

# POLICY PAGES

## Sexual Orientation and Gender Identity Nondiscrimination Laws

2023

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### 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, governments have prohibited discrimination based on immutable characteristics such as 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, they are 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.<sup>1</sup> 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

By adding “sexual orientation” and “gender identity” to existing nondiscrimination laws, anyone holding to a historical view of human sexuality and marriage is put at odds with the law. This often



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forces those with long-held and widespread beliefs about gender and marriage to choose between their livelihoods and their deeply held beliefs.

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 cannot serve all messages. Fortunately, in 2018 and again in 2023, the U.S. Supreme Court upheld First Amendment religious liberty and free speech rights of creative professionals from creating products that promote ideas that violate their religious views.<sup>2</sup>

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. The U.S. Supreme Court ruled in favor of Catholic Social Services in the June 2021 decision, *Fulton v. City of Philadelphia*. But the narrow ruling only protects the religious exemption as long as the city of Philadelphia allows other exemptions.<sup>3</sup>

[Homeless women's shelters](#) are being forced to allow men that identify as women to share sex-specific facilities with vulnerable women. Transgender people have filed lawsuits against Catholic hospitals in New Jersey and California for refusing to provide hysterectomies solely in pursuit of gender transition.<sup>4</sup> Even [religious schools](#) have been threatened with SOGI laws. The U.S. Supreme Court in June 2021 let stand a lower court's decision to allow a biological boy to use the girl's restroom in a Virginia public school.<sup>5</sup>

As of 2023, at least thirty-three states and Washington D.C. have extensive statewide SOGI laws.<sup>6</sup> Arizona does not have a statewide SOGI law, but 11 Arizona cities do: Chandler, Flagstaff, Glendale, Mesa, Phoenix, Scottsdale, Sedona, Tempe, Tolleson, Tucson, and Winslow.<sup>7</sup>

## **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, religious hospitals, 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.<sup>8</sup> 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. One example 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.<sup>9</sup>
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. Proponents of SOGI laws have yet to offer one concrete example of discrimination in Arizona based on SOGI.
5. **They Are Not Needed for Economic Growth.** SOGI proponents argue SOGIs are good for business. However, in Arizona, new businesses move to Arizona because of our favorable business climate. The lack of a statewide SOGI is not impeding growth. More than 634 companies have either relocated to, or expanded in Arizona between 2015 and 2020, creating more than 13,000 jobs in manufacturing alone.<sup>10</sup> The state “outperformed the United States throughout the pandemic years –losing fewer jobs than all but 10 other states during the 2020 recession and regaining lost jobs faster than all but 4 other states.”<sup>11</sup> Arizona has added more than 400,000 new jobs since 2015<sup>12</sup>, and its 2019 GDP growth is ranked among the top in the nation.<sup>13</sup> Further, Forbes ranks Arizona among the top 20 states for business in the nation.<sup>14</sup> Arizona has also been able to capitalize on sports related revenue without a statewide SOGI law. A recent report touted the state’s sports tourism as “big business,” citing Cactus League Baseball, Phoenix Open, and college bowl games that bring in more than \$700 million in outside money.<sup>15</sup> Larger events such as the Super Bowl, which Arizona hosted in 2023, and the NCAA Finals bring in about \$1 billion or more.<sup>16</sup>

## **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*.<sup>17</sup>

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.

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## **SUPREME COURT AND FEDERAL LAW**

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While the U.S. Supreme Court ruled in [\*Bostock v. Clayton County\*](#) that an employer may not fire a person merely for their sexual orientation,<sup>18</sup> these SOGI laws go much further. In addition, government is unilaterally expanding the reach of *Bostock* by interpreting it to include all areas of public accommodation.

On his first day in office, President Biden issued an Executive Order directing all agencies to "implement fully all federal laws that prevent discrimination on the basis of sex, to include sexual orientation and gender identity," effectively changing the definition of the word "sex" and applying *Bostock* to all areas of government, not just employment.<sup>19</sup>

Congress's effort to pass the Equality Act would codify the EO and further expand sexual orientation and gender identity accommodations with no regard or exemptions for religious freedom by adding sexual orientation and gender identity to the list of protected classes in the federal Civil Rights Act.

The affects would be sweeping, especially on parents, girls and women, health professionals, and religious organizations.<sup>20</sup>

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## **TALKING POINTS**

- 1. So-called "nondiscrimination laws" are meant to shield from undue discrimination, but are now used as a sword against those who do not agree with the government's ever-changing idea of human sexuality.**
- 2. SOGI laws are solutions in search of a problem. There is no evidence of widespread discrimination based on sexual orientation or gender identity.** Proponents of such laws have yet to offer concrete examples of LGBT discrimination in Arizona. Although there are several clearly documented cases of targeting religious artists and business owners for their long-held and widespread beliefs on human sexuality – including Brush & Nib in Phoenix.
- 3. Government has no business dictating which beliefs can or cannot override First Amendment protections of free speech and the freedom to exercise one's religion.**
- 4. Putting SOGI accommodations in law has sweeping consequences, including: violating deeply held and protected rights of individuals, artists, and health**

**professionals; erasing privacy and safety protections of girls and women, forcing religious organizations to violate their deeply held beliefs, to name a few.**

## **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. Yet, the U.S. Supreme Court ruling in *Bostock* further undermines such fundamental freedoms.

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<sup>1</sup> *Brush & Nib Studios, LC v. City of Phoenix*, 247 Ariz. 269 (2019).

<https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2019/Brush%20and%20Nib%20Final%20-%20Amended.pdf>

<sup>2</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

[https://www.supremecourt.gov/opinions/17pdf/16-111\\_new\\_d1of.pdf](https://www.supremecourt.gov/opinions/17pdf/16-111_new_d1of.pdf) ; 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023). [https://www.supremecourt.gov/opinions/22pdf/21-476\\_c185.pdf](https://www.supremecourt.gov/opinions/22pdf/21-476_c185.pdf)

<sup>3</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). [https://www.supremecourt.gov/opinions/20pdf/19-123\\_g3bi.pdf](https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf).

<sup>4</sup> *NorthJersey.com* (2017, Jan. 5). Transgender man sues St. Joseph’s in Paterson over denial of surgery, <https://www.northjersey.com/story/news/health/2017/01/05/transgender-man-sues-st-josephs-paterson-over-denial-surgery/96205098/>; Catholic hospital sued for denying sex reassignment surgery. (2017, April 27) <https://www.catholicnewsagency.com/news/35911/catholic-hospital-sued-for-denying-sex-reassignment-surgery>

<sup>5</sup> U.S. Supreme Court declines review. <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1163.html>

<sup>6</sup> 2022 State Equality Index, Human Rights Campaign Foundation (2023) [https://reports.hrc.org/2022-state-equality-index?\\_ga=2.77642269.881872720.1693336146-104434633.1693336146](https://reports.hrc.org/2022-state-equality-index?_ga=2.77642269.881872720.1693336146-104434633.1693336146)

<sup>7</sup> M.A.P Arizona’s Equality Profile, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/AZ](https://www.lgbtmap.org/equality_maps/profile_state/AZ).

<sup>8</sup> Alaska Public Media (2019, Sept 30) Anchorage settles case on transgender access to women’s shelter

<https://www.alaskapublic.org/2019/09/30/anchorage-settles-case-on-transgender-access-to-womens-shelter/>

<sup>9</sup> Alliance Defending Freedom, *Soule v. Connecticut Association of Schools* <https://adflegal.org/case/soule-v-connecticut-association-schools>

<sup>10</sup> CNBC highlights the rise of Arizona’s economy (2021, May 17). <https://azgovernor.gov/governor/files/cnbc-highlights-rise-arizonas-economy>

<sup>11</sup> Arizona Jobs and Labor Force Update: (2022, November). Common Sense Institute Arizona (2022, Nov. 18).

<https://commonsenseinstituteaz.org/arizona-jobs-and-labor-force-update-november-2022/>.

<sup>12</sup> AZ Business Magazine (2022, January 20). Arizona has added 400,000 jobs since 2015

<https://azbigmedia.com/business/arizona-has-added-400000-jobs-since-2015/>

<sup>13</sup> Phoenix Business Journal (2020, April 7). Arizona’s 2019 GDP growth among top in the nation,

<https://www.bizjournals.com/phoenix/news/2020/04/07/arizonas-2019-gdp-growth-among-top-in-the-nation.html>

<sup>14</sup> Forbes, Best State’s for Business, <https://www.forbes.com/best-states-for-business/list/#tab:overall>.

<sup>15</sup> ABC 15 (2021, July 12). Sports tourism is big business for Arizona, expected to keep growing

<https://www.abc15.com/news/state/sports-tourism-is-big-business-for-arizona-expected-to-keep-growing> .

<sup>16</sup> *Id.*

## **SOGI NONDISCRIMINATION LAWS**

September 2023

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<sup>17</sup> *Brush & Nib*, *Supra* note 1

<sup>18</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (, [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf)

<sup>19</sup>White House Fact Sheet, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-the-biden-harris-administration-champions-lgbtq-equality-and-marks-pride-month/>

<sup>20</sup>Heritage Foundation, “The Equality Act” <https://www.heritage.org/gender/heritage-explains/the-equality-act>