikhs, Hindus, Muslims, and everyone else. We should not distort our legal system and possibly infringe upon the separation of powers because of unfounded fears that a foreign religious law will creep into our legal system.

We urge a **Do Not Pass** recommendation.

#3
1425
2-8-17

Testimony in Opposition to HB 1425 – Foreign Laws

American Civil Liberties Union of North Dakota

House Judiciary Committee

February 8, 2017

Thank you, Chair Koppelman and members of the House Judiciary Committee for your time and attention this morning. My name is Jennifer Cook and I am the Policy Director for the American Civil Liberties Union of North Dakota. The ACLU of North Dakota is a nonprofit, nonpartisan organization with more than 6,000 members, activists, and followers. The ACLU of North Dakota is one of the state's leading organizations dedicated to advancing and defending civil liberties and civil rights.

HB 1425, which purports to regulate North Dakota courts' use and recognition of foreign law is unnecessary, raises significant constitutional concerns, and also has the potential to create significant unintended consequences in the everyday lives of North Dakotans who marry abroad, file for divorce, adopt children from overseas, or conduct other family matters that involve foreign or international law. For all these reasons, we urge you to give HB 1425 a Do Not Pass recommendation.

HB 1425 is a solution in search of a problem.

- This bill is motivated by an unfounded concern that so-called "Sharia law" could overtake North Dakota courts, but there is no evidence of that.

- The First Amendment already prohibits U.S. courts from imposing religious law as civil law, so this measure is unnecessary.

HB 1425 will have serious unintended consequences.

- **Creating confusion and a legal nightmare for many North Dakota families:** Courts routinely consider the law of foreign countries for a variety of reasons. It's especially important in family law matters. Courts look to foreign law to determine the validity of marriages and adoption agreements conducted abroad. But under this bill, a court would be prohibited from recognizing a foreign marriage, an international adoption agreement, or a will executed abroad unless the court first determines that the pertinent country's legal system provides *the exact same rights and liberties as our laws* with respect to the issue at hand. That's a problem because most countries have laws that differ from ours, even when it comes to fundamental liberties and rights, and it could leave many North Dakota families in an untenable position.

    - *Otherwise legal marriages would be invalidated:* A couple from North Dakota who is married abroad would be unable to have their marriage recognized at home unless they choose to be married in a country that provides the exact same procedural and substantive rights relating to marriage as our laws do. Similarly, married couples who move to North

Dakota from countries lacking the exact same legal protections (for example, Israel) might not be able to have their marriages recognized.

- *Otherwise legal international adoptions would be voided:* A North Dakota family who adopts a child from a foreign country must obtain a foreign adoption decree in compliance with the law of that country. But under HB 1425, a court would be prevented from recognizing a foreign adoption decree as valid if the pertinent country does not provide the exact same procedural and substantive rights relating to adoption as our laws do. The measure would also raise significant legal difficulties for adoption agencies, both religious and secular, that facilitate international adoptions.

- **Weakening the right of religious arbitration:** Many people of faith, including followers of Christianity and Judaism, agree to settle family or business disputes and other matters through religious arbitration panels, and courts have long been permitted to enforce these agreements provided that doing so would not violate public policy or cause the court to become too entangled in religion.[1] However, because the religious systems of law used by these arbitration panels do not provide the exact same procedural and substantive rights as our civil laws do, such religious arbitration agreements could be deemed unenforceable by North Dakota courts, impairing the right of people of faith to settle disputes in accordance with the principles of their religion.

- **Prevents enforcement of judgments from other states:** A potential corollary effect of HB 1425 is that it may conflict with the duty of North Dakota courts to give full faith and credit to the judgments of sister states in cases where the judgments have considered foreign laws, international norms, or religious-legal traditions. The ABA noted that, "a state's refusal to respect the judicial decisions of another state is a serious matter that may in many cases give rise to a constitutional violation." Under the Full Faith and Credit Clause of the Constitution, a state is obliged to recognize the judgments of a sister state so long as the latter has jurisdiction over the parties and the subject matter. The Supreme Court has made clear that there is no "roving 'public policy exception'" to the full faith and credit due judgments." This exacting obligation ensures that states are "integral parts of a single nation," and not simply an "aggregation of independent, sovereign [entities]."

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[1] For example, in *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007), the U.S. Court of Appeals for the Second Circuit properly enforced an agreement among two Jewish business partners to arbitrate the division of their assets before a Jewish arbitration panel). And in *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp.2d 1101, 1112 (D. Colo. 1999), a federal court properly enforced an agreement to arbitrate a business dispute in accordance with the Rules of Procedure for Christian Conciliation because the plaintiff was "bound by its contract").

HB 1425 disrupts the roles of the branches of government and undermines the separation of powers.

- As far back as *Marbury v. Madison*, it has been accepted that while the legislature has the power to write and enact laws, it is "emphatically the province and duty of the judicial department to say what the law is." Determining what sources of law to look at and how they should be applied are part of figuring out what the law is and thus also quintessential judicial acts.

- By forbidding judges from looking at foreign and international law, through HB 1425 the ND legislature will effectively arrogate to themselves this power by enacting sweeping rules on how judges may or may not use foreign and international law in deciding cases.

- When bills seeking to restrict judicial reliance on foreign law were introduced in Congress, Justice Scalia issued a stern rebuke to their proponents: *"It's none of your business. ... No one is more opposed to the use of foreign law than I am, but I'm darned if I think it's up to Congress to direct the court how to make its decision."*

HB 1425 may have a discriminatory impact that will raise constitutional questions arising from the First Amendment and Equal Protection Clause.

- The history of these bans shows that anti-foreign law measures or bills have been pushed in large part by organizations who openly advocate an anti-Islamic agenda. In states like Kansas, Tennessee, Louisiana, Florida, Montana and others where bans like these have been pushed, there is significant evidence on the record that anti-Islamic or Muslim sentiment was the intended purpose for the introduction and passage of such laws despite the removal of anti-Islamic language from the bills or measures.

- The discriminatory purpose of foreign law bans makes them susceptible to constitutional challenge.

These are just a few examples of the serious problems with HB 1425 and we urge you to give a Do Not Pass Recommendation to HB 1425.

NORTH DAKOTA STATE SENATE JUDICIARY COMMITTEE

By William Jeynes, Ph.D.
Professor

Graduate: Harvard University &
University of Chicago

HB 1425

HB 1425 is very consistent with the US constitution because, as with a very similar bill in North Carolina. It would apply only in situations in which invoking foreign law would violate a person's constitutional rights.

PURPOSE OF THE BILL

The purpose of the bill is to safeguard American constitutional liberties.

THE INHERENT VALUE OF THE U.S. CONSTITUTION

Historically, the U.S. Constitution has been regarded as an example to the world regarding guaranteeing human rights and democratic law. According the the Library of Congress, since 1982 American laws have been the most cited by foreign courts.

THE INHERENT VALUE OF THE U.S. CONSTITUTION (continued)

There is a reason for that. American laws are often viewed as exemplary by those seeking human rights and justice in the context of a free society.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL

1) There has been a trend, as noted in the press, for the U.S. Supreme Court and other courts to increasingly cite foreign law as a justification for their decisions. We have to be very careful here, because there are many nations, such as China, that operate by an entirely different set of values.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL

1) (cont.) To the degree that technology continues to substantially enhance the way the laws of one country can affect another's, it is important to guard the constitutional rights of Americans within this new changing context.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL

1) (cont.) THIS ISSUE HAS BECOME INCREASINGLY RELEVANT IN A NUMBER OF COURT CASES AT A VARIETY OF LEVELS, e.g., *Graham v. Florida (2010)* and *Abbott v. Abbott (2010*) at the U.S. Supreme Court Level.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL

1) (cont.) *In Graham v. Florida (2010)* Justice Kennedy referred to foreign law to argue that (LWOP) Life Without Parole was wrong unless there was a murder.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL

1) (cont.) *In Graham v. Florida (2010)* In his dissent, Justice Thomas replied, "FOREIGN LAWS AND PRACTICES ARE IRRELEVANT TO THE MEANING OF OUR CONSTITUTION."

11

WHEN THERE IS SOMETHING OUTSTANDING, LIKE THE U.S. CONSTITUTION, IT SHOULD BE PROTECTED

1) THE ANALOGY OF THE NORTH DAKOTA STATE BISON-The Bison have won 13 National Championships and 33 Conference Championships and won five-consecutive NCAA Division I-FCS National Championships between 2011 and 2015. NDSU is the only college football program to ever win five consecutive NCAA national championships.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL (continued)

2) As a nation, we should do what we can to protect the constitutional rights of our people. That is our responsibility and is a must, if we are to be a people of compassion and love.

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL (continued)

In 2009, Hudson County Superior Court Judge Joseph Charles Jr. ruled in *S.D. v. M.J.R.* that an ex-husband from Morocco repeatedly had sexually assaulted his ex-wife, both before and after their divorce. Following testimony from the husband's imam, however, the judge denied the ex-wife's request for a permanent restraining order against her ex-husband, citing the Moroccan man's "belief" and "practices."

THERE ARE TWO LINES OF REASONING THAT SHOULD LEAD THE SENATE TO PASS THIS BILL (continued)

IRANIAN WOMEN in the U.S. cannot divorce their husbands, even if their spouse is violent & if they do, the custody of children goes to the husband.

Contact Information:

whjharvard@post.harvard.edu

(2) 3/22/17 HB 1425

North Dakota Catholic Conference

Representing the Diocese of Fargo and the Diocese of Bismarck

Christopher T. Dodson
Executive Director and
General Counsel

To: Senate Judiciary Committee
From: Christopher T. Dodson, Executive Director
Subject: HB 1425 — Enforcement of Foreign and Religious Laws
Date: March 22, 2017

The North Dakota Catholic Conference opposes HB 1425 because it unduly interferes with religious freedom and upends well-established law. To understand the bill's problems, it helps to look at existing law and the bill's language.

The American legal system has well-established principles regarding the application of religious legal systems. Put simply:

(1) Courts will enforce contracts and other legal instruments that are secular on their face, even if they incorporate, in whole or in part, religious laws;
(2) Courts will not enforce contracts or other legal instruments that require interpretation of religious doctrine; and
(3) Courts will not enforce contracts or other legal instruments in a manner that violates the state or U.S. constitutions.[1]

This means that courts can enforce contracts and other legal instruments that are motivated by or an incorporate religious law. For example:

- An employee and a business might negotiate a contract that gives a day off for a religious holiday.
- A lender and a borrower may structure a financial transaction in a way that complies with religious law related to financing and insurance.
- People may contract for binding arbitration of their agreements under religious law.
- An employee's contract might incorporate canon law.
- A health care directive may require a health care decisions be made in accordance with a religious law.
- Instructions for funerals and burials could require adherence to religious laws.

American courts can and do enforce these types of contracts. If, however, any of these legal instruments required the interpretation of religious law or violated the U.S. or state constitutions, the contract would not be enforceable.

Courts may also consider the law of foreign countries that apply religious law. In such cases they are not interpreting religious law. Instead, they merely identify what law would be applied by the courts of the foreign country. That law might be based on a religious law. This happens in the areas of tort law, such as when an

[1] North Dakota, like other jurisdictions, accepts these rules of law. See, e.g., *State v. Burckhard*, 1999 ND 64, 592 N.W.2d 523 (1999) and *State v. Burckhard*, 1998 ND 121, 579 N.W.2d 194 (1998).

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American would sue a hotel in another country for an injury, or family law, such as when immigration law must determine whether a couple is legally married. Here again, the court cannot apply the foreign law if it violates rights under the state or U.S. constitutions.[2]

Courts may also need to interpret religious laws in criminal prosecutions. Our own state supreme court, for example, held that interpretation of Catholic canon law was not only proper, but necessary, for prosecution of an embezzlement case. The court noted, of course, that the inquiry stops if it requires looking at religious doctrine.

The committee should keep another legal principle to keep in mind when looking at HB 1425. Statutes that are generally applicable and neutral toward religion on their face can, constitutionally, substantially infringe upon religious freedom.[3] Unless the jurisdiction has accommodation laws — which North Dakota does not — employees and parties to a contract might seek application of religious law in their agreements to provide religious protections not afforded by the U.S. or state constitutions.

Supporters of House Bill 1425 may claim that it only restates existing law and that application of religious law like that described will not be affected. The North Dakota Supreme Court, however, holds that the legislature is presumed to not engage in idle acts.[4] In other words, courts must presume that HB 1425 is meant to change existing law. Moreover, a close reading of the bill indicates that it would, in fact, change existing law and prohibit enforcement of legal agreements.

The heart of the bill is the two sections on page 2, lines 3 through 21. At first glance, these sections appear to say that a court cannot enforce a religious law if doing so would violate one of the constitutional rights listed. That is not, however, what the sections say. What they actually say is that a court cannot enforce a religious or foreign law if *any part* of that law would violate one of those fundamental rights of American law, even if those parts of the foreign or religious law are not applicable to the legal question at issue.

As conservative journalist Matthew Schmitz wrote in the *National Review* about identical legislation in Kansas:

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[2] *Id.*

[3] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

[4] *Chamley v. Khokha*, 2007 ND 69, 730 N.W.2d 864 (2007).

> Sharia, of course, does not grant all the rights that the U.S. Constitution does; neither does Christian canon law or Jewish Halakhic law (or English or French law, for that matter). But why should this fact prevent a court from honoring a contract made under the provisions of one of these "foreign" legal systems if the contract does not itself violate any U.S. or state regulations, laws, or constitutional provisions? Under one reading of the Kansas law, a contract that makes reference to canon law or sharia — but is otherwise perfectly legal — would be thrown out, while an identical one that makes no such reference would be upheld.[5]

We must assume that the bill is purposely written in this way because a decision that violated any of the constitutional rights listed would already be void under existing law. Any other interpretation of the sections would make them meaningless.[6] Remember, the presumption in North Dakota courts is that the legislature does not engage idle acts.[7]

Section 5 of the proposed law (page 2, line 29 - page 3, line 2) appears to give a right to contract despite the above-cited sections. However, this carve-out is limited in two respects. First, it only applies to legal entities, such as corporations. It does not allow individuals who contract with each other or with a legal entity, such as in an employee and corporate employer relationship, the freedom to contract in a manner that reflects their religious beliefs.[8] Second, it only applies when a legal entity chooses to subject itself to a foreign law "in a jurisdiction." It does not apply to other types of foreign laws in the bill's definitions, such as religious laws.

The next section of the bill states: "No court or arbitrator may interpret this section to limit the right of any person to the free exercise of religion as guaranteed by the first amendment to the United States Constitution and by the Constitution of North Dakota." This may sound good until we remember that under the *Smith* decision a statute that is generally applicable — like HB 1425 — and is not discriminatory toward religion on its face — also like HB 1425 — is constitutional. In short, relying on religious protections in the constitutions fails to extend much in the way of religious protection.

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[5] Matthew Schmitz, "Fears of 'Creeping Sharia;'" National Review Online, June 13, 2012, available at at http://www.nationalreview.com/article/302280.

[6] Douglas Laycock, perhaps the nation's preeminent religious law scholar, came to the same conclusion. http://townhall.com/columnists/stevechapman/2012/06/10/the_bogus_threat_from_shariah_law

[7] The section on page 4, lines 22-28, is also meaningless since this is already established law.

[8] American Laws for American Courts, which drafted the bill, expressly acknowledges on its website that this section purposely does not cover individuals. http://americanlawsforamericancourts.com/faqs/

That section also states that no court can adjudicate "ecclesiastical matters" if adjudication would violate the Establishment Clause of the U.S. Constitution or the North Dakota Constitution. "Ecclesiastical matters" is not defined except that it "includes" ministerial hiring and termination decisions. As to ministerial decisions, this provision means nothing. The U.S. Supreme Court ruled unanimously in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* that religious bodies have an absolute right to make such decisions regarding ministerial positions.[9] The second part of the sentence says that a court may not adjudicate a decision that requires interpretation of doctrine. This is already well-established law.[10]

What is important is what is left out of this section; namely, non-doctrinal matters, matters involving non-ministerial positions, and subjects that are not "ecclesiastical matters". According to sections two and three of the bill those types of matters could never be enforced if the court found that any part of the referenced religious system did not give the same fundamental rights that are provided by the U.S. and North Dakota constitutions.

When we put all this together it is clear that HB 1425 interferes with the freedom to contract in a manner that an individual believes furthers their religious beliefs, like the examples listed at the beginning of this testimony.

My own employment contract with the North Dakota Catholic Conference incorporates Catholic canon law. I am a lay person. I might not hold a ministerial position.[11] I am not a legal entity. As already noted, Catholic canon law does not provide all the rights delineated under the U.S. and North Dakota constitutions. I chose, however, to exercise my freedom to contract and incorporate canon law in the agreement. Under existing law my rights under canon law and my employer's rights under canon law can be enforced so long as they do not require courts to interpret religious doctrine and so long as they do not violate the U.S. or state constitutions. Under HB 1425, we could lose those rights. If that is not the intent of HB 1425, this bill is not needed.

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[9] 565 U.S. ___ (2012).

[10] *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

[11] The *Hosanna-Tabor* decision left open what is a "ministerial" position.

House Bill 1425 could also interfere with a person's right to make health care decisions. Under North Dakota law, these are legal documents. Health care directives often require that health care decisions be made for an incapacitated individual according to prescribed religious beliefs. Sometimes those directions involve doctrine. A court could not enforce those instructions.

Sometimes, however, they involve religious law that could be enforced. For example, it might say that a "Catholic priest of the Diocese of Bismarck" be consulted or that a Mormon with a "temple recommend" be in attendance. These may not be doctrinal questions, but they would require a court, if necessary, to apply religious laws, which was the wish of the individual who executed the directive.

Christians and Jews have long depended on the freedom to contract in a manner that reflects their religious beliefs. Well-established legal precedents have formed to respect that right. The same practice should apply to Sikhs, Hindus, Muslims, and everyone else. We should not distort our legal system and infringe upon the separation of powers because of unfounded fears that a foreign religious law will creep into our legal system.

Two interpretations of this bill are before you. Either this bill does nothing and is meaningless or this bill dangerously interferes with religious freedoms, the right to contract, criminal prosecutions, and the separation of powers. There is no middle ground.[12]

We urge a **Do Not Pass** recommendation.

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[12] Supporters of HB 1425 have claimed that the concerns of the North Dakota Catholic Conference are unprecedented. In fact, the state Catholic conferences of Florida, Michigan, New Hampshire, Kentucky, Georgia, Alaska, Arizona, Pennsylvania, Tennessee, and most recently Montana opposed similar legislation in their states. Moreover, the former president of the Canon Law Society of America testified against similar legislation in Pennsylvania.

(3)

Testimony in Opposition to HB 1425 – Foreign Laws Ban

American Civil Liberties Union of North Dakota

Senate Judiciary Committee

March 22, 2017

Good morning Chairman Armstrong and members of the Senate Judiciary Committee. My name is Jennifer Cook and I am the Policy Director for the American Civil Liberties Union of North Dakota. The ACLU of North Dakota is a nonprofit, nonpartisan organization with more than 6,000 members, activists, and followers. The ACLU of North Dakota is one of the state's leading organizations dedicated to advancing and defending civil liberties and civil rights.

HB 1425, which purports to regulate North Dakota courts' use and recognition of foreign law is unnecessary, raises significant constitutional concerns, and also has the potential to create significant unintended consequences in the everyday lives of North Dakotans who marry abroad, file for divorce, adopt children from overseas, or conduct other family matters that involve foreign or international law. For all these reasons, we urge you to give HB 1425 a Do Not Pass recommendation.

HB 1425 is unnecessary and will have a significant impact on religious freedom.

- Our federal and state laws afford people of all faiths the right to seek relief from the courts. Courts routinely consider cases that touch on religion in various ways. Our judicial system has long recognized the ability of courts to consider cases that touch on religion in some way if the court is able to evaluate and decide them using neutral principles of law. For example, people of all faiths whether Jewish, Catholic, or Muslim seek relief from courts when their religious freedom is unnecessarily burdened. Because religious freedom rights are at the heart of such cases, they necessarily involve some consideration of, or reference to, religion. If courts undertake the examinations carefully, without becoming improperly entangled with religion, these cases do not present cause for concern. The alternative would be people of all faiths would have no judicial recourse when the government violates their religious freedom rights.[1]
    - Applying neutral principles of law when considering cases that involve religious freedom requires the court to look at a particular religion to determine whether there is a valid marriage according to that religion's doctrinal requirements for marriage, and once the court determines a valid marriage exists, the court will then apply neutral principles of law, like contract or family law, to determine certain aspects of a divorce case (i.e. a prenuptial agreement can only be enforced using contract law if there was a valid marriage in the first place).
    - An example of a common religious freedom claim courts routinely adjudicate can be found in the case *Nelson v. Miller*, 570 F.3d 868, 869 (7th Cir. 2009). In *Nelson*, the

[1] In *Sherbert v. Verner*, 374 U.S. 398, 410 (1963), the Supreme Court explained that right of free religious exercise extends to individuals of all religions, including, among others, "Catholics, Lutherans, Muslims, Baptists, Jews, Methodists . . . Presbyterians, or the members of any other faith."

court found that denying a non-meat diet during Lent and on Fridays substantially burdened the religious practice of a Roman Catholic prisoner.

- The First Amendment prohibits U.S. courts from imposing religious law as civil law.

HB 1425 will have serious unintended consequences.

- **Creating confusion and a legal nightmare for many North Dakota families:** Courts routinely consider the law of foreign countries for a variety of reasons. It's especially important in family law matters. Courts look to foreign law to determine the validity of marriages and adoption agreements conducted abroad. But under this bill, a court would be prohibited from recognizing a foreign marriage, an international adoption agreement, or a will executed abroad unless the court first determines that the pertinent country's legal system provides *the exact same rights and liberties as our laws* with respect to the issue at hand. That's a problem because most countries have laws that differ from ours, even when it comes to fundamental liberties and rights, and it could leave many North Dakota families in an untenable position.

    - *Otherwise legal marriages would be invalidated:* A couple from North Dakota who is married abroad would be unable to have their marriage recognized at home unless they choose to be married in a country that provides the exact same procedural and substantive rights relating to marriage as our laws do. Similarly, married couples who move to North Dakota from countries lacking the exact same legal protections (for example, Israel) might not be able to have their marriages recognized.

    - *Otherwise legal international adoptions would be voided:* A North Dakota family who adopts a child from a foreign country must obtain a foreign adoption decree in compliance with the law of that country. But under HB 1425, a court would be prevented from recognizing a foreign adoption decree as valid if the pertinent country does not provide the exact same procedural and substantive rights relating to adoption as our laws do. The measure would also raise significant legal difficulties for adoption agencies, both religious and secular, that facilitate international adoptions.

- **Weakening the right of religious arbitration:** Many people of faith, including followers of Christianity and Judaism, agree to settle family or business disputes and other matters through religious arbitration panels, and courts have long been permitted to enforce these agreements provided that doing so would not violate public policy or cause the court to become too entangled in religion.[2] However, because the religious systems of law used by these arbitration panels do

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[2] For example, in *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007), the U.S. Court of Appeals for the Second Circuit properly enforced an agreement among two Jewish business partners to arbitrate the division of their assets before a Jewish arbitration panel). And in *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp.2d 1101, 1112 (D. Colo. 1999), a federal court properly enforced an agreement to arbitrate a business dispute in accordance with the Rules of Procedure for Christian Conciliation because the plaintiff was "bound by its contract").

not provide the exact same procedural and substantive rights as our civil laws do, such religious arbitration agreements could be deemed unenforceable by North Dakota courts, impairing the right of people of faith to settle disputes in accordance with the principles of their religion.

- **Prevents enforcement of judgments from other states:** A potential corollary effect of HB 1425 is that it may conflict with the duty of North Dakota courts to give full faith and credit to the judgments of sister states in cases where the judgments have considered foreign laws, international norms, or religious-legal traditions. The ABA noted that, "a state's refusal to respect the judicial decisions of another state is a serious matter that may in many cases give rise to a constitutional violation." Under the Full Faith and Credit Clause of the Constitution, a state is obliged to recognize the judgments of a sister state so long as the latter has jurisdiction over the parties and the subject matter. The Supreme Court has made clear that there is no "roving 'public policy exception'" to the full faith and credit due judgments." This exacting obligation ensures that states are "integral parts of a single nation," and not simply an "aggregation of independent. sovereign [entities]."

HB 1425 disrupts the roles of the branches of government and undermines the separation of powers.

- As far back as *Marbury v. Madison*, it has been accepted that while the legislature has the power to write and enact laws, it is "emphatically the province and duty of the judicial department to say what the law is." Determining what sources of law to look at and how they should be applied are part of figuring out what the law is and thus also quintessential judicial acts.

- By forbidding judges from looking at foreign and international law, through HB 1425 the ND legislature will effectively arrogate to themselves this power by enacting sweeping rules on how judges may or may not use foreign and international law in deciding cases.

- When bills seeking to restrict judicial reliance on foreign law were introduced in Congress, Justice Scalia issued a stern rebuke to their proponents: *"It's none of your business. ... No one is more opposed to the use of foreign law than I am, but I'm darned if I think it's up to Congress to direct the court how to make its decision."*

HB 1425 may have a discriminatory impact that will raise constitutional questions arising from the First Amendment and Equal Protection Clause.

- The history of these bans shows that anti-foreign law measures or bills have been pushed in large part by organizations who openly advocate an agenda that singles out one faith particularly: Islam. In states like Kansas, Tennessee, Louisiana, Florida, Montana and others where bans like these have been pushed, there is significant evidence on the record that the intended purpose for the introduction and passage of such laws is to single out the Muslim faith and deny religious freedom to those people who follow Islam despite the removal of specific language that singles

out the Muslim faith from the bills or measures.

- The discriminatory purpose of foreign law bans makes them susceptible to constitutional challenge. Denying Muslims the same religious freedoms afforded to people of all other faiths would be a complete betrayal of our country's core commitment to religious liberty and equality.

These are just a few examples of the serious problems with HB 1425 and we urge you to give a Do Not Pass Recommendation to HB 1425. Thank you for your time and attention this morning. I will stand for questions.

HB 1425 (4) 3/22/17

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2011

RESOLUTION

RESOLVED, That the American Bar Association opposes federal or state laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law.

FURTHER RESOLVED, That the American Bar Association opposes federal or state laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of the entire body of law or doctrine of a particular religion.

REPORT

I. INTRODUCTION

Over the last year or so, an increasing number of state constitutional amendments and legislative bills have been proposed seeking to restrict or prohibit, in varying degrees, state courts' use of laws or legal doctrines arising out of international, foreign, or religious law or legal doctrines (the "Bills and Amendments"). Some such provisions have already been enacted, such as Tennessee's "American and Tennessee Laws for Tennessee Courts" bill, which was signed into law on May 13 2010,[1] and Oklahoma's "Save Our State Amendment,"[2] which was approved by a majority of the state's voters on November 2, 2010, but which has not yet been certified due to a federal court's preliminary injunction based on the likelihood of its unconstitutionality.[3] In approximately 20 states, some form of legislation that would impact the use or consideration of international, foreign or religious law has been introduced or is being considered for introduction in the state legislatures.[4]

The language of these Bills and Amendments varies, often considerably, from state to state. Some, like the amendment in Oklahoma, seek explicitly to forbid courts from considering "international law" or a particular religious legal tradition, most often "Sharia law."[5] Others refer more generally to the use of "foreign law" or "religious or cultural law" in judicial decisions.[6] Some refer only to "any law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [state] Constitutions."[7] One proposed law, another Tennessee bill (SB 1028), as initially introduced, would have provided that "[t]he knowing adherence to sharia and to foreign sharia authorities is prima facie evidence of an act in support of the overthrow of the United States government and the government of this state...." and would have made the support

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[1] 2010 Tenn. Pub. Acts 983. Similar legislation has been signed into law in Louisiana, 2010 La. Acts 714.

[2] Okl. Enr. H.J.R. 1056 (2010).

[3] *Awad v. Ziriax*, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010).

[4] *The Law of the Land,* ABA JOURNAL 14 (Apr. 2011).

[5] U.S. courts may be called up to interpret Sharia in certain limited circumstances. For instance, suppose a W and H married religiously in Egypt. The Maryland resident wife files for divorce in Maryland; her husband moves to dismiss her complaint alleging that they were never legally married. The Maryland judge – based on conflicts of law – must determine whether the parties' marriage was valid where it was contracted in Egypt. As such, the court would require expert testimony about Egyptian family law, which is based on Sharia. Other situations requiring the consideration of Sharia principles might involve the recognition of foreign divorces and custody decrees, probating wills that reference Sharia principles, applying contracts governed by principles of Islamic finance, or where the parties to a cross-border commercial contract have chosen the law of a jurisdiction that applies Sharia principles (such as Saudi Arabia and Malaysia) to govern their contract. Of course, American courts are not required to recognize or enforce any foreign law, including Sharia law, that would violate American public policy. As discussed in Section III of this Report, this is the established jurisprudence for more than 100 years.

[6] *See, e.g.*, Ten. Pub. Acts 983, La. Acts 714, Georgia HB 45 (all referencing "foreign law"); Arizona HB 2582 (2011) (referencing "foreign law" and "religious sectarian law"); Texas HJR 57 (2011) (referencing "any religious or cultural law").

[7] This provision, which has already passed in Tennessee and Louisiana, and has been proposed in Florida, Georgia, Mississippi, Texas and a number of other states, is based on a model law drafted by a group called the Public Policy Alliance, which touts it as a way to preserve "individual liberties and freedoms which become eroded by the encroachment of foreign laws and foreign legal doctrines, such as Shariah". http://publicpolicyalliance.org/?page_id=38 (last visited May 9, 2011)

of any "sharia organization" linked to terrorism a felony punishable "by fine, imprisonment of not less than fifteen (15) years or both."[8]

While not expressly referring to Sharia, many of these legislative initiatives are aimed at Islamic law.[9] For instance, HB 45, which was introduced in Georgia (but not enacted), made no reference to Sharia, stating that "it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application ... will result in the violation of a right guaranteed by the Constitution of this state or of the United States."[10] But the sponsor of the bill stated that the legislation was intended to "ban the use of Sharia law in state courts."[11] Florida's legislation (SB 1294) was copied almost verbatim from the "model legislation" posted on the website of a group called the American Public Policy Alliance.[12] The group's website indicates that the model legislation was "crafted to protect American citizens' constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, especially Islamic Sharia Law."[13]

Despite the differences in terminology used, on the whole these Bills and Amendments purport to protect state citizens from perceived risks to their constitutional rights or to prevent legal decisions that would run counter to the state's public policy. Some well-publicized decisions have understandably raised concerns. For instance, a trial court in New Jersey ruled that a husband, who was a Muslim, lacked the criminal intent to commit sexual assault upon his wife because "his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited."[14] Others have observed that certain Sharia rules governing divorce, child custody, and inheritance, as applied in certain jurisdictions or interpreted in certain schools of Islamic thought,[15] may discriminate

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[8] Tenn. SB 1028 (as initially filed, at http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf) (last visited May 8, 2011); §39-13-902(13), §39-13-906(a)(1)(B). The legislation has since been amended to remove any specific reference to Sharia and is now facially neutral. *See* SB 1028 (as amended, at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1028) (last visited May 8, 2011).

[9] *The Law of the Land,* ABA JOURNAL 14 (Apr. 2011) (noting that in "South Dakota, state Rep. Phil Jensen says he learned from the Oklahoma decision to omit the word *Shariah* in similar legislation he sponsored. … In South Carolina, state Sen. Michael Fair, a sponsor of an anti-Shariah bill in his state, says that he too has heeded the tactical wisdom to 'keep it bland'").

[10] Ga. HB 45 (http://www.legis.ga.gov/Legislation/en-US/History.aspx?Legislation=32048). The legislation remained in committee.

[11] Kathleen Baydala Joyner, *Lawyers Speak Against Ga. Bill That Bans Use of Foreign Laws in State Courts,* FULTON CO. DAILY REP. (Feb. 7, 2011).

[12] http://publicpolicyalliance.org/?page_id=38 (last visited May 8, 2011).

[13] *Id.*

[14] *S.D. v. M.J.R.,* 2 A.3d 412, 428 (N.J. Super. 2010).

[15] Sharia "law" is only "law" in the colloquial sense. The textual sources of the Sharia are the Quran and the Sunna. The Quran is the Muslim holy scripture. The Sunna is essentially the sayings and conduct of Mohammad, who is believed by Muslims to have been divinely guided. After these two primary sources, the two main secondary sources of Sharia are: (1) ijma (consensus of scholars and jurists), and (2) qiyas (reasoning by analogy to one of the higher sources). There is no single authoritative compilation of Sharia, or any judicial or legislative body with jurisdiction over all or even most Muslims. As recently noted, "[t]he amorphous nature of Sharia law can be difficult to appreciate as one often reads that a product is 'Sharia-compliant', or that a state applies 'Sharia law'. In fact, the term Sharia no more denotes a cohesive, codified law than the term 'natural law' does." Paul Turner & Robert Karrar-Lewsley, *Arbitration, Sharia & the Middle East,* 6 GLOBAL ARB. REV. (July 2011). As stated by one U.S. judge with respect to the indefinite nature of "Islamic law": "It is not possible to open up law books and read

against women in ways that would not be sanctioned by -- and indeed would often be illegal under -- the laws of this country.[16]

Yet that very fact highlights the point that the Bills and Amendments are duplicative of safeguards that are already enshrined in federal and state law. American courts will not apply Sharia or other rules (real or perceived) that are contrary to our public policy, including, for instance, rules that are incompatible with our notions of gender equality. Indeed, the New Jersey trial court decision referenced above was reversed by the Superior Court of New Jersey, which "soundly rejected" the lower court's "perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable."[17] In so ruling, the Court relied on long-standing precedent that the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[18]

While legislative initiatives that target specified conduct may be proper even if they run counter to the principles of a particular religion, such initiatives that target an entire religion or stigmatize an entire religious community, such as those explicitly aimed at "Sharia law," are inconsistent with some of the core principles and ideals of American jurisprudence. Thus, while the Supreme Court upheld the conviction of a Mormon on a polygamy charge in 1898 (at a time when polygamy was an accepted tenet of Mormonism), the law in question did not embody a broader "anti-Mormon" legislative initiative, but rather one aimed at specified conduct that was deemed socially harmful.[19]

Moreover, as further discussed in Section III of this Report, the provisions in these Bills and Amendments that seek to ban the use of international, foreign or customary law in U.S. state courts are unnecessary, as existing law and judicial procedure have already proven sufficient to deal with the concerns that such Bills and Amendments were designed to address.

Significantly, language in these Bills and Amendments dealing with "international law" or "foreign and customary law" is likely to have an unanticipated and widespread negative impact on business, adversely affecting commercial dealings and economic development in the states in which such a law is passed and in U.S. foreign commerce generally. Choice of law is a critical

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cases to discern [Islamic] law." *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 2003 WL 22016864 (Del. Supr.).

[16] Farrah Ahmed, *Personal Autonomy & the Option of Religious Law*, 24 INT'L J. L. POL'Y & FAM. 222, 231 (2010); Vivian E. Hamilton, *Perspectives on Religious Fundamentalism and Families in the U.S.*, 18 WM. & MARY BILL RTS. J. 883, 884 (2010).

[17] *S.D. v. M.J.R.*, 417, 2 A.3d 412 (N.J. Super. 2010).

[18] *Id.* at 437 *quoting Employment Div., Dep't of Human Res. of Oregon v. Smith,* 494 *U.S.* 872, 885, 110 *S.Ct.* 1595, 1603, 108 *L.Ed.*2d 876, 889-90 (1990) (holding that the Free Exercise Clause did not require Oregon to exempt the sacramental ingestion of peyote by members of the Native American Church from Oregon's criminal drug laws).

[19] *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878). *See also Cleveland v. United States,* 329 *U.S.* 14, 67 *S.Ct.* 13, 91 *L.Ed.* 12 (1946) (affirming the conviction of defendant practitioners of polygamy under the Mann Act upon a determination that they transported their wives across state lines for immoral purposes and a rejection of defendants' claim that, because of their religious beliefs, they lacked the necessary criminal intent).

term in the negotiation of international business deals. Some of the Bills and Amendments take that bargaining chip off the table or limit the latitude of negotiations. Companies from states that enact such Bills or Amendments are unable to freely negotiate the choice of law term with a foreign company that would insist on the application of the law of its own jurisdiction to govern the contract. This places the U.S. company at a competitive disadvantage with companies from foreign jurisdictions that are not similarly hampered in such negotiations. In addition, the Bills and Amendments create a perception that the courts of those states with such enactments are hostile to the application of foreign law, even if freely negotiated by the parties, which makes it more difficult to negotiate for a domestic forum. Thus, a foreign company that would otherwise be willing to agree to a U.S. forum, subject to the application of the law of its own jurisdiction, will be more inclined to insist on a foreign forum. Moreover, a harsh attitude by states in this country toward the application of foreign law will likely harden the attitude of foreign jurisdictions with regard to the application of U.S. law. In short, the Bills and Amendments create unnecessary barriers to the conclusion of business deals. As stated by one court, "[w]e cannot have trade and commerce in world markets ... exclusively on our terms, governed by our laws."[20]

Moreover, many of the Bills and Amendments would infringe federal constitutional rights, including the free exercise of religion and the freedom of contract, or would conflict with the Supremacy Clause and other clauses of the Constitution. Even those versions of these laws that have been carefully crafted so as to be facially neutral, and avoid any mention of religious law in general or Sharia law in specific, are nonetheless liable to face constitutional scrutiny to the extent that the effect of such proposals is to prohibit all practice of Sharia law, to prohibit parties' freedom to contract, or to interfere with the powers of the Executive and the Senate to negotiate and ratify treaties.

II. CONSTITUTIONAL ISSUES

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
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> *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943)

These various state Bills and Amendments, in all their incarnations, are attempting to do precisely what our founding fathers sought to prevent when they crafted our Constitution and Bill of Rights: deny fundamental rights to a group of citizens based on the vote of a state legislature or the results of a state-wide referendum. As set forth below, such legislation are unconstitutional because they violate the following provisions of the U.S. Constitution: the Supremacy Clause,[21] the Contracts Clause,[22] the First Amendment's free exercise of religion clause,[23] and the Full Faith and Credit Clause.[24]

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[20] *Laminoirs S.A. v. Southwire Co.*, 484 F.Supp. 1063, 1069 (N.D. Ga. 1980).

[21] "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

A. Violation of the Supremacy Clause

Under the Supremacy Clause of the U.S. Constitution, all treaties are "the supreme Law of the Land." Any provisions in the Bills and Amendments that bar state courts from considering "international law," as in Oklahoma's amendment, run afoul of the Supremacy Clause because of their effects on U.S. treaty obligations. Treaties are an important source of law applicable in state courts. For example, the United Nations Convention on Contracts for the International Sale of Goods (CISG)[25] is a treaty that applies directly to citizens or residents of a state who enter into a contract 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. To illustrate, under the Supremacy Clause, a state court faced with a sale of goods dispute governed by the CISG between a state resident and a supplier in, say, France must apply the CISG unless the parties expressly opted out of it, and any state constitutional amendment or statutory provision that prohibited this outcome would violate the Supremacy Clause, which provides that, as a treaty, the provisions of the CISG are "supreme" over state law.

The Supreme Court of the United States has recognized that there are times to recognize and enforce foreign judgments and international arbitration agreements.[26] Yet the Bills and Amendments would call into question states' willingness to recognize and abide by treaties, many of which have a very direct effect on economic investment in the United States and overseas, as well as on protecting American business interests overseas. Businesses negotiate contract terms assuming the backdrop protections of these treaties and agreements, and to prohibit their consideration could undermine the legal foundation of such contracts.

B. Violation of the Contracts Clause

The constitutionally protected right of contract is threatened by language in these provisions that seeks to limit choice of law. The Contracts Clause of the U.S. Constitution provides that "[n]o State shall…pass any…Law impairing the Obligation of Contracts." One generally recognized

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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, § 1, Cl. 2.

[22] "No State shall …pass any…Law impairing the Obligation of Contracts,…. U.S. Const. Art. I, § 10, Cl. 1.

[23] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. Const. Amend. 1.

[24] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. Art. IV, § 1.

[25] There is a distinction between self-executing treaties, which are to be automatically given effect of law in domestic courts, and non-self-executing treaties, which must be implemented through legislation. *Medellin v. Texas*, 552 U.S. 491, 504-505 (2008). The CISG, which was ratified by the United States in 1986 and implemented in 1988, is generally considered to be a self-executing treaty and therefore directly applicable in state courts without implementing legislation. *See, e.g., Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d. 1024, 1027 (2d Cir. 1995).

[26] *See e.g., Medellin v. Texas*, 128 S. Ct. 1346, 1365; 522 U.S. 491, 519-520 ("Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with Medellin that, as a general matter, 'an agreement to abide by the result' of an international adjudication--or what he really means, an agreement to give the result of such adjudication domestic legal effect--can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution."); see also id. at 1364 (citing dissent at 1379-1380) (referencing numerous cases where the Supreme Court found a treaty to be self-executing and thus directly enforceable in U.S. courts without domestic implementing legislation).

right of contract is the right to choose the law that governs that contract. Courts, including the U.S. Supreme Court, generally honor the parties' choice of law, unless such law is contrary to public policy,[27] even if doing so results in an outcome contrary to the laws that would otherwise apply.[28]

Provisions barring courts from using foreign, international or religious law gut the constitutional protection of the Contracts Clause. It is common practice for commercial contracts to include a choice of law provision, especially in the cross-border context. As previously discussed, choice of law is often a hotly negotiated provision of the contract that can significantly affect the substantive terms of the parties' business deal. To varying degrees under the various proposed Bills and Amendments, state courts would be prohibited from applying foreign laws governing the parties' contracts, thereby "impairing the Obligation of Contracts"[29] and encouraging foreign parties to either avoid the U.S. party's preferred forum or to impose a high price in connection with some other term of the business deal in exchange for agreeing to resolve future disputes in the U.S. The more broadly worded Bills and Amendments might also affect not only Muslims seeking to resolve disputes using Sharia principles, but also Jews utilizing rabbinic tribunals, Christians resolving disputes through Christian Conciliation, and members of other religious groups participating in faith-based dispute resolution fora. They might also impact the enforcement in state courts of international arbitral awards decided on the basis of foreign law, and of child custody agreements that were negotiated overseas, but that a parent seeks to enforce in the United States.

Such provisions are therefore unconstitutional infringements of individual's right to contract that will seriously impede business and stymie economic development. As discussed in more detail in Section III below, they are also unnecessary as the protections they seek to provide are already present in existing law.

C. Violations of the First Amendment's Free Exercise Clause

Laws or amendments that explicitly seek to ban "Sharia Law" from being considered by a state court, as in the Oklahoma amendment voted on in November 2010, violate the First Amendment's Free Exercise Clause because they place a substantial burden on individuals' religious practices. A law imposes an unconstitutional burden on the free exercise or religion when it (1) prevents individuals from performing religious acts or rituals that are (2) religiously motivated, (3) based on a sincerely held religious belief, and (4) the acts or rituals in question do not endanger the health or safety of other individuals and therefore present a substantial burden on individual's free exercise rights.[30] Laws that create such burdens must meet different levels of judicial scrutiny, depending on whether or not they are facially neutral, and must be narrowly

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[27] *Lauritzen v. Larsen*, 345 U.S. 571, 588-589 (1953) ("Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."); *see also* 16 Am. Jur. 2d Conflict of Laws § 81. Courts may also refuse to give effect to a choice of law provision if made in bad faith or with the purpose of evading the law of the place where the contract was made. *Id.*

[28] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

[29] U.S. Const., Art. 1, § 10.

[30] The federal government is prohibited "from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro. Esp. Benef. Uniao do Vege*, 126 S. Ct. 1211, 1216 (2006).

tailored to advance the asserted government interest. Most of the Bills and Amendments fail to pass these constitutional hurdles.

Those that either specify Sharia or other religious law, or which reference "international" or "foreign" law, clearly burden religious practice.[31] For example, many Muslims, such as the plaintiff who sought an injunction to prohibit the certification of the Oklahoma amendment, have wills that incorporate specific elements of Sharia law to determine the distribution of their estates. It will be impossible to probate such wills in states that ban the application of Sharia or religious law where their provisions do not endanger the health or safety of other individuals. Furthermore, as the validity of marriages and divorces, whether performed in the U.S. or in another country, may be based on Sharia or other religious law, banning such law from being "used" or "considered" by courts will prevent judges from considering evidence of such marriages or divorces, whether performed in the U.S. or abroad.[32] Most of the provisions are therefore likely to be found to create unconstitutional burdens on religious practice. This was the case in Oklahoma, where a federal district court issued a preliminary injunction based on its finding of a "substantial likelihood of success on the merits" of the plaintiff's Free Exercise Claim.

Provisions like the one in Oklahoma or Tennessee's SB 1028 that single out Sharia law are the most clearly unconstitutional; because they are not neutral on their face, they will only pass constitutional scrutiny if they are "justified by a compelling interest and narrowly tailored to advance that interest."[33] This will be a difficult case for states to make, because as demonstrated in Section III, the interests these provisions are designed to protect are already more than adequately covered through existing law. Moreover, prohibiting or singling out the lawful and peaceful religious practice of millions of U.S. citizens and residents is certainly not narrowly tailored to advance any state interest.

Provisions that refer to "religious law" more generally, such as Arizona's House Bill 2582, are likewise unconstitutional, because they are also not neutral – their discrimination simply extends

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[31] The Free Exercise Clause also works to protect an individual's right to avoid the imposition of religious law unless he or she has voluntarily agreed to be subject to such a law or doctrine. A court can determine whether the parties voluntarily agreed to appear before a religious tribunal, such as a Jewish rabbinic tribunal, or to be bound by religious law or principles by using "neutral, objective principles of secular law." *See*, Stein v. Stein, 707 N.Y.S.2d 754, 759 (N.Y. App. Div. 1999); *see also* Avitzur v. Avitzur, 446 N.E.2d 136, 138 (N.Y. 1983) (citing Jones v. Wolf, 443 U.S. 595, 602 (1979)).

[32] The Constitution, however, also prevents courts from interpreting religious law or canon or deciding disputed questions of religious doctrine. For example, anti-fraud ordinances regulation the use of kosher designations have been found invalid under the Establishment Clause of the First Amendment when they would require courts to interpret and determine religious law (i.e., whether the food represented to be kosher was, in fact, kosher), as such a determination would result in "excessive entanglement" with religion. *See, e.g., Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1349-50 (4th Cir. 1995) (Wilkins, J., concurring). As stated by Justice Brennan in *Serbian Eastern Orthodox Diocese v. Milivajevich*, 426 U.S. 696, 709 (1976), "[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."

[33] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

to *all* religious beliefs.[34] Even facially neutral provisions that do not refer to religious law at all may also be unconstitutional if their object is to restrict or infringe on religious practices.[35] Otherwise, neutral provisions will pass First Amendment scrutiny only if they are found to have a rational basis and to be narrowly tailored. [36] However, as discussed further in Section III, they remain unnecessary additions to existing law.

D. Violation of the Full Faith and Credit Clause

Finally, such Bills and Amendments violate the Full Faith and Credit Clause of the U.S. Constitution to the extent that they seek to refuse to enforce a judgment from another state court if that state includes religious law, "foreign" law, or "international" law in making judicial decisions. This is the case in Oklahoma's amendment, which would permit its state courts to uphold the decisions of courts in other states only "provided the law of the other state does not include Sharia law, in making judicial decisions."[37]

It is unclear how, after enactment, a court in the states with the new legislation would determine whether another state's law "included" prohibited "Sharia," "foreign," or "international law," and how broadly these terms might be interpreted. Would a state in which a will was probated that allowed for the distribution of the estate in accordance with a religious legal tradition (such as Sharia or a Rabbinical court ruling) be considered to "include" "foreign" law in its judicial decisions for purposes of these amendments? Would a marriage recognized under New York law because it was solemnized according to Sharia, Christian canon, or rabbinical rules be recognized? Would billions of dollars worth of sovereign wealth funds that operate around the world but were organized under New York state law and recognized Sharia legal principles have to be restructured? While the exact parameters and processes under which such a determination would be made are unclear, and the law in this area remains unsettled,[38] a state's refusal to respect the judicial decisions of another state is a serious matter that may in many cases give rise to a constitutional violation.

III. Existing Law Already Provides Adequate Protections

Proponents of the Bills and Amendments argue that they are necessary to protect constitutional rights, preserve U.S. law and prevent that application of religious or foreign legal principles which are considered unfair, discriminatory or offensive to basic American values. That is not so; U.S. citizens are already protected by existing law.

It is a general principle of U.S. law that our courts will not give effect to foreign or religious laws or to rights based on such laws if doing so would be contrary to the settled "public policy" of the forum, would violate good morals or natural justice, or would otherwise be prejudicial to the

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[34] *Id.* at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").
[35] *Id.* at 534.
[36] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990).
[37] Okl. Enr. H.J.R. No. 1056, Section C.
[38] The area in which this is most clearly seen is in interstate conflicts regarding the recognition of same-sex marriages and civil unions.

forum state or its citizens.[39] Our courts (both state and federal) have more than sufficient legal tools to permit them to reject foreign or religious law and refuse to enforce foreign judgments that do not meet our fundamental standards of fairness and justice. Constitutional rights (such as those contained in the Bill of Rights) protect everyone in the United States, and all courts throughout the country are bound to respect them. Under our Constitutional order, these rights cannot be infringed, even where foreign or religious law has been chosen by the parties (for example by contract) or is otherwise applicable to them (for example, foreign law because of their foreign citizenship). This is true of all laws. Long ago, for example, the Connecticut Supreme Court held that the courts of Connecticut "will not enforce the law of another jurisdiction, nor rights arising thereunder, which are injurious to our public rights, or to the interest of our citizens, nor those which offend our morals or contravene our public policy, or violate our positive laws."[40] It is the same in Colorado, where foreign law will not be enforced where it is "contrary to public policy."[41] As will be seen, the laws of many other states are consistent.

This is a proper application of the doctrine of comity, which the U.S. Supreme Court has described as:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[42]

Under our law, courts will decline to enforce the choice of a foreign law where the result would violate state or federal public policy. In this context, public policy is generally understood to include fundamental social values and morals, principles of justice, and public welfare; this concept permits a court to disregard the parties' choice of law and apply local law (the lex fori) instead when necessary to protect the policies and interests of the forum. For example, under California's choice-of-law principles, an agreement designating a foreign law will not be given effect if it would violate a strong California public policy or result in an evasion of a statute of the forum protecting its citizens.[43] Under Florida law, courts will not enforce choice-of-law provisions where the law of the chosen forum contravenes strong public policy.[44] Georgia law is similar: "[e]nforcement of a contract or a contract provision which is valid by the law governing the contract will not be denied on the ground of public policy, unless a 'strong case' for such action is presented."[45]

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[39] *See Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (N.Y. 1918) (enforcement not required when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal").
[40] *Christilly v. Warner*, 87 Conn. 461, 88 A. 711 (1913).
[41] *Gray v. Blight*, 12 F.2d 696 (10th Cir. 1940), cert. denied 311 U.S. 704 (1940).
[42] *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).
[43] *See Kaltwasser v. Cingular Wireless LLC*, 543 F.Supp.2d 1124 (N.D. Cal. 2008), *aff'd* 350 Fed.Appx.108 (9th Cir. 2009).
[44] *See Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005).
[45] *See Terry v. Mays*, 161 Ga.App. 328, 329 (1982).

A similar rule applies in respect of torts. As a matter of principle, U.S. courts will not consider actions based on a foreign cause of action the enforcement of which would be contrary to the strong public policy of the forum, nor will they apply foreign law to determine the outcome of a case when it would violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state.[46] In South Carolina, for example, the Supreme Court will not apply foreign law if it violates the public policy of South Carolina.[47]

Under U.S. law, judgments rendered in foreign nations are not entitled to the same "full faith and credit" protection that sister-state judgments receive under the U.S. Constitution. Thus, a state of the United States is free to refuse enforcement of a foreign judgment on the ground that the original claim on which the judgment is based is contrary to its public policy.[48] A foreign judgment need not be enforced, for example, if it was rendered under a system which does not provide impartial tribunals or procedures compatible with due process of law" or if the defendant did not receive notice of the proceedings in sufficient time to enable him to defend.[49] Versions of these uniform acts are in force in a majority of states, including Colorado (C.S.R. A. § 13-62-104 ("the judgment or the claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States"), Georgia (O.C.G.A. § 9-12-114), New York (McKinney's CPLR § 5304) and North Carolina (N.C.G.S.A. § 1C-1853).

Recognition of foreign marriages in the United States is for the most part governed by the principle that if the marriage is valid where performed or celebrated, it is valid in the U.S. unless violative of the public policy of the forum.[50] Some states provide for this result by statute.[51]

Courts will also refuse to enforce decisions made by religious tribunals when such decisions violate public policy or involve matters considered non-arbitral on public policy grounds, such as questions involving child custody.[52] Public policy considerations will also prevent courts from confirming awards by religious tribunals that would deprive a party of his or her constitutional rights or that attempt to usurp the state's prerogative in criminal matters.[53]

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[46] *See* Restatement (2d), Conflicts of Law §116.
[47] *Boone v. Boone*, 345 S.C. 8, 546 S.E.2d 191 (S.C. 2001).
[48] *See* Restatement (2d) Conflicts of Law §117.
[49] *See Hilton v. Guyot*, 159 US 113 (1895); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir.1995), cert. denied, 516 U.S. 989 (1995); *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2nd Cir.2000). See generally the 1962 Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. pt. II, at 39 (2002) and the 2005 Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. II, at 5 (Supp. 2007).
[50] *See, e.g., Hesington v. Estate of Hesington*, 640 S.W.2d 824, 826 (1982).
[51] *See* Cal. Civ. Code Ann., § 63 (West 1998); Idaho Code Ann. § 32-209 (1997); Kan. Stat. Ann. § 23-115 (1997); Ky. Rev. Stat. Ann. § 402.040 (Michie 1984); Neb. Rev. Stat. § 42-117 (Revised 1995); N.M. Stat. Ann. § 40-1-4 (Michie 1994); S.D. Codified Laws § 25-1-38 (Michie 1992); Utah Code Ann. § 30-1-4 (1995).
[52] In many states, for example, custody and visitation issues are considered inappropriate for resolution by arbitration, religious or otherwise, although courts may sometimes support arbitral decisions on such issues unless they are found not to be in the child's best interest. See generally Elizabeth A. Jenkins, Annotation, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R.5th 69 (1996).
[53] *See, e.g., Hirsch v. Hirsch*, 774 N.Y.S.2d 48, 50 (N.Y. App. Div. 2004) (court refused to enforce rabbinic tribunal's decision directing wife to withdraw pending criminal complaint against husband).

III. Conclusion

Legislation that bars courts from considering foreign or international law or the entire body of law of a particular religion impose unconstitutional burdens on various constitutional rights, threaten to impinge American commercial interests, and are unnecessary additions to existing law. Accordingly, the American Bar Association should oppose the enactment of such laws.

Respectfully Submitted,

Salli A. Swartz
Chair

113A

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Mike Byowitz and Josh Markus, Delegates, Section of International Law

1. Summary of Resolution(s).

This Resolution opposes federal or state laws imposing blanket prohibitions on the consideration or use of foreign or international law or the entire body of law or doctrine of a particular religion.

2. Approval by Submitting Entity.

Yes.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

This Resolution does not affect any existing policies of the Association.

5. What urgency exists which requires action at this meeting of the House?

As indicated in the April 2011 issue of the ABA JOURNAL, legislators in 20 states are considering more than 40 bills that would ban or restrict the consideration or use of foreign, international or religious law in state courts. *The Law of the Land*, ABA JOURNAL 14 (Apr. 2011).

6. Status of Legislation. (If applicable)

More than 40 bills are now pending in various stages of the legislative process.

7. Cost to the Association. (Both direct and indirect costs)

None.

8. Disclosure of Interest. (If applicable)

N/A.

9. **Referrals.**

This resolution is being provided to other ABA entities for support.

10. **Contact Name and Address Information.** (Prior to the meeting)

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11. **Contact Name and Address Information.** (Who will present the report to the House?)

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113A

EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution opposes federal or state laws imposing blanket prohibitions on consideration or use of foreign or international law and the entire body of law or doctrine of a particular religion.

2. Summary of the Issue that the Resolution Addresses

Over the last year or so, an increasing number of state constitutional amendments and legislative bills have been proposed seeking to restrict or prohibit, in varying degrees, state courts' use of laws or legal doctrines arising out of international, foreign, or religious law or legal doctrines. Some such provisions have already been enacted, such as Tennessee's "American and Tennessee Laws for Tennessee Courts" bill, which was signed into law on May 13 2010, and Oklahoma's "Save Our State Amendment," which was approved by a majority of the state's voters on November 2, 2010, but which has not yet been certified due to a federal court's preliminary injunction based on the likelihood of its unconstitutionality. In approximately 20 states, some form of legislation that would impact the use or consideration of international, foreign or religious law has been introduced or is being considered for introduction in the state legislatures.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Legislation that bars courts from considering foreign or international law or the entire body of law of a particular religion impose unconstitutional burdens on various constitutional rights, threaten to impinge American commercial interests, and are unnecessary additions to existing law. The Policy would oppose the enactment of such laws.

4. Summary of Minority Views

Many of these legislative initiatives are aimed, either explicitly or implicitly, at Islamic or Sharia law. Some well-publicized decisions have understandably raised concerns. For instance, a trial court in New Jersey ruled that a husband, who was a Muslim, lacked the criminal intent to commit sexual assault upon his wife because "his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited." Others have observed that certain Sharia rules governing divorce, child custody, and inheritance, as applied in certain jurisdictions or interpreted in certain schools of Islamic thought, may discriminate against women in ways that would not be sanctioned by -- and indeed would often be illegal under -- the laws of this country.

Yet that very fact highlights the point that these anti-Sharia initiatives are duplicative of safeguards that are already enshrined in federal and state law. American courts will not apply Sharia or other rules (real or perceived) that are contrary to our public policy, including, in particular, rules that are incompatible with our notions of gender equality. Indeed, the New Jersey trial court decision referenced above was reversed by the Superior Court of New Jersey, which "soundly rejected" the lower court's "perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable." *S.D. v. M.J.R.*, 417, 2 A.3d 412 (N.J. Super. 2010). In so ruling, the Court relied on long-standing precedent that the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 437 *quoting Employment Div., Dep't of Human Res. of Oregon v. Smith,* 494 *U.S.* 872, 885, 110 *S.Ct.* 1595, 1603, 108 *L.Ed.*2d 876, 889-90 (1990) (holding that the Free Exercise Clause did not require Oregon to exempt the sacramental ingestion of peyote by members of the Native American Church from Oregon's criminal drug laws).

While legislative initiatives that target specified conduct may be proper even if they run counter to the principles of a particular religion, such initiatives that target an entire body of religious doctrine or stigmatize an entire religious community, such as those explicitly aimed at "Sharia law," are inconsistent with the core principles and ideals of American jurisprudence.

3/29/17 (1) HB 1425

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Title.

Prepared by the Legislative Council staff for
Representative K. Koppelman
March 28, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1425

Page 1, remove lines 6 through 11

Page 1, line 12, remove "As used in this section:"

Page 1, line 13, remove "a."

Page 1, line 13, remove ", legal code, or system"

Page 1, line 17, replace "act" with "section"

Page 1, remove lines 19 through 24

Page 2, remove lines 1 and 2

Page 2, line 7, remove "following"

Page 2, line 8, remove ": due"

Page 2, remove lines 9 and 10

Page 2, line 11, remove "Constitution of North Dakota"

Page 2, line 18, remove "following"

Page 2, line 19, remove ": due process, equal protection,"

Page 2, remove line 20

Page 2, line 21, remove "privacy or marriage as specifically defined by the Constitution of North Dakota"

Page 2, line 26, remove "of the nonclaimant in the foreign forum"

Page 2, line 27, replace "with respect to the matter in dispute, then it is the public policy of this state that" with an underscored comma

Page 3, line 5, remove "No court may interpret this"

Page 3, remove lines 6 through 13

Page 3, line 14, replace "statute" with "section"

Renumber accordingly