STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 26, 2015

The Honorable Ilana Rubel
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: House Bill 2—Proposed Amendment to Idaho Code §§ 18-7301, 67-5901 and 67-5909 – Our File No. 15-50391

Dear Representative Rubel:

You ask several questions in connection with House Bill No. 2 ("HB 2"). The legislation, if adopted, would include freedom from discrimination on the basis of sexual orientation or gender identity as a civil right under Idaho Code § 18-7301 and prohibit such discrimination under the Human Rights Act through amendments to Idaho Code §§ 67-5901 and -5909. I will answer the questions in order posed.

Question No. 1: Does federal (or state) law already exist which protects gays/transgender people in Idaho from discrimination in employment, housing and public services/accommodations?[1] This question cannot be answered with a simple "yes" or "no" because the relevant law is not settled.

- **Title VII.** Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of "sex." 42 U.S.C. § 2000e-2(a)(1). Title VII applies, with certain exceptions, to both public and private discrimination. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976). No appellate court has extended the statute's prohibition of sex discrimination to sexual orientation discrimination. However, the Equal Employment Opportunity Commission ("EEOC") concluded in 2012 that sexual stereotyping discrimination does fall within Title VII's prohibition. *Macy v. Dep't of Justice*, EEOC DOC 0120120821, 2012 WL 1435995, at *6 (April 2012) (construing Title VII to prohibit discrimination on the basis of "gender"—a term that "encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity"). A federal district court, moreover, denied a motion to dismiss in a suit alleging sex stereotyping discrimination by the Library of Congress. *Terveer v. Billington*, Civ. No. 12-1290(CKK), 2014 WL 1280301, at *10 (D.D.C. Mar. 31,

[1] I construe your reference to "transgender" to be to the term "gender identity" used (but not defined) in HB 2.

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2014) ("[u]nder Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim") (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)); *see generally* Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 421 (2014) (discussing federal courts' varying application of *Price Waterhouse*, and observing that a "broader interpretation of *Price Waterhouse*" to include sexual stereotyping is "expanding"). It is therefore arguable, but not established, that Title VII prohibits gender identity and, by implication, sexual orientation discrimination.

- **Equal Protection Clause.** The Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws. The Equal Protection Clause applies only to "state action" and thus ordinarily has no impact on private conduct. It is enforced principally through 42 U.S.C. § 1983. Employment or other forms of discrimination against individuals because of their sexual orientation or gender identity may violate the Equal Protection Clause. The important—and not definitively resolved—issue is what standard of review governs determination of whether the Clause has been violated. Traditionally, sexual orientation, and presumably gender identity, discrimination has been subjected to rational basis review, but the Ninth Circuit applied a "heightened" form of review in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014). There, the court of appeals found that a prospective juror was struck from a venire panel because of his perceived sexual orientation. The panel then determined that *United States v. Windsor*, 133 S. Ct. 2675 (2013), overruled prior circuit precedent applying rational basis scrutiny to sexual orientation discrimination. 740 F.3d at 480-84. Application of "heightened" scrutiny to governmental employment discrimination on the basis of sexual orientation/gender identity discrimination would likely result in relief under § 1983.

- **Human Rights Act and Municipal Ordinances.** Idaho anti-discrimination statutes do not contain a specific prohibition with respect to sexual orientation or gender identity—as reflected by the proposed amendments in HB 2. *See* Idaho Code § 67-5909 (prohibiting discrimination on the basis of race, color, religion, sex, national origin, age or disability). However, it is theoretically possible that the term "sex" can be construed consistently with the EEOC's interpretation of Title VII. No Idaho state court has reached the issue. Various municipalities also have been active in this regard, adopting anti-discrimination ordinances that prohibit the denial of the "full enjoyment of" public accommodations because of sexual orientation and gender expression/identity. *See generally* Leslie M. Hayes and Lucy R. Juarez, *Idaho's Inconsistent System of Employment Protections for Lesbian, Gay, Bisexual and Transgender Individuals*, 57 *Advocate* (No. 2) 39, 41-42 (Feb. 2014). Each of these ordinances defines the term "full enjoyment of" expansively "to include, but be limited to, the right to . . . any service offered or sold by any person or establishment to the public . . . without acts directly or indirectly causing persons of any particular sexual orientation and/or gender identity/expression to be treated as not welcome, accepted, desired or solicited." *See* Boise City Code § 6-02-02; Coeur d'Alene City Code § 9.56.020; Ketchum City Code § 9.24.020, Moscow City Code § 19-2.D; Pocatello City Code § 9.36.020; Sandpoint City Code 5-2-10-2.

- **Fair Housing Act.** The Fair Housing Act prohibits various forms of discrimination, including on the basis of sex, in connection with the sale or rental of dwellings. 42 U.S.C. § 3604. Once again, the issue is whether the term "sex" extends to discrimination on the basis of sexual orientation/gender identity under this statute.

Question No. 2: Would the proposed text of HB 2 force clergy to marry gay couples? The answer is "no." Neither § 18-7301 nor § 67-5909 applies to religious ceremonies (which I understand to be the focus of the question by virtue of its reference to "clergy"). Idaho Code sec. 73-402 would likely be available to assert as a defense in the event an injunction or mandamus were sought against a religious order or a closely held religious corporation. *See Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2775 (2014).

Question No. 3: Would the proposed HB 2 impair any Idahoan's freedom of speech (or ability to express views on homosexuality)? As a general matter, the statutes amended by HB 2 regulate conduct, not speech. However, § 67-5909 contain provisions directed to, *inter alia*, written material such as notices and advertisements that may contain commercial speech. *See* §§ 67-5909(4), -5909(5)(b), -5909(7)(c), -5909(8)(f). Commercial speech may be regulated more broadly than non-commercial speech. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-68 (2011) ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. . . . To sustain the targeted, content-based burden [the involved statute] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."). Assuming that prevention of certain types of discrimination is a substantial government interest, a plausible argument exists that HB 2 satisfies this relaxed standard. The answer to this question is thus likely "no."

I hope that this letter adequately responds to your questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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