

MODERN DAY SEGREGATION:  
STATES FIGHTING TO LEGALLY ALLOW BUSINESSES  
TO REFUSE SERVICE TO SAME-SEX COUPLES UNDER  
THE SHIELD OF THE FIRST AMENDMENT

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I. INTRODUCTION

Since 2004,<sup>2</sup> seventeen states and Washington, D.C. have legalized same-sex marriage.<sup>3</sup> An additional four states, including conservative strongholds Utah, Texas, and Oklahoma, currently have a stay on federal decisions, which held their respective state's same-sex marriage bans unconstitutional.<sup>4</sup> In addition to almost two-fifths of the states legalizing gay marriage, the 1996 Defense of Marriage Act (DOMA), which blocked federal recognition of gay marriage, was struck down in the summer of 2013.<sup>5</sup> Republican-appointed Justice Anthony Kennedy, who wrote for the majority in the 5-4 decision, stated that “by seeking to displace this protection and treating those persons as living in marriages less respected

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2. *See 19 States with Legal Gay Marriage and 31 States with Same-Sex Marriage Bans*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last updated May 21, 2014, 1:06 PM). The states are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Vermont. Massachusetts was the first state to legalize same-sex marriage ten years ago in 2004. It took an additional four years for another state, Connecticut, to legalize same-sex marriage. A total of nine states, almost a fifth of the United States, legalized same-sex marriage in 2013.

3. *Id.*

4. *Id.* Federal judges in Utah and Oklahoma have stayed their opinions pending appeals, and a federal judge in Virginia stayed her decision because of an anticipated appeal. Also, on February 12, 2014, a federal judge ruled part of Kentucky's gay marriage ban unconstitutional. Kentucky must now recognize same-sex marriages legally performed in other states. Because that part of the ban was the only section challenged and ruled on, gay marriage is currently illegal in Kentucky. *See also*, Lyle Denniston, *Texas Ban on Same-Sex Marriage Nullified*, SCOTUS BLOG (Feb. 26, 2014, 4:16 PM), <http://www.scotusblog.com/2014/02/texas-ban-on-same-sex-marriage-nullified/>. Lastly, on February 26, 2014 U.S. District Judge Orlando L. Garcia struck down the state ban on same-sex marriage. The ruling has been put on hold to allow an appeal to go forward.

5. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

than others, the federal statute is in violation of the Fifth Amendment,” and its protection of equal liberty for all.<sup>6</sup> This landmark decision set off a chain reaction of federal judges ruling their states’ bans on same-sex marriage as unconstitutional.<sup>7</sup> Over the last decade, and especially in the last year, proponents for marriage equality and gay rights have gained strong footholds in America—a trend that shows no sign of slowing down.

In response to the flood of positive change towards legalizing same-sex marriage and gay rights<sup>8</sup> being realized in both public opinion<sup>9</sup> and court decisions, state legislators and conservative activists are scrambling to delay the inevitable. Over half a dozen states have introduced bills that would allow businesses, religious organizations, and even public servants to not recognize same-sex marriage and, as a result, discriminate against gay individuals.<sup>10</sup> Referred to as “Jim Crow-style” laws<sup>11</sup> and “Turn the Gays Away” bills, state legislators seek to validate these proposed legislations under the First Amendment’s protections of freedom of speech and religion.<sup>12</sup>

While our First Amendment rights are vital to our everyday lives, there is a gross misappropriation of these rights when they are used as a shield to deny publicly offered services to gays and same-sex couples.<sup>13</sup> It is particularly daunting to proponents of

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6. *Id.* at 2696.

7. Adam Serwer, *States Fight to Push Anti-Gay Bills. But Will They Pass?*, MSNBC (Feb. 21, 2014, 10:09 AM), <http://www.msnbc.com/msnbc/states-push-anti-gay-bills-will-they-pass>.

8. Throughout this article the use of “gay” and “gay rights” is meant to encompass the entire Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) community.

9. See *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RESEARCH (Mar. 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/>. Two-thirds of Americans agree that same-sex couples should have the same legal rights as heterosexual couples; just 30% disagree. Even among those who oppose allowing gays and lesbians to marry legally, a third say that same-sex couples should have the same legal rights as other couples.

10. Amanda Terkel, *States Push Anti-Gay Bills That Would Allow Businesses To Turn Away Same-Sex Couples*, HUFFINGTON POST (Feb. 20, 2014, 3:11 PM), [http://www.huffingtonpost.com/2014/02/20/state-anti-gay-bills\\_n\\_4823490.html](http://www.huffingtonpost.com/2014/02/20/state-anti-gay-bills_n_4823490.html).

11. Jim Crowe is a nickname for racial segregation laws (federal and state), which legally enforced segregation of African Americans from other races. They were enacted between 1876 and 1965.

12. U.S. CONST. amend. I.

13. Title II, Injunctive Relief Against Discrimination in Places of Public Accommodation, of the Civil Rights Acts of 1964 states that all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileg-

marriage equality considering the tremendous amount of case law and legislation that has given gays and same-sex couples so many rights in the past decade. This article will detail recent cases where public business owners sought to refuse services to same sex-couples, citing freedom of artistic expression and religious beliefs under the First Amendment as support. Next, the article examines a number of bills proposed and passed in response to these cases by state legislators, which would legally allow businesses to discriminate against gay individuals. Conservative activists working to get initiative ballots approved in support of the same type of discrimination will be discussed as well. Finally, this article will discuss the likely future of the proposed legislation and the implications it may have on the legal system and future cases.

## II. RECENT CASES: BUSINESS OWNERS' DENY PUBLICLY-OFFERED SERVICES TO SAME-SEX COUPLES

This initial section discusses several cases from multiple states where same-sex couples filed actions against business owners after they were refused services because of their sexual orientation. These services were mainly related to same-sex couples having a wedding, civil ceremony, or reception such as purchasing wedding photography, a wedding cake, and flower arrangements. The defendant business owners cited their constitutional rights of freedom of speech, expression, and religion as reasons why they should be permitted to discriminate against same-sex couples. The majority of courts found that these business owners could not refuse services on the basis of sexual orientation. Further details of these cases and the respective court's reasoning will be discussed below.

### *A. Wedding Photography in New Mexico*

This suit arose when Vanessa Willock contacted Elane Photography, LLC by e-mail to inquire about photography services and to determine whether a photographer would be available to photograph her in a commitment ceremony to another woman, Misti

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es, advantages, and accommodations of any place of public accommodation. 42 U.S.C. § 2000a (1964). While this Title does not include sexual orientation twenty-one states and the District of Columbia's public accommodation laws do. See *Non-Discrimination Laws: State by State Information Map*, ACLU, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited May 25, 2014).

Collinsworth.<sup>14</sup> Elaine Huguenin, who co-owns the business with her husband, is personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs.<sup>15</sup> Huguenin responded to Willock that Elane Photography only photographs “traditional weddings.”<sup>16</sup> Willock emailed back and asked, “Are you saying that your company does not offer your photography services to same-sex couples?” Huguenin responded, “Yes, you are correct in saying we do not photograph same-sex weddings” and thanked Willock for her interest.<sup>17</sup>

Willock filed a discrimination complaint against Elane Photography with the New Mexico Human Rights Commission for discriminating against her based on her sexual orientation in violation of the New Mexico Human Rights Act (NMHRA). In an appeal against Elane Photography, the company argued before the court that: (1) it did not discriminate on the basis of sexual orientation, and therefore it did not violate the NMHRA; or, alternatively, (2) by requiring Elane Photography to accept clients against its will, the NMHRA violates the protection of the First Amendment against compelled speech; (3) the NMHRA violates Elane Photography’s First Amendment right to freely exercise its religion; and (4) the NMHRA violates Elane Photography’s right under the NMRFRA to freely exercise its religion.<sup>18</sup> New Mexico’s Supreme Court held that Elane Photography’s refusal to serve Willock on the basis of her sexual orientation was in violation of the NMHRA and that enforcement of the NMHRA against Elane Photography did not violate the Free Speech or Free Exercise clause of the First Amendment, nor the New Mexico Religious Freedom Restoration Act.<sup>19</sup> The grant of summary judgment in Willock’s favor was affirmed.<sup>20</sup>

Though siding with Willock, the New Mexico Supreme Court agreed with Elane Photography on several points. The court stated, “[I]f Elane Photography took photographs on its own time and sold them at a gallery,” then it could say what it liked, but a busi-

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14. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

15. *Id.* at 60.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Elane Photography*, 309 P.3d at 59. Willock did not ask for monetary damages but she was awarded attorney fees.

20. *Id.*

ness open to the public must take all comers.<sup>21</sup> New Mexico Supreme Court Justice Bosson uneasily concurred with the majority opinion stating, “[T]he Huguenins are not trying to prohibit anyone from marrying, they only want to be left alone to conduct their photography business in a manner consistent with their moral convictions,” and instead they are “compelled by law to compromise the very religious beliefs that inspire their lives.”<sup>22</sup>

The following case dealt with similar issues and the court found along the same lines as the Supreme Court of New Mexico.

### *B. Wedding Cakes in Colorado*

Jack Phillips, the owner of Masterpiece Cakeshop in Lakewood, Colorado, serves homosexuals any product the bakery has to offer, except wedding cakes.<sup>23</sup> When Charlie Craig and David Mullins asked the owner in June 2013 to make them a wedding cake for their same-sex marriage reception, Mr. Phillips declined, citing his religious beliefs.<sup>24</sup> The couple sued.<sup>25</sup> Mr. Phillips argued that if he had to make the cake it would violate his freedoms of religion and speech. State Administrative Law Judge Robert N. Spencer discussed and dismissed Phillips’ arguments separately.

Under free speech, the respondents argued that compelling the bakery to prepare a cake for a same-sex wedding is equivalent to forcing them to “speak” in favor of same-sex weddings.<sup>26</sup> The judge rejected this argument finding that compelling the respondents to treat same-sex and heterosexual couples equally is the equivalent of forcing them to adhere to “an ideological point of view.”<sup>27</sup> The finished product of a wedding cake does not necessarily qualify as “speech,” as would the saluting of a flag, marching in a parade, or

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21. Adam Liptak, *Weighing Free Speech in Refusal to Photograph Lesbian Couple’s Ceremony*, N. Y. TIMES, Nov. 18, 2013, [http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?\\_r=0](http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?_r=0).

22. *Elane Photography*, 309 P.3d at 60. Judge Bosson’s comments will be discussed *infra* Section IV.

23. Valerie Richardson, *Colorado Judge: Bakery Owner Discriminated Against Gay Couple*, WASH. TIMES Dec. 6, 2013, <http://www.washingtontimes.com/news/2013/dec/6/colo-judge-bakery-discriminated-against-gay-couple/?page=all>.

24. *Id.*

25. Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack Phillips, CR 2013-0008 (Admin. Ct. Colo., Dec. 6, 2013).

26. *Id.*

27. *Id.*

displaying a motto.<sup>28</sup> The undisputed evidence is that Phillips categorically refused to prepare a cake for the complainants' same-sex wedding before there was any discussion about what that cake would look like.<sup>29</sup> Therefore, the respondents' claim that they refused to provide a cake because it would convey a message supporting same-sex marriage was specious.<sup>30</sup>

In response to the argument that making the wedding cake would violate the respondent's free exercise of religion, the judge posited that their refusal to provide a cake for the complainants' same-sex wedding is distinctly the type of conduct that the Supreme Court has repeatedly found subject to legitimate regulation.<sup>31</sup> Such discrimination is against the law<sup>32</sup> because it adversely affects the rights of complainants to be free from discrimination in the marketplace, and the impact upon the respondents is incidental to the state's legitimate regulation of commercial activity.<sup>33</sup> Therefore, the respondents have no valid claim that forcing them to bake a cake for a same-sex couple violates their right to free exercise of religion.<sup>34</sup>

Judge Spencer issued his ruling on December 6, 2013, in favor of the gay couple, ordering Mr. Phillips to "cease and desist discriminating against complainants and other same-sex couples by refusing to sell them wedding cakes or any other product [he] would provide to heterosexual couples."<sup>35</sup> A staff attorney with the American Civil Liberties Union (ACLU) LGBT Project stated that while "religious freedom is important, no one's religious beliefs make it acceptable to break the law by discriminating against pro-

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28. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.")).

29. *Id.* Phillips was not asked to apply any message or symbol to the cake, or to construct the cake in any fashion that could be reasonably understood as advocating same-sex marriage. After being refused, Complainants immediately left the shop. For all Phillips knew at the time, Complainants might have wanted a nondescript cake that would have been suitable for consumption at any wedding.

30. *Id.*

31. *Id.*

32. COLO. REV. STAT. ANN. § 24-34-601 (2008).

33. *Craig*, CR 2013-0008. Conceptually, Respondents' refusal to serve a same-sex couple due to religious objection to same-sex weddings is no different from refusing to serve a biracial couple because of religious objection to biracial marriage. However, that argument was struck down long ago in *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983).

34. *Id.*

35. *Id.*

spective customers . . . no one is asking [Phillips] to change his beliefs, but treating gay people differently because of who they are is discrimination, plain and simple.”<sup>36</sup> In January 2014, Alliance Defending Freedom (ADF)<sup>37</sup> filed an appeal on behalf of Masterpiece Cakeshop and Phillips which is still pending at this time.<sup>38</sup>

Other examples of discrimination include: a bakery receiving fines in Oregon for declining to make a cake for a lesbian couple celebrating their marriage;<sup>39</sup> and a pending case against a florist in Washington refusing to provide arrangements for a same-sex wedding.<sup>40</sup> Despite the numerous holdings in favor of same-sex couples, many states have decided to propose legislation in favor of homosexual discrimination based upon the constitutional right to freedom of religion, which will be further discussed in Section III of this note.

### C. *Rooms in Hawaii*

A suit was filed in Hawaii after the owner of a bed and breakfast refused to rent a room to a lesbian couple. Diane Cervelli and Taeko Bufford wanted to rent a room near friends they were visiting on the island.<sup>41</sup> When Ms. Cervelli contacted the Aloha Bed and Breakfast, Ms. Young, the innkeeper, refused her a room because she and her partner were lesbians.<sup>42</sup> Ms. Young denied the

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36. Richardson, *supra* note 23.

37. ADF is a non-profit legal organization that advocates for the right of people to freely live out their faith.

38. Jeff Schapiro, *Cake Shop Owner Files Appeal After Judge Rules He must Sell Wedding Cakes for Same-Sex Ceremonies*, CHRISTIAN POST (Jan. 8, 2014, 9:01 AM), <http://www.christianpost.com/news/cake-shop-owner-files-appeal-after-judge-rules-he-must-sell-wedding-cakes-for-same-sex-ceremonies-112204/>.

39. Joe Saunders, *Bakers Facing Fines, Hate for Saying No to Lesbian ‘Wedding’ Cake Aren’t Backing Down* (Jan. 21, 2014), BIZPAC REVIEW, <http://www.bizpacreview.com/2014/01/21/bakers-facing-fines-hate-for-saying-no-to-lesbian-wedding-cake-arent-backing-down-95728>. The Oregon Bureau of Labor and Industry announced that its investigation of the bakery determined that the owners discriminated against a Portland same-sex couple; the owner will now have to participate in settlement talks with couple.

40. Lornet Turnbull, *Richland Florist Asks Court to Dismiss Attorney General’s Suit*, SEATTLE TIMES (Oct. 28, 2013, 5:32 PM), <http://blogs.seattletimes.com/today/2013/10/richland-florist-asks-court-to-dismiss-attorney-generals-suit/?syndication=rss>.

41. Cervelli v. Aloha Bed & Breakfast, Civ. No. 11-1-3103-12 ECN (Haw. Circ. Court 1st Cir. Apr. 15, 2013), *available at* [http://www.lambdalegal.org/sites/default/files/cervelli\\_hi\\_20130213\\_plaintiffs-and-plaintiff-intervenors-mps.pdf](http://www.lambdalegal.org/sites/default/files/cervelli_hi_20130213_plaintiffs-and-plaintiff-intervenors-mps.pdf).

42. *Id.*

couple a room because she felt uncomfortable renting rooms to homosexuals, citing her personal religious views.<sup>43</sup> The couple subsequently complained to the Hawaii Civil Rights Commission (HCRC), which found reasonable cause to believe that discrimination had occurred, and a case was filed against the business.<sup>44</sup> The court granted summary judgment to the plaintiffs in February 2013, finding that “because the bed and breakfast is a public accommodation, it must abide by the same rules that govern all places of public accommodation.”<sup>45</sup> The court also added that the defendant’s religious beliefs do not excuse its discriminatory conduct or the injuries that such conduct inflicts.<sup>46</sup>

### III. THE CURRENT SHAPE OF PROPOSED LEGISLATION TO ALLOW BUSINESS OWNERS TO DISCRIMINATE AGAINST SAME-SEX COUPLES IN MULTIPLE STATES

This section will highlight legislation proffered in response to the previously discussed cases. Many state lawmakers are proactively proposing new legislation allowing business owners to potentially discriminate against same-sex couples; arguing this approach instead of waiting for their state courts to be tied up with the types of cases previously discussed. This proposed legislation is contradictory to the majority of courts recent holdings. Further, the legislation being proposed in over a half dozen states is much broader than the scope of these cases. The reasoning behind these proposals is to be proactive about potential legal issues that may arise and the protection of individual’s First Amendment rights to speech and religion. The main purpose of these proposed legislations is to allow business owners to deny service to customers if they feel it would violate their religious beliefs.

#### A. Arizona

On February 19, 2014, Arizona’s legislature became the first state to pass a bill that would allow businesses to reject service to any customer based on the owner’s religious beliefs.<sup>47</sup> Arizona’s

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Cervelli* (LambdaLegal.org)

47. Shadee Ashtari, *Arizona Senate Passes Bill Allowing Discrimination on Basis of Religious Freedom*, HUFFINGTON POST (Feb. 20, 2014, 10:06 AM), [http://www.huffingtonpost.com/2014/02/20/arizona-religious-freedom-discrimination\\_n\\_](http://www.huffingtonpost.com/2014/02/20/arizona-religious-freedom-discrimination_n_)



House of Representatives passed the bill by a 33-27 vote the following day on February 20, 2014.<sup>48</sup> Senate Bill 1062 pertinently states that “exercise of religion” means, the “*practice or observance of religion, including the ability to act or refusal to act*” in a manner substantially motivated by a religious belief whether or not the exercise is compulsory or central to a larger system of religious belief.<sup>49</sup> Also, “person” is statutorily defined as including “any individual, association, partnership, corporation, church, religious assembly, or institution, estate, trust, foundation, or other legal entity.”<sup>50</sup> This broad definition would not only allow people, including government employees,<sup>51</sup> to discriminate against gays and lesbians, but it would also allow discrimination for essentially any religious reason by any enumerated entity.<sup>52</sup>

Arizona Democrats sponsored eight amendments in an attempt to thwart the legislation, all of which were rejected by Senate Republicans.<sup>53</sup> GOP Senator Steve Yarbrough declared, “[T]his bill is not about allowing discrimination . . . this bill is about preventing discrimination against people who are clearly living out their faith.”<sup>54</sup> The only step that was needed for this bill to be made into law was for Republican Arizona Governor Jan Brewer to sign it into law.<sup>55</sup> On February 26, 2014, one week after the bill passed in

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4823334.html?utm\_hp\_ref=mostpopular. Arizona is also the state which has passed through legislation the controversial “papers, please” bill which requires undocumented immigrants fourteen years or older who are in the country for longer than thirty days to register with the U.S. government and have registration documents in their possession at all times. See S.1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

48. Ray Sanchez & Miguel Marquez, *Arizona Lawmakers Pass Controversial Anti-Gay Bill*, CNN (Feb. 21, 2014, 7:57 PM), <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/index.html?c=homepage-t>.

49. S.1062, 51st Leg., 2nd Reg. Sess. (Ariz. 2014) (emphasis added).

50. *Id.*

51. The opportunities for potential discrimination are endless. A same-sex couple attempting to adopt or become a foster parent could be denied solely because it would offend the social worker’s religious beliefs.

52. Avoiding situations like those in *Elane Photography* have been cited as the reasoning behind the bill. The result of this Bill in avoidance of litigation similar to *Elane* appears to open the door to countless litigation concerning whether a person who chose to discriminate was acting within their religious beliefs.

53. Ashtari, *supra* note 47.

54. *Id.*

55. Sanchez & Marquez, *supra* note 48. “I think anybody that owns a business can choose who they work with or who they don’t work with,” Brewer expressed the day after the House vote. “But I don’t know that it needs to be statutory. In my life and in my businesses, if I don’t want to do business or if I don’t

the senate, Governor Brewer vetoed the bill describing it as “broadly worded” and “could result in unintended and negative consequences.”<sup>56</sup> Senate Bill 1062 is dead for now but it is possible that a similar bill, more narrowly worded, may appear again in the conservative state.<sup>57</sup> Though Arizona is the first state to pass a bill of this nature through both the House and Senate, it is not the only state full of legislators seeking the same outcome. While some states, including Nevada and Ohio, have tabled similar bills because of a disapproving public, Arizona’s decision may bring them back into the forefront.

### B. Kansas

On February 12, 2014, by a vote of 72-49, the Republican-controlled House of Representatives approved House Bill No. 2453.<sup>58</sup> The bill states:

No individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender (a) Provide any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement.<sup>59</sup>

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want to deal with a particular company or person or whatever, I’m not interested. That’s America. That’s freedom.” *Id.*

56. Catherine E. Shoichet, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-gay Bill, SB 1062*, CNN (Feb. 26, 2014, 11:13PM), <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/>.

57. H.R. 2481, 51st Leg., 1st Reg. Sess. (Ariz. 2013), which purports to protect ministers from having to officiate weddings they do not believe in, is awaiting consideration by the House of Representatives. See Zack Ford, *Here’s the Anti-Gay ‘Religious Freedom’ Bill Arizona Lawmakers Are Still Considering*, THINK PROGRESS (Mar. 3, 2014, 10:14 AM), <http://thinkprogress.org/lgbt/2014/03/03/3351811/anti-gay-religious-freedom-arizona-lawmakers-considering/>.

58. Emma Margolin, *Kansas Advances Religious Liberty Bill that Could Lead to Anti-Gay Discrimination*, MSNBC (Feb. 12, 2014), <http://www.msnbc.com/msnbc/religious-liberty-or-license-discriminate>.

59. Kansas Committee on Federal and State Affairs, *House Bill No. 2453, available at* [http://www.kslegislature.org/li/b2013\\_14/asures/documents/hb2453\\_00\\_0000.pdf](http://www.kslegislature.org/li/b2013_14/asures/documents/hb2453_00_0000.pdf) (last visited May 25, 2014).

The following week, on February 18, 2014, the Senate declared that the bill would not pass their chamber<sup>60</sup> partially due to criticism of it being too broad. However, the bill is not completely off the table. Senate Judiciary Committee Chairman Jeff King, an Independence Republican, said that he is not drafting a narrower alternative.<sup>61</sup> He said that he will hold hearings so interested parties can have national experts discuss whether Kansas needs a new law.<sup>62</sup> Supporters repeatedly stated that the bill has been misrepresented.<sup>63</sup> Rep. Steve Brunk, a Wichita Republican and chairman of the House committee that handled the bill, said the intent was “religious liberties protection.”<sup>64</sup> “The issue is not going to go away,” Brunk said, “as the topic progresses, we will refine the language.”<sup>65</sup>

Though the bill is currently stalled for now in the Senate, activists say the bill is likely to return soon in another format.<sup>66</sup> One activist noted that Kansas is very committed to passing some kind of discriminatory bill, but the state is trying to accomplish this in a way that does not draw as much public notice or attention.<sup>67</sup> The bill may be delayed for now, but there is no guarantee that it will stay away.

### C. Additional States

While other states may be in earlier stages than Arizona and Kansas, it is worth noting who these states are and how far along they are in the process of passing these types of laws. Georgia is one of the states that is further along than others. There are two

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60. *Kansas State Senator Declares Gay Discrimination Bill is Dead*, ASSOCIATED PRESS (Feb. 18, 2014), <http://www.lgbtqnation.com/2014/02/kansas-state-senator-declares-gay-discrimination-bill-is-dead/>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Kansas State Senator Declares Gay Discrimination Bill is Dead*, *supra* note 60.

66. Serwer, *States Fight to Push Anti-Gay Bills*, *supra* note 7.

67. *Id.* After the House of Representatives voted in favor of the bill it quickly sparked national media attention. This even caused some who voted in favor of the bill to say that they regretted their decision and state that they did not fully understand the bill. *See also*, Bryan Lowry, *Some Kansas GOP Lawmakers Would Rather Religious Freedom Bill Just ‘Go Away’*, THE KANSAS CITY STAR (Feb. 17, 2014), <http://www.kansascity.com/2014/02/17/4830773/some-kansas-gop-lawmakers-would.html>.

versions of the Georgia bill: a State House version, House Bill 1023;<sup>68</sup> and a State Senate version, Senate Bill 377.<sup>69</sup> Both would affirm the “right to act or refuse to act in a manner substantially motivated by a sincerely held religious tenet or belief, whether or not the exercise is compulsory or a central part or requirement of the person’s religious tenets or beliefs.”<sup>70</sup> Where those beliefs conflict with local, state or federal law, the government would have to prove that the law is meant to pursue “a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”<sup>71</sup>

Idaho has constructed a similar bill as well. Presently, Idaho does not have a state law defending gays from intolerance.<sup>72</sup> However, Boise, Coeur d’Alene, Moscow, and several other cities do have local rules outlawing such discrimination.<sup>73</sup> Therefore, the bill before the statehouse could potentially supersede those local statutes.<sup>74</sup> House Bill 426 would prevent the denial or revocation of a professional or occupational license for someone who refuses services to, or makes employment decisions based on their religious

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68. Georgia General Assembly, *House Bill 1023*, available at <http://www.legis.ga.gov/Legislation/20132014/140141.pdf> (last visited May 25, 2014).

69. Georgia State Senate, *Senate Bill 377*, available at <http://www.legis.ga.gov/Legislation/20132014/140925.pdf> (last visited May 25, 2014). See also Adam Serwer, *Another State Considers Discrimination Based on Religious Freedom*, MSNBC (Feb. 25, 2014), <http://www.msnbc.com/msnbc/the-next-state-discriminate>. There were two Democratic sponsors of the House Bill, but have since removed their sponsorship citing “they did not understand the exact content of the bill.” *Id.*

70. *Id.*

71. *Id.* Georgia Republicans launched a last-ditch effort to pass the bill on the last day of session on March 20, 2014 and failed. See Adam Serwer, *Georgia Republicans Tack Anti-Gay Amendments onto Unrelated Bills*, MSNBC (Mar. 20, 2014, 6:38 PM), <http://www.msnbc.com/msnbc/georgia-anti-gay-religious-liberty-discrimination>. The bill was added onto unrelated bills last minute. Therefore, this legislation may make an appearance in later sessions.

72. Almost half the states and the District of Columbia have laws that currently prohibit sexual orientation discrimination in both public and private jobs: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. In addition, a few states have laws prohibiting sexual orientation discrimination in public workplaces only. See *Sexual Orientation Discrimination: Your Rights*, NOLO, <http://www.nolo.com/legal-encyclopedia/sexual-orientation-discrimination-rights-29541.html>.

73. Jerry Nelson, *Idaho Jim Crow Laws Coming into Vogue*, LIBERTY VOICE (Jan. 31, 2014), <http://guardianlv.com/2014/01/idaho-jim-crow-laws-coming-into-vogue/>.

74. *Id.*

beliefs.<sup>75</sup> The State Senate recently sent the bill back to the committee, which will likely result in it being dead for the time being, since the Idaho legislature usually only meets in March.<sup>76</sup> “There is a good possibility this may be done,” Leo Morales of the Idaho ACLU said, as a result of a “combination of pressure from the community and legislators opposed to the bill.”<sup>77</sup> Though the State Senate will not be discussing the topic this session, it is possible that the bill will be brought up in later State Senate meetings.

On February 24, 2014 Republican Senator Wayne Wallingford from Missouri, introduced Senate Bill 916, which is similar to Arizona’s.<sup>78</sup> As it is currently worded, the bill would not remove any protections against discrimination currently in Missouri law.<sup>79</sup> The bill has yet to be assigned to a committee,<sup>80</sup> and because it is so new, it is too early to determine whether it will pass.

Oklahoma’s religious freedom legislation resembles Missouri’s bill.<sup>81</sup> The sponsor of the bill is Republican State Representative Tom Newell.<sup>82</sup> Political outcry over Arizona’s law has convinced Newell to rewrite his bill, though it is unclear whether any LGBT rights concerns would be alleviated.<sup>83</sup> Also, conservative activists in Oregon are attempting to get a ballot initiative approved for the fall of 2014, which would allow Oregon residents to vote to exempt businesses whose owners have religious objections to participating in same-sex marriage ceremonies or celebrations.<sup>84</sup> The Oregon proposal appears more limited in that the exemptions for businesses would apply only to “same-sex marriage ceremonies or ar-

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75. Serwer, *States Fight to Push Anti-Gay Bills*, *supra* note 7.

76. *Id.*

77. *Id.*

78. Jonathan Shorman, *Missouri Joins States Mulling Anti-Gay Religious Bills*, USA TODAY (Feb. 26, 2014), <http://www.usatoday.com/story/news/nation/2014/02/26/missouri-anti-gay-religion-bill/5834319/>.

79. *Id.*

80. *Id.*

81. S. 1846, 54th Leg., 2nd Sess. (Okla. 2014), *available at* <http://openstates.org/ok/bills/2013-2014/SB1846/documents/OKD00022542/>.

82. Serwer, *States Fight to Push Anti-Gay Bills*, *supra* note 7.

83. *Id.* Newell told the Associated Press, “I realize it is a tricky thing, but I do think it is something we need to look at, and people should not be forced to serve someone if it violates their religious conscience.”

84. *Id.* This vote would occur at the same time residents would be voting whether to approve same-sex marriage in the state.

rangements,” rather than granting a license to discriminate more broadly.<sup>85</sup>

With the various languages of these states’ proposed legislation, and several others not mentioned in this article, it is understandable why so many politicians, judiciaries, and citizens have so many varying views. Though, it must be made clear that discrimination, for any reason, is still discrimination, and should be seen as illegal under the law.

#### IV. THE FUTURE OF THIS FORM OF DISCRIMINATION LITIGATION

This section will analyze the differing thoughts and rationales behind statements of those who vehemently support these bills, those who find themselves in the middle, and those who are adamantly against them. Then, there is a discussion of the likely outcome of the legislation discussed in the previous section and any similar legislation that may be brought in the future by other states.

##### *A. Analysis of Varying Views*

###### 1. In Favor of Legislation

While there are many who find this new wave of legislation highly discriminatory and unconstitutional, many lawyers and lawmakers are persistent in trying to convey its purpose. Jordan W. Lorence, a lawyer at the ADF who represented Elane Photography, aligned his views with many of the state legislators proposing these bills.<sup>86</sup> He stated, “a tattoo artist should not be forced to put a swastika on an Aryan Nation guy.”<sup>87</sup> “The government could not force someone to put a bumper sticker on their car that says, ‘I support same-sex marriage’ or ‘I support interracial marriage.’”<sup>88</sup>

Katy Steinmetz, a *TIME* reporter, stated, “Same-sex marriage opponents also argue that there is a form of reverse discrimination going on—that their views against same-sex marriage should be tolerated and protected just like the views of people who support

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85. *Id.* It is currently illegal in Oregon to distinguish on the basis of discrimination.

86. Liptak, *supra* note 21.

87. *Id.*

88. *Id.*

it.”<sup>89</sup> Frank Schubert, political director for the National Organization for Marriage, told *TIME* Magazine in an email, “Unfortunately, same-sex marriage advocates have increasingly treated people who believe in traditional marriage as the legal equivalent of bigots and even racists.”<sup>90</sup> “Legislation like this . . . becomes necessary to assure that people are not forced to personally be part of something they cannot in good conscience support. There are plenty of people willing to serve a gay marriage ceremony without having to force everyone to do so.”<sup>91</sup>

Regrettably for same-sex couples and those in support of gay rights, the majority of supporters of these bills align their views with Mr. Lorence. However, an argument seeking support from the Nazi Party, a regime that single-handedly killed millions of people, including homosexuals in the 1930s,<sup>92</sup> is not well grounded or convincing. Also, referencing the act of providing services to a group of people as comparable to the act of putting a bumper sticker on one’s car professing their beliefs is absurd. If a liberal chef serves a conservative patron, the chef is not professing, “I support conservative views.” The chef is providing the patron with the very service she offers. Baking a cake for a Jewish wedding does not mean the baker is claiming that they are Jewish.

Additionally, the idea that business owners are “forced” to provide their services is a weak argument. When owners open their doors to customers, no one is forcing them to do anything. Customers are simply asking them to provide them with services the business offers. Asking a baker to bake a cake or a florist to make an arrangement does not involve force at all; it involves providing a service. Just because it is not in alignment with their views does not mean that it is violating their rights. A florist may detest lilies, but if a customer wants lilies, the florist will provide them. This is because they are in the business of selling flowers, regardless of the florist’s convictions. Though merit can be found in the argu-

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89. Katy Steinmetz, *Kansas Wants to Make Sure Gay Couples Aren’t Guaranteed Wedding Cake*, *TIME*, Feb. 10, 2014, <http://nation.time.com/2014/02/10/gay-marriage-kansas-colorado-wedding-cake/>.

90. *Id.*

91. *Id.*

92. See Terese Pencak Schwartz, *The Holocaust: Non-Jewish Victims*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Holocaust/NonJewishVictims.html>. Homosexual inmates of concentration camps were forced to wear pink triangles on their clothes so they could be easily recognized and further humiliated inside of the camps. Between 5,000 to 15,000 homosexuals died in concentration camps during the Holocaust.

ments of those in favor of this legislation, it is weak and easily dispelled.

## 2. In the Middle

Valid points can be made on both sides as to why these proposals are beneficial or harmful to business owners and potential patrons. Oregon's proposed bill appears to be more narrowly construed than other states. This is because it allows for discrimination against homosexuals who are seeking services involving "same-sex marriages, ceremonies, or arrangements."<sup>93</sup> Oregon lawmakers appear to be arguing that it is okay to serve gay persons most of the time, so the law is not really discriminatory. Also, while Judge Bosson's concurrence<sup>94</sup> from *Elane Photography* is valid, he identifies the compromise that business owners have to make in foregoing certain rights when entering the marketplace.

Businesses must accept all who wish to partake in their services so long as it does not promote hatred, violate the law, or compromise the safety of others—all things that same-sex marriage does not do. As the Supreme Court ruled in the 1950s, separate but equal is inherently unequal.<sup>95</sup> Neither business owners nor lawmakers today should have a say as to whether discrimination is allowed under the argument that doing so would be contrary to one's religious beliefs. Comparable laws were struck down over sixty years ago<sup>96</sup> and it does not seem likely that courts would uphold these kinds of laws today.

## 3. Opposed to Legislation

Many citizens, civil rights groups, and politicians have publicly stated their outrage and disagreement with these "Turn the Gays Away" laws. A group statement from the ACLU of Arizona called these bill's unnecessary and discriminatory.<sup>97</sup> These bills allow private individuals and businesses to use religion to discrim-

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93. Serwer, *States Fight to Push Anti-Gay Bills*, *supra* note 7.

94. "The Huguenins are not trying to prohibit anyone from marrying, they only want to be left alone to conduct their photography business in a manner consistent with their moral convictions, and instead they are "compelled by law to compromise the very religious beliefs that inspire their lives." *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

95. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

96. *Id.* at 483.

97. Sanchez & Marquez, *supra* note 48.



inate, and that any state who proposes such a bill is “intolerant and unwelcoming.”<sup>98</sup> Another ACLU member added that “these bills are totally unnecessary—they offer a fix for a nonexistent problem.”<sup>99</sup> Nevada’s ACLU chapter argued that, “although the bill claims to protect the free exercise of religion, it could actually allow individuals to ignore our laws and discriminate based on their religious beliefs.”<sup>100</sup> Adam Hamilton, pastor of the United Methodist Church of the Resurrection, the largest church in Kansas, pointed out what all Christians should know: “Jesus routinely healed, fed and ministered to people whose personal lifestyle he likely disagreed with.”<sup>101</sup> This put Jesus at odds with religious leaders, who believed they were sullied by associating with the “wrong” people.<sup>102</sup> As noted in the few quotes above, the purpose of these bills would only promote discrimination against gay individuals under the shield of freedom of religion. Any form of legislation that allows for disregard of civil rights laws and the vast potential for legal gray area is superfluous and calls for inequality.

These bills have a negative economic effect as well. Democratic Senator Steve Farley of Arizona argued that it could have a negative economic impact on the state if the bill became law.<sup>103</sup> “I think this bill makes a statement . . . that we don’t welcome people here, this bill gets in the way, and this bill sends the wrong message around the country and around the world.”<sup>104</sup> Farley astutely noted, “[O]ur economy is strengthened by different people, and different backgrounds, and different beliefs, and different motivations, coming in and working together in our economy to make this state and this country stronger. Discrimination hurts that. It hurts that in so many different ways.”<sup>105</sup>

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98. *Id.*

99. Kaimipono D. Wenger, *License to Discriminate? Religious Freedom, Discrimination, Elane Photography, and S.B. 1062*, CONCURRING OPINIONS (Feb. 21, 2014), <http://www.concurringopinions.com/archives/2014/02/license-to-discriminate-religious-freedom-discrimination-elane-photography-and-s-b-1062.html>.

100. Serwer, *States Fight to Push Anti-Gay Bills*, *supra* note 7.

101. Kirsten Powers, *Jim Crow Laws For Gays and Lesbians?*, USA TODAY (Feb. 19, 2014, 1:17 PM), <http://www.usatoday.com/story/opinion/2014/02/18/gays-lesbians-kansas-bill-religious-freedom-christians-column/5588643/>.

102. *Id.*

103. Ashtari, *supra* note 47.

104. *Id.*

105. *Id.*

Farley's views are accurate in that this legislation would have negatively affected Arizona economically.<sup>106</sup> Farley makes the point that in choosing to exclude a group of people, a large business opportunity is lost. This is arguably the reason, despite her denial, why Governor Brewer vetoed the bill.<sup>107</sup> States attempting to pass similar legislation stand to lose out far more than the "benefit" the legislation provides.

### *B. Anticipated Outcome*

This type of legislation begs the question that if this is passed, what else could be next? The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deprive *any* person of life, liberty, or property, without due process of law."<sup>108</sup> Arguably, this form of legislation violates this clause in denying gay persons the right to enjoy their liberty and freedom to be served by businesses. If this protection can be denied under the law, there is no reason why other types of discrimination would be legal. Owners could then refuse business to those with differing religious views, races, or gender under the argument that providing their services would not comport with their religious beliefs. All but one of these proposed bills are so broad that if any of the latter oc-

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106. See George Takai, *Razing Arizona: If the "Turn Away the Gay" Bill Becomes Law, Be Ready to Face the Fire, Arizona*, (Feb. 21, 2014), <http://www.allegiancemusical.com/blog-entry/razing-arizona>. Openly gay actor George Takai expressed his desire not to return to the state and noted, "[I]n 1989, [Arizona] voted down recognition of the Martin Luther King, Jr. holiday, and as a result, conventions and tourists boycotted the state, and the NFL moved the Super Bowl to Pasadena. That was a \$500 million mistake." Ironically, Arizona is set to be the home to Super Bowl XLIX. See also Sam Frizell, *How Apple Went to War Over Arizona Anti-Gay Bill*, TIME, Feb. 25, 2014, <http://business.time.com/2014/02/25/how-apple-went-to-war-over-arizona-anti-gay-bill/>. In addition to American Airlines and Marriott, Apple is warning that the bill could be bad for business. In November, Apple announced they are building a sapphire glass plant in the state, which would bring 2,000 new jobs. Apple is currently urging Governor Brewer to veto the bill.

107. Gov. Brewer said she made this decision despite all of the mounting pressure from major businesses, including Delta Airlines, the Super Bowl host committee, and Major League Baseball. See also Gov. Jan Brewer, S.B. 1062 Press Conference, (Feb. 26, 2014) (transcript available at [http://i2.cdn.turner.com/cnn/2014/images/02/26/gs\\_022614\\_sb1062remarks.pdf](http://i2.cdn.turner.com/cnn/2014/images/02/26/gs_022614_sb1062remarks.pdf)). In these remarks Brewer stated "my agenda is to sign into law legislation that advances Arizona . . . among them are passing responsible budget that continues Arizona's economic comeback."

108. U.S. CONST. amend. XIV § 1 (emphasis added).

curred, those discriminated against would have no relief from their experience under the law.

Any state that chooses to turn such a discriminatory practice into law will certainly be met with lawsuits. Luckily, the majority of these bills have all been halted or moved out of the forefront, either for more pressing issues to be decided or because there is too much media attention surrounding the legislation. This is a likely indication as to what will happen to the several other proposed bills that are waiting to be heard throughout the country. It may have taken decades to strike down racial segregation, but progression throughout society makes clear that this will not happen again. Rising American tolerance and solidarity, as well as technology that makes it easier to become better informed of new developments in the law, has grown tremendously as support for the nuclear family.<sup>109</sup> Additionally, sexual orientation discrimination has declined both legally and socially.<sup>110</sup>

## V. CONCLUSION

Instead of the steadfast laws in support of rights for gays and marriage equality being met with further support, there has been a wave of litigation introduced trying to deny service to homosexual persons and same-sex couples. Even worse, the majority of this discriminatory support is being presented under the guise that it is within the First Amendment's freedom of religion to do so. Nick Worner of the Ohio ACLU rightly stated, "religious freedom is a shield, not a sword; it is not religious freedom when you're using it to hurt someone else."<sup>111</sup> This type of legislation has quickly gained momentum in the past year, more particularly in the month of February 2014, with Arizona being the first state to pass such a

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109. See *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1977).

110. See *Growing Support for Gay Marriage*, *supra* note 9. Younger generations, who were more accepting than older generations ten years ago, have only grown more-so, while there is little change among their elders. Generational differences about homosexuality largely mirror attitudes about same-sex marriage, with about three-quarters of Millennials (75%) and 62% of Gen Xers now saying homosexuality should be accepted. Americans are still less accepting of other western countries, with religion being one of the main reasons. See Juliana Menasce Horowitz, *Americans Less Accepting of Homosexuality Than Other Westerners-Religion May Be One Reason*, PEW RESEARCH (June 12, 2013), <http://www.pewresearch.org/fact-tank/2013/06/12/americans-are-less-accepting-of-homosexuality-than-canadians-western-europeans-and-religion-may-be-one-explanation/>.

111. Serwer, *States Fight to Push Anti-Gay Bills*, *supra* note 7.

bill through both the Senate and the House.<sup>112</sup> If any state manages to make this law, there is little doubt that this type of legislation will be challenged in the court system just as quickly as it is passed. The few cases mentioned in this article alone show that this kind of discriminatory behavior will not, and should not, be tolerated. America's social and legal history has shown that segregation and discrimination, no matter the alleged justification, will not be permitted. This is one area where America's history will, hopefully, repeat itself.

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112. Though later vetoed by Arizona's governor, this legislative history is still notable. Shoichet, *supra* note 56.