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The Threat to Interest-Free Home Financing: The Problem of State Governments' Prohibition of Islamic-Compliant Financing Agreements

Matt Anderson
manderson51@hamline.edu

THE THREAT TO INTEREST-FREE HOME FINANCING: THE PROBLEM OF STATE GOVERNMENTS' PROHIBITION OF ISLAMIC-COMPLIANT FINANCING AGREEMENTS

Matt Anderson[*]

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I. INTRODUCTION

Islamic law prohibits any charges or interest payments on debt, including home loans.[1] The Islamic interest prohibition is more than just a law; it is a fundamental tenant of the religion and philosophy of Islamic economics.[2] Many Muslims must choose to either adhere to religious beliefs or achieve the "American Dream" because the Islamic prohibition against interest conflicts with America's interest-based home financing.[3] For some, abandoning Islam is not an option.[4] The need to reconcile religious beliefs with the American Dream has led to the emergence of Islamic-compliant financing programs across the country.[5] Minnesota's New Markets Mortgage

[1] *See infra* Part II.A.1 (explaining the Islamic prohibition of *riba*).

[2] *See infra* note 28 (explaining the rationale behind *riba* including the idea that money has no intrinsic value and that profit from the principle amount must be attributable to something concrete).

[3] *See* Elliot B. Smith, *Dream Fulfilled Helps Muslims Realize Theirs*, USA TODAY (Feb. 25, 2005), usatoday30.usatoday.com/money/perfi/general/2005-02-24-islamic-finance-usat_x.htm (explaining the situation of Muslim families seeking help for Islamic-compliant loans).

[4] *Id.*

[5] *See id.* (explaining different types of Islamic-compliant financing).

Program was one such program and the first to be quasi-government sponsored.[6] However, the program was soon halted, and the rise of anti-*Sharia* legislation continues to threaten the future of Islamic-compliant financing agreements.[7] The result: Islamic-compliant loan agreements are invalid in state courts.[8]

This note argues that state courts must take a stance in favor of enforcing Islamic choice of law provisions in financing contracts due to the oppressive practices from the political branches of government and special interest groups.[9] Part II provides background information for the Islamic prohibition against paying interest on late payments.[10] This section also describes the Restatement analysis of choice of law provisions, paying particular attention to the elements that are most applicable to this subject.[11] Part III begins by exploring the politically oppressive policies against Islamic-compliant contracts.[12] This section also discusses the events surrounding the termination of the Minnesota New Markets Mortgage program.[13] Additionally, Part III introduces state legislation prohibiting Islamic law and explains the role of special interest groups in drafting the legislation.[14] Arizona, South Dakota, and Oklahoma serve as three examples.[15] Finally, Part IV argues that the Oklahoma court's handling of the issue should serve as a model to other courts. Further, because state political branches have been targeting Islamic-compliant contracts, future courts must enforce Islamic choice of law provisions in loan agreements, even if the

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[6] *See generally infra* Part III.A (reporting the New Markets Mortgage Program).

[7] *See infra* note 143 (compiling the attempts and implementation of Islamic law bans in state courts).

[8] *See infra* Part III.B.1 (noting the activities of APPA, a political group that has drafted a model bill aimed at limiting Islamic law in state courts).

[9] *See infra* Part IV.C.1 (explaining that courts are in a unique position and should use their position to make a determination based on the facts with guidance from the Restatement).

[10] *See infra* Part II.A.1 (explaining Islamic law's prohibition of interest payments).

[11] *See infra* Part II.B (explaining the public policy exception and relationship exception to the general rule that choice of law provisions are considered valid).

[12] *See infra* Part III.A–B (explaining the termination of the New Markets Mortgage Program, the increase in state law proposals limiting Islamic law, and the special interest groups invested in banning Islamic law).

[13] *See infra* Part III.A.2 (noting former governor Tim Pawlenty's political ambitions terminated the program).

[14] *See infra* Part III.B (describing state legislatures proposing laws that were influenced or entirely drafted by special interest groups and individuals with an agenda against Islam).

[15] *See infra* Part III.B.2–3 (comparing the different types of legislation around the country).

court must invalidate anti-Islamic legislation.[16] The standard the court should adopt is the analysis in the Restatement (Second) of Conflict of Laws, which enforces choice of law provisions unless the outcome is contrary to public policy or the parties and transaction bear no relation to their choice of law.[17]

II. BACKGROUND

Two concepts are central to understanding the argument of this article. The first is the traditional Islamic ban of charging or paying interest for late payments, or *riba*.[18] The second concept is the American jurisprudence surrounding "choice of law" provisions in contracts embodied in the Restatement (Second) of Conflict of Law.[19]

A. Sharia *Law and Islamic-Compliant Financing*

1. The Prohibition of Riba

The word "*riba*" directly translates to "increase."[20] The prohibition of *riba* comes directly from the text of the Qur'an.[21] As with many religious concepts, the extent of the Islamic prohibition against interest rates is open to interpretation.[22] The concept of regulating unfair interest rates is not unique to Islam, as many Western societies also have usury laws aimed at regulating unfair interest rates.[23] However, most scholars agree that the prohibition of *riba* is broader, including interest rates that would pass usury regulations.[24] The prohibition of *riba* is commonly interpreted to cover even interest rates on late payments.[25]

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[16] *See infra* Part IV.B.1 (explaining the Tenth Circuit's decision in favor of a Muslim man who challenged a state constitutional amendment prohibiting *Sharia* or Islamic law in state courts).

[17] *See infra* Part IV.B.1–3 (applying the Restatement's suggestion).

[18] *See* Sina Ali Muscati, *Late Payment in Islamic Finance*, 6 UCLA J. ISLAMIC & NEAR E.L. 47, 49 (2007) (introducing the concept on *riba*).

[19] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988) (suggesting the rule to apply to contractual choice of law provisions).

[20] Barbara L. Seniawski, *Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 708 (2001).

[21] Qur'an, 2:275-80; 3:130 (Tahrike Tarsile Qur'an Inc. 2003) (stating "Those who devour [*riba*] will not stand except as stands one whom the Evil One by his touch has driven to madness. That is because they say: 'Trade is like [*riba*],' but Allah has permitted trade and forbidden [*riba*].").

[22] Muscati, *supra* note 18, at 48 (explaining the debate as to what type of interest rates are or should be prohibited).

[23] Muscati, *supra* note 18, at 49; *see*, *e.g.*, MINN. STAT. § 334.03 (2012) (prohibiting "usurious" contracts).

[24] Seniawski, *supra* note 20, at 712–13 (explaining that the common interpretation includes all interest, but arguing that it should not be so broad).

[25] *Id.* at 712.

Scholars argue that part of the prohibition against *riba* is a moral justification to protect the poor from being exploited by the rich.[26] Additionally, the prohibition of *riba* is based on fundamental beliefs of economics unique to Islamic culture,[27] which teaches that money has no value in and of itself, and all profit must be connected to something other than money that actually has value.[28] The idea that economic exchanges must be equal and profits fair is also related to this concept.[29] Therefore, those who choose to follow their faith and avoid paying interest do so not as a convenient means to avoid being charged late payments, but because of a fundamental disagreement on the nature of money and equitable profiting.

2. Alternative Financing Programs

Recognizing a need for financing that conforms to this belief system, some institutions have established creative and successful Islamic-compliant financing programs.[30] Three models of financing currently dominate the Islamic-compliant market.[31] One is *Ijara-wa-Iqtinaa*, or "lease to own", in which the financing institution takes a lien in the property but gives title to the prospective homebuyer.[32] The homebuyer pays rent until the full cost is paid.[33] A second model, called *Murabaha*, or installment purchases, occurs when a homebuyer negotiates a price with the seller, and the financing institution purchases the home from the seller.[34] The financing institution then immediately sells the home to the homebuyer for periodic installments.[35] The third model, called *Musharaka*, occurs when the homebuyer and financing institution purchase the home jointly as a limited

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[26] *See id.* (discussing whether the poor are disadvantaged by interest rates).

[27] *Id.* (discussing Islamic views on microeconomics).

[28] Muscati, *supra* note 18, at 50 (stating that "money on its own has no intrinsic value," and any additional profit from the "principal amount must be attributable to something concrete").

[29] Seniawski, *supra* note 20, at 711; *see* Jean-Francois Seznec, *Ethics, Islamic Banking and the Global Financial Market*, FLETCHER F. WORLD AFF., Spring 1999, at 161–62 (explaining that profit from equal and fair transactions does not violate the prohibition of *riba*).

[30] *See* Smith, *supra* note 3; Huma Qureshi, *Sharia-Compliant Mortgages Are Here—and They're Not Just for Muslims*, GUARDIAN (June 28, 2008), www.theguardian.com/money/2008/jun/29/mortgages.islam (explaining different types of Islamic-compliant loans).

[31] *Id.* (noting the three dominant models are *Ijara-wa-Iqtinaa; Murabaha;* and *Musharaka*).

[32] *Id.* (explaining the *Ijara-wa-Iqtinaa* model).

[33] *Id.*

[34] *Id.* (describing the role of the home-buyer and the financer).

[35] *Id.*

liability company.[36] Over time, the homebuyer gains full ownership of the purchase.[37]

In all three of these models the financing agency has made profit without charging interest for late payments.[38] One extremely successful model is Lariba.[39] Founded in 1987, Lariba offers "*riba*-free" financing for home, car, and business loans.[40] The Lariba model is a twist on *Musharaka*.[41] In this model, Lariba will purchase the home jointly with the homebuyer and then immediately sell its share to the homebuyer.[42] Lariba takes a lien on the property, with its share decreasing as the homebuyer pays the monthly installments.[43] Lariba will eventually own no shares and will then release the lien on the property, usually after a contracted period of thirty years.[44] The mortgage giants Fannie Mae and Freddie Mac have even purchased mortgages arising from these transactions.[45]

However, as with any contract, disputes among the parties sometimes arise.[46] Lenders offering *Sharia*-compliant financing recognize that the nontraditional loans may raise eyebrows or be confusing for courts asked to interpret them. For example, Lariba informs potential home buyers that:

> *In order to protect our clients in case of adverse situations* against the possibility of excessive legal fees, *unusual language in the contracts that make them irregular and*

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[36] *Id.*

[37] Smith, *supra* note 3 (stating that the home-buyer's equity will grow until they have full ownership of the home).

[38] *Id.* (describing the "$600 million Muslim mortgage market" as small but growing); *see also* Qureshi, *supra* note 30 (describing the success of some Islamic-loan providers).

[39] Smith, *supra* note 3 (citing Lariba as a major company in the market).

[40] *The Lariba Model*, LARIBA, https://www.lariba.com/home-financing.htm (last visited Mar. 23, 2014) (describing the company as one that provides financing for home, car, and business loans).

[41] *See id.* (comparing the Lariba method to the "Declining Participation in Usufruct," also known as "Declining Musharaka").

[42] *Id.* (describing how the Lariba Model works).

[43] *Id.*

[44] *Id.*

[45] Smith, *supra* note 3 (noting that Fannie Mae purchased $10 million in *Musharaka*-style mortgages). After Fannie Mae's involvement, the applications doubled from roughly twenty-seven a month in 2002 to fifty-four a month in 2003. *Id.*; Thomas A. Fogarty, *Freddie Mac Now Buys Mortgages Held by Muslims*, USA TODAY, *available at* https://www.lariba.com/knowledge-center/articles/freddie-mac-usatoday.htm (last visited Mar. 23, 2014) (reporting Freddie Mac's recent trend to buy mortgages for interest-free loans).

[46] *See* Paul E. Pompeo, *East Meets West: A Comparison of Government Contract Dispute Resolution in the Common Law and Islamic Systems*, 14 LOY. L.A. INT'L. & COMP. L.J. 815, 837 (1992) (describing dispute resolution in the Islamic legal system).

> *difficult to pursue legally*, and the putting of name of company on title with client, LARIBA uses standard industry and regulatory sanctioned contracts and uses a rider called the *LARIBA Agreement which describes the process followed above and the rental value used as the basis for the payment calculations*.[47]

The language above illuminates an issue that courts are likely to face in resolving potential disputes: "unusual language in the contracts that make them irregular and difficult to pursue legally."[48] Because these contracts are written to comply with Islamic faith, they often contain provisions directing disputes to be settled through Islamic law.[49] These provisions are intended to ensure the contract will be enforced as intended, providing consistency and predictability—qualities desirable for any commercial transaction.[50] It is important to acknowledge that these contracts may have different language rendering them difficult to enforce.[51] It is equally important to note that the different language, especially when the contract contains a provision describing the process of its formation, also indicates an intention to have the contract enforced differently than a standard loan contract.[52] The use of Arabic language, coupled with the language of the contract explicitly referring to Islamic law, could be enough to be considered an "explicit provision" directing resolution of the issue to Islamic law.[53]

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[47] *The Lariba Model*, *supra* note 40 (emphasis added).

[48] *Id.*

[49] *See* Michael J.T. McMillen, *Contractual Enforceability Issues: Sukuk and Capital Markets Development*, 7 CHI. J. INT'L L. 427, 434, 437 (2007) (explaining that the contract is written to comply with *Sharia* law and that the complexity of this contract may not be handled well outside of *Sharia* law concepts).

[50] *Id.* at 434–35 (providing contract language meant to provide these agreements ". . . with the degree of certainty, consistency, predictability, and transparency of the Shari'ah-compliant structure, product, or transaction, and with the functioning of the relevant legal regimes as risk allocators").

[51] *Id.* (using Arabic words such as "*Haqul Manfa'aa*" and "*Milkul Raqabah*" and noting that some words are improperly translated, such as "lien" to "*rahn*," when "*rahn*" means "pawn" in Arabic).

[52] McMillen, *supra* note 49, at 439 (stating that interest-free finance contracts written to comply with *Sharia* law are also intended to be enforced by *Sharia* law).

[53] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. c (1971) (providing that the contracting parties "may spell out these terms in the contract" or "incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law"). If foreign law is provided for in the contract, the Restatement states that "[i]n such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intentions of the parties. So much has never been doubted." *Id.*

B. Guidance from the Restatement (Second) of Conflicts of Law § 187

The general rule in the Restatement is a court should enforce a provision that explicitly establishes a forum of law for dispute resolution, also called a choice of law provision.[54] The comments further recommend a liberal interpretation of what constitutes an explicit provision, allowing evidence of the intent of the parties and extrinsic evidence.[55] The purpose is to enforce the contract as the parties intended.[56] The Restatement provides two exceptions.[57] One exception deals with public policy, and the other grants an exception based on the relationship between the transaction and the chosen law.[58]

1. The Public Policy Exception

As stated above, the Restatement recommends a rule enforcing choice of law provisions.[59] However, if applying the chosen law produces a result contrary to the forum state's clearly articulated public policy, the court does not have to apply that law.[60] Courts have refused to enforce choice of law provisions based on public policy in a variety of contexts, often because the chosen law would cause a substantial burden on one party.[61] Courts have commonly applied the public policy exception in both domestic and foreign Islamic marriage contracts.[62]

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[54] *Id.* § 187(1)–(2).

[55] *Id.* § 187 cmt. c.

[56] *See id.* (asserting that the law of the chosen forum will be enforced).

[57] *See id.* § 187(2)(a)–(b). The exceptions are invoked when:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id.

[58] *Id.* (explaining that a court can elect not to enforce a choice of law provision in a contract when "(a) the chosen state has no substantial relationship to the parties . . . or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state").

[59] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

[60] *Id.* § 187(2)(b).

[61] *See, e.g.*, Aghili v. Saadatnejadi, 958 S.W.2d 784, 785 (Tenn. Ct. App. 1997) (marriage/divorce); JRT, Inc. v. TCBY Sys., Inc., 52 F.3d 734, 739 (8th Cir. 1995) (franchise agreement); DCS Sanitation Mgmt., Inc. v. Castillo, 435 F.3d 892, 895 (8th Cir. 2006) (noncompete agreement); *In re* Millenium Seacarriers, Inc., 96 F. App'x 753, 755 (2d Cir. 2004) (enforcing a provision choosing Norwegian law and applying Norwegian law).

[62] *See, e.g.*, *Aghili*, 958 S.W.2d at 785; *In re* Marriage of Altayar & Muhyaddin, No. 57475-2-I, 2007 WL 2084346, at *3 (Wash. Ct. App. July 23, 2007) (refusing to enforce the prenuptial agreement of marriage bound under Islamic law because it was unfair); Aleem

The public policy in many U.S. states favors an equitable distribution of assets in a divorce proceeding.[63] Applying the public policy exception in the marriage context is not always as simple as invalidating the choice of law provision to effectuate public policy.[64] A comparison of the outcome and reasoning in *Aghili v. Saadanejadi*[65] with the outcome and reasoning in *Aleem v. Aleem* demonstrates this.[66]

In *Aghili*, the court found a valid marriage partially because the marriage was completed according to Islamic custom.[67] The fact that the couple never actually filed a marriage license with the state was not enough to invalidate the marriage.[68] Because the marriage was valid, the wife was able to bring a divorce proceeding against her husband.[69] This overruled the lower court's decision which refused to recognize a valid marriage, leaving the wife without any recourse when the relationship ended.[70] In *Aleem*, the court enforced the marriage agreement, but not the Islamic divorce proceedings.[71] The divorce proceeding would have left the wife with no property rights from the marriage.[72] In both cases, the enforceability of the

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v. Aleem, 931 A.2d 1123, 1134 (Md. Ct. Spec. App. 2007), *aff'd*, 947 A.2d 489 (Md. 2008) (holding that a marriage contract from Pakistan was enforceable in Maryland, but the Pakistani law claiming that the wife has no property rights in a divorce was contrary to Maryland public policy); Odatalla v. Odatalla, 810 A.2d 93, 96 (N.J. Ch. 2002) (upholding the marriage as valid but dividing property according to principles of equity).

[63] *See*, *e.g.*, MINN. STAT. § 518.58 (2012) (requiring a just and equitable distribution); MD. CODE ANN., FAM. LAW § 8-205 (West 2014) (requiring a fair and equitable distribution).

[64] *Compare Aleem*, 931 A.2d at 1134, *with Aghili*, 958 S.W.2d at 786–87.

[65] *Aghili*, 958 S.W.2d at 786–87. Aghili negotiated a dowry with Saadatnejadi's father and agreed to pay 10,000 Iranian gold coins if he violated the contract. *Id.* at 786. The couple received an Islamic blessing and filed a marriage license with the Mosque. *Id.* They acquired, but did not file, a license with the state because Aghili refused to file the license unless Saadatnejadi signed a prenuptial agreement. *Id.* The marriage deteriorated and Saadatnejadi filed for divorce. *Id.* The appeals court upheld the marriage despite the filing error. *Id.* at 789.

[66] *Aleem*, 931 A.2d at 1134 (refusing to enforce divorce proceeding of a valid marriage).

[67] *Aghili*, 958 S.W.2d at 788 (stating that it was clear the imam had authority to administer the Islamic blessing).

[68] *Id.* (" . . . his failure to return the completed marriage license within the time required by TENN. CODE § 36-3-303 does not undermine the validity of the marriage").

[69] *Id.* at 789 (remanding the case back to district court consistent with equitable division principles).

[70] *Id.* at 787 (citing the district court's ruling that the marriage was invalid because the couple did not file a marriage license with the state and the Islamic imam was not qualified to solemnize the marriage under Tennessee law).

[71] *Aleem*, 931 A.2d at 1127 (accepting the lower court's factual determination that the marriage was arranged and held in Pakistan, but ultimately referring to "divisible divorce").

[72] *Id.* at 1134. The court explained:

> [T]he "default" under Pakistani law is that Wife has no rights to property titled in Husband's name, while the "default" under Maryland law is that

Islamic proceedings was less important than the state's policy favoring equitable division of property upon divorce.[73] The two courts had different opinions on the validity of Islamic marriage and divorce proceedings to achieve that policy.[74]

2. The Strong Relationship Between the Chosen Law and the Transaction

The court may also refuse to apply the chosen law when it "has no *substantial relationship* to the parties or the transaction *and* there is no other *reasonable basis* for the parties' choice."[75] If the chosen law has a substantial relationship to the transaction, it is presumed that there is also a reasonable basis for the choice.[76] It is rare that parties do not have a reasonable basis for their choice of law provision.[77] Because of this, provisions are rarely deemed unenforceable by this exception.[78] The chosen law can be deemed substantially related to the parties if they are familiar with the chosen law or if the chosen law is better developed to deal with the content of the contract.[79]

> the wife has marital property rights in property titled in the husband's name. We hold that this conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy.

Id.

[73] *Aghili*, 958 S.W.2d at 785, 789 (reversing the lower court's decision to grant Aghili's motion for summary judgment for an annulment, and granting Saadatneadi's claim for divorce); *Aleem*, 931 A.2d at 1135 (holding that the lower court was correct to apply Pakistan law for determining the wife's marital property).

[74] In both cases, the wife received property through divorce. *See Aleem*, 931 A.2d at1123; *Aghili*, 958 S.W.2d at 789 (upholding the validity of the marriage and remanding for consistent proceedings).

[75] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (emphasis added). Comment g provides insight into what constitutes "reasonable" and "substantial relationship." The comment mentions that choosing a law for adventure's sake would not be reasonable, suggesting that most choices are reasonable. *Id.* § 187 cmt. g. The chosen law must have a "substantial relationship" to either the parties of the contract or the subject matter of the contract. *Id.* Finally, a choice of law may be reasonable even if it there is no substantial relationship. *Id.*

[76] *Id.* § 187 cmt. f.

[77] *Id.* (noting "[c]ontracts are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so").

[78] *See id. But cf.* Bank of New York v. Janowick, 470 F.3d 264, 270 (6th Cir. 2006) (invalidating contract that contained a New York choice of law provision, because no party to the contract conducted business in, nor resided in, New York).

[79] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f ("[W]hen contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed. For only in this way can they be sure of knowing accurately the extent of their rights and duties under the contract.").

Consul Ltd. v. Solide Enters., Inc. provides an example of how the substantial relationship exception is applied.[80] The Ninth Circuit Court of Appeals first determined the parties chose California law in their contract.[81] The next inquiry was whether California had a substantial relationship to the transaction.[82] The court held that because some property involved in the transaction was located in California and one party to the contract was domiciled in California at the time the contract was made, the transaction was substantially related to California. Therefore, the parties had a reasonable basis for choosing it.[83]

3. The Sliding Scale

Further, the public policy exception and substantial relationship exception work together to form a sliding scale.[84] The more substantial the relationship between the transaction and the chosen law, the more fundamental the policy of the forum state must be to disregard the chosen law in favor of the forum's law.[85] A recent federal case in Pennsylvania applied the sliding scale.[86] A Pennsylvania woman paid for credit repair services from a Virginia store.[87] The contract had a provision in small print choosing Virginia law for disputes arising from the contract.[88] The court determined there was a substantial relationship between the contract and the chosen law because the store was located in Virginia.[89] The court further reasoned that while it has a duty to protect consumers, it also has a duty to protect businesses.[90] The court ruled that public policy did not outweigh the substantial relationship, and therefore applied Virginia law.[91]

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[80] Consul Ltd. v. Solide Enters., Inc., 802 F.2d 1143, 1146–47 (9th Cir. 1986).

[81] *Id.* at 1146.

[82] *Id.*

[83] *Id.*

[84] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g ("The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision.").

[85] *Id.*

[86] Gay v. CreditInform, 511 F.3d 369, 390 (3d Cir. 2007) (ruling the policy to protect consumers did not outweigh the substantial relationship of Virginia law to Virginia purchase agreements).

[87] *Id.* at 374.

[88] *Id.* at 390.

[89] *Id.*

[90] *Id.* at 390 (explaining "[t]hough it certainly is true that Pennsylvania has an interest in protecting its consumers, we cannot say that Virginia has a lesser interest in protecting businesses located in it").

[91] *Id.* at 390–91 (reasoning that because Virginia law applied due to the choice of law provision, the inquiry as to whether the arbitration clause was unenforceable would analyzed under Virginia law).

Many financing institutions have creative solutions to help finance major purchases for Muslims who adhere to a strict *riba* prohibition.[92] Many of these contracts understandably direct dispute resolution to be consistent with the Islamic laws with which the contract was designed to comply.[93] The Restatement rule on choice of law provisions is clear: the chosen law should presumably govern the contract.[94] Only two narrow exceptions can overcome the general rule: when the chosen law has no substantial relationship to the transaction and no reasonable basis for selection, or when the result is contrary to fundamental public policy.[95]

III. POLITICAL FORCES AGAINST ISLAMIC-COMPLIANT FINANCING

Despite the clear jurisprudence enforcing any choice of law provision, including Islamic law, political movements have increasingly attempted to render these provisions unenforceable.[96] This section will explore a Minnesota executive agency's role in Islamic-compliant home financing, the ultimate cancellation of the program by a Minnesota governor, and a general overview of anti-Islamic legislation sweeping states across the nation.[97] Finally, this section will focus on Oklahoma's anti-Islamic laws and highlight the role of the Oklahoma courts in protecting the validity of Islamic choice of law provisions. [98] The Oklahoma and Minnesota examples are meant to show the oppressive effect of the political process on Muslims who wish to obtain financing, compared to the relative success courts have had in protecting the Muslim population's freedom to contract.

A. Minnesota's New Markets Mortgage Program

In 2005, a record-breaking 15,546 people immigrated to Minnesota.[99] Almost half of those immigrants were from African countries

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[92] *See supra* Part II.A.1 (describing Lariba and other models of Islamic-compliant financing).

[93] *See supra* text accompanying notes 40–44 (describing the Lariba process for creating contracts).

[94] *See supra* Parts II.B.1–2 (describing the overall policy validating choice of law provisions).

[95] *See supra* Parts II.B.1–2.

[96] *See infra* Parts III.A–C (explaining Minnesota's New Markets Mortgage Program's termination and legislative enactments across the country).

[97] *See infra* Part III.B (explaining the NMMP, MHFA, and Governor Pawlenty's role in cancelling the program).

[98] *See infra* Part III.C (highlighting the important aspects of the *Awad* case).

[99] Susan Brower, *Record Number of Immigrants Arrived in Minnesota in 2005*, MINN. DEP'T OF ADMIN (July 11, 2006), http://www.demography.state.mn.us/resource.html?Id=18677 (noting "[m]ore immigrants arrived in Minnesota in the year ending Sept. 30, 2005 than in any of the previous 25 years, according to the U.S. Department of

and 1,303 were from Somalia, a predominantly Muslim nation.[100] Minnesota already had one of the highest disparities of home ownership between white people and people of color in the United States.[101] Because of the Islamic prohibition of *riba*, many Muslim immigrants were not able to obtain financing for a home.[102] Because so many in the immigrant population were Muslim people who adhere to the *riba* prohibition, they had few options for home financing.[103] With such a large population lacking access to home financing, the homeownership gap could only get worse.[104] As the Emerging Markets Initiative explained, homeownership is important to a stable economy and is the central focus of achieving the American Dream.[105] Minnesota governor Tim Pawlenty created a task force specifically to deal with the homeownership issues described above.[106]

Recognizing that a lack of homeownership in the Minnesota immigrant community was an ongoing issue, Fannie Mae, the Minnesota Housing Financing Agency, and the Federal Reserve Bank of Minneapolis, created *The Emerging Markets Homeownership Initiative: A Business Plan to Increase Homeownership in Minnesota's Emerging Markets* in 2005.[107]

Homeland Security. The 15,456 arrivals placed Minnesota 17th among the states in immigration for the reporting period and accounted for 1.4 percent of the U.S. total").

[100] *Id.*

[101] *See* FANNIE MAE ET AL., THE EMERGING MARKETS HOMEOWNERSHIP INITIATIVE: A BUSINESS PLAN TO INCREASE HOMEOWNERSHIP IN MINNESOTA'S EMERGING MARKETS 72–73 (2005) *available at* http://www.mnhousing.gov/idc/groups/homes/documents/webcontent/mhfa_002552.pdf [hereinafter EMERGING MARKETS INITIATIVE] (citing 2003 American Community Survey and MHFA staff tabulations and noting the disparity of home-ownership between "White Owners" and "Owners of Color").

[102] *See id.* at 99, 53 (describing the ban of *riba* as a barrier to homeownership among the Muslim community).

[103] *See* Brower, *supra* note 99 (describing the immigrant demographics).

[104] *See* EMERGING MARKETS INITIATIVE, *supra* note 101, at 3, 53, 99 (defining the purpose of the initiative to reverse the homeownership trend and stating that a third of Minnesota immigrants were Somalian); A BUSINESS PLAN TO INCREASE HOMEOWNERSHIP IN EMERGING MARKETS: 40,000 NEW EMERGING MARKET HOMEOWNERS BY 2012, 1, *available at* http://www.mnhousing.gov/idc/groups/public/documents/webcontent/mhfa_002593.pdf [hereinafter BUSINESS PLAN] (defining the "emerging market" as the minority population and discussing the growth of the emerging market).

[105] EMERGING MARKETS INITIATIVE, *supra* note 101, at 13, 3 (explaining that the housing industry is fifteen percent of the gross domestic product (GDP); homeownership fosters small businesses; it is a contributing factor to seeking higher education; homeownership is "a central element of the 'American dream;'" and that the majority of American families have most of their assets tied to their home).

[106] *See* Jacqueline King, *Community Dividend, Homeownership Initiative Targets Minnesota's Emerging Markets*, FEDERAL RESERVE BANK OF MINNEAPOLIS (May 1, 2005), http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2370#top (describing the process of the Emerging Markets Initiative's creation).

[107] EMERGING MARKETS INITIATIVE, *supra* note 101, at *title page* ("Presented by: Fannie Mae, The Federal Reserve Bank of Minneapolis, Minnesota Housing Finance Agency . . . Accepted by Tim Pawlenty, Governor June 30, 2005"). The Emerging Markets Initiative was created in tandem with the Business Plan which stated that "an aggressive and sustained

The Initiative was a business plan set up to increase home ownership among low-income immigrant and minority populations in Minnesota.[108] The report included a list of barriers minority populations face when trying to purchase homes.[109] One barrier was "cultural factors, preferences and immigration."[110] The report specifically mentioned the Islamic belief against paying interest on late payments as one cultural factor.[111] The plan contained an outreach phase, which included developing "culturally-sensitive" plans and products.[112] The final "Innovate Structural Support" phase included developing financing products that were suited for the immigrant populations identified in the Initiative.[113] Minnesota Governor Tim Pawlenty accepted the proposal on June 30, 2005.[114]

1. The African Development Center and New Markets Mortgage Program

Mulki Hussein of the African Development Center (ADC) played a role in creating the overall Emerging Markets Initiative.[115] The entire ADC played an important role in the creation and business planning of this Initiative.[116] The ADC was largely involved in the New Markets Mortgage Program (NMMP), a specific financing product from the Emerging Markets Initiative that offered interest-free loans. The NMMP was initially created for

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effort to implement the strategies" was necessary to increase homeownership. *See* BUSINESS PLAN, *supra* note 104, at 3.

[108] *See* EMERGING MARKETS INITIATIVE, *supra* note 101, at 1–4; The report notes the history of the project:

> In spring 2004, a variety of business and community groups convened under the Emerging Markets Homeownership Initiative (EMHI). Its primary goal was to create a business plan whereby the homeownership industry and community groups could identify and implement objectives that would significantly increase the homeownership rates among Minnesota's emerging markets.

Id. at 1.

[109] *Id.* at 7; The barriers include: "1. Wealth and down payment 2. Credit and lending practices 3. Cultural factors, preferences and immigration 4. Discrimination 5. Information, marketing and outreach 6. Homebuyer counseling and financial education." *Id.*

[110] *Id.*

[111] *See id.* at 99 (noting that principles of Islamic faith that prohibit charging an interest often cause Muslims to avoid seeking to purchase a house).

[112] *See id.* at 8 (explaining the "Expand and Tailor Outreach" phase of the business plan).

[113] *Id.* at 8. The initiative listed four strategies for improving structural support including expanding access to entry cost assistance, developing products that are emerging market friendly, acknowledging problems of the housing supply, and acknowledging the issue of racism. *Id.*

[114] EMERGING MARKETS INITIATIVE, *supra* note 101, at *title page*.

[115] *Id.* at *acknowledgements page* (listing people who "provided noteworthy contributions to the business planning process").

[116] *Id.* at 4 (listing ADC as an "Advisory Group" that was "instrumental" in the Initiative).

Muslims but was open to all people with a low-to-moderate income.[117] The ADC began developing the NMMP in early 2006, after the approval of the Emerging Markets Initiative.[118] The NMMP was finally a complete product in late 2008, with the first participants preapproved in December.[119]

The Minnesota Housing Finance Agency (MHFA) played a limited role in NMMP.[120] The ADC worked with potential buyers who were financially eligible for the NMMP to get their credit to the point where they could afford a home.[121] The ADC required participants to attend homebuyer workshops, meet with economic counselors, and obtain preapproval before looking for a home.[122] Chicago-based Devon Bank was the underwriter for the home loans.[123] MHFA's only involvement before Devon Bank approved the loan was to set a price limit for the home according to the participant's credit rating.[124] MHFA purchased mortgages from ADC and Devon Bank using the same fund as the other programs from the Emerging Markets Initiative.[125] Devon Bank and the other actors involved in the loan maintained the process was very similar to a standard loan.[126]

2. Initial Growth and Ultimate Termination

The NMMP, though only in existence for a short time, was relatively successful and garnered some support. Three families made it to the final

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[117] *See* MINN. HOUS. FIN. AGENCY, NEW MARKETS MORTGAGE PROGRAM PROCEDURAL MANUAL 2, (Sept. 2008), *available at* http://www.mnhousing.gov/get/MHFA_007623 [hereinafter NMMP MANUAL]; Hussein Samatar, *Setting the Record Straight on the New Markets Mortgage Program (NMMP)*, AFRICAN DEV. CTR. OF MINN., http://www.adcminnesota.org/page/media-coverage/setting-record-straight-new-markets-mortgage-program-nmmp (last visited Oct. 6, 2013) (explaining that the initial purpose was to provide financing options for African immigrants, but that European-Americans made up half of the clientele).

[118] Paula Woessner, *Community Dividend, New Markets Mortgage Program Broadens Homeownership Opportunities in Minnesota*, FED. RESERVE BANK OF MINNEAPOLIS (July 1, 2009), http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4228 (describing the formation of the NMMP),

[119] *Id.*

[120] *See* Samatar, *supra* note 117 (noting that because MHFA was only exposed to risk after the mortgage was already funded by Devon bank, MHFA's risk and cost was "very limited").

[121] *Id.* (explaining the ADC's role in training and counseling of first time home buyers).

[122] Woessner, *supra* note 118 (describing how the process worked).

[123] Samatar, *supra* note 117.

[124] *Id.*; Woessner, *supra* note 118.

[125] *See* Samatar, *supra* note 117; NMMP MANUAL, *supra* note 117, at 28 ("The mortgage must be originated and closed in, or assigned to, the name of the Seller that is a party to the Participation Agreement and that has received an Individual Commitment of Funds from Minnesota Housing."); Woessner, *supra* note 118 (stating that there is $15 million set aside for this program as part of the overall fund to support first time home buyers).

[126] Woessner, *supra* note 118.

stage where MHFA ultimately purchased the mortgage;[127] though, many other families worked with ADC to become eligible for a loan.[128] The Emerging Markets Initiative garnered notoriety from the George W. Bush administration in August 2007, before the Islamic-compliant interest-free loans had gained attention.[129] The same governor, Tim Pawlenty, who accepted the proposal of the Emerging Markets Initiative also created, by an executive order, *The Governor's Council On Faith-Based And Community Initiatives* on October 7, 2005.[130] Pawlenty's Chief of Staff said, "There is no Governor more supportive of faith and service."[131] The Chief of Staff also stated that the purpose of the Initiative was to connect the Minnesota state government more closely to faith communities within the state by providing support for them.[132]Further, corporate counsel for Devon Bank noted that Devon Bank had never lost money on any Islamic-compliant loans during the five and a half years it had offered the loans.[133] In February 2009, Devon Bank's corporate counsel projected the Islamic-compliant loan market to grow, but was also weary of the potential ill-effects of the housing slump.[134]

The Pawlenty Administration unexpectedly cancelled the program in 2011.[135] The MHFA and the ADC blamed the cancellation on the lack of enrollment and slow program growth.[136] The ADC attributed the low

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[127] Samatar, *supra* note 120; Bob Collins, *Walking Back Pawlenty's Islamic Home Ownership Program*, MINN. PUBLIC RADIO (Mar. 25, 2011), http://blogs.mprnews.org/newscut/2011/03/walking_back_pawlentys_islamic/ (quoting Megan Ryan, a spokesperson for the Minnesota Housing Finance Agency, "The program had only three loans.").

[128] *See* Samatar, *supra* note 117 (explaining that twenty families were interested and the pipeline to more families was growing); Collins, *supra* note 127 (continuing Megan Ryan's quote, "There was a lot of interest, but many of the borrowers weren't credit ready.").

[129] Adam Sorenson, *Is There a Double Standard in Tim Pawlenty's Disavowal of Sharia-Compliant Mortgages?*, TIME (Mar. 25, 2011), swampland.time.com/2011/03/25/is-there-a-double-standard-in-tim-pawlentys-disavowal-of-sharia-compliant-mortgages/#ixzz2gysIZBrc; *Fact Sheet: Compassion In Action: White House Minnesota Conference on Faith-Based and Community Initiatives*, http://georgewbush-whitehouse.archives.gov/government/ fbci/FactSheet-MinnesotaFBCI.pdf (praising former Governor Tim Pawlenty for having "Led The Charge For Minnesota Faith-Based And Community Initiatives").

[130] *Id.*

[131] *Id.* (quoting Chief of Staff Matt Kramer).

[132] *Id.*

[133] Jessica Mador, *New Islamic Mortgages Now Available in Minnesota*, MINN. PUBLIC RADIO (Mar. 25, 2011), http://minnesota.publicradio.org/display/web/2009/02/28/islamicfinancing.

[134] *Id.* (admitting the recession had the potential to adversely affect the Islamic-compliant financing agreements).

[135] Collins, *supra* note 127; *see also* Ben Smith, *Pawlenty Shut Down Islam-Friendly Mortgage Program*, POLITICO (Mar. 25, 2011), politico.com/blogs/bensmith/0311/Pawlenty_shut_down_Islamfriendly_mortgage_program.html (reporting that the Minnesota program designed to offer Islamic-compliant mortgages was cancelled).

[136] Collins, *supra* note 127 (referencing Megan Ryan, a spokesperson for the MHFA).

numbers to the amount of time needed to get low-income people loan-eligible, Devon Bank's limited exposure to low-income loans, Minnesota Public Radio's inconsistent explanation of the program in a 2009 article, and the nationwide home-mortgage meltdown during 2008–09.[137] However, a spokesperson for the Pawlenty Administration issued a statement saying:

> This program was independently set up by the Minnesota state housing agency and did not make any mention [of] Sharia Law on its face, but was later described as accommodating it. As soon as Gov. Pawlenty became aware of the issue, he personally ordered it shut it down. Fortunately, only about three people actually used the program before it was terminated at the Governor's direction. The United States should be governed by the U.S. Constitution, not religious laws.[138]

Pawlenty was campaigning for President of United States at this time and received criticism about this program from conservative commentators.[139] Other Republican Presidential campaigners took a stance against Islamic law, applying more pressure on Pawlenty to align himself with the ideals of the conservative base of his party.[140] The program was cancelled while over twenty families were in the process of improving their credit to Devon Bank's acceptable rate.[141] Other programs originating from the June 30, 2005

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[137] Samatar, *supra* note 117 (listing reasons in response to criticism of the program); Mador, *supra* note 133 (describing the process of the interest-free loans).

[138] Smith, *supra* note 135 (quoting Alex Conant, Pawlenty spokseman); *see also* Collins, *supra* note 127 (quoting Alex Conant, Pawlenty spokseman).

[139] *See* Adam Swerner, *Morris: Pawlenty Knew About Sharia Mortgage Program*, PROSPECT (Apr. 29, 2011) http://prospect.org/article/morris-pawlenty-knew-about-sharia-mortgage-program (quoting Dick Morris's book that encouraged readers to share their outrage over the Islamic-compliant mortgages with Pawlenty directly and also quoting Morris from a column: "He claims he didn't know about it. Didn't know? There were protests at every Agency meeting. Eileen and I wrote about it in Catastrophe which sold 300,000 copies! If he didn't know, he's a bad Governor. If he knew, he'd be a bad president."); *See also* DICK MORRIS, CATASTROPHE 278–79 (2009).

[140] *See* THE FAMILY LEADER, THE MARRIAGE VOW: A DECLARATION OF DEPENDENCE ON MARRIAGE AND FAMILY, *available at* http://www.thefamilyleader.com/wp-content/uploads/2011/07/themarriagevow.final_.7.7.111.pdf ("I vow to do so through my: . . . Rejection of Sharia Islam and all other forms of anti-woman, anti-human rights forms of totalitarian control . . . "); William Petroski, *Update: Bachmann Is First to Sign Family Leader's Pro-Marriage Pledge*, DES MOINES REG. (July 7, 2011), caucuses.desmoinesregister .com/2011/07/07/update-bachmann-is-first-to-sign-family-leaders-pro-marriage-pledge/ (reporting that Michele Bachman, fellow Minnesota political leader, was the first to sign this pledge).

[141] Samatar, *supra* note 117 (claiming that ADC was in contact with an additional twenty families).

initiative targeting immigrant and minority populations are still in effect today.[142]

B. Nationwide Legislation Strictly Prohibiting **Sharia** *Law*

Legislation intended to invalidate contract provisions choosing Islamic law have emerged at the state level across the country.[143] There have been ninety-one pieces of legislation proposed in thirty-two different states banning *Sharia* or foreign law in that state's court.[144] Six states have passed laws, either by legislation or constitutional amendment.[145] Some state proposals expressly prohibit "*Sharia*" or "Islamic" law, whereas other proposals are a general prohibition of any law outside the United States.[146]

1. The Model American Laws for American Courts Bill Limits Enforcement of **Sharia** *Law in State Courts*

Some of the legislation prohibiting Sharia law in state courts is based off a model bill drafted by American Public Policy Alliance (APPA) titled the American Laws for American Courts (ALAC).[147] The APPA is a

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[142] *See* MINN. HOUS. FIN. AGENCY, ANNUAL REPORT AND PROGRAM ASSESSMENT 2012 12–13 (2012) *available at* http://www.mnhousing.gov/wcs/Satellite?c=Page&cid=1358904870907&pagename=External%2FPage%2FEXTStandardLayout (expand the list labeled "Previous Housing Assistance in Minnesota Reports"; then follow "Annual Report and Program Assessment for 2012) (stating that almost 282 million dollars was allocated to "Homebuyer Programs," including "homeownership assistance fund" and "Minnesota Mortgage Program"); MINN. HOUS. FIN. AGENCY, LEGISLATIVE SUMMARY 2013 4 http://www.mnhousing.gov/wcs/Satellite?c=Page&cid=1358904866274&pagename=External%2FPage%2FEXTStandardLayout (follow hyperlink "2013 Legislative Updates").

[143] *See generally* PEW RESEARCH CTR., STATE LEGISLATION RESTRICTING JUDICIAL CONSIDERATION OF FOREIGN OR RELIGIOUS LAW, 2010–2012 (Aug. 3, 2013), *available at* http://www.pewforum.org/files/2013/04/State-legislation-restricting-foreign-or-religious-law.pdf (providing an extensive list of proposed state legislation across the United States).

[144] *Id*. at 1 (adding the legislation described on the list).

[145] *State Legislation Restricting Use of Foreign or Religious Law*, PEW FORUM (Aug. 8, 2013), http://features.pewforum.org/sharia-law-map/. Note that this map leaves out the fact that Idaho passed a resolution asking Congress to ban international law in state courts. H.R. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010). Though not a law, this would make the seventh state legislature to pass something addressing international law. *See* PEW RESEARCH CTR., *supra* note 143, at 8.

[146] *See* KAN. STAT. ANN. § 60-5102 to -5105 (West 2013); LA. REV. STAT. ANN. § 9:6001 (2013); H.R. 597, Reg. Sess. (Ala. 2011); H.R.J. Res. 14, 84th Gen. Assemb. (Iowa 2011); H.R. 301, 126th Leg. (Miss. 2011); H.R.J. Res. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); S.J. Res. 18, 50th Leg. Sess., 1st Sess. (N.M. 2011); H.R.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 613 (2013).

[147] *See Legislation > American Laws for American Courts Model Act,* AM. PUBLIC POL'Y ALLIANCE, http://publicpolicyalliance.org/legislation/model-alac-bill/ (last visited Mar. 25, 2014) [hereinafter *Model Act*] (declaring "[a]ny court, arbitration, tribunal, or

nonpartisan advocacy group that specializes in anti-Islamic legislation.[148] The APPA has credited itself for pushing legislation across the country to counter what it considers *Sharia* infiltration into state courts.[149] The APPA justified the need for this type of legislation by referring to an article published by the Center for Security Policy.[150] The article was part of the Sharia Awareness Project, a larger campaign initiated by the Center for Security Policy to raise awareness and counter Islamic law infiltration into the United States.[151] A second instrument in the Sharia Awareness Project was a website devoted to tracking Islamic-compliant financing agreements.[152] The website cited the report*, Shariah: The Threat To*

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administrative agency ruling or decision shall violate the public policy of this State and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any law [that conflicts with grants of fundamental rights under U.S. or State Constitutions]").

[148] *About the American Public Policy Alliance*, AM. PUBLIC POL'Y ALLIANCE, http://publicpolicyalliance.org/about/ (last visited Mar. 25, 2014) (referring explicitly to *Sharia* legal systems infiltrating the United States as a reason for this legislation); *See Model Act, supra* note 147.

[149] *See About the American Public Police Alliance*, *supra* note 148; *see also Civil Rights > Islamist Organizations in America with the Stated Mission of Imposing Shariah on Muslim American Families,* AM. PUBLIC POL'Y ALLIANCE, http://publicpolicyalliance.org/civil-rights/pro-shariah-law-in-u-s/ (last visited Mar. 25, 2014). One example of *Sharia* infiltration cited in the report was the Minnesota Court of Appeals case, Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. App. 2004). However, the court decision struck a balance, declining to make a determination based on Islamic law, but upholding the Islamic arbitration award by which both parties agreed to be bound. *Id.* at 573.

[150] *See Issues > Shariah Law*, AM. PUBLIC POL'Y ALLIANCE, http://publicpolicyalliance.org/issues-2/shariah-law/ (last visited Mar. 25, 2014) (referencing a study on *Sharia* law in American courts conducted by the Center for Security Policy).

[151] *See The Shariah Awareness Project,* SUPPORT SECURE FREEDOM http://supportsecurefreedom.org/shariahawarenessproject (last visited Mar. 25, 2014). The project declares:

> Under successive administrations of both parties, America's civilian and military elites have too-often focused single-mindedly on the kinetic terror tactics deployed by al-Qaeda and its affiliates, but ignored the overarching supremacist ideology of shariah that animates them. It is past time for Americans to awaken to the danger posed by shariah and its adherents. We can no longer ignore the inroads made by these forces into Western civilization's European flank. And we certainly cannot delude ourselves into believing that our homeland will remain immune from their predations as long as we persist in the same sorts of appeasement that have brought our friends and allies across the Atlantic to their present, parlous state.

Id.

[152] *Id.* (directing viewers to www.shariahfinancewatch.org to track *Sharia*-compliant financing agreements); SHARIAH FINANCE WATCH, www.shariahfinancewatch.org (last visited Mar. 25, 2014).

America, as proof of the dangers of Islamic-compliant financing.[153] The Center for Security Policy's corporate attorney David Yerushalmi, was a primary contributor to the report.[154] As another part of the Sharia Awareness Project, Yerushalmi also coauthored an article arguing that there is a strong correlation between those who adhere to Islamic law and violence.[155] He argued this showed that Islam is a violent religion.[156]

Outside of his work for the Sharia Awareness Project, Yerushalmi wrote the legislation for which APPA advocated, the model ALAC bill.[157] Yerushalmi claimed his interest in Islam was fueled by the September 11, 2001, attacks on the World Trade Center in New York City.[158] He is convinced that his research proves that Islamic militants are not the exception, but are simply average followers of a religion that calls for world domination.[159] In his worldview, Islamic takeover of United States courts is a very real threat, which is part of the reason he began drafting the model ALAC bill.[160]

Yerushalmi, together with APPA, continued to push the model ALAC bill as the starting point for anti-Islamic legislation across the

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[153] *About Shariah Finance,* SHARIAH FIN. WATCH, http://www.shariahfinance watch.org/blog/about-shariah-finance/ (last visited Mar. 25, 2014) (following "About Shariah Finance," directing readers to the report to learn more about *Sharia*-compliant financing).

[154] WILLIAM BOYKIN ET AL., SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITIVE ANALYSIS (REPORT OF TEAM B II) (2010) (listing Yerushalmi, General Counsel to Center for Security Policy, as an Associate to the report).

[155] *See* Mordechai Kedar & David Yerushalmi, *Sharia Adherence Mosque Survey: Correlations between Sharia Adherence and Violent Dogma in U.S. Mosques*, 2011 PERSPECTIVES ON TERRORISM VOL. 5, NO. 5–6 (2011), http://www.terrorismanalysts.com/ pt/index.php/pot/article/view/sharia-adherence-mosque-survey/html (explaining that Mosques are a place where young Muslims read the violent literature of the Qur'an and learn to act on the violence in the literature).

[156] *See id.* (concluding there is violence in Islamic literature; Islam promotes violence; Islam promotes *jihad*; and that this is higher the more "Sharia adherent" that particular mosque is).

[157] Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 21, 2011), www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0 (describing Yerushalmi's motivations for drafting the anti-Sharia law).

[158] *See id.* (stating that he was living in Ma'ale Adumim at the time, which is a Jewish settlement in the West Bank).

[159] *See id.*

[160] *Id.* (believing *Sharia* law was as big a threat to the United States as the U.S.S.R. was during the Cold War, he began work on many projects aimed at pointing out the threat of *Sharia* law). Yerushalmi faced scrutiny after he made what some dubbed arguably racist comments in a 2006 article and also for his representation of Pamela Geller, who led a fight against a proposed Islamic community center near Ground Zero. *See id.*; *see generally* David Yerushalmi, *On Race: A Tentative Discussion*, THE MCADAM REPORT, No. 585, at 7 (May 12, 2006), *available at* http://www.mcadamreport.org/The%20McAdam%20Report %28585%29-05-12-06.pdf

country.[161] The model bill bans choice of law provisions if the chosen law would not grant the same rights that would be required under the United States or a particular state's constitution.[162] The bill provides a nonexclusive list of those rights.[163] The bill specifically exempts Native American tribunals, businesses and partnerships, as well as religious organizations' decisions on termination and selection of in-house leaders.[164] The model statute makes no reference to Islamic or *Sharia* law[165]

*2. States' Statutory Responses to Anti-*Sharia *Law*

Arizona is one of the states that has adopted a law incorporating parts of the model ALAC bill.[166] Arizona's adoption was not the first attempt by the state's legislatures to restrict Islamic choice of law provisions in state

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[161] Elliot, *supra* note 157; PEW RESEARCH CTR., *supra* note 143 (containing a list of states that enacted legislation based on ALAC language); *About the American Public Policy Alliance*, *supra* note 148 (stating that ALAC language has been used in Tennessee, Louisiana, Arizona, and Kansas and is still being proposed in many other states).

[162] *Model Act*, *supra* note 147. The proposed model law provides:

> A contract or contractual provision (if severable) which provides for the choice of a law, legal code or system to govern some or all of the disputes between the parties adjudicated by a court of law or by an arbitration panel arising from the contract mutually agreed upon shall violate the public policy of this State and be void and unenforceable if the law, legal code or system chosen includes or incorporates any substantive or procedural law, as applied to the dispute at issue, that would not grant the parties the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state.

Id.

[163] *Id.* ("[I]ncluding but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state").

[164] *Id.* ("For the purposes of this act, foreign law shall not mean, nor shall it include, any laws of the Native American tribes in this state . . . Without prejudice to any legal right, this act shall not apply to a corporation, partnership, limited liability company, business association, or other legal entity that contracts to subject itself to foreign law in a jurisdiction other than this state or the United States . . . No court shall interpret this Act to require or authorize any court to adjudicate, or prohibit any religious organization from adjudicating, ecclesiastical matters, including, but not limited to, the election, appointment, calling, discipline, dismissal, removal or excommunication of a member, officer, official, priest, nun, monk, pastor, rabbi, imam or member of the clergy").

[165] *Id.* (defining foreign law as any law outside the United States).

[166] *See* PEW RESEARCH CTR., *supra* note 143, at 4 (noting that this statute borrowed language from the model ALAC bill); *About the American Public Policy Alliance*, *supra* note 148 (noting that the model ALAC bill has been used by Tennessee, Louisiana, and Arizona) (emphasis added); ARIZ. REV. STAT. ANN. § 12-3101 (2013) (defining "foreign law" as anything other than the state or US constitution); ARIZ. REV. STAT. ANN. § 12-3102 (2013) (establishing the scope as applying to actual conflicts of law and exempting businesses); ARIZ. REV. STAT. ANN. § 12-3103 (banning enforcement of foreign law).

courts.[167] The Arizona legislature attempted in January 2011 to restrict Islamic choice of law provisions, but the bills died in committee.[168]

Undeterred by the bills' initial defeat, the Arizona state legislature again attempted to pass legislation in 2012 aimed at restricting Islamic choice of law provisions in state courts.[169] Again, the proposals were defeated.[170] A bill was introduced in February 2012, passed the House of Representatives and Senate in April 2012 and was signed into law shortly thereafter.[171] Like the model ALAC bill, Arizona's statute exempts businesses.[172] However, it does not list which constitutional rights may not be infringed upon by the chosen foreign law.[173] Further, the statute is not limited in application to Arizona courts, but also applies to administrative agencies or any "enforcement authority."[174]

Similarly, South Dakota's state legislature exhausted many avenues in an attempt to restrict Islamic law from its courts.[175] South Dakota introduced a constitutional amendment that would prohibit courts from considering international law, the law of a foreign country, or the rules of a religious body.[176] When that failed, the South Dakota Senate attempted to pass a bill largely mirroring the model ALAC bill, aimed at restricting the application of foreign law in courts and arbitration panels.[177] That bill failed as well.[178] In 2012, South Dakota introduced a similar bill, but with greater

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[167] PEW RESEARCH CTR., *supra* note 143, at 4 (listing previous proposals in Arizona including H.B. 2379 and S.B. 1026 from 2010, S.C.R. 2010 and H.C.R. 3022 in 2011; and H.B. 2582 in 2001).

[168] H.B. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); S.B. 1026, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (listing the first two attempts that tried to ban courts from considering "religious sectarian law," which it defined to include "sharia law, canon law, halacha and karma," or anything else not of the "Anglo-American legal tradition and principles on which the United States was founded"); PEW RESEARCH CTR., *supra* note 143, at 4 (noting the bills died in committee).

[169] S. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.R. Res. 2033, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.R. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[170] PEW RESEARCH CTR., *supra* note 143, at 4 (noting the bills died in committee).

[171] *Id.* (explaining the bill was signed into law on April 12, 2011).

[172] ARIZ. REV. STAT. ANN. §§ 12-3101 to -3103.

[173] *See id.* (banning any law that would offend the constitutional rights of a state citizen but not defining which rights).

[174] ARIZ. REV. STAT. ANN. § 12-3103 ("[A]dministrative agency or other adjudicative, mediation or enforcement authority shall not enforce . . . ").

[175] PEW RESEARCH CTR., *supra* note 143, at 27 (listing multiple attempts to pass legislation).

[176] H.R.J. Res. 1004, 86th Leg. (S.D. 2011) (banning foreign law or any religious code).

[177] S.B. 201, 86th Leg. (S.D. 2011) (making unenforceable any court or arbitration resolution that would not grant the parties the same "fundamental liberties, rights, and privileges granted under the constitutions of the United States and the State of South Dakota").

[178] PEW RESEARCH CTR., *supra* note 143, at 27 (noting that the bill died in committee).

specificity and exceptions for businesses and Native American tribunals.[179] This bill also failed.[180] However, South Dakota was finally able to pass a bill restricting courts, administrative agencies, and governmental agencies from enforcing any "religious code."[181]

3. The Oklahoma Example: The "Save Our State" Amendment

Neither the South Dakota nor the Arizona bills make a specific reference to *Sharia* or Islamic law.[182] Oklahoma, on the other hand, passed a facially anti-Islamic law through a constitutional amendment voted on by its citizens.[183] Named the "Save Our State" amendment, it allowed Oklahoma courts to consider laws from other states but banned courts from considering Islamic law.[184] After a revision by the attorney general adding a definition of *Sharia* law, the proposal was left for the Oklahoma voters to decide its fate.[185] It passed with seventy percent of the popular vote.[186]

The amendment was challenged in the *Awad* case heard in Oklahoma state courts before it could be officially certified.[187] The court heard the plaintiff's claim and concluded the amendment did not allow him to practice Islam.[188] The court also agreed that the plaintiff's will would not be able to be probated under the "Save Our State" amendment because of the references to Islamic law.[189] The court found these injuries to be sufficient to pass the injury-in-fact analysis and a heightened scrutiny looking to the

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[179] *See id.*; *compare* S.D. S.B. 201, *with* S.B. 136, 87th Leg. Sess. (S.D. 2012) ("For the purposes of this Act, a foreign law, legal code, or system is any foreign law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including international organizations and tribunals, and applied by that jurisdiction's courts, administrative bodies, or other formal or informal tribunals. For the purposes of this Act, the term, foreign law, does not include any tribal laws of the Native American tribes in this state.").

[180] PEW RESEARCH CTR., *supra* note 143, at 27 (noting that the bill died in committee).

[181] S.D. CODIFIED LAWS § 19-8-7 (2013).

[182] *See supra* III.B.2 (discussing facially neutral laws aimed at limiting Islamic law in state courts).

[183] Save Our State Amendment, OKLA. CONST. art. VII § 1 (West, Westlaw through Nov. 2013 amendments); Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012) (explaining the operation of the Oklahoma amendment).

[184] OKLA. CONST. art. VII § 1 (West, Westlaw through Nov. 2013 amendments).

[185] *Awad*, 670 F.3d at 1118 (stating that the Oklahoma Attorney General revised the ballot to add a definition of *Sharia* law as law that includes teachings from Muhammad and the text of the Qur'an).

[186] *Id.*

[187] *See id.*

[188] *See id.* at 1123 (concluding that the Save Our State amendment was an injury-in-fact because it prevented him from practicing his religion by making his will unenforceable).

[189] *Id.* (finding that the Save Our State amendment would disfavor Islam relative to other religions, rendering Awad's will unenforceable).

merits of the case and probability of success.[190] Finally, the court determined that his right to contract under religious law outweighed the public interest in preventing him from doing so.[191]

The *Awad* case was more procedural than substantive, only affirming the lower court's decision to grant a preliminary injunction until the case could be decided on the merits.[192] However, the district court later ruled in favor of Awad's motion for summary judgment for permanent injunction.[193]

In summation, many states have enacted laws with the purpose of preventing Islamic law from deciding disputes in state courts.[194] These bills are advocated for and supported by special interest groups aimed at raising awareness of the dangers of Islam.[195] After the legislative process, some bills have been enacted as facially neutral, some specifically target Islamic law, and others have vague language targeting religious codes.[196] Finally, the United States Court of Appeals has ruled strongly, though on procedural grounds, against the more specific version of the anti-Islam legislation.[197] This means that there are widely divergent approaches across the United States regarding the enforceability of Islamic-compliant finance agreements. The wide array of possibilities leaves the contracting parties of an Islamic-compliant financing agreement uncertain of the validity of the choice of law provision it contains. Therefore, the validity of the contract as it was intended to be enforced is also uncertain.

IV. ANALYSIS

Islamic choice of law provisions need to be enforced for two major reasons: to encourage economic activity and to promote individual liberties.[198] Islamic-compliant financing has a vast economic effect in

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[190] *Id.* at 1124, 1130 (finding that Awad's injuries traced to the constitutional amendment and that Awad made a showing that he would succeed on the merits of his claim).

[191] *See Awad*, 670 F.3d at 1131–32 (ruling that the Oklahoma voters' interests do not outweigh Awad's interest in practicing his religion because an unconstitutional law cannot outweigh an individual's constitutional right).

[192] *Id.* at 1133 (ruling that Awad had standing and that the lower court correctly granted the preliminary injunction).

[193] Awad v. Ziriax, No. CIV-10-1186-M, 2013 WL 4441476 (W.D. Okla. 2013).

[194] *See supra* Parts III.B.1–3 (arguing that even if the statute is quiet on Islamic law, the purpose behind it is clear from the history).

[195] *See supra* Part III.B.1 (naming David Yerushalmi, APPA, and the Sharia Awareness Project).

[196] *See supra* Parts III.B.1–3 (discussing only an example from each category).

[197] *See supra* note 183 and accompanying text (describing the procedural grounds on which the court made its decision).

[198] *See supra* note 101 and accompanying text (introducing the Emerging Markets Initiative as a business plan); *supra* note 190 and accompanying text (citing the *Awad* court's decision that a state limitation on contracting in Islamic law presents an injury-in-fact).

Minnesota.[199] The evidence of economic effect is in favor of promoting Islamic-compliant financing options.[200] Legislation banning enforcement of Islamic law in state courts prevents individuals from practicing their religion.[201] The proposed and passed prohibitions of Islamic law in state courts therefore hinder economic progress and infringe upon individual liberties.

A. Failure to Enforce Islamic Law Provisions Hinders the Economy

Much of the proposed legislation attempts to address the economic concerns by exempting businesses from the Islamic law ban.[202] The operative effect is that businesses are allowed to contract in foreign or Islamic law, but individuals are barred from doing so.[203] This exception is inadequate because it undermines the purpose of the law and unfairly favors high-income earners over low-income earners.[204] Further, legislation based off the model ALAC bill prohibits state involvement.[205] Even with the business exception, express prohibition of state involvement removes low-income Muslim families from the housing market.[206] This is bad for the economy because homeownership represents a significant part of the United States gross domestic product, is linked to forming small businesses, and is often a family's principal asset.[207] Therefore, a state should increase avenues of homeownership instead of raising barriers to homeownership.

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[199] *See supra* text accompanying note 105 (describing the economic effect of homeownership).

[200] *See supra* note 105 and accompanying text (explaining that homeownership is good for starting small businesses, contributes to GDP, and promotes higher education).

[201] *See supra* note 188 and accompanying text (citing a Tenth Circuit ruling that the Oklahoman ban on Islamic law in Oklahoma courts would infringe on Awad's right to freedom of religion and would prevent him from executing his last will as intended).

[202] *See supra* note 172 and accompanying text (mentioning the business exception).

[203] *See supra* text accompanying note 179 (explaining that people are banned from contracting in Islamic law because of the legislation, but businesses are exempt from the ban).

[204] *See supra* text accompanying note 157 (explaining that the purpose of the model ALAC bill was to stop *Sharia*-infiltration into state courts).

[205] *See supra* note 174 and accompanying text (citing an Arizona law which prohibits administrative agency involvement).

[206] *See supra* note 108 and accompanying text (describing the Emerging Markets Initiative's commitment to low-income families).

[207] *See supra* note 105 and accompanying text (listing the economic benefits of homeownership).

1. The Business Exception Does Not Adequately Promote Economic Policies Because It Does Not Allow Low-Income Individuals to Enforce Islamic-Compliant Financing

First, the business exception is ambiguous as to the enforceability of Islamic-compliant financing contracts.[208] If the purpose is to keep Islamic law out of state courts, then enforcing Islamic law in business transactions undermines the purpose of the entire legislation.[209] The technical nature of the process for Islamic-compliant financing agreements often involves LLCs and banks.[210] According to a rigid textual construction, Islamic-compliant financing agreements should fit into the business exception.[211] However, the purpose of the anti-Islamic legislation is to prevent the enforcement of Islamic law, including financing agreements.[212] The legislative purpose against this enforcement still leaves the financing agreements open to attack.[213] If businesses routinely enforce Islamic law in state courts, the anti-Islamic laws no longer have any real meaning.[214] The legislation then only bars individuals from enforcing their own transactions in Islamic law.[215] The distinction between a business transacting in Islamic law and an individual transacting in Islamic law is artificial—either way Islamic law is enforced in a state court.[216] Thus, the business exception still does not clearly address the enforceability of Islamic-compliant financing agreements.

Second, the business exception is bad for the economy because it only favors a few and prevents a majority of the population from accessing the housing market.[217] Not only does the technical nature of Islamic-compliant financing involve businesses, but it also involves complicated

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[208] *See supra* note 164 and accompanying text (introducing the business exception through the model ALAC bill).

[209] *See supra* text accompanying note 149 (explaining that the purpose of the Model ALAC bill was to keep Islamic law out of state courts).

[210] *See supra* text accompanying note 36 (describing Islamic-compliant financing options that involve the use of a limited liability company).

[211] *See supra* note 164 and accompanying text (citing the model ALAC bill's exception, which allows limited liability companies to contract in foreign law).

[212] *See supra* text accompanying note 152 (citing the website that is part of the Sharia Awareness Project and devoted to tracking Islamic-compliant financing).

[213] *See supra* text accompanying note 149 (explaining that the purpose of the model ALAC bill was to counter *Sharia* infiltration into state courts).

[214] *See supra* note 150 and accompanying text (citing a study that lists cases that involved Islamic law in support of legislation that would prevent the enforceability Islamic law in the future).

[215] *See supra* note 164 and accompanying text (citing the model ALAC bill that allows business entities to contract in foreign law as a narrow exception to the general bar against Islamic law).

[216] *See supra* text accompanying note 164 (explaining that the law would not ban businesses from contracting in Islamic law).

[217] *See supra* text accompanying note 107 (explaining that the Emerging Markets Initiative was created to aid low income and immigrant populations).

language and difficult economic concepts.[218] The level of technicality makes these agreements difficult for individuals who are not financially savvy.[219] High-income earning Muslims were not having trouble finding Islamic-compliant financing even before the Emerging Markets Initiative.[220] Fannie Mae and Freddie Mac drove an increase in Islamic-financing agreements, but high-income earners were already getting this type of loan.[221] Devon Bank was already issuing loans to high-income earners and was optimistic about expanding to low-income earners through the ADC.[222] The Emerging Markets Initiative was specifically tailored for low-income families.[223] Low-income earners need more than the existence of the loans; they need access, availability, and assistance to get to a point where they are financially eligible.[224] The business exception does nothing to address that need.[225]

2. Banning State Involvement in Islamic-Compliant Contracts Blocks Low-Income Muslims from Buying Homes and Is Therefore Bad for the Economy

First, laws that explicitly ban state agency involvement in Islamic-compliant contracts produce negative economic effects because low-income Muslim families often need government assistance to afford a home.[226] Despite the existence of Islamic-compliant financing, many low-income

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[218] *See supra* text accompanying note 48 (highlighting some of the technical language and concepts involved in Islamic-compliant financing agreements).

[219] *See supra* text accompanying note 48 (explaining that the language is difficult to understand).

[220] *See supra* text accompanying note 137 (explaining that the NMMP was the first time Devon Bank had been involved with income loans); *see supra* text accompanying note 133 (stating that Devon Bank had never lost money on Islamic-compliant loans that were given to high-income earners).

[221] *See supra* note 45 and accompanying text (explaining the dramatic increase in Islamic-compliant financing after Fannie Mae involvement); *supra* text accompanying note 137 (explaining that the NMMP was the first time Devon Bank had been involved with low-income loans).

[222] *See supra* text accompanying note 133 (stating that Devon Bank was optimistic about the loans because it had never lost money on Islamic-compliant loans in the past).

[223] *See supra* text accompanying note 108 (explaining that the Emerging Markets Initiative was created to aid low-income families).

[224] *See supra* text accompanying notes 121–122 (describing ADC's role in working with low-income families to get them ready for a home loan).

[225] *See supra* text accompanying note 164 (explaining that the exception simply allows for businesses to contract in Islamic law, but considering the evidence that low-income earners need more assistance, the narrow exception does nothing to aid them).

[226] *See supra* text accompanying note 174 (prohibiting government agencies' involvement in Islamic law in the Arizona statute); *supra* text accompanying note 181 (prohibiting government agencies' involvement in Islamic law in the South Dakota statute); *supra* text accompanying note 120 (explaining MHFA's role in the NMMP).

Muslim families had no real access to it.[227] The Initiative sought to address the need by providing avenues to overcome homeownership barriers and access to home financing.[228] After seeing the positive effect Fannie Mae and Freddie Mac had on Islamic-compliant financing nationwide, the Emerging Markets Initiative sought to reproduce that success in Minnesota.[229] The ADC could have provided the boost to homeownership in Minnesota that Fannie Mae and Freddie Mac provided nationwide.[230] The MHFA was the state agency involved, however limited.[231] This would violate any of the anti-Islamic legislation that has been passed, and most that has been introduced.[232] High-income earners who do not need state involvement to qualify for a loan, and who are economically savvy enough to find the Islamic-compliant loans, may have their agreements enforceable under the business exception.[233] However, low-income earners who need state involvement would not be so lucky.[234] Therefore, laws that ban state agency involvement in Islamic-compliant contracts are detrimental to the economy because they prevent low-income Muslim families from buying a home.

Second, banning the enforcement of Islamic law for Islamic-compliant financing agreements takes an entire demographic out of the

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[227] *See supra* text accompanying note 104 (noting the trend tended towards a large gap in homeownership and establishing the Emerging Markets Initiative to reverse that trend); *supra* text accompanying note 137 (explaining that the NMMP was the first time Devon Bank had been involved with low-income loans); *see supra* note 38 and accompanying text (describing the success of Lariba with Islamic-compliant loans); *supra* text accompanying note 108 (explaining that the Emerging Markets Initiative was created to aid low-income families).

[228] *See supra* note 108 and accompanying text (explaining that the Emerging Markets Initiative was created to establish avenues for homeownership among low-income immigrant populations).

[229] *See supra* text and accompanying note 107 (describing Fannie Mae's role in creating the Emerging Markets Initiative).

[230] *See supra* text and accompanying notes 128–129 (noting that more people were working to be loan eligible and that the overall Emerging Markets Initiative had gained recognition from President George W. Bush).

[231] *See supra* text and accompanying note 125 (describing MHFA's role in the NMMP).

[232] *See supra* text and accompanying note 174 (prohibiting government agencies' involvement in Islamic law in the Arizona statute); *supra* text and accompanying note 181 (prohibiting government agencies' involvement in Islamic law in the South Dakota statute); *supra* text and accompanying note 120 (explaining MHFA's role in the NMMP).

[233] *See supra* note 164 and accompanying text (citing the model ALAC bill that allows business entities to contract in foreign law as a narrow exception to the general bar against Islamic law).

[234] *See supra* text and accompanying note 174 (prohibiting government agencies' involvement in Islamic law in the Arizona statute); *supra* text and accompanying note 181 (prohibiting government agencies' involvement in Islamic law in the South Dakota statute); *supra* text and accompanying note 120 (explaining MHFA's role in the NMMP).

housing market for all practical purposes.[235] This is not only damaging to the Muslim population that is left without a home financing option, but it is economically irresponsible for the state as a whole.[236] Homeownership produces many benefits for the economy, and the home is usually an American family's most valuable asset.[237] The Muslim immigrant population is one of the largest growing immigrant populations in Minnesota.[238] Minnesota has historically ranked among the worst in the United States in homeownership for immigrants and people of color.[239] As a matter of sound economic policy, states should be trying to increase access to the market rather than enacting policies that discourage it.[240] Homeownership benefits the state economy in a number of ways, and increasing the homeownership market helps the overall health of the economy.[241] Therefore, it makes sense economically to find ways to include this growing demographic in the homeownership market. This was precisely the point of the NMMP.[242]

B. Banning Islamic-Compliant Financing Infringes upon Personal Liberties

Failing to allow individuals, banks, and government agencies to draft and enforce Islamic-compliant financing also constrains individual liberties.[243] Freedom to contract, freedom of religion, and freedom to participate in the American Dream are systemically denied to Muslims

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[235] *See supra* note 38 and accompanying text (describing the Islamic-compliant financing market as small but growing); *supra* text and accompanying note 100 (explaining the growing population of immigrants from predominately Muslim nations).

[236] *See supra* note 105 and accompanying text (explaining the economic benefits of increasing homeownership).

[237] *See supra* note 105 and accompanying text (explaining that homeownership is good for starting small businesses, contributes to overall GDP, and promotes higher education).

[238] *See supra* note 100 and accompanying text (listing the demographics of Minnesota's immigrant population).

[239] *See supra* note 101 and accompanying text (citing Minnesota's rank among states with low homeownership among people of color).

[240] *See supra* note 45 and accompanying text (noting the effect Fannie Mae's involvement had on Islamic-compliant financing).

[241] *See supra* note 105 and accompanying text (explaining that the housing industry is 15% of the U.S. GDP, homeownership fosters small businesses, that it is a contributing factor to seeking higher education, that homeownership is "a central element of the 'American dream,'" and that the majority of American families have most of their assets tied to their home).

[242] *See supra* note 117 and accompanying text (explaining that the NMMP was created to aid low-income Muslim families in purchasing their first home).

[243] *See supra* note 188 and accompanying text (citing the Tenth Circuit ruling that the Oklahoman ban on Islamic law in Oklahoma courts would infringe on Awad's right to freedom of religion).

because of these bans.[244] Often, the bans are contrary to sound public policy and based off personal biases or political pressure rather than sound evidence.

1. Banning Islamic Law in State Courts Infringes on an Individual's Freedom to Contract and Freedom of Religion

The Tenth Circuit correctly determined that public policy was in favor of enforcing Islamic contracts to protect an individual's freedom to contract.[245] The notion of freedom to contract was not explicit in the Tenth Circuit's opinion; rather, the enforcement of a will was at the center of the controversy.[246] While the case concerned a will, it could have been any contract with reference to Islamic law, including a financing agreement.[247] The same reasoning can apply to a home financing agreement because both involve the enforcement of a legal document.[248] Like the will in *Awad*, financing agreements may make reference to or be tailored to comply with Islamic law.[249] Therefore, Islamic-compliant financing agreements should receive the same protection as the Oklahoma courts gave Awad's will to protect the individual's freedom to contract.[250]

The Tenth Circuit made the correct determination that the amendment prevented the plaintiff from following his religion.[251] Freedom of religion was the central focus for both the Tenth Circuit and district court.[252] Islamic-compliant financing agreements are designed to adhere to the Islamic prohibition of *riba*.[253] Muslims go to great lengths to draft complicated contracts to ensure the agreements comply with their religious beliefs.[254]

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[244] *See supra* note 188 and accompanying text (holding that the Oklahoman ban would prevent Awad from executing his last will as intended).

[245] *See supra* note 191 and accompanying text (determining that public policy was in favor of allowing the will to be enforced by state courts).

[246] *See supra* text accompanying note 189 (detailing the facts of the case, including Awad's will).

[247] *See supra* note 189 and accompanying text (ruling that the amendment disfavored Muslim contracts, not only Muslim wills).

[248] *See supra* note 31 and accompanying text (introducing the three major types of Islamic-compliant financing contracts).

[249] *See supra* text accompanying note 52 (explaining that Islamic-compliant financing agreements use language that is intended to comply with Islamic law).

[250] *See supra* note 193 and accompanying text (citing a district court opinion ruling in favor of Awad's summary judgment motion after the Tenth Circuit ruled in favor of Awad on procedural grounds that required looking into the merits of Awad's claim).

[251] *See supra* note 192 and accompanying text (ruling in favor of Awad).

[252] *See supra* note 193 and accompanying text (citing the district court and Tenth Circuit who ruled in favor of Awad over freedom of religion concepts).

[253] *See supra* text accompanying note 21 (explaining that the prohibition of *riba* comes directly from the Qur'an).

[254] *See supra* note 49 accompanying text (explaining that Muslim families will draft contracts to avoid the *riba* prohibition).

Contracting to avoid *riba* is an exercise of religion because the Qur'an expressly bans *riba* payments.[255] This type of financing is as much an exercise of Islam as is executing an Islamic will.[256] Therefore, Islamic-compliant financing deserves as much religious protection as an Islamic will.[257]

States should adopt the same policy outlined in the Tenth Circuit's opinion.[258] As the Tenth Circuit correctly stated, the state has an interest in protecting an individual's freedom of religion.[259] A majority approval of unconstitutional policy does not make the policy constitutional.[260] State courts should enforce Islamic-compliant financing even if the majority of its citizens oppose it, because contracting around the *riba* prohibition is an exercise of religion.[261] The fear of Islamic infiltration of state courts does not outweigh the long-standing United States tradition of freedom of religion.[262] The same reasoning the Tenth Circuit applied to a constitutional amendment can be applied to statutes passed by legislatures.[263] No matter whether anti-Islamic law policy is enforced through legislative enactment, constitutional amendment, or otherwise, the effect is an infringement upon personal liberty.[264] A state infringement of a personal liberty cannot be justified simply because a majority of citizens favor infringing on that personal liberty.[265] In sum, Islamic-compliant financing cannot be banned simply because the state's citizens support the ban.

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[255] *See supra* note 21 and accompanying text (citing the portions of the Qur'an that prohibit *riba*).

[256] *See supra* text accompanying note 28 (explaining the Islamic beliefs that influence the prohibition of *riba*).

[257] *See supra* note 189 and accompanying text (ruling that the amendment disfavored Muslim contracts, not only Muslim wills).

[258] *See supra* note 191 and accompanying text (citing the court's analysis that individual liberty outweighed any state interest).

[259] *See supra* note 191 and accompanying text (explaining that the court has an interest in protecting a person's freedom to exercise religion).

[260] *See supra* note 191 and accompanying text ("But when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected.").

[261] *See supra* note 21 and accompanying text (citing the portions of the Qur'an that prohibit *riba*).

[262] *See supra* text and accompanying note 149 (stating the APPA's concern that *Sharia* law is infiltrating state courts).

[263] *See supra* text and accompanying note 176 (explaining the South Dakota legislature's process in passing anti-Islamic legislation).

[264] *See supra* note 191 and accompanying text.

[265] *See supra* note 191 and accompanying text (explaining that Awad's constitutional interest is greater than Oklahoma citizens' interests in limiting Awad's constitutional rights).

2. Barring Islamic Law in State Courts Prevents Muslim Immigrants from Achieving the "American Dream"

Barring Islamic-compliant financing agreements prohibits Muslim immigrants from achieving the American Dream.[266] Immigrants come to the United States with the hope to start a better life—a concept colloquially known as the American Dream.[267] Homeownership is a large part of that dream.[268] A prohibition on Islamic law in state courts bars Islamic-compliant financing agreements for home purchases.[269] This bar on Islamic-compliant financing represents unequal treatment for Muslim families compared to other communities, and low-income Muslim families are affected the most.[270] There is no real state interest to justify this unequal treatment.[271] As a result, low-income Muslim families are systemically denied the American Dream with no real policy concerns to justify the denial.

Fannie Mae and the Federal Reserve Bank created the Initiative to boost access to homeownership opportunities for Muslim families struggling to purchase a home.[272] Muslim families were having trouble securing loans to buy homes, as evidenced by the low numbers of Muslim immigrants who owned homes.[273] The ADC was working with over twenty families during the brief existence of the NMMP, showing that the lack of homeownership among Muslims was due to barriers to access rather than disinterest.[274] Programs, such as the NMMP, which provide assistance in securing Islamic-compliant financing are essential to growing homeownership among Muslims.

The cancellation of the NMMP represented an inconsistent treatment for Muslims compared to other communities resulting in an unfair

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[266] *See supra* text accompanying note 105 (citing homeownership as a fundamental part of the American Dream).

[267] *See supra* text accompanying note 105 (stating that homeownership is part of the American Dream).

[268] *See supra* text accompanying note 105.

[269] *See supra* note 171 and accompanying text (describing Arizona's anti-Islamic statute, based on the model ALAC bill, as one that bans Islamic choice of law provisions).

[270] *See supra* text accompanying note 137 (explaining that the NMMP was tailored to low-income Muslim families and that Devon Bank had previously experienced success with high-income Islamic-compliant loans).

[271] *See supra* note 191 and accompanying text (explaining that the *Awad* court found that the Oklahoma's interest in banning Islamic law was minimal compared to Awad's right to practice Islamic law).

[272] *See supra* note 108 and accompanying text (stating that the Emerging Markets Initiative was created for low-income first time homebuyers).

[273] *See supra* text accompanying notes 100–101 (listing the immigrant demographics and the gaps in homeownership).

[274] *See supra* text accompanying note 128 (explaining that many families had shown interest in the program).

distribution of state funding based on religion.[275] The Pawlenty Administration's decision to cancel the NMMP because it was tailored to Muslims was a drastic departure from its leadership in Minnesota's faith-based community initiatives.[276] Most programs conceived from the Emerging Markets Initiative to target faith-based and immigrant communities are still around.[277] The NMMP was the only program from the Emerging Markets Initiative to be cancelled because of its connection to a religious group.[278] Whereas Pawlenty received praise for his commitment to other faith groups, he was criticized for his commitment to the Muslim community.[279] The Pawlenty Administration boasted about its commitment to other faith groups but claimed ignorance of the NMMP's compliance with Islamic law.[280] As a result, other faith groups are receiving state-sponsored aid for home financing, and Muslims are not.[281] Not only is this fundamentally unfair, it is contrary to evidence of good policy.

The cancellation of the NMMP denied low-income Muslims access to homeownership with no real policy argument to justify the decision.[282] The housing market experts articulated a need for the NMMP and developed a business plan to fill the need.[283] Because of expert approval and presidential support, Pawlenty should have been comfortable concluding that the NMMP was sound public policy.[284] In fact, the NMMP was a product of a committee that created it to address Minnesota's homeownership gap.[285]

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[275] *See supra* note 125 and accompanying text (explaining that the NMMP was using the same fund as other programs developed to aid first time homebuyers).

[276] *See supra* text accompanying notes 130–132 (quoting the Pawlenty administration after receiving recognition from the Bush administration for demonstrating commitment to faith communities); *supra* note 138 and accompanying text (stating Pawlenty administration's reason for cancelling the NMMP was because the state should not support Islamic law).

[277] *See supra* text accompanying note 142 (stating that Minnesota is still spending money on programs targeted at other minority and faith-based communities even after the cancellation of the NMMP).

[278] *See supra* note 138 and accompanying text (stating Pawlenty administration's reason for cancelling the NMMP was because the state should not support Islamic law).

[279] *See supra* note 139 and accompanying text (citing the criticism Pawlenty was receiving for the NMMP).

[280] *See supra* note 138 and accompanying text (claiming Pawlenty had no knowledge that the program would support Islamic-compliant agreements).

[281] *See supra* text accompanying note 142 (stating that Minnesota is still spending money on programs targeted at other minority and faith-based communities even after the cancellation of the NMMP).

[282] *See supra* text accompanying note 139 (stating that the Pawlenty cancelled the NMMP during his presidential campaign).

[283] *See supra* note 107 and accompanying text (explaining the reasons behind the Emerging Markets Initiative, as well as the important actors in the creation of the Initiative).

[284] *See supra* note 107 and accompanying text (citing the expert organizations that helped create the Emerging Markets Initiative).

[285] *See supra* note 106 and accompanying text (stating that Pawlenty created the committee to address low homeownership among Minnesota's "emerging market").

Instead, Pawlenty acted against the expert recommendations, his claimed commitment to communities of faith, and President Bush's support.[286] He cancelled the program to appease the critics from his conservative base during his presidential campaign.[287] As a result, the families that were in the process of becoming loan eligible, and the many more families that showed interest, suddenly lost their support—and chance—to obtain financing.[288] The American Dream of homeownership was gone.[289]

C. Minnesota Must Combine Legislative, Executive, and Judicial Success to Form a Cohesive Policy in Favor of Enforcing Islamic-Compliant Financing Agreements

The analysis above argued that political forces against Islam played too great a role in state policy decisions of purely economic matters. The result is an infringement of individual liberties of Muslims who choose not to abandon their faith in financial transactions. Further, the economy of the state needlessly suffers when the policy decisions are based on purely political justifications rather than rational policy considerations and extensive economic evidence. The current problem is that Minnesota's economic policy regarding Islamic-compliant financing is not based on economic findings, but instead on political biases.

The solution is to combine Minnesota's legislative and executive success with the judicial success in the federal courts to create a policy that enforces Islamic-compliant choice of law provisions in state courts. The state court should make case-by-case determinations consistent with the suggestions in the Restatement.[290]

1. Applying the Restatement's Choice of Law Standards and International Marriage Principles Provides the Courts with a Mechanism to Enforce Islamic-Compliant Financing Agreements

Any agreement that makes reference to the Islamic prohibition of *riba* is intended to be interpreted through Islamic law.[291] The references to

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[286] *See supra* text accompanying note 130 (receiving praise from President Bush and stating his commitment to faith communities).

[287] *See supra* note 139 and accompanying text (citing the criticism Pawlenty was receiving for the NMMP).

[288] *See supra* text accompanying note 141 (explaining that many families were working with the NMMP program to become loan eligible when it was canceled).

[289] *See supra* text accompanying note 105 (explaining that homeownership is part of the American Dream).

[290] *See supra* text and accompanying note 54 (explaining the overall policy in favor of upholding such provisions).

[291] *See supra* note 52 and accompanying text (explaining that Islamic-compliant contracts are intended to be enforced under Islamic law).

Islamic law that are typically in the agreements are enough to show the parties intended to be bound by Islamic law.[292] Choice of law provisions for Islamic-compliant financing agreements directing enforcement under Islamic law essentially seek to ensure that a party to the agreement is never forced to pay interest.[293] Islamic law is rationally related to the financing agreement and the parties because the parties are Muslims who draft the financing agreement consistent with Islamic law.[294] Forms of home financing, other than interest-based loans, do not violate any articulable state public policy.[295]

Courts have already been ruling on conflicts of law issues involving Islamic law based on public policy concerns.[296] In those cases, the public policy was clearly articulated and the result to be avoided was directly contrary to well established law, but there is no such clearly established policy against Islamic law specifically.[297] Rather, the Restatement makes clear that policy is in favor of enforcing foreign law when agreed upon by both parties.[298] Further, the Tenth Circuit stated in *Awad* that the policy justifications for prohibiting Islamic law, if any at all, did not outweigh the policy considerations in allowing the plaintiff to freely exercise his religion and freedom to contract.[299]

Finally, Islamic-compliant loan agreements between a person who practices Islam, a bank that specializes in providing Islamic-compliant loans, and a third party agency that works with people to secure those loans, necessarily implicates a strong tie to the chosen Islamic law.[300] As discussed in the Restatement, the stronger the relationship between the chosen law and the agreement, the greater the public policy concern needs to be to prevent application of the chosen law.[301] In most cases, the strong relationship

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[292] *See supra* note 52 and accompanying text ("However, by definition, these transactions will also include participants that proceed from a different set of principles and precepts: those embodied in the Shari'ah.").

[293] *See supra* note 52 and accompanying text (explaining that Islamic-compliant contracts are intended to be enforced by Islamic law).

[294] *See supra* note 57 and accompanying text (stating the Restatement's rule for choice of law provision enforcement).

[295] *See supra* note 57 and accompanying text.

[296] *See supra* note 60 and accompanying text (listing situations where the court has ruled on public policy grounds for choice of law provision enforcement).

[297] *See supra* note 191 and accompanying text (citing the *Awad* court rejecting any state interest or public policy against Islamic law in state courts).

[298] *See supra* note 53 and accompanying text (noting the Restatement policy in favor of upholding the intent of the parties).

[299] *See supra* note 191 and accompanying text (citing the *Awad* court rejecting any state interest or public policy against Islamic law in state courts).

[300] *See supra* note 120 and accompanying text (describing how the NMMP worked).

[301] *See supra* note 85 and accompanying text ("The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision.").

between Islamic law and an Islamic-compliant contract is enough to outweigh the policy concerns.[302] Thus, Islamic-compliant financing agreements should not carry a *per se* invalidation by virtue of being Islamic law, but should be subject to the same public policy exception as any other foreign law.[303]

2. The Executive and Legislative Branches Must Create Laws Which Support the Creation and Enforcement of Islamic-Compliant Financing Agreements

Policy cohesion between the three branches of government is crucial to the success of the economic policy in favor of Islamic-compliant financing.[304] The Restatement's analysis is most effective if there is not a state statute banning the enforcement of Islamic-compliant contracts.[305] Though not currently an issue in Minnesota, there is a trend across the United States of introducing legislation that would make Islamic choice of law provisions unenforceable.[306] Fortunately, the Tenth Circuit Court of Appeals and an Oklahoma district court have already laid the groundwork for such a situation.[307] Though the *Awad* case dealt with the injury caused by a will rendered unenforceable by a state constitutional amendment with an express ban of Islamic law, the same reasoning applies to an injury caused by a financing agreement rendered unenforceable by a legislative enactment purporting to be neutral.[308] In both contexts, there is a financial injury to the party seeking enforcement caused by a clear government policy against Islamic law.[309] Like Awad, who would have been unable to have his will probated if the Oklahoma ban on Islamic law were upheld, many Muslims are currently unable to buy a home because of state policy against Islamic

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[302] *See supra* note 85 and accompanying text.

[303] *See supra* note 57 and accompanying text (stating the Restatement's rule for choice of law provision enforcement).

[304] *See supra* note 193 and accompanying text (noting courts can invalidate legislative enactments); *supra* text accompanying note 135 (explaining that Pawlenty ended the NMMP during his campaign for presidency); *supra* note 54 and accompanying text (arguing the legislature needs to adopt such a rule).

[305] *See supra* note 54 and accompanying text (explaining the operation of the Restatement rule).

[306] *See supra* note 146 and accompanying text (listing the enacted legislation across the nation).

[307] *See supra* note 183 and accompanying text (ruling against the Save Our State amendment on procedural grounds).

[308] *See supra* note 183 and accompanying text.

[309] *See supra* note 183 and accompanying text (determining that the unenforceability of the will and testament is an injury-in-fact).

law.[310] State policy against Islamic law can be found in legislative acts, executive orders, or judicial decisions.[311] The operative effect is the same—Muslims are deterred from practicing their religion.[312]

Ideally, the state legislature would immediately stop anti-Islamic legislation as was the case in Minnesota.[313] However, the executive branch can undermine a bill's progress, despite such efforts contradicting the apparent legislative and judicial policy.[314] Thus, the bill will only be successful if all three branches of government agree on the enforceability of Islamic law in the state's court.[315]

Finally, the state needs to sponsor programs that aid low-income Muslim families in securing an Islamic-compliant loan. The Emerging Markets Initiative, proposed by Fannie Mae and the Minneapolis Reserve Bank demonstrated the strong need for a state to support government programs that actively assist families in securing the loans.[316] The typical family trying to secure this type of loan is of low-to-moderate income and needs assistance to even become eligible for a loan.[317] The passive policy of simply enforcing the agreement is not enough.[318]

V. CONCLUSION

Across the nation, state legislatures have enacted oppressive policies targeting *Sharia*-compliant contracts.[319] In Minnesota, the executive branch

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[310] *See supra* note 162 and accompanying text (citing the model ALAC bill that bans foreign law in state courts and has been used by state legislatures to pass anti-Islamic legislation).

[311] *See supra* note 162 and accompanying text (citing the model ALAC bill that bans foreign law in state courts and has been used by state legislatures to pass anti-Islamic legislation); *supra* note 193 and accompanying text (noting courts can invalidate legislative enactments); *supra* text accompanying note 135 (explaining the end of the NMMP during Pawlenty's campaign for presidency).

[312] *See supra* note 190 and accompanying text (citing the *Awad* court's decision that a state limitation on contracting in Islamic law presents and injury-in-fact).

[313] *See supra* note 166 and accompanying text (explaining the quick defeat of the Minnesota proposal).

[314] *See supra* text and accompanying note 135 (ending the NMMP during Pawlenty's campaign for presidency).

[315] *See supra* note accompanying text 193 (noting courts can invalidate legislative enactments); *supra* text accompanying note 135 (describing Pawlenty ending the NMMP is his campaign for presidency); *supra* note 54 and accompanying text (arguing the legislature needs to adopt such a rule).

[316] *See supra* note 107 and accompanying text (explaining that Emerging Markets Initiative identified a large need for culturally sensitive financing programs).

[317] *See supra* note 120 and accompanying text (citing this as one reason the program may have had trouble gaining ground).

[318] *See supra* note 120 and accompanying text (describing the intensive process of getting loans to the target groups, which resulted in cancellation of the program).

[319] *See supra* note 125 and accompanying text (listing the enacted legislation across the nation).

created alternative financing programs in an effort to increase home ownership.[320] However, when political pressures mounted, the program was cut before it had a chance to be successful.[321] The Tenth Circuit has ruled that the right to contract under religious laws is protected by the Constitution and interference with that right causes a real injury to the person whose right is interfered.[322] This is the example state courts should follow.[323] A joint effort between the state executive, legislature, and courts must take place to ensure the enforceability of Islamic-compliant financing agreements.[324] A simple passive policy allowing enforcement is simply not enough.[325] States must follow the lead of Minnesota's New Markets Mortgage Program in actively encouraging Islamic-compliant loans for low-to-moderate income families.[326] The legislature and the state courts need to reject any bill that bears a resemblance to the Model ALAC bill.[327] In the absence of such a bill, the state court should apply the suggested Restatement analysis in favor of choice of law provisions to Islamic choice of law provisions.[328] This solution is consistent with the American principle of freedom to contract and overall economic creativity and necessity.[329]

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[320] *See supra* note 107 and accompanying text (Emerging Markets Initiative identifying a large need for culturally sensitive financing programs).

[321] *See supra* text and accompanying note 135 (noting Pawlenty ended the NMMP during his campaign for presidency).

[322] *See supra* note 183 and accompanying text (determining that the unenforceability of the will is an injury-in-fact).

[323] *See supra* text accompanying note 192 (describing the court's ruling in *Awad*).

[324] *See supra* note accompanying text 193 (noting courts can invalidate legislative enactments); *supra* text accompanying note 135 (noting Pawlenty ended the NMMP during his campaign for presidency); *supra* note 54 and accompanying text (stating legislature needs to adopt such a rule).

[325] *See supra* note 120 and accompanying text (describing the intensive process of getting loans to the target groups, which still ended in cancellation of the program).

[326] *See supra* note 117 and accompanying text (describing the intensive process for NMMP acceptance).

[327] *See supra* note 147 and accompanying text (describing the legislative purpose behind the model ALAC bill, which is to prevent Muslims from finding Islamic-compliant home financing).

[328] *See supra* note 54 and accompanying text (explaining the operation of the Restatement rule).

[329] *See supra* note 52 and accompanying text ("However, by definition, these transactions will also include participants that proceed from a different set of principles and precepts: those embodied in the Shari'ah.").