

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 386

INTRODUCER: Senator Hays

SUBJECT: Application of Foreign Law in Certain Cases

DATE: April 2, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 386 restricts courts and arbitration tribunals from applying foreign law, legal codes, and systems to disputes brought under chapters 61 and 88, F.S. These chapters relate to divorce, alimony, division of marital assets, child support, and child custody.

The bill restricts courts from applying foreign laws that do not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

Specifically, the bill prohibits the courts of this state from:

- Basing a decision on a foreign law that does not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforcing a choice of law clause in a contract which requires a dispute to be resolved under a foreign law that does not grant the parties the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforcing a forum selection clause in a contract which requires a dispute to be resolved in a forum in which a party would be denied his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Granting a motion to dismiss a lawsuit based on forum non conveniens if granting the motion would likely result in the denial of a party's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.

The bill authorizes a party to a contract to waive his or her rights, but requires the court to narrowly construe the scope of a waiver.

This bill does not apply to the following:

- Corporations, partnerships, and other types of business associations, unless chapters 61 or 88, F.S., govern the dispute;
- Ecclesiastical matters; and
- Matters governed by federal treaty or international agreements to which the United States is a party and which preempt state law.

## II. Present Situation:

### Choice of Law and Choice of Forum

Questions of choice of law or forum generally arise when a case involves parties or situations with connections to multiple states or countries.

#### Domestic Law

The Full Faith and Credit Clause, found in section 1, Article IV of the U.S. Constitution, provides, in part: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” The question of full faith and credit may arise after a state refuses to enforce another state’s judgment, considered to be a “sister state.”<sup>1</sup> A full faith and credit issue may also arise when a party to a case involving contacts in one state seeks to have the law of another state apply.

In choice of law cases, a court typically requires proof of sufficient contacts to a state, such as through residency, home ownership, or place of work to apply the law of that state. This test remains the prevailing standard in choice of law cases.<sup>2</sup>

#### Foreign Law

##### *Choice of Law*

Some contracts stipulate a choice of law, defined as “A contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties.”<sup>3</sup>

Numerous policies exist which favor application of foreign law by U.S. state and federal courts.<sup>4</sup> These policies are based on principles of international comity, reciprocity,

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<sup>1</sup> William B. Sohn, *Supreme Court Review of Misconstructions of Sister State Law*, 98 VA. L. REV. 1861, 1864-65 (December 2012).

<sup>2</sup> In the seminal case of *Allstate Insurance Co. v. Hague*, the Supreme Court considered whether Minnesota law could apply where the widow established the following state ties to Minnesota: the decedent’s long-term workplace, a daily commute between states, the insurer’s place of operation, and the wife’s new place of residency. The Court required proof of a singular or aggregate significant contact to a state so that choice of its law is not arbitrary or fundamentally unfair. Here, the court determined that the aggregate of contacts justified application of Minnesota law. 449 U.S. 302, 313-319 (1981).

<sup>3</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>4</sup> Nicholas M. McLean, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303, 304 (October 2012). “A court sitting in diversity might apply a state choice-of-law rule that requires the court to apply the tort law of a foreign nation. In a contract dispute, a federal court might apply foreign substantive law pursuant to an international

predictability, fairness, and disapproval of forum shopping.<sup>5</sup> The term “comity” is defined as “A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive, and judicial acts.”<sup>6</sup> Principles of comity are the international equivalent of full faith and credit.<sup>7</sup>

A court does not take judicial notice of the law of another country.<sup>8</sup> Instead, if relevant to a case, a court reviews foreign statutes, case law, and secondary sources and heavily relies on expert testimony.<sup>9</sup>

### **Forum Non Conveniens**

The term “forum non conveniens” is defined as:

The doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.<sup>10</sup>

Courts apply a strong presumption in favor of a plaintiff’s choice of forum.<sup>11</sup> Still, the proponent must firmly establish bona fide connections to the forum choice to outweigh perceptions of forum shopping.<sup>12</sup> Courts typically allow a U.S. citizen to choose a U.S. forum, rather than have the case heard in a foreign jurisdiction. However, if a U.S. corporation operates in international commerce, not all litigation will be heard in the U.S.<sup>13</sup>

Courts place a high burden on a defendant who seeks dismissal of a case based on forum non conveniens. Although international treaty requirements promote the principle “equal access to courts,” in practice, courts do not accord foreign plaintiffs the same deference to move a case to another jurisdiction as U.S. citizens.<sup>14</sup>

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agreement’s choice-of-law clause. In the realm of corporate law, a court might find, based on an application of the internal affairs doctrine, that a foreign nation’s procedural requirements govern a shareholder derivative suit (citation omitted).” *Id.*<sup>5</sup> *Id.* at 304.

<sup>6</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>7</sup> James Botsford and Paul Stenzel, *The Wisconsin Way Forward with Comity: A Legal Term for Respect*, 47 TULSA L. REV. 659 (Spring 2012). “Full faith and credit is a constitutional principle requiring states to enforce fully the judgments and orders of other states. Comity is the principle of international law by which a sovereign gives deference to the judgments of another due to mutual respect.” *Id.* at 660.

<sup>8</sup> Determination of question relating to foreign law as one of law or fact, 34 A.L.R. 1447.

<sup>9</sup> McLean, *supra* note 4, at 306-307.

<sup>10</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>11</sup> Plaintiff’s choice of forum, 32A AM. JUR. 2D FED. CTS. § 1364.

<sup>12</sup> Forum Non Conveniens – Deference to Plaintiff’s Forum Choice, 14D FED. PRAC. & PROC. JURIS. § 3828.2 (3d ed.)

<sup>13</sup> American citizenship of party; suits by aliens, 32A AM. JUR. 2D FED. CTS. §1365.

<sup>14</sup> 14D FED. PRAC. & PROC. JURIS. §3828.2 (3d ed.).

### ***Validity of Judgment***

U.S. courts are generally not bound by foreign judgments. Still, principles of comity dictate strong consideration of another country's judicial orders, based on deference and mutual respect. Criteria that courts apply in accepting a foreign judgment include proof that:

- The parties had access to a full and fair trial.
- The proceeding took place after due notice and voluntary appearance.
- The jurisdiction operates under impartiality, rather than prejudice, between its own citizens and those of other countries.
- No evidence of fraud existed in securing the judgment.<sup>15</sup>

### **Chapter 61, F.S.**

Chapter 61, F.S., addresses dissolution of marriage including distribution of assets and liabilities, alimony, and child support and custody arrangements. Regarding child support, the public policy of the state is that each parent has a fundamental obligation towards dependent children.<sup>16</sup> Child support is based in part on a parent's income and the child's needs.<sup>17</sup> Child custody arrangements, whether developed by the parents or by a court, must comply with state law and international treaties.<sup>18</sup>

Florida courts distribute assets and liabilities through equitable distribution, rather than, for example, community property, as is done in California and a handful of other Western states. Under equitable distribution, a court considers various factors including contributions to the marriage, economic circumstances of the parties, and the length of marriage.<sup>19</sup> The court also considers various factors in awarding alimony and awards it on different bases such as monthly, lump sum, temporary, or permanent.<sup>20</sup>

Florida recognizes written, signed premarital agreements as enforceable contracts.<sup>21</sup> These agreements may include choice of law clauses.<sup>22</sup> An agreement cannot negatively affect the rights of a child to support.<sup>23</sup> Grounds for unenforceability of a premarital agreement include coercion, fraud, duress, or overreaching or that the agreement is unconscionable.<sup>24</sup>

To relocate with a child, absent an agreement between the parents, the relocating parent must petition the court or face contempt charges.<sup>25</sup>

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<sup>15</sup> 9 AM. JUR. *Proof of Facts* 3D 687 §1.5. Comity (December 2012).

<sup>16</sup> Section 61.29, F.S.

<sup>17</sup> Section 61.30, F.S.

<sup>18</sup> These laws include the Uniform Child Custody Jurisdiction and Enforcement Act, the International Child Abduction Remedies Act, the Parental Kidnapping Prevention Act, and the Convention on the Civil Aspects of International Child Abduction.

<sup>19</sup> Section 61.075(1), F.S.

<sup>20</sup> The law recognizes bridge-the-gap, rehabilitative, durational, and permanent forms of alimony. Section 61.08(1) and (2), F.S.

<sup>21</sup> Section 61.079, F.S.

<sup>22</sup> Section 61.079(4)(a)7., F.S.

<sup>23</sup> Section 61.079(4) (b), F.S.

<sup>24</sup> Section 61.079(7), F.S.

<sup>25</sup> Section 61.13001(3), F.S.

## Chapter 88, F.S.

Federal law required each state to adopt the Uniform Interstate Family Support Act (UIFSA), codified in chapter 88, F.S.<sup>26</sup> The purpose of the UIFSA is to unify state law among the states regarding child support obligations, reconcile child support orders issued by multiple states, and streamline procedures for out-of-state petitioners.<sup>27</sup> Under the Act, only one court possesses jurisdiction and only one order is in effect at any given time.<sup>28</sup> This can change, however, to another court for modification, if that court has personal jurisdiction.<sup>29</sup>

The UIFSA applies to support proceedings involving a foreign support order (meaning an order entered into out-of-state), a foreign tribunal, or a case in which an obligee, obligor, or child lives in a foreign country.<sup>30</sup>

The UIFSA governs the:

- Establishment of a spousal or child support order.
- Enforcement of support orders and income-withholding orders without the registration of an order from out-of-state with a court in this state.
- Registration of a support order of another state for enforcement in this state.
- Modification of a child support order issued by a court of the state in which the support obligations originated.
- Registration of an order of another state for modification.
- Determination of parentage as it relates to child support.<sup>31</sup>

### *Jurisdiction*

Section 88.2011, F.S., addresses a court's jurisdiction over parties to a support order or parentage determination. When a court exercises personal jurisdiction over a nonresident, in some circumstances, the state procedural and substantive laws apply, including choice of law rules, unless specified otherwise in the UIFSA:

<sup>26</sup> Building on earlier federal efforts to address the complications of enforcing child support across state lines, Congress passed the original UIFSA in 1992, and later amended it in 1996 and 2001. Kimball Denton, *A Brief History of Uniform Laws for Private Interstate Support Enforcement*, 20 J. CONTEMP. LEGAL ISSUES 323, 326 (2011-12). “[T]he Act innovatively created a one-order system by including a long-arm jurisdiction provision, which provided that a case should be kept in the obligee’s home state as often as possible. The long-arm provision called for ‘extended personal jurisdiction over nonresidents’ . . . .” This was thought to remove the noncustodial parent’s advantage of having automatic case transfer to his or her home state. Nicole K. Bridges, *The “Strengthen and Vitalize Enforcement of Child Support (Save Child Support) Act: Can the Save Child Support Act Save Child Support from the Recent Economic Downturn?”*, 36 OKLA. CITY U.L. REV. 679, 692-93 (Fall 2011).

<sup>27</sup> Denton, *supra* note 26 at 326-328.

<sup>28</sup> Denton, *supra* note 26 at 327.

<sup>29</sup> *Id.* at 327. In Florida, a court may establish personal jurisdiction over an individual based on any of the following: The individual is served with citation, summons, or notice in-state; the individual consents to jurisdiction in the state; the individual lived with the child in-state and provided prenatal expenses or child support; the child lives in the state as a result of the acts or directives of the individual; the individual had sexual intercourse in this state which may have resulted in the conception of the child; the individual asserted parentage in a court or putative father registry in the state; or any other basis which is constitutional for the exercise of personal jurisdiction. Section 88.2011, F.S.

<sup>30</sup> Section 88.1041(1), F.S.

<sup>31</sup> 23 AM. JUR. 2D *Desertion and Nonsupport* § 74.

Under ... choice of law ... the substantive law of an issuing state applies to petitions filed in a responding state to enforce the existing ... orders of the issuing state; ... the substantive law of the issuing state does not apply to petitions filed in a [subsequent] responding state to modify the existing child support orders of the issuing state.

A foreign country may be a “state” for purposes of application of the UIFSA, but the Act does not apply to obligations established under the law of a foreign country where there is no state law or contravening treaty or federal statute recognizing the enforcement of support orders from the foreign country ...<sup>32</sup>

### **Enforcement of Income-Withholding Orders Without Registration**

Part V of chapter 88, F.S., provides for income-withholding orders issued by another state to be self-executing and treated as if a Florida court issued them.<sup>33</sup> However, a Florida court can enforce out-of-state support and income-withholding orders once a party registers the order with the Florida court.<sup>34</sup>

### ***Choice of Law***

Under the UIFSA, the law of the issuing or originating state applies regarding the nature, extent, amount and duration of payments and other support obligations, including arrearages. In proceedings to collect arrearages under support orders, the statute of limitation that applies is whichever is longer, this state’s or the issuing state’s.<sup>35</sup>

### **Enforcement and Modification of Support Order After Registration**

Under the UIFSA, jurisdiction to enforce or modify another state’s child support order in a registration proceeding in this state is proper if all parties, including children, reside here.<sup>36</sup> To modify a support order from another state, an agency or party must register it in Florida.<sup>37</sup> Once the recipient meets personal jurisdiction and other factors, the court can enforce the order just as if it had been issued in-state.<sup>38</sup>

To enforce orders involving a foreign country, the UIFSA authorizes:

- A tribunal of this state to assume jurisdiction to modify an order and make it the controlling order if a foreign country lacks or refuses jurisdiction to modify its own order.<sup>39</sup>
- A party or support enforcement agency seeking to modify or enforce a foreign order which is not governed by an international convention to register the order in this state.<sup>40</sup>

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<sup>32</sup> Section 88.2021, F.S.; 67A C.J.S. *Parent and Child* § 267.

<sup>33</sup> Sections 88.5011 and 88.50211(2), F.S.

<sup>34</sup> Section 88.6011, F.S.

<sup>35</sup> Section 88.6041(1) and (2), F.S.

<sup>36</sup> Section 88.6131(1), F.S.

<sup>37</sup> Section 88.6091, F.S.

<sup>38</sup> Section 88.6101, F.S.; Requirements for modification of child support orders issued out-of-state are provided in s. 88.6111, F.S.

<sup>39</sup> Section 88.6151(1) and (2), F.S.

<sup>40</sup> Section 88.6161, F.S.

The UIFSA requires courts to recognize and enforce foreign support orders and agreements, unless:

- A court finds that a registered convention support order is manifestly incompatible with public policy. Incompatibility with public policy includes the failure of the issuing court to maintain minimum standards of due process such as notice and an opportunity to be heard.<sup>41</sup>
- A court finds that a registered foreign support agreement is manifestly incompatible with public policy.”<sup>42</sup>

### **Use and Acceptance of Religious Law by U.S. Courts**

The U.S. Constitution does not permit official adoption of religious law by federal, state, or local governments.<sup>43</sup> Examples exist, however, of judicial deference to religious edicts.

In the seminal case of *Wisconsin v. Yoder*, the U.S. Supreme Court reviewed a challenge by Amish parents of a Wisconsin law requiring mandatory school attendance.<sup>44</sup> At the time, the law did not recognize home schooling as alternative education. The parents asserted that high school would negatively impact their children through exposure to “worldly” views, self-distinction, and social life, all antithetical to Amish religion.<sup>45</sup> The Court noted the reputable work ethic, law-abiding nature, and potentially-compromised survival of the Amish.<sup>46</sup> The Court found the parents’ violation of compulsory school attendance firmly rooted in Amish religion.<sup>47</sup> Requiring high school attendance would violate the defendants’ rights to religious Free Exercise, under the First Amendment of the U.S. Constitution.<sup>48</sup>

Scholars suggest that the Court is inclined to uphold a religious practice that violates a law if the statute unduly burdens religious First Amendment rights. This is particularly so where the practice cannot be said to harm others.<sup>49</sup> Still, “American laws impose behavioral mandates on all citizens, regardless of faith, and to the extent that religious regimes tolerate behaviors that fall outside those mandates, the secular court system will always come down on the side of secular laws.”<sup>50</sup>

Another group that the Court recognizes is the Beth Din of America (BDA), or a Jewish rabbinic court. The BDA established itself as a limited court alternative to civil

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<sup>41</sup> Section 88.7081(1) and (2)(a), F.S.

<sup>42</sup> Section 88.7101(3), F.S.

<sup>43</sup> Jaron Ballou, *Sooners vs. Shari’a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari’a Law*, 30 LAW & INEQ. 309, 314 (Summer 2012).

<sup>44</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>45</sup> *Id.* at 210-11.

<sup>46</sup> *Id.* at 212-13.

<sup>47</sup> *Id.* at 213-16.

<sup>48</sup> *Id.* at 234.

<sup>49</sup> Omar T. Mohammedi, *Sharia-compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259, 280 (2012-13).

<sup>50</sup> Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of American Precedent*, 57 N.Y.L. SCH. L. REV. 287, 303 (2012-13).

disputes.<sup>51</sup> Functioning primarily as a court of arbitration, BDA has undergone significant changes since its inception 50 years ago.<sup>52</sup> Present day proceedings include:

- A detailed and standardized rules of procedure.
- An internal appellate process.
- Consideration of choice of law.
- Testimony from experts on secular law and commercial practice.
- Recognition of common commercial custom.
- Belief in communal governance, as reflected in multiple individual arbitration.<sup>53</sup>

As noted, the BDA incorporated these features over time. “Recognizing this secular focus on procedure and procedural fairness, the BDA adopted detailed rules and procedures that contributed tremendously to the eventual secular acceptance of BDA decisions.”<sup>54</sup>

The Beth Din of America (BDA) cases apply to situations in which:

- A contract contains an arbitration provision that designates the BDA as the preferred forum for arbitration; or
- A party to a dispute invites an opposing party to bring the case to the BDA.<sup>55</sup>

### ***Anti-Foreign Law***

In recent years, state legislatures have moved to limit Sharia law or the applicability of foreign law through choice of law and choice of forum clauses in contracts. Starting with Louisiana and Tennessee, 32 states have considered some limits on the application of foreign law, either through legislation or ballot initiative.<sup>56</sup>

Scholars generally classify initiatives or legislation in one of three ways:

- Bills that singularly restrict the use of Sharia law;<sup>57</sup>
- Bills that include Sharia as one of several banned types of law or tradition;<sup>58</sup> or

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<sup>51</sup> *Id.* at 288.

<sup>52</sup> *Id.* at 288.

<sup>53</sup> *Id.* at 288-89. “Traditionally, Jewish law did not offer an appellate process like the American secular court system . . . . Over time, however, the BDA came to find that if it did not provide an internal mechanism by which parties could appeal perceived errors, secular judges would interject and substitute their own judgment. Because the ultimate goal for litigants submitting to a religious tribunals’ jurisdiction (and for the tribunal itself) is to have matters resolved internally from start to finish, the BDA added an appellate process to its arbitration services.” *Id.* at 293.

<sup>54</sup> *Id.* at 290.

<sup>55</sup> *Id.* at 291-92.

<sup>56</sup> Faiza Patel, Matthew Duss, and Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems*, Center for American Progress at the Brennan Center for Justice, N.Y.U. School of Law 1 (May 2013).

<sup>57</sup> Alabama’s proposed language read, in part: “The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia.” H.R. 597 (Ala. 2011). Iowa, Missouri, and New Mexico proposed virtually the same language. Language before the Wyoming legislature would have prohibited the court from both direct use of Sharia law, and the citing of other states that use Sharia law. H.R. 8, (Wyo. 2011). Asma T. Uddin and Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 370-71, 373 (Winter 2012.)

<sup>58</sup> An example of this was the language initially proposed in Arizona, which provided, in part: “. . . court shall not use . . . [a] tenet of any body of religious sectarian law in to any decision, finding or opinion as controlling or influential authority.” The bill defined “religious sectarian law”, as including sharia law, canon law, halacha and karma . . . .” H.R. 2582 (Ariz. 2011). Udder and Pantzer, *supra* note 57, at 373-74.



- Prohibitions on foreign law generally, commonly known as a foreign or international law bill.<sup>59</sup>

Currently, six states have laws restricting foreign law in state courts. The states are Arizona, Kansas, Louisiana, North Carolina, South Dakota, and Tennessee.<sup>60</sup> Of these, South Dakota's law focuses exclusively on religious code, rather than foreign law, or foreign and religious law.<sup>61</sup> No foreign law bill identifies specific religions as disfavored.

The Missouri Legislature passed a foreign law bill, but the Governor vetoed the bill, citing concerns about the legislation's possible effect on international adoptions.<sup>62</sup>

Most recently, North Carolina passed foreign law legislation.<sup>63</sup> The Governor allowed it to become law without his signature.<sup>64</sup> The legislation does not specifically reference religions or ethnicities as disfavored, and limits the law's application to family law.

Perhaps the most notable attempt to limit court use of foreign law was the constitutional amendment placed on the ballot in Oklahoma in 2010. The amendment restricted courts to the use of federal and state law and expressly banned consideration of international and Sharia laws. The initiative defined Sharia law as Islamic law, based on the Koran and the teachings of Mohammed.<sup>65</sup> Fewer than one percent of Oklahoma's population self-identifies as Muslim.<sup>66</sup> Known as the "Save our State" amendment, the measure passed handily both in the legislature and through adoption by voters.<sup>67</sup>

A Muslim Oklahoma resident challenged the amendment on the basis that it violated his First Amendment rights under the Establishment Clause and the Free Exercise Clause of the U.S. Constitution. The U.S. District Court for the Western District of Oklahoma ruled in favor of the plaintiff. The plaintiff argued that the initiative unconstitutionally interfered with his ability to indicate his wishes as detailed in his will. Specifically, the will provided for:

charitable allotments to be made "in a manner that does not exceed the proscribed limitations found in Sahih Bukhari ... a highly respected collection of the "sayings

<sup>59</sup> *Id.* at 373-74. The more generalist approach was tried in Michigan. It defined foreign law as "any law, rule or legal code or system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, or the constitution and laws of this state .... a court ... shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States ... ." *Id.* at 375.

<sup>60</sup> Sara Praasatik, *Assessing the Viability of State International Law Prohibitions*, 35 HOUS. J. INT'L L. 465, 467 (Spring 2013).

<sup>61</sup> South Dakota's HB 123 reads: "No court, administrative agency or other governmental agency may enforce any provisions of any religious code."

<sup>62</sup> [http://www.huffingtonpost.com/2013/07/29/sharia-law-usa-states-ban\\_n\\_3660813.html](http://www.huffingtonpost.com/2013/07/29/sharia-law-usa-states-ban_n_3660813.html).

<sup>63</sup> Known as HB 522, the North Carolina bill passed in July of 2013. <http://www.newsobserver.com/2013/07/19/3042514/nc-senate-passes-sharia-law-bill.html>.

<sup>64</sup> <http://www.bizpacreview.com/2013/08/29/nc-shariah-ban-becomes-law-without-governors-signature-despite-cair-pressure-82373>.

<sup>65</sup> *Id.* at 377.

<sup>66</sup> Ballou, *supra* note 43, at 310.

<sup>67</sup> Uddin and Pantzer, *supra* note 57, at 377.

and deeds of Prophet Muhammad,” and the cited provision appears to set a cap on the amount of property that a decedent may give to charity by will. It also provides for the preparation of Awad’s body in a manner that “comports precisely with ... Sahih Bukhari” ... and for “a burial plot that allows my body to be interned [sic] with my head pointed in the direction of Mecca.”<sup>68</sup>

His will, the plaintiff argued, would be rendered unenforceable under the amendment.<sup>69</sup>

The court noted that the amendment language subjected the plaintiff and other Muslims in the state to disfavored treatment.<sup>70</sup> In determining the proper test to apply, the Court reviewed the principles of the tests established in *Lemon v. Kurtzman*<sup>71</sup> and *Larson v. Valente*.<sup>72</sup> The Court cited *Larson* for the proposition that *Lemon* applies to laws providing a uniform benefit to all religions, while *Larson* applies in instances where a law discriminates among religions. Therefore, *Larson* provided the proper test in the Oklahoma challenge.<sup>73</sup> The *Larson* test requires both strict scrutiny, and more narrowly, language “closely fitting” to a compelling interest.<sup>74</sup>

This case presents even stronger ‘explicit and deliberate distinctions’ among religions than the provision that warranted strict scrutiny in *Larson* .... *Larson* involved a ... statute that imposed certain registration and reporting requirements upon only those religious organizations that solicited more than 50 percent of their funds from nonmembers .... Unlike the provision in *Larson*, the Oklahoma amendment specifically names the target of its discrimination.<sup>75</sup>

The court selected the *Larson* test as the proper test. To satisfy strict scrutiny, the state must show that the interest addresses a real, identified problem, rather than a mere perception of harm.<sup>76</sup> As the state could not identify even a single time when an Oklahoma court applied Sharia law, the court found that the state failed to illustrate an actual problem, and therefore, failed to show a compelling state interest.<sup>77</sup> As the state failed the first prong, the court did not reach whether the state complied with the “close fit” required of the second prong.<sup>78</sup>

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<sup>68</sup> *Id.* at 390.

<sup>69</sup> *Id.* at 390-91.

<sup>70</sup> *Awad v. Zirriax*, 670 F.3d 1111, 1123 (10th Cir. U.S.C.O.A. 2012).

<sup>71</sup> 403 U.S. 602 (1971). The *Lemon* test of constitutionality requires the language in question to have a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and that does not foster an excessive government entanglement with religion. *Id.* at 612-13.

<sup>72</sup> *Larson v. Valente*, 456 U.S. 228 (1982).

<sup>73</sup> *Awad*, 670 F.3d at 1126-27, 1128.

<sup>74</sup> *Larson*, 456 U.S. at 246-248.

<sup>75</sup> *Awad*, 670 F.3d at 1128.

<sup>76</sup> *Awad*, 670 F.3d at 1129-30.

<sup>77</sup> *Awad*, 670 F.3d at 1129.

<sup>78</sup> *Awad*, 670 F.3d at 1130-31.

## Constitutional Impairment of Contracts

Article 1, Section 10, of the Florida Constitution provides, “No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.”

As a result of the constitutional limitation, the courts typically invalidate statutes that retroactively apply to existing contracts. In a 1940 Florida Supreme Court case, the Court ruled any statute enacted by the Legislature void which would impair the obligation of a contract.<sup>79</sup> Subsequent courts, however, carved out limited exceptions.

In *Pomponio v. Claridge of Pompano Condo, Inc.*, the Florida Supreme Court recognized that the state may have a legitimate interest in amending a law that impacts existing contracts based on its police power.<sup>80</sup> In determining legitimacy, the Court employed a balancing test to “weigh the degree to which a party’s contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy.”<sup>81</sup>

The Court then applied the test established in the U.S. Supreme Court case of *Allied Structural Steel Co. v. Spannaus* to determine whether a law may apply to existing contracts.<sup>82</sup> Under the test, a law is more likely to be upheld if it meets the following three prongs of the test, which are, cumulatively that:

- The law was enacted to deal with a broad, generalized economic or social problem.
- The law operates in an area already subject to state regulation at the time the parties’ contractual obligations were originally undertaken, rather than invading an area not previously subject to regulation by the state.
- The law effects a temporary alteration of the contractual relationships of those within its coverage, instead of working a severe, permanent, and immediate change in those relationships irrevocably and retroactively.<sup>83</sup>

In an impairment of contracts challenge to a local ordinance, the Fifth District Court of Appeal reiterated that laws reasonable and necessary to preserve public health, safety, and welfare are constitutional even if obligations of a private contract are impaired.<sup>84</sup> Still, governmental authority is not unrestrained.<sup>85</sup>

In *Cohn v. Grand Condominium Association, Inc.*, the statute changed voting arrangements in condominium governance. In employing the *Pomponio* test, the court determined that the state failed to identify a current social problem, the law did not

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<sup>79</sup> *Bedell v. Lassiter*, 143 Fla. 43, 49 (Fla. 1940).

<sup>80</sup> *Pomponio v. Claridge of Pompano Condo, Inc.*, 378 So. 2d 774, 781 (Fla. 1979).

<sup>81</sup> *Id.* at 780.

<sup>82</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). “Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.” *Id.* at 245.

<sup>83</sup> *Pomponio*, 378 So. 2d at 779.

<sup>84</sup> *Brevard County v. Florida Power & Light Co.*, 693 So. 2d 77, 81 (Fla. 5th DCA 1997).

<sup>85</sup> *Id.* at 81.

regulate the specific area at issue at the time that the condo organized, and the resulting change from the law would be severe, permanent, and immediate.<sup>86</sup> Therefore, the state failed to meet its burden.<sup>87</sup> On appeal, the Florida Supreme Court affirmed but recognized that new laws apply to related contracts with provisions which incorporate future changes to the law.<sup>88</sup>

### III. Effect of Proposed Changes:

SB 386 restricts courts from applying foreign law, legal codes, and systems to disputes brought under chs 61 and 88, F.S. These chapters relate to divorce, alimony, the division of marital assets, child support, and child custody

This bill restricts courts from applying foreign law to dissolution of marriage cases and issues involving multiple-state child support enforcement actions.

Specifically, under the bill, the courts of this state may not:

- Base a decision on a foreign law that does not grant the parties to litigation the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a choice of law clause in a contract which requires a dispute to be resolved under a foreign law that does not grant the parties the same fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Enforce a forum selection clause in a contract which requires a dispute to be resolved in a forum in which a party would be denied his or her fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution.
- Grant a motion to dismiss a lawsuit based on forum non conveniens if granting the motion would likely result in the denial of a party's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution in the foreign forum.

This bill does not apply to:

- Corporations, partnerships, and other types of business associations, unless chs. 61 or 88, F.S., are implicated;
- Ecclesiastical matters; and
- Matters governed by federal treaty or international agreements to which the United States is a party and which are preempted by federal law.

Although this bill recognizes that a party may waive his or her rights through a contract, the bill requires a court to narrowly construe the scope of the waiver.

The bill does not identify any laws or conduct authorized under foreign laws within the family law context which would deny a person's fundamental liberties, rights, and privileges. As such, courts will likely determine the impact of the bill on a case-by-case basis.

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<sup>86</sup> *Cohn v. Grand Condominium Assoc.*, 26 So. 3d 8, 11 (Fla. 3d DCA 2009).

<sup>87</sup> *Id.* at 11.

<sup>88</sup> *Cohn v. Grand Condominium Assoc.*, 62 So. 3d 1120 (Fla. 2011).

The bill requires a court to invalidate contractual provisions or judgments not based on laws that provide the parties with the “same” constitutional protections as the state and federal constitutions. As the “same” standard appears inflexible, the bill may result in the invalidation of contractual provisions or judgments based on foreign laws that grant the parties similar, or greater rights, privileges, and immunities as those granted by this country.

The bill declares in s. 45.022(4), F.S., that court orders based on disfavored foreign laws are void and unenforceable. However, the bill does not specifically address a situation in which a person seeks to enforce in this state a court order from a sister state which is based on a disfavored foreign law. In those situations, a court may likely rule that the Full Faith and Credit Clause of the U.S. Constitution requires enforcement of the order.

Similarly, the bill does not specifically address how a court would reconcile the bill with ch. 88, F.S., the Uniform Interstate Family Support Act (UIFSA), which was mandated by Congress. Under the bill, a support order entered in a foreign nation whose laws are inconsistent with this nation’s constitutional “fundamental liberties, rights, and privileges” is unenforceable. In contrast, ch. 88, F.S., renders foreign support orders and agreements unenforceable if they are “manifestly incompatible with public policy.” Although the two provisions appear to overlap (for example, manifest incompatibility includes due process and opportunity to be heard), the scope of the bill is likely broader than the restrictions on foreign law under the UIFSA.

The bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

This bill implicates four constitutional issues:

##### **First Amendment**

State legislatures that have restricted courts from applying foreign law have banned the use of Sharia law, banned several types of law or tradition including Sharia law, or prohibited the use of foreign law generally. Of the three initiatives, this bill comes under the third category, as it contains no mention of Sharia or another specific type of banned

law other than foreign law in general. In contrast to the law at issue in *Awad v. Ziriya*,<sup>89</sup> the bill appears to carry the greatest merit constitutionally, as it does not specifically single out a particular religion for disfavor or preference. If this bill is challenged on First Amendment grounds, a court will review the language for facial discrimination. As religion is not mentioned at all, the court will deem it facially neutral. A court will then apply the *Lemon* test, and likely find both a secular government purpose and that the law does not facilitate excessive governmental entanglement with religion. Because of this, a court will likely uphold the law from a First Amendment challenge.

### **Impairment of Contracts**

The bill takes effect upon becoming a law and applies to lawsuits filed after the effective date. If a party attempts to apply the law to invalidate pre-existing contracts, the party must demonstrate that the law is a legitimate use of the state's police power and that the change operates in less than a severe, permanent, and immediate fashion, as required in *Pomponio v. Claridge of Pompano Condo, Inc.*<sup>90</sup> This test places a very high burden on the state. Alternatively, this bill may reach back to existing contracts, if a contractual provision expressly incorporates future changes to the law.

### **Dormant Federal Foreign Affairs Powers**

Although not explicitly provided for in the U.S. Constitution, the Supreme Court has interpreted the U.S. Constitution to mean that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute that refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property. The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs. The Court also held that, to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries,"<sup>91</sup> and the action must pose a "great potential for disruption or embarrassment"<sup>92</sup> to the national unity of foreign policy. Such a determination would necessarily rely heavily on considerations of current political climates and foreign relations, as well as perception of the U.S. abroad. These factors could only be evaluated if and when a challenge to this bill was brought.

### **Separation of Powers**

The first three articles of the U.S. Constitution define the powers given to the three branches of government in the United States.<sup>93</sup> Article I defines the legislative branch and vests with it all power to make law. Article II defines the executive branch and vests in it the power to enforce the law. Article III defines the judicial branch and vests in it all

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<sup>89</sup> 670 F.3d 1111, 1123 (10th Cir. U.S.C.O.A. 2012).

<sup>90</sup> 378 So. 2d 774 (Fla. 1979).

<sup>91</sup> *Zschernig v. Miller*, 389 U.S. 429, 434 (1968).

<sup>92</sup> *Id.* at 435.

<sup>93</sup> Articles I, II, III, U.S. Const.

judicial power. For time immemorial, that power has been understood to mean the power to interpret and apply the law.<sup>94</sup>

As discussed above, to the extent that this bill directs Florida courts to consider and interpret foreign decisions and law in a certain manner, it may interfere with the federal government's ability to govern foreign policy with one voice. As such, this bill could be challenged as preempted by the federal government. Similarly, as previously stated, the judiciary's constitutional role is to act as the sole interpreter of laws; therefore, the bill could be challenged as an infringement on the essential role of the judicial branch in violation of the constitutional separation of powers. Similarly, the Florida Constitution explicitly mandates separation of powers between branches of the Florida government. Article II, section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Because of this language, Florida's separation of powers doctrine is even stronger than the federal concept of separation of powers. Therefore, the bill may face an additional separation of powers inquiry.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

The extent to which private parties will be impacted by the provisions of this bill is unknown.

### **C. Government Sector Impact:**

The Office of the State Courts Administrator expects an impact from the bill on judicial workload in ch. 61 and ch. 88, F.S., proceedings by requiring the court to determine whether application of foreign law would grant litigants the same fundamental rights as the state and federal constitutions grant. These determinations will require the court to research liberties, right, and privileges granted under foreign law. The fiscal impact cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial workload.<sup>95</sup>

## **VI. Technical Deficiencies:**

None.

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<sup>94</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>95</sup> Office of the State Courts Administrator, *2014 Judicial Impact Statement* (December 30, 2013); on file with the Senate Judiciary Committee.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 45.022 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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