

Case Study

SB-1062 - The Religious Freedom Act in Arizona

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Background

In 1990, the United States Supreme Court ruled in *Employment Division v. Smith* 494 U.S. 872 (1990) that denying public accommodation laws were unconstitutional when the application of the law used religious belief as its basis. A public accommodation includes retail stores, rental establishments, service centers, as well as educational institutions. Justice Scalia suggested that by allowing an individual to apply religious beliefs in this manner would make the religious belief superior to the laws of the land and in essence would allow every citizen to become a law unto himself. (Yale, 1994).

Following the decision on *Employment Division v. Smith*, the U.S. Congress introduced and passed the Religious Freedom Restoration Act (RFRA) in 1993 that required strict scrutiny of the law when it may substantially burden a person's ability to practice one's religious beliefs. In layman's terms, a person or business cannot refuse service to someone else because that person's activity goes against the server's or business owners religious beliefs. However, in 1997 the Supreme Court ruled that RFRA was not applicable to state laws. As such, many states proposed and then passed their own Religious Freedom Restoration Acts. The State of Arizona has had such a law since 1999, though there have been no updates to it (CAP, 2014).

On January 10, 2014, Arizona Senator Steve Yarbrough, a Republican from District 21, introduced Senate Bill 1062 as an act to amend sections 41-1493 and 41-1493.01 of Arizona statutes relating to the free exercise of religion. SB 1062 is to provide what the Senators believed to be two updates to Arizona's RFRA statute. It expands the definition of "person," in this state, to include corporations, sole proprietorships, partnerships, and all other forms of business entities. In addition, it ensures that a government enactment could not infringe on religious faith merely

because the enactment allows for enforcement by a private person (Yarbrough, Barto & Worsley, 2014). The motivation to amend the existing RFRA came about due to a 2013 ruling in New Mexico. In the case of *Elane Photography v. Willcock* the state's RFRA did not protect the business owner for refusing to take photographs at a same-sex wedding. The Willcock couple sued Elane Photography because the photographer declined to use her artistic expression to illustrate through photographic means the story of a same-sex marriage ceremony (ADF, 2013).

The introduction of SB 1062 garnered prompt attention of the media and social network sites and word of this new bill went viral throughout Arizona and across the United States. The Lesbian, Gay, Bi-sexual and Transgendered (LGBT) community expressed concern and considered this bill to be a direct attack on them. Civil rights groups and many large employers in Arizona opposed the bill. In addition, Republican Senators, John McCain and Jeff Flake publicly stated their opposition to the bill.

While SB 1062 passed in the Senate and its mirror bill HB 2153 passed in the House as well, Governor Jan Brewer ultimately vetoed both bills on February 26, 2014. At a press conference Governor Brewer stated the bill "has the potential to create more problems than it purports to solve," and, "The bill is broadly worded and could result in unintended and negative consequences" (Weinger & McCalmont, 2014).

Examination of SB 1062 is important to business owners and citizens as it illustrates how changing a few words in existing law could set back more than 200 years of social progress. What ensued during the thirty-seven days surrounding the bill is a good example of how multi-media and social media plays an important role in the decision-making process of elected officials.

Bill History

SB 1062 moved quickly through the senate and the house during the early 2014 senate session. The Government and Environment committee passed the bill January 10, 2014. During the next nine days, it passed through Senate Rules Committee, and went on to have a few parts of the bill modified. This process helps to build momentum on the bill, as each Senator will hear from both supporters and detractors within their district. After the third and final, read on February 20 the bill passed in a tight vote of 33 to 27 with no Senator absent or abstaining.

When the bill passed on February 20, 2014, it was up to the Governor to accept the bill, sign it into law, or reject the bill with a veto. On February 24, Governor Brewer told reporters at the National Governors Association conference that she was in no rush to decide the bill's fate (Fuller, 2014). Over the next few days, Governor Brewer became the recipient of media and political pressure to make her decision on accepting or vetoing the bill. Ultimately, on February 26 Governor Brewer issued her veto.

Critical Issues

Understanding the wording of the bill is critical to examining the issues of the bill. The purpose of SB 1062 is to be a refinement of Arizona's Religious Freedom Restoration Act. This refinement did not tighten the scope of the law; it broadened it. The bill expands the definition of exercise of religion to include both the practice and observance. It also expands the definition of a person to include any individual, association, partnership, corporation, church, estate, trust, or foundation of other legal entities. The current Arizona RFRA requires a person or organization to deliver goods or services to someone without regard as to either party's religious beliefs. In practice, this means that one's religion should have no bearing on whether or not they serve

someone else. Federal statutes do not prohibit discrimination based on sexual orientation; though many states including California, New York and New Mexico specifically prohibit discrimination based on sexual orientation.

SB 1062 would in effect allow individuals and their businesses the same rights afforded to religious institutions. For example, under Arizona's RFRA, a synagogue can discriminate in the process of hiring a Rabbi. As such, the job description can require a Rabbi to be Jewish and be a follower of certain sects within the religion. However, that same practice is illegal when applied to a construction company hiring a plumber. The prospective employer cannot require the plumber to be a Baptist or any religion for that matter. SB 1062's purpose is to refine on a state level the First Amendment to the United States Constitution. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Madison, 1787). The refinements or expansion protects those who wish to use religion and religious beliefs as a basis for refusal of service without fear of legal reprisal.

Because SB 1062 used the New Mexico Supreme Court ruling in *Elane Photography v Willock* as a case example, many positioned SB 1062 as an anti-gay bill. The news media and commentators quickly used that single approach as the primary spin. The carefully worded bill does not indicate the purpose is to oppose the LGBT community. However, as the only case used for support of the bill was *Elane Photography v Willock*. It is the opinion of some political analysts, media commentators, and business owners that the bill specifically targets the LGBT community.

Proponents of SB 1062

The purpose of the bill is to protect business owners from possible lawsuits when they chose to refuse services based upon religious objections. The Arizona Republican Party and the Christian Right assert that, without SB 1062, business owners may be subject to immoral people whose actions hinder their ability to use their own property to fulfill their own religious mission.

According to Dave (2014), an attorney at the Alliance Defending Freedom who helped draft SB 1062 provides the following example; “Let’s pretend that I’m a bakery and that, in my town here in Arizona, Westboro Baptist Church comes to picket the funeral of a soldier, and they tell me to bake a cake. They want it to say, “God hates ...” and that terrible word they use. “It would offend my dignity. I don’t want to give voice to that horrible message. Right now, they could sue me for discrimination based on their religious beliefs. If the Arizona courts went the way of the New Mexico courts, I would lose and if they targeted me, I could lose my business because of the damages I’d have to pay out. I would never be able to assert my Religious Freedom Restoration Act defense because it’s available only if the government is prosecuting me.” (p. 222)

A group of Republican and Democratic law professors from, Harvard, Stanford, Notre Dame, Pepperdine, and Universities in Virginia, Illinois, and Minnesota delivered a letter to Governor Brewer supporting SB 1062. They contend that after examining the bill, SB 1062 is not a discrimination bill, but a bill that protects people while practicing their religions. They also noted the bill now clarified two areas of the law that were ambiguous in the 1999 RFRA, that of definition of a person, and government intervention. (Laycock et al., 2014).

Opponents to SB 1062

Opponents to SB 1062 became visible as soon as they heard about the bill on the Senate floor. Toni Massaro, a law professor at the University of Arizona, said that many Arizona lawmakers fear that the federal government would develop sexual discrimination laws in ways that could restrict religious freedom. Putting SB 1062 into law protects business owners when who are sued for sexual orientation discrimination. It gives them protection for doing the wrong thing (Dave, 2014)

Opposition support skyrocketed when actor and LGBT activist George Takei posted an open letter on his website to Arizona regarding the bill. He articulated that this bill was likely to have a negative effect on Arizona's economy. The letter regarding the gay consumer said, "If your Governor Jan Brewer signs this repugnant bill into law, make no mistake. We will not come. We will not spend. And we will urge everyone we know—from large corporations to small families on vacation—to boycott [Arizona]. Because you don't deserve our dollars. Not one red cent" (Takei, 2014).

Other opponents to the bill included The Arizona Super Bowl Host Committee and the Arizona Cardinals that said they "do not support anything that has the potential to divide, exclude and discriminate," and "We are concerned with anything that creates a negative perception of Arizona." The opposition group continued to grow to include more than 83 executives from major corporations in the state including those from PetSmart Inc, Hensley Beverage Co, AT&T Inc, Taser International Inc, and the Greater Phoenix Economic Council (Sunnucks, 2014). In addition to opposing the bill on moral and ethical foundation, the negative economic effect it could have on Arizona business was a major concern.

Impact on Business

Some Arizona business leaders expressed concern that SB 1062 would have a negative economic impact. The interpretation of the bill targets the LGBT community and by association makes Arizona unfriendly to gays. On a national basis, the LGBT population is between 19-23 million and carries a purchasing power of over \$800 billion. The LGBT community has the highest disposable income among adults. The data also reveals that 74% are brand loyal and 77% will switch to companies that have a positive LGBT stance (McFall, 2014). Data obtained from MC Publishing Inc. a company that serves LGBT consumers in five states through travel magazines and websites compiled the following LGBT consumer data from direct surveys and U.S. Census Bureau data.

- Arizona Ranks 10th highest concentration of same-sex couples.
- 30% of people moving to Arizona claim to be part of the LGBT community.
- Arizona is ranked 7th for U.S. and 3rd for International LGBT travelers
- Phoenix ranks fifth for LGBT Business Travelers within the U.S.

In an article, for International Business Times, Rick Murry, CEO of The Arizona Small Business Association, tells Johanson that the bill:

Unintentionally exposes private sector businesses and business owners to liability by allowing an employee to exercise their own religious beliefs at the expense of the business. And, that SB 1062 could shift the balance of control from the business owner to employees who can decide to refuse someone's business based on their own personal religious beliefs and not the business owners" (2014).

News and Social Media Response

Within moments of the bill introduction, media outlets including print media, television, and the Internet were abuzz with information. Because this is a controversial bill, it could have an impact on other states. FOX commentators support the bill, whereas MSNBC and CNN's commentators opposed the bill. In addition to the television news media, SB 1062 garnered attention from the New York Times, Los Angeles Times, Wall Street Journal, Forbes, Barron's, Chicago Tribune, Miami Herald, and the Huffington Post. In addition, to people using Facebook and Twitter for discussions, activist groups were using these feeds as well, gaining support both for and against SB 1062. Some groups used the internet to organize and encourage people to join protest demonstrations.

Future of SB 1062

SB 1062 lived a very short life. The intent of the bill was to develop religious freedom rights. The LGBT community declared a victory at the defeat of SB 1062. The Christian right viewed it as a big loss for Arizona. The true impact the veto of SB 1062 will have on the state is still yet to unfold. If business expands and more members of the LGBT community support the state, then defeating the bill will have had a positive business effect. If the market remains unchanged then there were only gains on a social, political, and moral level. Nevertheless, the activity surrounding SB 1062 shows how the media and social networking can make a difference in how issues like these may be handled in the future. The ability for so many people to voice their opinion and exert influence on law and policy makers nationwide with such speed is a testament to the usefulness of technology for critical social and business issues.

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