

House Bill 2
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TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS

CHAPTER 59
COMMISSION ON HUMAN RIGHTS

67-5910. LIMITATIONS. (1) This chapter does not apply to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by the corporation, association, or society of its religious activities.

(2) It is not a discriminatory practice:

(a) For an employer to employ an employee, or an employment agency to classify or refer for employment an individual, for a labor organization to classify its membership or to classify or refer for employment an individual, or for an employer, labor organization, or joint labor-management committee controlling an apprenticeship or other training or retraining program, on the basis of his religion, sex, national origin, or age if religion, sex, national origin, or age is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise, or

(b) For an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit involuntary retirement of any individual specified in subsection (9) of this section because of the age of such individual; however, the prohibition against age discrimination contained in this chapter shall not be construed to prohibit compulsory retirement if such retirement is permitted under the terms of 29 U.S.C., section 631(c)(1) and (2), or

(c) For a religious educational institution or an educational organization to limit employment or give preference to members of the same religion, or

(d) For an employer, employment agency, or labor organization to discriminate against a person with a disability which, under the circumstances, poses a direct threat to the health or safety of the person with a disability or others. The burden of proving this defense is upon the employer, labor organization, or employment agency.

(3) Nothing in this chapter shall require a person who owns, leases or operates a place of public accommodation, to permit an individual with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such place of public accommodation, where such individual poses a direct threat to the health or safety of others. The burden of proving this defense is upon the person who owns, leases or operates a place of public accommodation.

(4) This chapter does not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation.

(5) The provisions of section 67-5909(6), Idaho Code, do not apply to:

(a) Any agency of or any governmental entity within the state; or

(b) Religious organizations or entities controlled by religious organizations, including places of worship.

(6) Notwithstanding any other provisions of this chapter, it is not a discriminatory practice for:

(a) A religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization to limit admission or give preference to applicants of the same religion, or

(b) An educational institution to accept and administer an inter vivos or testamentary gift upon the terms and conditions prescribed by the donor.

(7) The provisions of section 67-5909(8), Idaho Code, do not apply:

(a) To the rental of a housing accommodation in a building which contains housing accommodations for not more than two (2) families living independently of each other, if the lessor or a member of his family resides in one (1) of the housing accommodations, or

(b) To the rental of a room or rooms in a housing accommodation by an individual if he or a member of his family resides therein.

(8) It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction.

(9) The prohibitions against discrimination based on age contained in this chapter shall be limited to individuals who are at least forty (40) years of age.

History:

[67-5910, added 1969, ch. 459, sec. 10, p. 1277; am. 1982, ch. 83, sec. 4, p. 155; am. 1988, ch.28, sec. 1, p. 35; am. 1988, ch. 225, sec. 4, p. 437; am. 1994, ch. 268, sec. 4, p. 830; am. 2005, ch. 278, sec. 5, p. 875.]

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FOR IMMEDIATE RELEASE:
January 24, 2015

Contact: Caroline Merritt
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Boise Metro Chamber Endorses Several Statewide, Local Issues

BOISE, ID – The Boise Metro Chamber of Commerce has added several statewide and local issues to its 2015 legislative agenda. The local issues include support for the Gowen STRONG coalition, the LIV Boise Early Childhood Education Initiative, the St. Luke’s Master Plan, and Uber’s operations in Boise.

The statewide issues include appropriations for technology investments, funding for Small Business Development Centers on college campuses, state university building appropriations, and Idaho House Bill 2, also known as the “Add the Words” legislation.

Local Issues

The Boise Metro Chamber is supporting the community-wide effort led by the City of Boise and the Idaho Air National Guard to secure a flying mission for the 124th Fighter Wing at Gowen Field. Branding themselves as “**Gowen STRONG**” (Strengthening the Treasure Valley Region and Our National Guard), this coalition is working to raise public awareness about Gowen Field’s positive impact on our local economy and advocate for a new mission. The Chamber is an active participant in this group.

The Chamber has endorsed **LIV (Lasting, Innovative, Vibrant) Boise**, a citywide effort to promote livability throughout our community. This initiative encompasses sustainable practices, policies, and partnerships that preserve Boise’s livability for present and future generations through a wide variety of projects and programs. Included in these efforts, Vista Neighborhood, in partnership with the City, will design a targeted strategy to **expand early childhood education**.

The Chamber is also endorsing the **St. Luke’s Master Plan**. St. Luke’s is planning a critical development that will result in a new Children’s Pavilion, expansion of the Children’s Hospital, modernization and renovation of the main hospital tower (critical care units, labor and delivery, emergency department, operating suites, and about 60 additional patient rooms), expansion of St. Luke’s MSTI cancer services, and construction of a new central plant and parking structure. The plan has been collaboratively developed with many partners, including neighbors, public agencies, community business leaders, boards, and steering committees, to serve the needs of the hospital through 2030.

The Chamber is also voicing its support for **Uber**, a technology company that allows users to connect with drivers instantly by allowing them to book a rideshare from their mobile phone. On Friday, the Chamber sent a letter to City Hall urging the City Council to find a solution which would allow Uber to operate in Boise.

-MORE-

Statewide Issues

The Chamber is endorsing **state appropriations for technology investments** that are critical to workforce development in Idaho. These include Boise State’s computer science program and a \$3 million dollar appropriation for the **Idaho Opportunity Fund**.

The Chamber supports state funding for **Small Business Development Centers** on college campuses. In partnership with the U.S. Small Business Administration, Small Business Development Centers offer resources such as coaching and consulting to help small business and startup companies succeed.

The Chamber is also endorsing several **state university building appropriations**, including funding for the Boise State University Fine Arts Building, Idaho State University-Meridian’s Dental Health Program, and occupancy of the University of Idaho Law Center in the former Ada County Courthouse.

The Chamber supports House Bill 2, Amendments to the Idaho Civil Rights Act and Human Rights Act, or more commonly known as the **“Add the Words” legislation**. On Monday, the Idaho Legislature’s House State Affairs Committee will consider this legislation to ban discrimination on the basis of sexual orientation or gender identity. The Chamber also supported the City of Boise’s anti-discrimination ordinance in December 2013. “Discrimination is bad for business,” said Bill Connors, President & CEO of the Boise Metro Chamber of Commerce.

About the Boise Metro Chamber of Commerce: Established in 1883, the Boise Metro Chamber of Commerce strives to be the leading business advocacy organization in the Boise Valley. The Boise Metro Chamber is a private, nonprofit, membership-driven organization comprised of more than 1,800 business enterprises, civic organizations, education institutions and individuals. Its mission is to provide leadership that will help create regional economic prosperity and success for its members.

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From: Phil Batt

For Release: Noon 12M Wednesday February 26, 2014

The Idaho Legislature has once again decided to take no action to include sexual orientation under our anti-discrimination statutes. Instead, they seriously considered state approval of anti-gay incidents if they are done because of religious convictions.

These procedures and the protests generated by them have attracted the attention of major news outlets in large cities and even that of London newspapers.

Idaho leaders have said this of no interest to present or prospective business opportunities in our state. In my career as a Legislative leader and as a Governor, I found otherwise. Large Idaho corporations, and particularly Hewlett-Packard and Boise Cascade, were very much concerned about Idaho's reputation regarding tolerance.

The long presence of practicing Nazis, in North Idaho, caused negative press coverage of our beloved state worldwide. H.P. executives and other Idaho business people helped force these scumbags out. However the main credit goes to North Idaho citizens who detested their abominable presence.

When an Idaho Congresswoman said people of color would not live in North Idaho because it was too cold for them, we got another wave of bad publicity. She recanted her views and our good name was again restored.

Our Idaho executives told me that the State's reputation is important to their businesses. If it is damaged, sales are hurt. Perhaps more importantly, it becomes much more difficult to attract outstanding, well qualified and forward thinking people to apply for Idaho employment.

Such is the case for a couple of my grandchildren. Max is gay. He attended Boise Schools. He felt marginalized and troubled by some of the treatment he received from students and teachers. Ultimately, due to this, he dropped out, obtained his G.E.D. and moved to San Francisco.

He waited tables and washed dishes until he became a legal California resident. He then obtained a degree in Fine Arts from a leading design school.

Max achieved a bachelor's degree, then a master's degree. Even before he left school he had several job offers in the computer design field. He accepted one at a high salary plus valuable options. He is now earning considerably more and has had numerous opportunities to advance further.

His sister Anna, followed him to California, became a resident and entered the higher education system at Berkeley. She was a great student and was shepherded through her bachelor's and master's degrees by professors who took a special interest. She is now pursuing a doctorate degree in Biochemistry at the University of Southern California.

These young folks love Idaho and I wish they lived here so that I could see them more. However, they will never make this their home again as long as we maintain our disdain for people who are different than most of us.

I would like to have somebody explain to me who is going to be harmed by adding the words to our civil rights statutes prohibiting discrimination in housing and job opportunities for homosexuals.

Or, I forgot, that might hurt the feelings of the gay bashers.

Poll: Idahoans Think It Should Be Illegal to Discriminate Against LGBT Residents (/politics/16-poll-idahoans-think-it-should-be-illegal-to-discriminate-against-lgbt-residents)

Details

Written by Bob Bernick

Category: [politics \(/politics\)](#)

🕒 Published: 04 January 2015

Two-thirds of Idahoans believe it should be against state law to discriminate against gays, lesbians and transgender people in housing, employment and business, a new poll by Idaho Politics Weekly shows.

Idaho is among two dozen states that do not specifically protect homosexuals and transgender people from such discrimination.

And the Idaho Legislature, which saw half a dozen [protests](#) (http://en.wikipedia.org/wiki/Add_The_Words,_Idaho) by gay rights advocates during its 2014 general session, has refused to pass such legislation before.

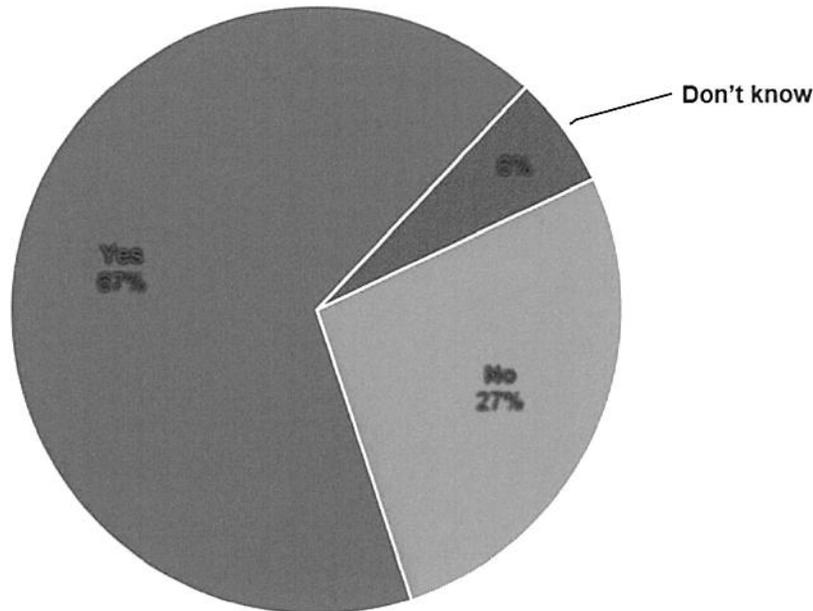
The GOP-controlled House and Senate have even refused to hear such an anti-discrimination measure.

The 2015 general session starts Jan. 12.

The new poll, conducted by Dan Jones & Associates in late December, finds that 67 percent of Idahoans believe it should “be illegal to discriminate in housing, employment, and business based on sexual orientation and gender identity.”

Should it be illegal to discriminate in housing, employment, and business based on sexual orientation and gender identity in Idaho?

Survey conducted 12/18-12/29, 520 Idaho residents. Margin of error +/- 4.3%



Source: [Idaho Politics Weekly](#) [Get the data](#)

The poll is of 520 adults and has a margin of error of plus or minus 4.3 percent.

Only 27 percent of Idahoans said it should not be illegal and 6 percent told Jones they didn't know.

Since the 1960s Idaho has had a human rights law.

And gay rights advocates – under that banner Add The Words and Add The 4 Words -- have been asking the Legislature to add four words to that law, including “sexual orientation” and “gender identity” which in effect would make such discrimination illegal.

A dozen (http://en.wikipedia.org/wiki/LGBT_rights_in_Idaho) Idaho cities have such anti-discrimination ordinances now. But so far gay rights advocates have not been able to convince the Legislature to pass a statewide measure.

Republicans make up more than two-thirds of both the Idaho House and Senate. And Idaho is, by and large, one of the more conservative states in the nation.

But most Republicans, even most “very conservative” Idahoans, favor making such gay and lesbian discrimination illegal.

Jones found:

-- 58 percent of rank-and-file Republicans said they believe such discrimination against homosexuals should be illegal.

-- 87 percent of Democrats said so.

-- 72 percent of political independents agree.

-- 52 percent of classified themselves as “very conservative” believe such discrimination should be illegal.

As one's political leanings move to the left, even greater majorities said it should be illegal in Idaho to discriminate against gays and lesbians in housing, employment and business.

Many Idahoans are members of the LDS Church.

And several years ago Mormon Church leaders came out in favor of such an anti-discrimination ordinance for Salt Lake City, headquarters of the worldwide church.

Yet the Utah Legislature, which is dominated by members of the LDS faith, has also failed to pass such a statewide anti-discrimination law.

Jones found that among Idaho Mormons who said they are "very active" in their church, 64 percent said they favor making such discrimination illegal statewide.

Twenty-eight percent of "very active" Mormons said they oppose such a legal protection for gays and lesbians.

The "somewhat active" Mormons favor such an anti-discrimination law, 68-26 percent; "not active" Mormons favor it, 80-20 percent; Catholics favor it, 71-27 percent; Protestants favor it, 57-27 percent; members of other denominations favor it, 73-21 percent; and those with no religion favor it, 75-19 percent.



States across the country that have passed statewide nondiscrimination protections (18 and D.C.):

Washington, Oregon, California, Nevada, Hawaii, Colorado, New Mexico, Minnesota, Iowa, Illinois, Maine, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland and Washington, D.C. In addition, New York, Wisconsin and New Hampshire have passed nondiscrimination protections on the basis of sexual orientation only.

Cities in Idaho that have passed nondiscrimination ordinances, in the absence of state protections:

- Sandpoint, ID: December 21st, 2011
- Boise, ID: December 5th, 2012
- Ketchum, ID: January 22th, 2013
- Moscow, ID: April 2nd, 2013
- Coeur d'Alene, ID: June 4th, 2013
- Pocatello, ID: June 6th, 2013
- Idaho Falls, ID: September 12th, 2013
- Victor, ID: June 11th, 2014
- Lewiston, ID: October 27th, 2014
- Driggs, ID: January 6th, 2015

Dear Representative:

Regarding written testimony on HB 2, I would like to emphatically ask that you vote "NO!" This bill will compromise the freedoms and liberty of the citizens of Idaho! Passing laws that give special status or that guarantee special protections for some, but punishes others, is reckless and undermines true diversity and equality. The government shouldn't dictate to business owners—regardless of sexual orientation—whom they can hire or who they must serve. And then, legally inviting men, even those who are sexually confused, into the public restrooms, locker rooms, and dressing rooms used by women and girls needlessly compromises the protection, privacy, and safety of women and children. There are soooo many reasons that this bill is so wrong! PLEASE vote no!

Thank you for the service that you render in behalf of the citizens of Idaho. Sincerely,
Sonja Davis ksdavis@cableone.net

Paul Thompson
Twin Falls, Idaho

Colossians 1:9-23 (NASB)

⁹ For this reason also, since the day we heard of it, we have not ceased to pray for you and to ask that you may be filled with the knowledge of His will in all spiritual wisdom and understanding, ¹⁰so that you will walk in a manner worthy of the Lord, to please Him in all respects, bearing fruit in every good work and increasing in the knowledge of God; ¹¹strengthened with all power, according to His glorious might, for the attaining of all steadfastness and patience; joyously ¹²giving thanks to the Father, who has qualified us to share in the inheritance of the saints in Light.

¹³ For He rescued us from the domain of darkness, and transferred us to the kingdom of His beloved Son, ¹⁴in whom we have redemption, the forgiveness of sins. ¹⁵He is the image of the invisible God, the firstborn of all creation. ¹⁶For by Him all things were created, both in the heavens and on earth, visible and invisible, whether thrones or dominions or rulers or authorities—all things have been created through Him and for Him.

¹⁷ He is before all things, and in Him all things hold together. ¹⁸He is also head of the body, the church; and He is the beginning, the firstborn from the dead, so that He Himself will come to have first place in everything. ¹⁹For it was the Father's good pleasure for all the fullness to dwell in Him, ²⁰and through Him to reconcile all things to Himself, having made peace through the blood of His cross; through Him, I say, whether things on earth or things in heaven.

²¹And although you were formerly alienated and hostile in mind, engaged in evil deeds, ²²yet He has now reconciled you in His fleshly body through death, in order to present you before Him holy and blameless and beyond reproach— ²³if indeed you continue in the faith firmly established and steadfast, and not moved away from the hope of the gospel that you have heard, which was proclaimed in all creation under heaven...

Judges 21:25 (NASB)

²⁵ In those days... everyone did what was right in his own eyes.

↑
start Mr. Chairman + committee members

My name is Paul Thompson from Twin Falls. I represent myself + my wife Linn Thompson
as a man of faith
I appeal to you to vote no on this bill

When humanity is zealous to support their own agenda and authority above that of God's we become a public danger to all. When legislation is made in favor of personal desire rather than public wellness; or when we give a path to equate sinful liberty with civil equal rights we become positioned to invite the judgment of God upon us, our descendants, and the general prosperity of the land.

Rather, today, I call upon you as elected, public servants of the citizens of Idaho, appointed by the sovereign order of God, to give sober reality to this historic moment given you to be a blessing rather than a curse to all who live or hope to live in this great state. This sober reality is to submit to Jehovah God and be an agent of blessing. Better today to repent of rash oaths disguised as champions of equal rights and avoid the guilt of being wrong before God.

When law advises others to acts of pride, selfishness and idolatry it really proves a strong stubbornness and a blindness of the human mind. Legislating acts of lawful immorality is the result of the fatal effects of a conscience, under ignorance and error, and is paved with misguided hope and expectations.

I respect that not all will understand my plea to you. I mean no disrespect to anyone present. The jurisdiction of this proposed law moves dangerously beyond the jurisdiction of civic law and duty.

As already stated by the introduction of the bill, Idaho Civil Rights law already identifies sexual orientation or gender identity
All citizens have equal rights already promised them by Idaho code and law. This proposed addition is really no addition at all and moves to legislation of the conscience of all and gives lawful permission to sexual deviant behavior that becomes a danger to all.

God is not confused over sexuality. God created us male and female. Will you act so arrogantly today and redefine what God has already ordered as good? There may be confusion within the mind but all created nature must submit to the Lordship of its creator. Sexual orientation and gender identity is already settled as male and female, not by you and me, but by Almighty God.

I'm not appealing to you on behalf of religious freedom or separation of church and state. This is the least of my concern... I'm appealing to you as one who has tasted the kindness of God. I'm a fellow citizen, a bond-servant under the Lordship of Christ, an ambassador of Christ's reconciliation. My appeal is to everyone of you and everyone here today, repent of your sin and submit to the Lordship of Christ.

Equal rights law already protects male and female; don't make law that protects acts against nature or sexually deviant behavior. This is a road that will surely not end well for any citizen in Idaho, regardless of sexual orientation and/or gender identity. It is a law that will make a mockery of all things created and an offense to the Lord of creation.

~~It is my appeal that you be as~~

In arrogance some may say, "if God be for us, who can be against us" but listen, if God be against us, it will no longer matter who is for us.

Thank you for hearing from all of us today.

I'm willing to answer any questions to clarify what I'm asking.



LEGAL MEMORANDUM

DATE: January 26, 2015

RE: Legal Analysis of House Bill 2

Introduction

Enacting Idaho House Bill 2 (“HB 2”)—the proposed legislation to include the categories of “sexual orientation” and “gender identity or expression” in the State’s nondiscrimination laws—will threaten First Amendment and statutory freedoms and expose the State to legal and fiscal liability.

HB 2 presents, among others, the following legal concerns:

- I. HB 2 will infringe First Amendment free speech rights, and constitutional and statutory free exercise rights, by requiring business owners to participate in or promote same-sex ceremonies, or support certain messages, in violation of their religious beliefs.
- II. HB 2 will infringe First Amendment free speech rights by prohibiting not only conduct, but also the printing and disseminating of speech deemed to be discriminatory.
- III. HB 2 may require churches and religious schools to employ clergy, teachers, and other employees who embrace a sexual identity or views about human sexuality that conflict with the religious entities’ faith and doctrine.
- IV. HB 2 may require religious schools to enroll students who embrace a sexual identity or views about human sexuality that conflict with the schools’ faith and doctrine.
- V. HB 2 will require businesses to make their restrooms gender neutral, and also force fitness centers to make their restrooms, locker rooms, and shower rooms gender neutral. This will violate the constitutional right to privacy and place businesses at risk of lawsuits.

I. HB 2 Will Infringe Constitutional and Statutory Rights By Requiring People to Participate in Events, or Produce Messages, With Which They Disagree.

Both the United States and Idaho Constitutions protect freedom of expression from government coercion.¹ The constitutional right to free speech “includes both the right to speak freely and the right to refrain from speaking.”² A long line of U.S. Supreme Court precedent establishes that the government cannot force citizens or organizations to convey messages that they deem objectionable; nor may it punish them for declining to convey such messages.³

In many of its applications, HB 2 will violate the First Amendment freedom from compelled speech and subject the State to lawsuits for which the State may be liable for attorneys’ fees. Current public accommodations laws provide that “the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation” on the basis of a protected characteristic.⁴ HB 2, if enacted, will add “sexual orientation” and “gender identity” to the list of protected characteristics. The effect of this addition will be to require many businesses to provide their services to promote messages and ideas that are contrary to their religious beliefs about human sexuality—such as promoting marriage as something other than a union of one man and one woman.

The vast majority of businesses, including those owned by people of faith, already happily serve all customers, including those who identify as gay, lesbian, and transgender. Indeed, our research was unable to identify a substantiated, or even alleged, pattern of sexual-orientation or gender-identity discrimination in Idaho. But some business owners, because of their religious beliefs, are unable to provide services for certain expressive events, such as same-sex ceremonies. Similarly, some business owners are unable to create messages that are contrary to what their faith teaches them is correct. Because neither current statutes nor HB 2 provides an exemption to protect rights of conscience, the enactment of HB 2 will result in discrimination complaints filed against business owners who are simply trying to run their business consistent with their faith. Notably, conviction for a violation of HB 2 includes criminal and civil penalties.

Some examples may help illustrate the problem.

Late last year, pursuant to its local nondiscrimination law, the City of Coeur D’alene tried to force two ministers, Donald and Evelyn Knapp, to perform a same-sex ceremony, even though

¹ See U.S. Const. amend. I; Idaho Const. art. I, § 9.

² *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

³ See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) (government may not require a public-accommodation parade organization to facilitate the message of a gay-advocacy group); *Pacific Gas and Elec. Co. v. Public Utils. Comm’n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (government may not require a business to include a third party’s expression in its billing envelope); *Wooley*, 430 U.S. at 717 (government may not require citizens to display state motto on license plates); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not require a newspaper to include a third party’s writings in its editorial page).

⁴ Idaho Code Ann. § 67-5909(5); see also Idaho Code Ann. § 18-7301A *et seq.*

doing so would violate their religious convictions.⁵ The Knapps own the Hitching Post, a for-profit wedding chapel. The City subsequently confirmed that it had not made a mistake: the wedding chapel was subject to the nondiscrimination ordinance.⁶ Alliance Defending Freedom attorneys have filed a lawsuit on the Knapps' behalf, challenging the constitutionality of the nondiscrimination law as applied to them.⁷

Similarly, Barronelle Stutzman, the owner of Arlene's Flowers in Richland, Washington, has for her entire 40-year career served and employed people who identify as gay and lesbian. But when one of her long-time clients asked her to create the floral arrangement for his same-sex ceremony, Barronelle declined. She believes that marriage is a sacred institution, created by God, and that it is only the union of a man and a woman. Barronelle carefully creates each wedding floral arrangement, designing the flowers to communicate the beauty and joy of the event. She then transports the flowers to the wedding location and decorates the venue with her floral designs. Barronelle believed that it would be wrong for her to use her artistic talents to create floral arrangements for a wedding that she believed to be in conflict with God's intention for marriage. So she declined to create the requested arrangements, but she gladly referred her long-time customer to another florist. She has explained that, while she serves all people, she does not create floral arrangements for all events. The customer easily found another florist, going with one of the florists to which Barronelle had referred him. But he and his same-sex partner filed a complaint against Barronelle anyway pursuant to Washington's sexual-orientation nondiscrimination law.⁸

And in Lexington, Kentucky, an ordinance similar to HB 2 is currently being used to prosecute Blaine Adamson, the owner of a printing company named Hands On Originals. Blaine has employees who identify as gay, and he has always served everyone equally regardless of sexual orientation. But he declined to print messages on shirts promoting a local "Gay Pride" festival. It would violate his sincerely held religious beliefs to print and convey messages promoting such an event. So he declined the business. The representative of the festival found another printing business that produced the requested shirts for free. Nevertheless, the group hosting the festival filed a complaint against Blaine and Hands On Originals, alleging sexual-orientation discrimination. Blaine has been defending himself against these charges for nearly three years already, with no end yet in sight. This has taken valuable resources and energy from operating his business.⁹

⁵ Alliance Defending Freedom, "Govt tells Christian ministers: Perform same-sex weddings or face jail, fines," October 18, 2014, available at <http://www.adfmedia.org/News/PRDetail/9364>.

⁶ Alliance Defending Freedom, "City of Coeur d'Alene confirms for-profit wedding chapel violates ordinance," October 21, 2014, available at <http://www.adfmedia.org/News/PRDetail/9366>.

⁷ *Id.*

⁸ For more information about Barronelle Stutzman and Arlene's Flowers, including links to relevant legal documents, see the Alliance Defending Freedom media page, available at <http://www.alliancealert.org/tag/zz-state-of-washington-v-arlenes-flowers/>. The complaints against Barronelle are available at <http://www.adfmedia.org/files/ArlenFlowersAGcomplaint.pdf> and <http://www.adfmedia.org/files/ArlenFlowersACLUcomplaint.pdf>. A short video featuring Barronelle telling her story is available at <http://www.youtube.com/watch?v=MDETkcCw63c>.

⁹ For more information about Blaine Adamson and Hands On Originals, including links to relevant legal documents, see *ADF: Ky. T-shirt company not required to promote message it disagrees with*, April 20, 2012, available at <http://www.adfmedia.org/News/PRDetail/5454>.

There are a number of other examples of business owners who declined to provide services for a same-sex ceremony, or declined to produce a message, because doing so would violate their religious beliefs. All of the examples have three commonalities.

First, none of the sexual-orientation discrimination litigation taking place today involves people who were turned away from restaurants or people who were denied necessary services like medical care. Those things simply do not happen. Rather, the lawsuits all involve plaintiffs who use statutes like HB 2 to demand that others participate in or promote same-sex ceremonies or support or convey messages that conflict with someone's faith. In other words, they all involved freedom-of-conscience issues.

Second, in none of these instances was the person desiring services unable to obtain them. Every time, they easily found businesses wanting to provide the requested services. In fact, they generally had other business owners lining up to provide services. So the subsequent discrimination lawsuits were not about the inability to access services. Rather, they were intended to stamp out any objection to their own views, beliefs, and practices.

Finally, each of these lawsuits have come about because sexual orientation and gender identity were added to the nondiscrimination law. Such additions, without robust freedom of conscience protection, can lead to the trampling of religious liberty and free speech.

HB 2 has no such protection. This arguably renders HB 2 unconstitutional under the Idaho Constitution,¹⁰ as well as in violation of Idaho's Free Exercise of Religion Protected Act ("FERPA").¹¹ And to the extent that HB 2 compels anyone to produce a message that they do not want to produce, it is likely unconstitutional under the free speech clause of the First Amendment,¹² requiring the taxpayers of Idaho to pay the attorneys' fees of whoever challenges it.¹³

¹⁰ Idaho Const. art. I, § 4 (Providing that "[t]he exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions" and that "the liberty of conscience" is "secured.").

¹¹ The Code provides in pertinent part:

- (1) Free exercise of religion is a fundamental right that applies in this state, even if laws, rules or other government actions are facially neutral.
- (2) Except as provided in subsection (3) of this section, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.
- (3) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both: (a) Essential to further a compelling governmental interest; (b) The least restrictive means of furthering that compelling governmental interest.

Idaho Code Ann. § 73-402.

¹² See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

¹³ See 42 U.S.C. §§ 1983, 1988 (providing that persons who challenge an unconstitutional state law may recover costs and attorneys' fees).

II. HB 2 Will Infringe Constitutional Rights By Prohibiting the Printing and Disseminating of Speech Deemed To Be Discriminatory.

It is a violation of current state nondiscrimination statutes “[t]o print, circulate, post, or mail or otherwise cause to be published a statement, advertisement or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual’s patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable.”¹⁴ By its terms, the law “distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed” and thus is “content based.”¹⁵ Such speech restrictions are “presumptively invalid” under the First Amendment and trigger strict-scrutiny review.¹⁶ Such review is “the most demanding test known to constitutional law,”¹⁷ requiring the government to prove that the restriction “is justified by a compelling government interest, and is narrowly drawn to serve that interest.”¹⁸ It is unlikely that the current statutes’ speech restriction would survive this level of scrutiny.

As the nondiscrimination laws are currently written, it is not likely that this speech restriction will be challenged. That may change, however, if HB 2 is enacted and “sexual orientation” and “gender identity” are added to the nondiscrimination laws. If that happens, HB 2 would prohibit businesses from posting advertisements or disseminating statements about marriage or human sexuality that have the unintended effect of making those who identify as gay, lesbian, bisexual, or transgender feel unwelcome. Imposing this restriction on speech would quite possibly lead to litigation against the State.

A few hypothetical situations illustrate the concern.

Suppose that a church decides to hold a marriage retreat. Further suppose that the church understands the Bible to teach that marriage is only the union of a man and a woman. Finally, suppose that the local Christian bookstore posts an advertisement for the marriage retreat, and that the advertisement says that only married couples consisting of a man and a woman are invited to attend. One who identifies as gay or lesbian could bring a charge of discrimination against the bookstore for posting the advertisement, alleging that the advertisement made him or her feel “unwelcome” in the store. This would arguably violate the prohibition against “post[ing]” an “advertisement” indicating that a person is “unwelcome” because of his or her sexual orientation.¹⁹

Or suppose that a photographer holds the religious belief that marriage is only the union of a man and woman. Further suppose that she decides to serve same-sex ceremonies because

¹⁴ Idaho Code Ann. § 67-5909(5).

¹⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994).

¹⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹⁷ *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

¹⁸ *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011).

¹⁹ See Idaho Code Ann. § 67-5909(5).

she understands that the law requires her to do so. Finally, suppose that she posts on her website a statement declaring that although she serves all weddings, it is her religious belief that God intends marriage to be only the union of a man and a woman. This too would arguably violate the prohibition against “print[ing]” or post[ing]” a “statement” indicating that the patronage of gays and lesbians is “unwelcome.”²⁰

If the Christian bookstore owner or the photographer in the above hypotheticals were prosecuted for communicating these messages, they would surely assert their First Amendment rights among other legal defenses. Such an unconstitutional infringement on constitutional liberties could result in a judgment requiring the taxpayers of Idaho to pay attorneys’ fees.²¹

III. House Bill 2 May Infringe Constitutional and Statutory Rights By Requiring Churches and Religious Schools to Violate Their Doctrinal Positions With Regard to Employment Matters.

The current statutes proscribing discrimination in employment matters²² define “employer” to include every “person” having five or more employees.²³ “Person,” meanwhile, is defined to include an association or corporation.²⁴ This definition is broad enough to include churches and other houses of worship, as well as religious schools.²⁵ Thus, on their face, the nondiscrimination statutes prohibit churches and other houses of worship with five or more employees from discriminating in employment.

Those statutes provide only limited protection for the rights of churches, houses of worship, and religious schools to make employment decisions as demanded by their religious beliefs. Specifically, they state that [t]his chapter does not apply to a religious corporation,

²⁰ *See id.*

²¹ *See* Idaho Code Ann. § 73-402 (“A party who prevails in any action to enforce this chapter against a government shall recover attorney’s fees and costs.”); *see also* 42 U.S.C. §§ 1983, 1988.

²² The Code in pertinent part provides that it is prohibited:

For an employer to fail or refuse to hire, to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment or to reduce the wage of any employee in order to comply with this chapter;

Idaho Code Ann. § 67-5909.

²³ The Code in pertinent part provides:

“Employer” means a person, wherever situated, who hires five (5) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year whose services are to be partially or wholly performed in the state of Idaho, except for domestic servants hired to work in and about the person’s household.

Idaho Code Ann. § 67-5902(6).

²⁴ The Code in pertinent part provides:

“Person” includes an individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, any other legal or commercial entity, the state, or any governmental entity or agency[.]

Idaho Code Ann. § 67-5902.

²⁵ Most churches, other houses of worship, and private religious schools are incorporated. Those that are not incorporated are still legal associations. Both corporations and associations are subject to the law.

association, or society *with respect to the employment of individuals of a particular religion* to perform work connected with the carrying on by the corporation, association, or society of its religious activities.”²⁶ The nondiscrimination laws afford similarly limited protection for religious educational associations.²⁷ These exemptions are inadequate, however, because they seem to permit religious entities to make distinctions in their employment decisions only on the basis of their employees’ religious identification. They do not allow religious entities to make employment decisions that might arguably implicate another statutorily protected classification.

So, for example, a Baptist church may decline to employ a Lutheran who applies to be its worship minister because the Baptist church is allowed to make adherence to the Baptist faith a requirement for employment. But if HB 2 is enacted, the statutes would not permit the church to make employment decisions based on the sexual practices and identifications of its applicants or employees. So if an applicant who identifies as a gay Baptist applies to be the Baptist church’s worship minister, the church cannot consider the applicant’s sexual practices and identification when making its hiring decision—even if the church’s doctrine speaks directly to that issue. If the church declines to hire the gay Baptist because of his sexual practices and identification, the church would seemingly engage in prohibited discrimination.

The United States Supreme Court held, in a unanimous decision, that the First Amendment to the United States Constitution provides churches and other religious entities—including schools—complete freedom to make employment decisions regarding ministers and minister-like employees without governmental interference.²⁸ This law will not protect that right. It is therefore likely to be found unconstitutional if challenged. Such a ruling would require Idaho to pay the challenger’s attorneys’ fees, because federal law provides that, when a state law violates the United States Constitution, the State must pay the attorneys’ fees of the prevailing party who challenged the law.²⁹ Litigation of this type could be very expensive to the taxpayers of Idaho.

For the same reasons, HB 2, if enacted, would likely be unconstitutional under Article I, Section 4 of the Idaho Constitution, which provides that “[t]he exercise and enjoyment of religious faith and worship shall forever be guaranteed.”³⁰ Furthermore, it would probably be struck down as violating Idaho’s Free Exercise of Religion Protected Act (“FERPA”), which prohibits the government from imposing substantial burdens on the free exercise of religion unless the law in question is essential to further a compelling interest and is the only way that the government can accomplish its interest.³¹

²⁶ Idaho Code Ann. § 67-5910(1) (emphasis added).

²⁷ The Code provides in pertinent part:

It is not a discriminatory practice . . . For a religious educational institution or an educational organization to limit employment or give preference to members of the same religion[.]

Idaho Code Ann. § 67-5910.

²⁸ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012).

²⁹ See 42 U.S.C. §§ 1983, 1988.

³⁰ Idaho Const. art. I, § 4.

³¹ Idaho Code Ann. § 73-402.

IV. House Bill 2 May Infringe Constitutional and Statutory Rights By Requiring Religious Schools to Violate Their Doctrinal Positions With Regard to Students They Enroll.

The existing nondiscrimination laws prohibit “educational institutions” from making discriminatory enrollment decisions.³² An “educational institution” includes religious elementary schools, secondary schools, and universities.³³ As discussed above, the only religious exemption for this provision permits preference to be given to “applicants of the same religion.”³⁴

If HB 2 is enacted, it would threaten to force religious schools to admit students whose sexual practices or identifications conflict with the schools’ religious beliefs. This will almost certainly be found to violate the First Amendment to the United States Constitution (not to mention the Idaho’s constitutional and statutory protections for religious liberty³⁵), requiring the taxpayers of Idaho to pay the attorneys’ fees of whoever successfully pursues that lawsuit.³⁶

V. HB 2 Will Require Public Restrooms, Locker Rooms, and Shower Rooms to Be Gender Neutral Rather Than Gender Specific.

The nondiscrimination statutes make it discriminatory for a person³⁷ “to deny an individual the full and equal enjoyment of the . . . facilities . . . of a place of public accommodation.”³⁸ House Bill 2 seeks to add “gender identity” to the characteristics protected against discrimination. The effect of that change will be that the law will require businesses to allow biological males who identify as female to use the women’s facilities, and likewise allow

³² The Code in pertinent part states:

It shall be a prohibited act . . . For an educational institution:(a) To exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, or (b) To make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information, or to make or keep a record, of an applicant for admission, except as permitted by the regulations of the commission[.]

Idaho Code Ann. § 67-5909.

³³ The Code in pertinent part provides:

“Educational institution” means a public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, or university and a business, nursing, professional, secretarial, technical, or vocational school and includes an agent of an educational institution[.]

Idaho Code Ann. § 67-5902(10).

³⁴ Idaho Code Ann. § 67-5910(6).

³⁵ See Idaho Const. art. I, § 4; Idaho Code Ann. § 73-402.

³⁶ See 42 U.S.C. §§ 1983, 1988.

³⁷ “Person” includes both natural born persons and corporate persons. See Idaho Code Ann. § 67-5902.

³⁸ Idaho Code Ann. § 67-5909(5). A *public accommodation* is defined by the Code as “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public[.]” Idaho Code Ann. § 67-5902. *Facilities*, while not defined, is generally understood to include restrooms, shower rooms and locker rooms.

biological females who identify as male to use the men's facilities. The law will also require fitness centers to make their restrooms, shower rooms, and locker rooms gender neutral. A business that seeks to prevent a biological male from using the women's facilities, or vice versa, will engage in prohibited discrimination in those cases where the person identifies as the opposite gender.

This has the potential to lead to a number of unintentional and undesirable consequences.

First, allowing biological males into the restrooms, shower rooms, or locker rooms used by biological females may violate constitutional privacy rights. The Ninth Circuit Court of Appeals has noted that “[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity.”³⁹ The Tenth Circuit Court of Appeals has similarly explained that a person’s constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while “engag[ing] in personal activities, such as undressing, using toilet facilities, or showering.”⁴⁰ Thus, HB 2, if enacted, may violate the constitutional privacy interests of citizens who will be forced to share a restroom, shower room, or locker room with a person of the opposite biological sex.

Second, laws allowing biological males to use facilities designated for women may be used by heterosexual sexual predators to gain easier access to women, teens, and girls. Sadly, this has happened in other communities that have enacted laws prohibiting discrimination on the basis of gender identity.⁴¹ Businesses will no longer be able to protect their female patrons by preventing these predators from entering the women’s facilities. Instead, they will have to allow all biological males who assert that they identify as female access to rooms previously reserved for biological females. This puts women, teens, and girls at risk of harm.

Businesses will thus be given the untenable choice of complying with the law or seeking to protect the safety and privacy of their patrons. They will not be able to do both. This places businesses in a no-win situation.

Conclusion

HB 2 raises many constitutional and statutory concerns. It is our opinion that it will have many adverse unintended consequences, including trampling freedom of speech and religion.

³⁹ *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

⁴⁰ *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982). See also *Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are “entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets”).

⁴¹ See, e.g., Robert J. Lopez, *Man wore dress, wig to videotape women in bathroom, deputies say*, Los Angeles Times, May 14, 2013, available at <http://articles.latimes.com/2013/may/14/local/la-me-ln-man-videotape-women-in-restroom-20130514>; Sam Pazzano, *Predator who claimed to be transgender declared dangerous offender*, Toronto Sun, February 26, 2014, available at <http://www.torontosun.com/2014/02/26/predator-who-claimed-to-be-transgender-declared-dangerous-offender>.