



## ISSUE NUMBER 3

(Referred to the people by the Arkansas General Assembly)

# Arkansas Religious Freedom Amendment

**POPULAR NAME:** A Constitutional Amendment to Create the “Arkansas Religious Freedom Amendment.”

**BALLOT TITLE:** An amendment to the Arkansas Constitution to create the “Arkansas Religious Freedom Amendment”; and to provide that government may never burden a person’s freedom of religion except in the rare circumstance that the government demonstrates that application of the burden to the person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling government interest.

### What is being proposed?

The proposed amendment would add language to the Arkansas Constitution that:

- Prohibits state and local governments from burdening the practice of religion in Arkansas unless the government shows there’s a compelling reason to do so and acts in the least restrictive way.
- Provides a legal claim in a court or other governmental proceeding for a person to seek relief against the government for imposing on their religious freedom.

The amendment would apply to current and future government laws, rules, regulations, ordinances, administrative provisions and rulings, guidelines and other requirements.

### How did this issue get on the ballot?

The Arkansas Senate and House of Representatives voted to place Issue 3, then known as SJR14, on the 2022 General Election Ballot. The Arkansas Constitution grants the legislature the right to include up to three constitutional amendments on the general election ballot.

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## QUICK LOOK: What does your vote mean?

**FOR:** A FOR vote means you are in favor of adding an amendment to the Arkansas Constitution that prohibits state and local governments from burdening a person’s practice of religion unless there’s a compelling reason to do so.

**AGAINST:** An AGAINST vote means you are not in favor of adding an amendment to the Arkansas Constitution that would prohibit state and local governments from burdening a person’s practice of religion unless there’s a compelling reason to do so.

## Where can I find more information?

The complete wording of this amendment can be found at [uaex.uada.edu/issue3](http://uaex.uada.edu/issue3)

Constitutional amendments require the approval of a majority of voters in a statewide election. Election Day is Nov. 8, 2022.

### **Who sponsored this amendment?**

Sen. Jason Rapert of Conway and Rep. Jimmy Gazaway of Paragould

**When was the last time Arkansas voted on this issue?** Approved by voters in 1874, the Arkansas Constitution contains a freedom of religion provision in Article II, Section 24:

*All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect or support any place of worship; or to maintain ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other.*

Since then Arkansans have not voted on any constitutional amendments regarding this issue.

The following statements are examples of what supporters and opponents have made public either in media statements, campaign literature, on websites or in interviews with Public Policy Center staff. The University of Arkansas System Division of Agriculture does not endorse or validate these statements.

### **What do supporters say?**

- Courts and opinions change over time, so the state should put forth the strongest language possible.
- The First Amendment has not changed, but the way courts interpret it has over the years. The Arkansas Religious Freedom Amendment helps stop courts from reinterpreting and undermining the free exercise of religion in Arkansas.
- SJR14 [Issue 3] would be a barrier to infringements on religious freedom at the local level.
- The proposed amendment would provide a stronger protection for religious freedom because it would only have to be proven that the government was burdening religious liberty, not that it was a substantial burden.
- Measures like SJR 14 [Issue 3] simply help restore protections for the free exercise of religion. It's just a good amendment that will help ensure that our state constitution protects religious liberty in Arkansas.
- We have executive branches come and executive branches go, and I don't want an executive branch that changes our law. Governors have really done things to infringe on people's religious freedoms, and I don't want that to happen in the future.

### **What do opponents say?**

- This proposal is redundant. We're doing something that really doesn't do anything.
- I think it sets us in a weaker position were this to be challenged under the First Amendment.
- Nothing in the amendment explains what remedies are available when one person's or group's religious liberties adversely impact the rights and liberties of other groups or people. On the contrary, this amendment sets up the potential for abuse of other people by persons claiming "free expression" or "free exercise" of religion.
- Despite public claims by its supporters that this amendment will safeguard religion from government, it does not safeguard government from religion. It will allow religion to burden the government and it implicitly demands that the government allow that to happen.
- The amendment does not permit the government to burden anyone's religious practice for any reason, which is extremely short-sighted in cases of public health, security, order, and the protection of other rights and liberties of people in society.
- Despite public claims by its proponents that this amendment will strengthen the free expression of religion, the language of this amendment is vague and overbroad, with little guidance for how it is to be interpreted.

## How does this proposal define “government?”

Specifically, government is defined in the proposal as:

- A branch, department, agency, or instrumentality of the State of Arkansas,
- A political subdivision of the state, including county, city, town or other unit of local government,
- An official acting on behalf of government, and
- A person acting under the “color of law” of the State of Arkansas. The term “color of law” in this instance would mean there is an appearance of someone acting on behalf of the state.

The amendment would apply to local, county and state government agencies, courts, state-funded schools and colleges, government-owned utilities, and government-related commissions, councils, and boards. If an entity was created by an Arkansas governing body or law, it would fall under the definition of government in this proposal.

## Aren’t there already laws about government and religion?

There are federal and state laws regarding the free exercise of religion.

The First Amendment to the U.S. Constitution prohibits Congress from making any law respecting an establishment of religion or prohibiting the free exercise of religion. The 14th Amendment also extends the protections in the First Amendment to the state and local level.

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA)<sup>1</sup> in response to a 1990 U.S. Supreme Court case that affected how to judge and determine the government’s burden in constitutional free exercise claims. The RFRA prohibited federal, state and local governments from “substantially” burdening a person’s exercise of religion.

In 1997, the U.S. Supreme Court ruled that the RFRA was unconstitutional as it applied to state and local governments because it exceeded Congress’ enforcement power. However, RFRA is still the law when it comes to the federal government’s impact on a person’s exercise of religion.

Since then, Arkansas and more than 20 other states have passed their own versions of the federal law.

In 2015, Arkansas lawmakers passed Act 975.<sup>2</sup> This state-level RFRA mirrors the federal law and says government cannot substantially burden a person’s exercise of religion.

The state law refers to a federal test, or method, for determining whether a government has a compelling interest for substantially burdening the free exercise of religion.



## What’s the difference between the existing state law and the proposed constitutional amendment?

(1) Act 975 says government may not “substantially burden” a person’s exercise of religion. The proposed constitutional amendment lacks the word “substantially” when describing prohibited government burdens. This one-word difference indicates a stricter limit on what government can do in terms of impacting a person’s exercise of religion than Act 975. Ultimately, the answer to whether an action or law burdens someone’s exercise of religion in violation of the proposed constitutional amendment would rest with judges in the legal system.

(2) Act 975 exempts the Department of Correction, the Department of Community Correction, county jails and detention facilities, meaning the law does not apply to these agencies. The proposed constitutional amendment does not list any exemptions for government entities.

(3) Issue 3 would put the prohibition into the state constitution. Changes to a constitutional amendment require a vote of the people, whereas lawmakers can change Act 975 during any legislative session.

## How is “burden” defined by this proposal?

There is not a definition of “burden” in the proposed amendment or a process for identifying when a government does it for non-compelling reasons. This will likely be left for court interpretation.

## What does “compelling government interest” mean in this proposal?

The term “compelling government interest” isn’t defined in this proposal, but the Arkansas General Assembly’s legislative findings that accompanied Issue 3 when they voted to place it on the ballot note that the “compelling interest test” described in previous court rulings as well as in the federal law “is a workable test for striking sensible balances

<sup>1</sup><https://www.congress.gov/bill/103rd-congress/house-bill/1308/text>

<sup>2</sup><https://encyclopediaofarkansas.net/entries/act-975-of-2015-9259/>

between religious liberty and competing government interests from public education ... [to] national defense ... and other areas of important mutual concern.”

### **How is “person” defined in this proposal?**

There is no definition of “person” in the proposed amendment. (Nor is there a definition in Act 975, a current law discussed above.)

Ultimately, a court would resolve what this term means, which could stretch beyond the common use of “person” to refer to a human being. For example, the U.S. Supreme Court ruled in *Burwell v. Hobby Lobby* that “person” included privately-held corporations.

### **What does “rule” mean in this proposal?**

The proposal defines “rule” as a “statement of Arkansas law.” The proposal includes several examples but notes the meaning is not limited to these specifically. The examples listed are:

- Statute (state law)
- Rule
- Regulation
- Ordinance (a county or city law)
- Administrative provision
- Administrative ruling
- Guideline
- Requirement

### **How does this proposal compare to other states?**

A provision for freedom of religion is found in all 50 state constitutions, according to a reference guide on the Arkansas Constitution by Kay Goss.<sup>3</sup> Additionally, religious freedom restoration laws now exist in over 20 states, including Arkansas and surrounding states.

According to the National Conference of State Legislatures, some states define “burden” and “person” in their state laws. In addition to prohibiting government interference, Indiana and Texas also prohibit non-governmental entities from burdening religious practice.

Only Alabama has a constitutional amendment. Alabama’s amendment does not include the word “substantially” when discussing burden. Arkansas lawmakers said they modeled Issue 3 after the Alabama amendment, which voters there approved in 1998.

### **If approved, when would this proposed amendment take effect?**

The day after the election, which is Nov. 9, 2022.

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<sup>3</sup>Goss, K.C. (2011). *The Arkansas State Constitution*. Oxford University Press.

The following is the proposed constitutional amendment name and title as they will appear on the state’s November General Election ballot.

## **CONSTITUTIONAL AMENDMENT REFERRED TO THE PEOPLE BY THE GENERAL ASSEMBLY**

### **Issue No. 3**

#### **(Popular Name)**

A Constitutional Amendment to Create the “Arkansas Religious Freedom Amendment.”

#### **(Ballot Title)**

AN AMENDMENT TO THE ARKANSAS CONSTITUTION TO CREATE THE “ARKANSAS RELIGIOUS FREEDOM AMENDMENT”; AND TO PROVIDE THAT GOVERNMENT MAY NEVER BURDEN A PERSON’S FREEDOM OF RELIGION EXCEPT IN THE RARE CIRCUMSTANCE THAT THE GOVERNMENT DEMONSTRATES THAT APPLICATION OF THE BURDEN TO THE PERSON IS IN FURTHERANCE OF A COMPELLING GOVERNMENT INTEREST AND IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THAT COMPELLING GOVERNMENT INTEREST.

FOR ISSUE NO. 3

AGAINST ISSUE NO. 3