**Amending Arizona’s Religious Freedom and Restoration Act (SB1062 and HB2153)**

**Background Paper, Updated March 2, 2014**

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**Background**

 ***Readers are invited to comment, suggest additions or edits. Send these to*** ***legislativeadvocacy@vuu.org***

**Short summary:** **The Legislature passed SB1062 with the intent of amending the Arizona Religious Freedom Restoration Act (RFRA) to strengthen a person’s ability to refuse services or in other ways fail to provide equal treatment if providing such service or treatment would infringe on a “sincerely held religious belief.” There is admittedly a delicate balance between the free exercise of religion and the civil rights of other persons; but opponents of this law believe it would upset that delicate balance and permit religious claims to impinge too much on the civil rights of others. This bill enables people, businesses, corporations and other entities a legal defense in a civil case using religious beliefs to punish “sinners” by withholding services or discriminating in hiring, housing, employment against those whose behavior or beliefs violate their religious principles.**

**What’s happening in Arizona?**  Both bills are basically the same as the ones introduced last year (and passed) but were vetoed by the Governor as part of her threats to veto everything until the Legislature passed the Medicaid expansion. SB1062 was introduced by Sen. Yarbrough of Chandler (District 17) and immediately passed the Senate Government and Environment committee (4-2). The House sponsor is Rep. Eddie Farnsworth (District 12). The Bill passed the house 5-2 on a straight party line vote February 4. There were amendments, but they do not change the objectionable parts of the bill.

 Opponents include the ACLU, Anti-Defamation League and Equality Arizona. Also speaking against the bill in the House were representatives from the Arizona Counseling Association, the Secular Coalition of Arizona; and the Reform Catholic Church. *The Arizona Republic* has twice used its lead editorial to speak against the bills (2/4 and 1/24). Opponents of these bills point to the unintended consequences, arguing that the legislation would greatly expand the ability of a person or business to use “religious infringement” as a defense if they deny services or in other ways discriminate against people (including their own employees in the case of a business) who do not share their religious views.

 Supporters argue that anti-discrimination laws are in place and this bill would not change that. However, gays, lesbians, bisexual and transgender people are not included in Arizona’s “protected” group; and many others who might be considered “sinful” from some religious points of view also are not specifically protected in Arizona law.

 **Background**

 The Arizona amendments, if successful in the legislature (SB 1062 and HB2153), are another step beyond what most states have done so far in terms of infringement on religion when it violates (or seems to violate) the civil rights of others, especially the gay, lesbian, bisexual, and transgender communities or others who are not specifically covered by Arizona’s public accommodations and civil rights laws. Below is a very condensed version of the history and background.

1. In 1990 the U.S. Supreme court, in its *Smith* decision changed the standard for burdening religious liberty. The “old” model was that the government had to show a regulation was backed by a compelling governmental interest and pursued by the least restrictive means. The *Smith* model was that religious infringement did not occur if the laws were neutral and generally applicable.
2. In response, Congress passed the Religious Freedom and Restoration act, which restored the “old” standard – but later court rulings said this only applied to federal laws.
3. States then began passing state-level religious freedom restoration acts (RFRA), to protect against religious infringement by state and local ordinances and so far 16 have done so, including Arizona. Many states however, introduced RFRA legislation but defeated it, including California, Georgia, Kansas, Louisiana, Maryland, Michigan, NH, NJ, NY, Oregon, PA, Tennessee, Vermont, Virginia, and over the years bills also have failed or failed again in Hawaii, Indiana, Kansas, Kentucky, LA, Nevada, Oregon, NY, NC and West Virginia (*See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 n.6 (1999).
4. In 2013, Kentucky overrode a Governor’s veto to pass RFRA, Kansas passed it in 2013 as did Nevada. Arizona passed amendments that would extend the scope of its RFRA but Governor Brewer vetoed it – not because she opposed it, but because it was one of the five bills on her desk at the time she had threatened the legislature with vetoing every bill they sent until they approved Medicaid expansion. Maine is currently considering a similar bill.
5. According to published papers, the state-level RFRAs aren’t working very well – at least, not very well from the point of view of those who want really strong religious infringement protections. See Lund: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666268> and also

<http://www.virginialawreview.org/content/pdfs/99/2/343.pdf>

1. **The New Mexico Case:** In march of 2012 a New Mexico court ruled in *Elane Photography v. Willock*, that New Mexico’s RFRA did not apply because a private party was trying to enforce a law against another private party. In that case, a photographer refused to take the wedding pictures of a same sex couple, and they sued under New Mexico’s human rights law. The appeals court ruled against the photographer and fined her. That is, New Mexico’s RFRA did not protect her and she (since she in a public accommodation business) would have to take their pictures. Arizona supporters of the bills cite this case as their reason for introducing it – to protect people in Arizona from a court ruling that they might have to provide public accommodation services to gay couples or others they consider “sinful.”
2. **In March, 2013 the NM Supreme Court began hearing arguments about this case and they upheld the lower court ruling. Their RFRA was not a protection against violation of an anti-discrimination law. The** Arizona law would be a national trend-setter several ways.
3. First, Arizona already has an RFRA. SB1062 and HB2153 would allow a private party who is being sued over discrimination to claim that the anti-discrimination law infringes on their religious beliefs. The government does not have to be a party to the suit.
4. Second, the Arizona law, if passed, greatly expands the definition of “person” who can use the religious infringement claim so that “person” includes not just an individual, but also corporations, organizations, local agencies and governments. This enables a business to claim that it has a sincerely held religious belief and its employees or customers could be discriminated against if their behavior, dress, or values were in conflict.
5. Third, it permits a person or business to discriminate, not only when the person's religious belief *prohibits* the person from providing equal treatment, but also when the refusal to comply is "*motivated by* a religious belief," *whether or not the refusal is "compulsory or central to" the relevant system of religious belief.* So if a person wants to refuse to hire a woman because the person believes that women should not work for money, the bills would apparently give immunity from prosecution or civil liability, not only when the person's religion prohibits hiring women, but also when the person thinks the religion opposes the hiring of women, even when it does not. This law leaves it up to someone who discriminates to decide whether he or she *thinks* that his or her religion requires discrimination, whether or not the tenets of the religion actually require or even counsel discrimination. These provisions could potentially provide anyone with a license to be a bigot.
6. Fourth, supporters of the law have claimed that groups protected explicitly by anti-discrimination laws would still be protected, but the GLBT people in Arizona are not included and a plain reading of the law in no way guarantees that anti-discrimination law would “trump” the amended RFRA.
7. Examples of the kind of discrimination that are being cited include denying public accommodation services (such as refusing to rent a motel room to a gay couple or to an unmarried couple), discrimination in hiring (if ones religion says that women should be in the home not in the workplace) , salary differentials (if a religion says that men should make more than women), and discrimination in firing (firing a married person who is having an affair if the business’ religious belief is that adultery is wrong).
8. At the hearing January 17, Sen. Yarbrough argued that the bill would protect a person from infringement on their religion if they were offering a service that could easily be found elsewhere. He was less direct about the scope of the law if there were no other service provider. Opponents, Sen. Hobbs specifically, argued that the discrimination constituted harm even if there was another service available.
9. The *Arizona Republic* lead editorial (Friday, Jan. 24), opposed the legislation as seeking to fix a problem that doesn’t exist and a “bad law.” The *Republic* also opposed it again in an editorial Feb. 4. They mentioned bakers, photographers, and others in Oregon and Colorado who claimed that serving same-sex couples in marriage ceremonies infringed on their religion.

The Arizona law, if amended, could be a step in a new direction even for states that have RFRAs in that it attempts to make claims of infringement broader and more likely to stand up in court even when the government is not a party to the case, and by expanding who can use religious infringement defense when engaged in discriminatory activity.

Here’s some useful links:

Video of the House hearing <http://azleg.granicus.com/MediaPlayer.php?publish_id=8>

Video of Senate hearing: <http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=13105>

Copy of the bill <http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf>

Background story by Howard Fischer <http://www.svherald.com/print/365889>

This table is from Lund’s paper:

**Table 1**

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| 67. **State**  | **Year**  | **Required Threshold Showing**  |
| Connecticut  | 1993  | Burden  |
| Florida  | 1998  | Substantial Burden  |
| Illinois  | 1998  | Substantial Burden  |
| Rhode Island  | 1998  | Restrictions on Religious Liberty  |
| Alabama  | 1999  | Burden  |
| Arizona  | 1999  | Substantial Burden  |
| South Carolina  | 1999  | Substantial Burden  |
| Texas  | 1999  | Substantial Burden  |
| Idaho  | 2000  | Substantial Burden  |
| New Mexico  | 2000  | Restrictions on Religious Liberty  |
| Oklahoma  | 2000  | Substantial Burden  |
| Pennsylvania  | 2002  | Substantial Burden  |
| Missouri  | 2004  | Restrictions on Religious Liberty  |
| Virginia  | 2007  | Substantial Burden  |
| Utah  | 2008  | Substantial Burden  |
| Tennessee  | 2009  | Substantial Burden  |