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The vetoed bill that never existed

By Leigh Jones
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The debate over religious liberty exploded in Arizona this week after lawmakers sent Gov. Jan Brewer a bill that would have helped businesses defend themselves against discrimination claims. Facing enormous pressure both at home and across the nation, Brewer vetoed the measure Wednesday night. Gay rights groups heaped condemnation on the law, calling it a throwback to the South's infamous Jim Crow laws.

After issuing her veto, Brewer said the bill "could divide Arizona in ways we could not even imagine and no one would ever want." She also criticized the bill's broad language, which could cause more problems than it would solve, she warned. But the bill's supporters say Brewer's decision was based on a successful smear campaign, not reality. "The veto was for a bill that didn't really exist," said Cathi Herrod, president of the Center for Arizona Policy.

Contrary to opponents' claims, the bill would not have given restaurants or retail stores, businesses open to the general public, the right to refuse to serve gay customers. Nor would it have given religious business owners an automatic shield against legal challenges. It didn't even address the issues of homosexuality or same-sex marriage directly.

Arizona's law was designed to clear up ambiguities in the state's existing Religious Freedom Restoration Act (RFRA), which has been on the books for almost 15 years. The RFRA, like the federal statue it's modeled after, forbids the government from placing an undo burden on someone's religious liberty without a compelling interest. The bill Brewer vetoed would have clarified that individuals also are forbidden from using state law to place an undo burden on someone else's religious liberty. Without that clarification, business owners must first convince courts that the RFRA applies to suits brought by individuals before those cases can be litigated. But they can, and will, still be litigated.

"Defendants will assert RFRA defenses in suits by private plaintiffs whether or not you sign this bill," a group of 11 legal scholars from both sides of the political spectrum wrote in a letter to Brewer. "Without the bill, whether RFRA applies will be an additional issue for litigation; with the bill, the answer will be clear and the parties and the court can proceed to the merits. And keep in mind that these private plaintiffs may not be suing a business; they may be suing a church, a minister, a religious charity, an individual, or anyone else clearly protected by the Arizona RFRA."

It's a complex legal argument that got lost in this week's emotional rhetoric. Sens. John McCain and Jeff Flake, both Arizona Republicans, voiced their concern with the bill, and former

presidential candidate Mitt Romney also urged the governor to let the law die on her desk. Business groups bemoaned what they described as the bill's message of intolerance. But Herrod and the bill's other supporters aren't giving up. They crafted the bill in response to cases involving wedding vendors in other states, and those legal challenges aren't likely to go away any time soon.

"We see a growing hostility toward religion in this country," Herrod said. "There's a critical need to assure that Americans and Arizonans are free to work according to their faith. … The Arizona experience exposed the underbelly of what's going on across the country. This is what the future holds."

The possible future began to appear in 2006, when New Mexico photographer Elaine Huguenin declined to work with a lesbian couple who wanted her to take photos of their commitment ceremony. The couple filed a complaint against her with the state's Human Rights Commission, which found Huguenin guilty of discrimination and ordered her to pay $6,637.94 in legal fees. The photographer took her case all the way to New Mexico's Supreme Court, which also found her guilty of discrimination.

Huguenin appealed to the U.S. Supreme Court, and if the justices agree to hear her case, it would be the first in the country to test the limits of wedding vendors' religious liberty against same-sex couples' bid for acceptance. Although Huguenin's case will be the first put before the nation's highest court, she's not the only business owner defending her decision not to work with same-sex couples. Bakers in Oregon and Colorado, a florist in Washington, and an event venue in Iowa, all are facing accusations of discrimination because they declined to participate in same-sex weddings. To do so, they have said, would violate their sincerely held belief in the biblical definition of marriage—one man and one woman.

When Huguenin began her battle, same-sex marriage was restricted to just a few Northeastern states, and the federal Defense of Marriage Act was still the law of the land. But almost eight years later, the Supreme Court has ruled the federal government cannot refuse to recognize state-sanctioned unions and federal courts have struck down same-sex marriage bans in half a dozen states.

Amid a rapidly changing legal and cultural landscape, conservative state legislatures are considering laws to protect wedding vendors, and other businesses, from discrimination claims. In addition to Arizona, nine other states have taken up similar legislation, although the legal methods they use differ. In the midst of the Arizona debate, legislators in Ohio, Idaho, Kansas, and Georgia withdrew or stalled their bills. Legislation is still pending in Mississippi, South Dakota, Tennessee, Oklahoma, and Missouri.

But none of those laws may matter after next month, when the U.S. Supreme Court announces whether it will take Elaine Huguenin's case. Despite the vociferous denunciations of Arizona's law, even same-sex marriage supporters have filed briefs in support of Huguenin's right not to be forced to create art that promotes something she doesn't believe in. Serving gay customers and being forced to work for them are two very different things, wrote Eugene Volokh of the UCLA School of Law and Ilya Shapiro of the Cato Institute.

“Democracy and liberty rely on citizens’ ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, and the expression that they ‘foster’ and for which they act as ‘courier[s],’ is consistent with what they actually believe,” Volokh and Shapiro noted in their friend of the court brief.

The distinction between creating and serving lie at the heart of the discrimination claims against Huguenin and the other wedding vendor businesses. None of the businesses being labeled as bigots refused to serve gay customers. They only refused to participate in their same-sex ceremonies. And that right of refusal is protected under the First Amendment, Huguenin’s attorneys with Alliance Defending Freedom maintain. It also extends to businesses or professionals—marketers, advertisers, publicists, website designers, writers, videographers, and photographers—being forced to create something with which they disagree, for religious reasons or otherwise.

“Just as it requires Ms. Huguenin to create expression communicating messages that conflict with her beliefs about marriage, the decision below would require a gay photographer to create pictures of a religious-based event opposing same-sex marriage, even if doing so would force him to create images expressing messages contrary to his deeply held beliefs,” the lawyers wrote in their brief asking the U.S. Supreme Court to take the case. “Thus, the freedom of all conscientious professionals—no matter what they believe—hangs in the balance.”