ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

LEGAL M E M O R A N D U M

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.

15100 N. 90th Street Scottsdale, AZ 85260 Phone: 800.835.5233 Fax: 480.444.0028 AllianceDefendingFreedom.org

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

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[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 a 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]

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[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/ArlenesFlowersAGcomplaint.pdf and http://www.adfmedia.org/files/ArlenesFlowersACLUcomplaint.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]

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[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.
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> (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.
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> (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

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[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 matters[22] 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,

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[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]

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[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 liberty[35]), 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 person[37] "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

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[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.

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[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.