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The Bizarre, Slanted Coverage of Arizona's SB 1062

by Hans Bader on February 27, 2014 ·

Yesterday, Arizona Governor Jan Brewer vetoed a bill that would have made clear that the state's Religious Freedom Restoration Act (RFRA) applied not just as a defense to a lawsuit brought by a government entity, but also as a defense to lawsuits brought by a private party under a state statute, or using a cause of action created by state law. Under RFRA, no government action (including a damage award in a lawsuit) can "substantially burden" religious freedom unless it is "the least restrictive means" to further a "compelling interest." The bill hardly seems like a radical change, since damage awards in private lawsuits already constitute "state action" for purposes of the First Amendment, under the Supreme Court's decisions in *Snyder v. Phelps* and *New York Times v. Sullivan*. The bill just applies the same principle to RFRA, and, indeed, the bill's enactment might merely have given the state's RFRA the same meaning that other jurisdictions' RFRA's already have by judicial construction. The bill did not even mention sexual orientation, did not single out gays, and probably would have had its greatest effect in other areas.

The media, including the *Washington Post* and the *New York Times*, have fundamentally distorted what that bill, SB 1062, vetoed by Gov. Brewer, would have done, by claiming that it would have "allowed" a broad range of discrimination. It was written narrowly enough (and did not even mention gays) that it conceivably might not have legalized any additional discrimination against gays at all. It might have had more effect as to refusals to serve other groups disapproved of by religious fundamentalists, like cohabiting unmarried couples, although even that is not guaranteed. (Disclosure: I support both gay marriage and religious liberty, and CEI did not take any position on the bill.)

As a lawyer who has read the bill, I think it is erroneous for new stories to claim the contrary. The Washington Post's Aaron Blake, for example, misleadingly wrote, "Arizona Gov. Jan Brewer (R) vetoed a controversial bill Wednesday that would have allowed businesses in the state to deny service to gays and lesbians if they felt that serving them would violate their

religious rights." Similarly, the teaser to that article originally read, "The Arizona governor rejects legislation that would have allowed businesses to refuse to serve gay people if they thought doing so violated their religious liberty."

That contains two misleading messages: (1) that the bill would have given businesses carte blanche not to serve gay people on religious grounds, based on their subjectively having "felt" their religious rights were affected, rather than merely allowing them to do so **only if** the state actually lacked a compelling interest in prohibiting such refusals to serve **and** requiring them to serve **actually did** substantially burden their religious freedom; and (2) that it singled out gay people (as someone who has studied the history of similar legislation, I can tell you it probably would have been of more use to a religious landlord seeking not to rent to an unmarried cohabiting couple, than to a gay couple who might be able to more plausibly argue that they are a traditionally disadvantaged minority group that the state has more of a compelling interest in protecting. When the California Supreme Court ruled 4-to-3 in 1996 that a religious landlord had to rent to an unmarried couple, even the three dissenters implied that they might have ruled in favor of a gay couple, rather than an unmarried couple. And that was back in 1996.)

But legal scholars — including same-sex marriage advocates like law professor Douglas Laycock and Walter Olson, an openly-gay legal scholar at the Cato Institute (see here and here) – have taken issue with this mischaracterization of the bill. (The bill appears to just rewrite the Arizona state RFRA to do what some other states' RFRA's already do by judicial construction). As Olson notes, the Arizona bill is very different from the more extreme Kansas bill that it has wrongly been lumped in with, which "introduced a new legal right for many public servants not to do their jobs and created rights to sue employers for not accommodating anti-gay sentiment," which was one reason that bill died in the Kansas legislature.

Olson's colleague Ilya Shapiro notes that courts logically ought to rule in favor of some religious-freedom defenses to discrimination claims brought against private citizens and firms (as I have argued in the past); but in the world we live in, where courts are more sympathetic to discrimination plaintiffs than they are to religious-freedom claimants, they tend *not* to, even when a state has a RFRA on the books. Supporters of the Arizona bill hoped it would prevent lawsuits like one in New Mexico where a religious wedding photographer was found by the state supreme court to have illegally discriminated when she declined to photograph a gay couple's non-marital commitment ceremony and the couple then brought a discrimination complaint against her (a ruling I criticized on free-speech grounds here). But it's not certain that the Arizona bill was either necessary, or sufficient, to prevent such rulings in Arizona in the future, or that it would have changed the outcome in that case (although it would have given the wedding photographer more ammunition for one of her arguments