

THINK PROGRESS

Dismantling The ‘Religious Liberty’ Talking Points Used To Justify Anti-LGBT Discrimination

By [Zack Ford](#)

Conservatives have been flailing this month to recover control of their “religious liberty” talking points after the country turned on Arizona for its “license to discriminate” bill, leading up to [Gov. Jan Brewer’s veto](#) Wednesday afternoon. Groups like the Heritage Foundation, the National Organization for Marriage, the Family Research Council, the Cato Institute, and Focus on the Family all came to SB 1062’s defense, arguing in various fashions that it would do nothing to promote discrimination against LGBT people. At the forefront of this media effort was the Alliance Defending Freedom (ADF), which not only helped draft Arizona’s bill, but provides legal counsel to individuals who engage in such discrimination.

By doubling down in response to the backlash, these groups have sent a clear signal that the fight over “religious liberty” is far from over, even if Arizona proves to have been a turning point. Here’s a look at the rhetoric they’ve used over the past two weeks to suggest that “religious freedom” somehow requires the privilege to refuse service to the LGBT community — in particular, marrying same-sex couples — and why it doesn’t hold up.

What Is “Discrimination”?

At the core of this discussion is a fundamental disagreement about what “discrimination” is and what “discrimination” is not. It’s no secret that stories of bakers, florists, and photographers being punished for refusing service to marrying same-sex couples is what motivates these bills; [proponents admit as much](#). But they don’t actually think of that refusal of service as discrimination. Here’s how ADF’s Kellie Fiedorek attempted to explain the bill [earlier this week](#):

SB 1062 merely clarifies Arizona’s existing law to protect Arizonans from any attempt by the government to force them to speak or act in ways that violate their religious beliefs. It safeguards freedom by closing loopholes that have allowed other state governments to punish private citizens for living and working according to their convictions.

In other words, cakes, flowers, and pictures constitute “speech,” and providing them for a same-sex commitment ceremony would violate the religious expression of those who oppose marriage equality. At the same time, these conservatives believe that it *is* “discrimination” when

those vendors are penalized for refusing to provide the exact same services to same-sex couples that they offer to straight couples. Here's how the Heritage Foundation's Ryan T. Anderson and Leslie Ford [framed it last week](#):

A growing number of incidents show that the redefinition of marriage and state policies on sexual orientation have created a climate of intolerance and intimidation for citizens who believe that marriage is the union of a man and a woman and that sexual relations are properly reserved for marriage. **Now comes government coercion and discrimination. Laws that create special privileges based on sexual orientation and gender identity are being used to trump fundamental civil liberties such as freedom of speech and the free exercise of religion.**

Those "incidents," which Anderson and Ford proceed to cite in their piece, are the four prototypical stories fueling the "religious liberty" talking points: the [New Mexico photographer](#), the [Colorado baker](#), the [Oregon bakers](#), and the [Washington florist](#). All four refused to provide their services to same-sex couples' commitment ceremonies in violation of state nondiscrimination laws that protect sexual orientation. The consequences these businesses are facing do not, however, constitute "discrimination."

"Discrimination" suggests that these vendors are being treated differently from other vendors, but that is not the case. If a state or municipality requires that public accommodations be provided equally regardless of sexual orientation, that applies equally to all businesses. There is not some perk or privilege that some businesses enjoy that these anti-gay vendors have been denied access to. Rather than being subjected to "discrimination," they are being held to the same consistent standard as everybody else. If it's "[on the menu](#)" at a public business, all protected classes must have equal access to that accommodation.

Discrimination Is Okay If Other Businesses Can Provide The Service

One of the arguments that proponents of these laws have made is that it's okay to let one religious business owner discriminate because there will be plenty of other businesses that don't. Here's the Cato Institute's Ilya Shapiro [making this point](#):

This isn't the Jim Crow South; there are plenty of wedding photographers — over 100 in Albuquerque — and bakeries who would be willing to do business regardless of sexual orientation, and no state is enforcing segregation laws. I bet plenty of Arizona businesses would and do see more customers if they advertised that they welcomed the LGBT community.

Shapiro isn't wrong, but nondiscrimination protections aren't just about access; they're about basic equality. The injustice occurs in the moment when the refusal of service occurs. It's a message to same-sex couples that they are less than — that they don't deserve the same access to public goods as other newly forming families. Nondiscrimination protections [literally mitigate harm](#) by interrupting stigma. Other vendors can substitute the service, but they can't undo the harm.

Moreover, Shapiro's assumptions convey an urban bias. Attitudes toward LGBT people are [dramatically improving](#), but in rural areas, there often aren't other many options for services.

When one Washington lawmaker was trying to legalize discrimination, one of his staffers told a constituent that if gay people in rural areas couldn't find a grocery store that served them, they "[can just grow their own food](#)." This is not a viable solution to guarantee equal access across society.

Everybody Deserves Viewpoint Discrimination!

Proponents of these laws also try to justify their anti-gay discrimination by proposing support for gay people to discriminate as well. In other words, viewpoint discrimination is okay so long as everybody gets to do it. Here's [ADF's Fiedorek again](#):

For example, a Jewish caterer shouldn't be forced to serve pork sandwiches at a Christian wedding on Saturday just because the couple asks for them. And a religious photographer shouldn't be required to use her creative talents to promote the message of an atheist group.

In fact, we at Alliance Defending Freedom supported the right of a California photographer to refuse to photograph our own staff because she disagrees with our views. We supported the right of New Mexico hairstylist Antonio Darden to refuse to cut Gov. Susana Martinez's hair because she supports marriage as the union of one man and one woman. **We simply want the same for Arizona businesses who don't want to be forced to violate their beliefs either. That's a far cry from what the bill's detractors are telling you.**

Fiedorek's point is a red herring. Political views are not protected under law from discrimination ([nor is the eating of pork](#)). The District of Columbia protects against discrimination based on "political affiliation" (party), and New York protects "political activity" (i.e., volunteering for a campaign), but no other state has anything close, and neither New York or DC would prevent viewpoint discrimination. No caterer could ever be forced to serve any particular food, atheists are protected from discrimination under federal law just like other religious affiliations/non-affiliations, and political viewpoints aren't protected. ADF might applaud itself for "[supporting a California photographer](#)" that refused to take pictures at one of its events because she disagreed with the group's positions, but that example has nothing to do with the "religious freedom" the group is purporting to protect.

The False "Christian vs. Gay" Conflict

Through these various talking points, conservatives promote a narrative that suggests a "religious rights vs. gay rights" conflict. This obviously does not account for the fact that not all people with a religious identity are anti-gay nor the reality that many LGBT people are religious. Moreover, it suggests an uneven playing field in the wrong direction.

There are currently no federal laws protecting LGBT people from discrimination in employment, housing, or public accommodations. [Many states](#) and cities offer their own laws to compensate, but LGBT people are still largely unprotected throughout the country. Conversely, religious discrimination has been prohibited under federal law since the passage of the Civil Rights Act of 1964. Conservatives nevertheless paint LGBT nondiscrimination protections as — according to [Anderson and Ford](#) — "special privileges," suggesting that religious people are thereby at a

disadvantage, even though they already enjoy those same protections. Based on this false premise, they argue that religion needs its own extra protection to compensate for these “special” LGBT protections — a law like what was proposed in Arizona. In reality, such a law would actually give religion an unfair advantage, allowing religion to trump any protections LGBT people might enjoy through other state or local laws.

That’s really what “religious freedom” means in these debates; it frames a learning curve for conservative Christians wrestling with the emerging equality of a previously disadvantaged group. [Just as segregationists argued](#) during the 20th Century that “God created the races” and “placed them on separate continents” for a reason, 21st Century conservatives similarly struggle to reconcile legal equality for the gay community with a religious tradition of condemning homosexuality. Rather than “burdening” religious belief, the progression of LGBT equality simply presents a new legal framework to ensure that anti-gay religious beliefs are not unjustly imposed upon others.