



Douglas Laycock

ROBERT E. SCOTT DISTINGUISHED PROFESSOR OF LAW
PROFESSOR OF RELIGIOUS STUDIES
ALICE MCKEAN YOUNG REGENTS CHAIR IN LAW EMERITUS, UNIVERSITY OF TEXAS AT AUSTIN

February 25, 2014

Hon. Janice K. Brewer, Governor
Executive Tower
1700 West Washington Street
Phoenix, AZ 85007

Dear Gov. Brewer:

SB1062, which amends Arizona's Religious Freedom Restoration Act, is on your desk for signature. The bill has been egregiously misrepresented by many of its critics. We write because we believe that you should make your decision on the basis of accurate information.

Some of us are Republicans; some of us are Democrats. Some of us are religious; some of us are not. Some of us oppose same-sex marriage; some of us support it. Nine of the eleven signers of this letter believe that you should sign the bill; two are unsure. But all of us believe that many criticisms of the Arizona bill are deeply misleading.

The federal government and eighteen states have Religious Freedom Restoration Acts (RFRAs). Another twelve or thirteen states interpret their state constitutions to provide similar protections. These laws enact a uniform standard to be interpreted and applied to individual cases by courts. They say that before the government can burden a person's religious exercise, the government has to show a compelling justification.

That standard makes sense. We should not punish people for practicing their religions unless we have a very good reason. Arizona has had a RFRA for nearly fifteen years now; the federal government has had one since 1993; and RFRA's standard was the constitutional standard for the entire country from 1963 to 1990. There have been relatively few cases; if you knew little about the Arizona RFRA until the current controversy, that is because it has had no disruptive effect in Arizona. Few people had heard of the federal RFRA before the current litigation over contraception and the Affordable Care Act.

SB1062 would amend the Arizona RFRA to address two ambiguities that have been the subject of litigation under other RFRAs. It would provide that people are covered when state or local government requires them to violate their religion in the conduct of their

business, and it would provide that people are covered when sued by a private citizen invoking state or local law to demand that they violate their religion.

But nothing in the amendment would say who wins in either of these cases. The person invoking RFRA would still have to prove that he had a sincere religious belief and that state or local government was imposing a substantial burden on his exercise of that religious belief. And the government, or the person on the other side of the lawsuit, could still show that compliance with the law was necessary to serve a compelling government interest. As a business gets bigger and more impersonal, courts will become more skeptical about claims of substantial burden on the owner's exercise of religion. And as a business gets bigger, the government's claim of compelling interest will become stronger.

Arizona's RFRA, like all RFRA's, leaves resolution of these issues to the courts for two related reasons. First, it is impossible for legislatures to foresee all the potential conflicts between the diverse religious practices of the many faiths practiced in Arizona and the diverse array of regulations enacted by the state and all its agencies, counties, municipalities, and special purpose districts. And second, when passions are aroused on all sides, as they have been in this case, it becomes extraordinarily difficult for legislatures to make principled decisions about whether to make exceptions for unpopular religious practices. Courts can generally devote more time to the question, hear the evidence from both sides, and be more insulated from interest-group pressure.

So, to be clear: SB1062 does *not* say that businesses can discriminate for religious reasons. It says that business people can assert a claim or defense under RFRA, in any kind of case (discrimination cases are not even mentioned, although they would be included), that they have the burden of proving a substantial burden on a sincere religious practice, that the government or the person suing them has the burden of proof on compelling government interest, and that the state courts in Arizona make the final decision.

All of this is fundamentally different from the Kansas bill that has gotten so much publicity (HB2453). The Kansas bill does not enact a broadly applicable standard, give each side a chance to prove its case, and leave decisions to the courts. It enacts a specific rule about religious objections to same-sex marriages and civil unions, and it says the religious objector *always wins*, no matter what.

The Kansas bill appears to limit discovery for both sides. It authorizes awards of attorneys' fees against private citizens; the Arizona bill does not. Any religious objection triggers the Kansas law; it doesn't matter that a business may be so large and impersonal that there is no substantial burden on anyone's religion. Substantial burden on religion isn't required. There is no compelling interest exception, and no hardship exception; it doesn't matter if the religious objector is the only provider of some essential goods or services in a rural Kansas county. Government officials and employees are protected, and there is a hardship exception *for the government*. If all the employees in a government office object to serving a same-sex couple, the answer must always be that one of them has to serve that couple anyway. The Kansas bill's proposed answer is that if the government cannot serve

them without undue hardship, the same-sex couple has to do without. This gets things backwards.

The problem with the Kansas bill is not that it proposes a specific rule. Carefully crafted specific exemptions can clarify the law for everyone and avoid the need to litigate the issue under the general standard of a RFRA or a state constitution. But specific exemptions for specific situations are very different from a general standard under RFRA, and it is important to recognize that difference.

The real problem with the Kansas bill is not that it proposes a specific rule, but that it proposes a very one-sided and unfair rule. We agree with Congress and a clear majority of states that government should not burden a person's religious practice without a compelling interest. But sometimes the government does have compelling interests, and then religious practices must be burdened. The Arizona bill recognizes that; the Kansas bill does not. People claiming that the two bills are similar are simply smearing the Arizona bill, disregarding the long and successful history of state and federal RFRA's, and trying to deceive you.

We should also say a word about the history of the two ambiguities in the Arizona bill. The Arizona RFRA was modeled on the federal RFRA, parts of which were copied verbatim. Language in the federal RFRA that authorizes relief against a government, inserted for reasons having to do with sovereign immunity, has been misinterpreted by a few courts to mean that RFRA cannot be a defense against a suit by a private citizen. The legislative history on how this ambiguity arose is very clear; there was never a congressional intention to preclude a RFRA defense against private citizens. This history is carefully reviewed in Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343 (2013).

Arizona copied the sovereign immunity language from the federal RFRA, and presumably had no intent to change the meaning. Defendants will assert RFRA defenses in suits by private plaintiffs whether or not you sign this bill. Without the bill, whether RFRA applies will be an additional issue for litigation; with the bill, the answer will be clear and the parties and the court can proceed to the merits. And keep in mind that these private plaintiffs may not be suing a business; they may be suing a church, a minister, a religious charity, an individual, or anyone else clearly protected by the Arizona RFRA.

If the state enacts a law that burdens someone's religion, and a private citizen sues to enforce it, the burden on religion is imposed by the state law, not by the private plaintiff. This has long been settled in constitutional law; common-law rules enforced by private plaintiffs are unconstitutional if they violate a defendant's constitutional rights. We believe that it is also the law of RFRA's. The most famous constitutional case is *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964), protecting the First Amendment right to criticize public officials from overreach in the common law of defamation; that opinion cites earlier cases.

There is also good evidence that Congress thought businesses were covered by RFRA, although of course that is disputed. Arizona's legislature may have taken a different view. But this too will be the subject of litigation if you veto the bill. If you sign the bill, the threshold issue will be resolved and the case will proceed to the merits.

There have been very few claims by businesses over the years, but there have been a few. It is true that some of these claims are based on objections to same-sex marriage, although that is not an issue in Arizona. The cases pending in the Supreme Court involve business owners who believe they are being asked to pay for abortions. Business regulations do not often require a business owner to violate a deeply held religious belief, but sometimes they do, and when that happens, the Arizona RFRA should be available. Keep in mind that it will not guarantee either side a win; it will test the government's claims and the religious believer's claims under RFRA's general standard.

Whatever judgment you pass on SB1062, you should not be misled by uninformed critics. The Arizona bill is fundamentally different from the Kansas bill. It resolves ambiguities that have been the subject of litigation elsewhere. It deserves your accurately informed consideration.

Very truly yours,

Prof. Mary Ann Glendon
Harvard Law School

Prof. Douglas Laycock
University of Virginia School of Law

Prof. Michael W. McConnell
Stanford Law School

Prof. Helen M. Alvaré
George Mason University School of Law

Professor Thomas C. Berg
University of St. Thomas School of Law (Minnesota)

Prof. Carl H. Esbeck
University of Missouri School of Law

Prof. Richard W. Garnett
Notre Dame Law School

Prof. Christopher C. Lund
Wayne State University Law School

Prof. Mark S. Scarberry
Pepperdine University School of Law

Prof. Gregory C. Sisk
University of St. Thomas School of Law (Minnesota)

Robin Fretwell Wilson
University of Illinois College of Law

(Institutional affiliations are for identification only.
Our institutions take no position on these bills.)