

POLICY PAGES

Sexual Orientation and Gender Identity Nondiscrimination Laws

Sept. 19, 2019

OVERVIEW

All Americans should be free to peacefully live and work according to their deeply held beliefs without fear of unjust government punishment. Unfortunately, sexual orientation and gender identity (SOGI) nondiscrimination laws throughout the country undermine this freedom.

Historically, nondiscrimination laws were meant to shield people from systemic unjust discrimination, especially in housing, employment, and places of public accommodation. Therefore, they have prohibited discrimination based on race, sex, and national origin for example. SOGI nondiscrimination laws add “sexual orientation” and “gender identity” to these existing nondiscrimination laws.

SOGI laws are a solution in search of a problem, and instead of shielding people from discrimination, are being used as a sword against individuals, businesses, and organizations that hold a historic understanding of marriage and gender. Instead of solving a real problem, SOGI laws create a host of problems, like undermining free speech and religious freedom, threatening women’s equality and privacy, and harming small businesses.

The Arizona Supreme Court’s decision in [Brush & Nib v. City of Phoenix](#) (2019) provided a strong defense against these laws when it ruled that Phoenix could not compel two artists to create custom wedding invitations for same-sex wedding ceremonies. Doing so would violate their rights under the Free Speech clause in the Arizona Constitution ([AZ Const. art. 2, §6](#)) and Arizona’s Free Exercise of Religion Act (FERA) ([A.R.S. § 41-1493.01](#)).



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ANALYSIS

SOGI nondiscrimination laws add “sexual orientation” and “gender identity” to existing nondiscrimination laws that typically prohibit discrimination in employment, housing, and public accommodations against protected classes, like race, color, religion, sex, age, disability, familial status or national origin. Historically, nondiscrimination laws were meant to *shield* minority groups from widespread unjust discrimination. However, SOGI laws are not solving a widespread problem, but are rather being used across the country as a *sword* against individuals, businesses, and organizations who have a historic understanding of marriage and gender.

State and local governments are using these laws to compel creative professionals, like [photographers](#), [cake artists](#), [florists](#), [promotional printers](#), [videographers](#), [painters](#), and [calligraphers](#) to express a message they disagree with and in violation of their sincerely held religious beliefs about human sexuality and gender. These creative professionals serve all people, but they can’t serve all messages.

However, creative professionals are not the only ones that have been targeted. [Faith-based adoption and foster care providers](#) have shut down because SOGIs compelled them to place children in same-sex households, in violation of their religious beliefs. [Homeless women’s shelters](#) are being forced to allow men that identify as women to share sex-specific facilities with vulnerable women. Even [religious schools](#) have been threatened with SOGI laws.

As of 2019, [twenty-one states and Washington D.C.](#) have statewide SOGI laws. Arizona does not have a statewide SOGI law, but [six Arizona cities do](#): Phoenix, Tucson, Tempe, Flagstaff, Sedona, and Winslow.

PROBLEMS WITH SOGI LAWS

1. **They Undermine Constitutionally Guaranteed Freedoms of Speech and Religion.** They compel individuals and organizations to communicate messages or act contrary to their beliefs about marriage, sexuality, and what it means to be male and female. Creative professionals, adoption and foster care providers, homeless women’s shelters, and even religious schools have been threatened or punished under these laws.
2. **They Threaten Women’s Equality and Privacy.** SOGI laws force sex-specific facilities, like women’s shelters, locker rooms, showers, and restrooms, to admit men who identify as women. For example, the City of Anchorage attempted to punish a [faith-based women’s shelter](#) for not admitting a man that identified as a woman, but fortunately dropped its complaint after a loss in federal court. These laws also threaten academic and athletic advances women have made by allowing men who identify as women to compete with them for spots on female teams and for scholarships reserved for women. This is happening in Connecticut where two biological males are [competing in high school track and field against female athletes](#) and have won several indoor and outdoor track titles.

3. **They Harm Small Businesses.** They force small-business owners to choose between their livelihood and operating consistent with their core values. Under SOGI laws, business owners that serve all people face lawsuits, fines, and jail time just because they decline to communicate a message or participate in an event that violates their conscience.
4. **They Do Not Solve a Widespread Problem.** These types of laws are solutions in search of a problem. The citizens of Arizona, like most Americans, do not refuse to hire, serve, or rent to people because of their sexual orientation or gender identity. This is not only because the people of Arizona are tolerant and fair-minded, but also because the free market, through boycotts and public pressure, would swiftly impose substantial social and economic costs on anyone engaged in baseless discrimination.
5. **They Are Not Needed for Economic Growth.** SOGI proponents argue SOGIs are good for business. However, in Arizona, we see repeated announcements of new businesses moving to Arizona because of our favorable business climate. The lack of a statewide SOGI is not impeding growth. Arizona has added [over 300,000 new jobs](#) since 2015, and its 2018 [GDP growth](#) ranks fourth in the nation. Further, of the “[top ten states for business](#)” according to the 2018 Forbes rankings, six of them do not have SOGI laws. According to the American Legislative Exchange Council (ALEC), of the top ten states with [best economic outlooks in 2018](#), only one of them had a statewide SOGI.

BRUSH & NIB V. CITY OF PHOENIX

In September 2019, the Arizona Supreme Court delivered a major victory for free speech and religious freedom in Arizona with its 4-3 decision in [Brush & Nib Studio v. City of Phoenix](#).

Joanna Duka and Breanna Koski, owners of Brush & Nib Studio, create custom wedding invitations, incorporating calligraphy and painting. They filed a pre-enforcement action to challenge Phoenix’s SOGI ordinance. They serve all people, but because of their religious beliefs, they cannot communicate all messages. According to the City, if they declined to create custom wedding invitations for a same-sex wedding, they would be in violation of the ordinance and could face fines of up to \$2,500 and six months in jail for every day they were in violation.

Joanna and Breanna asked the Supreme Court to uphold their right to refuse to create custom-made wedding products for same-sex weddings, and their right to post a statement on their website indicating that because of their religious beliefs they are unable to create such products.

The Court ruled Phoenix could not compel them to create custom wedding invitations celebrating same-sex wedding ceremonies because it would violate their rights under the [Arizona Constitution, article 2, section 6](#), which reads “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right” and the Free Exercise of Religion Act (FERA), [A.R.S. §41-1493.01](#). The Court also ruled they could post a statement on their website

indicating that because of their religious beliefs they are unable to create custom wedding invitations for same-sex marriage ceremonies.

The Court's ruling protects more than just Joanna and Breanna. It protects any artist in Arizona that creates custom wedding invitations that are "materially similar" to those done by Joanna and Breanna. Photographers, musicians, videographers, and writers that create custom works with celebratory messages for weddings would most likely be protected as well. The granting of the injunction only benefits Joanna and Breanna, but the reasoning will have broader applications.

CONCLUSION

All Americans should be free to peacefully live and work according to their deeply held beliefs without fear of unjust government punishment. Unfortunately, sexual orientation and gender identity (SOGI) nondiscrimination laws throughout the country undermine this freedom. Instead of solving a problem, SOGI laws violate constitutionally guaranteed freedoms of speech and religion, threaten women's equality and privacy, and harm small businesses. Arizona's *Brush & Nib* decision is a major victory for free speech and religious freedom in a time when these foundational freedoms are constantly under attack.