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Gender Identity Discrimination in Employment: Analysis of H.R. 3686 in the 110th Congress

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Summary

H.R. 3686, a bill to prohibit employment discrimination on the basis of actual or perceived gender identity, was introduced in the 110th Congress and appears to represent half of an earlier bill that dealt with both gender identity and sexual orientation discrimination. Gender identity appears to include, but likely is not limited to, trans-gender status. Like the earlier bill, H.R. 3686 would also prohibit employment discrimination against an individual based upon the gender identity of persons associated with that individual, and does not permit disparate impact claims of gender identity discrimination. A minority of states have enacted their own prohibitions against gender identity employment discrimination. Additionally, some types of gender identity employment discrimination may already be prohibited by existing prohibitions against sex stereotypes and harassment in Title VII of the Civil Rights Act of 1964, despite the fact that Title VII's definition of sex generally has not been interpreted to encompass trans-gender status. H.R. 3686 does not appear to apply to religious organizations as defined under Title VII. However, even if H.R. 3686 were enacted, religious organizations may still be prohibited from engaging in those types of gender identity discrimination that are currently prohibited by Title VII. Alternatively, despite the fact that H.R. 3686 does not claim to limit the provisions of any other federal or state discrimination law, the bill could be read to implicitly repeal judicial interpretations of sex stereotype discrimination under Title VII.

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History

On September 27, 2007, Representative Barney Frank of Massachusetts introduced two bills that separately prohibit employment discrimination on the basis of sexual orientation and gender identity, respectively.[1] The bills appear to separate the issues of sexual orientation and gender identity discrimination that had been conjoined in an earlier bill, also introduced by Representative Frank.[2] H.R. 3686, which appears to represent the half of the earlier bill that dealt with employment discrimination on the basis of gender identity, would be the first federal prohibition on gender identity discrimination, if enacted.[3] However, predicting how its provisions would be applied is complicated by existing judicial interpretations of "sex" under Title VII of the Civil Rights Act of 1964 that may also incorporate instances of gender identity discrimination.

Anatomical Sex vs. Gender Identity

Although Title VII's prohibitions against discrimination on the basis of sex generally have not been interpreted to include discrimination on the basis of gender identity,[4] in *Schroer v. Billington*, the United States District Court for the District of Columbia recently held that Title VII may in fact encompass trans-gender

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[1] H.R. 3685 and H.R. 3686, 110th Cong. (2007). *See also*, CRS Report RS22740, *Sexual Orientation Discrimination in Employment: Analysis of H.R. 3685, the Employment Non-Discrimination Act of 2007*, by Edward Chan-Young Liu. H.R. 3685, which would prohibit only sexual orientation discrimination, was introduced and reported favorably, with no amendments, out of the House Committee on Education and Labor, on October 18, 2007. Although that bill does not deal with gender identity discrimination, it is very similar to H.R. 3686, particularly when looking at the types of employers the bills would apply to.

[2] *See*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007).

[3] A minority of jurisdictions have enacted laws prohibiting gender identity discrimination. *See*, *e.g.*, CAL. GOV'T CODE § 12926 (incorporating gender identity definition in CAL. PENAL CODE § 422.56(c)); D.C. CODE § 2-1401.02(12A); 775 ILL. COMP. STAT. 5/1-102; N.J. STAT. ANN. § 10:2-1; ME. REV. STAT. ANN. tit. 5, § 4553; MINN. STAT. § 363A.01; N.M. STAT. § 28-1-2(Q); R.I. GEN. LAWS § 28-5-6(10); WASH. REV. CODE § 49.60.040(15).

[4] *See, Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984); *DeSantis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 237 (9th Cir. 1979); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977).

discrimination.[5] According to that court, the "factual complexities that underlie human sexual identity" warranted a more developed record, including "the scientific basis of sexual identity, and gender dysphoria in particular."[6] Other courts, while not adopting the reasoning of the court in *Schroer*, have held that, under some circumstances, victims of treatment that would arguably *also* qualify as gender identity discrimination may be able to successfully assert that they were victims of sex stereotypes or sexual harassment under Title VII.

Sex stereotypes. Victims of gender identity discrimination may prevail under Title VII where the facts *also* indicate the presence of discrimination for failure to conform to "sex stereotypes," as defined by the United States Supreme Court in *Price Waterhouse v. Hopkins*.[7] In that case, a female employee was denied partnership in an accounting firm despite the fact that she was regarded as a high performer. Tellingly, partners in the firm had instructed her to act more femininely in order to be considered for a partnership in the future.[8] The Court held that Price Waterhouse was applying standards for partnership in a prohibited sexually disparate manner, in that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer's stereotypical view of femininity.[9]

The sex stereotype theory may also be viable in cases involving trans-gender individuals. In *Smith v. Salem*, a male firefighter who was undergoing gender transition to female argued that he had been suspended because of his feminine appearance.[10] The Sixth Circuit held that, to the extent that the firefighter asserted that she experienced discriminatory treatment due to the fact that she did not conform to what her employer believed males should look and act like, she had sufficiently plead a prima facie case of sex discrimination.[11] Similarly, in *Barnes v. Cincinnati*, a male police officer undergoing gender transition to female was denied a promotion because she acted too femininely in her supervisors' opinions.[12] Coverage under the sex stereotype theory, however, only goes so far. The Ninth Circuit has held that it does not violate Title VII for covered employers to require female employees to wear makeup and long, styled hair so long as these requirements do not impose an

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[5] *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

[6] *Id*. at 212-213. In so holding, the court suggested reexamining the Seventh Circuit's holding in *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

[7] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[8] *Id*. at 233-235. Partners also objected to her use of vulgar language and reported that she acted too "macho."

[9] *Id*. at 250-251. Interestingly, the court in *Schroer* refused to apply a sex stereotype theory, reasoning that trans-gender individuals are not attempting to deviate from sexual stereotypes, but are embracing them as part of their gender transition. *Schroer v. Billington*, 424 F. Supp. 2d at 211.

[10] *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004).

[11] *Id.* at 575.

[12] *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

"unequal burden" when compared to grooming requirements for male employees.[13] In addition, the Tenth Circuit has held that employers may require employees undergoing gender transition to use the bathrooms designated for their current anatomical sex.[14]

Sexual harassment. In the context of sexual harassment, recent court decisions have been guided by the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*.[15] In that case, the Court held that the critical question is whether the harassment occurred "because of sex."[16] Furthermore, relying on *Price Waterhouse*, the Third Circuit held, in *Bibby v. Philadelphia Coca Cola Bottling Comapny*, that harassment of an individual for failure to conform to sex stereotypes could constitute harassment "because of sex" consistent with *Oncale*.[17]

The Ninth Circuit has further held, in *Rene v. MGM Grand Hotel*, that harassment "which targeted body parts clearly linked to [a person's] sexuality" constituted sexual discrimination prohibited by Title VII, and that "whatever else those attacks may, or may not, have been 'because of' has no legal consequence."[18] Although the plaintiff in *Rene* prevailed, the holding of the Ninth Circuit may contradict the Supreme Court's earlier holding in *Oncale*. As the dissent in *Rene* noted, the Ninth Circuit relied in large part on *Doe v. City of Belleville*, in which the Seventh Circuit argued that evidence of physical abuse of a sexual nature alone could lead to an inference that the victim was targeted because of his gender.[19] That judgment, however, was vacated and remanded to the Seventh Circuit after the

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[13] *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006). H.R. 3686 explicitly allows enforcement of "reasonable" grooming codes. H.R. 3686 § 7(a)(5).

[14] *Etsitty v. Utah Transit Auth.*, ___ F.3d ____ (10th Cir. 2007). H.R. 3686 contains provisions explicitly allowing segregated changing and shower facilities. Note, however, that bathrooms are not listed explicitly. H.R. 3686 § 7(a)(3). H.R. 3686 also explicitly would not require additional facilities to be built to comply with the bill. H.R. 3686 § 7(a)(4).

[15] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

[16] *Id.* at 81. The Court also recognized that an inference that harassment is "because of sex" is not obvious where the harasser and the victim are of the same sex, but provided three examples of how such an inference could be established: (1) if the harasser sexually desired the victim; (2) if the harasser was hostile to the presence of one sex in the workplace; or (3) if comparative data showed that the harasser targeted only members of one sex. *Id*. at 80-81. This discussion of *Oncale* is not meant to imply that gender identity harassment is only perpetrated by persons of the same sex as the victim, but merely to suggest that an employer's assertion that harassment occurred solely because of trans-gender status, and not sex, may be refuted by the methods of proof offered in *Oncale*.

[17] *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3rd Cir. 2001).

[18] *Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1064, 1066 (9th Cir. 2002). In this case, the plaintiff believed he was harassed because of his sexual orientation, but the court's holding may have broader implications beyond this type of harassment.

[19] *Id*. at 1066 (citing *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997)).

Court's decision in *Oncale*.[20] The text of the opinion in *Oncale* also seems to require more than conduct of a sexual nature in order to give rise to an inference that it was "because of sex."[21]

Effect of H.R. 3686 on existing law. H.R. 3686 would define gender identity as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[22] Given this definition, a reasonable court could conclude that the definition of "gender identity" includes the kind of employer behavior evidenced by the facts in *Price Waterhouse v. Hopkins, Smith v. Salem,* and *Bibby v. Coca Cola*. If H.R. 3686 were enacted, it is unclear whether facts similar to these cases would be governed by H.R. 3686 or existing protections of Title VII. Section 14 of H.R. 3686 states that

> the Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination under any other Federal law or regulation.[23]

Therefore, H.R. 3686 might be interpreted to leave *Price Waterhouse's* judicially created protections in place. The Supreme Court has held that "repeals by implication are strongly disfavored."[24] However, in *United States v. Fausto*, the Supreme Court also held that the normal presumption against implicit repeals is not present when dealing with "repeal by implication of a legal disposition *implied* by a statutory text."[25] Therefore, in that case, the Court held that the Civil Service Reform Act had implicitly repealed a prior *judicial interpretation* of the Back Pay Act.[26]

In H.R. 3686, there are several facts that might argue for implicit repeal of *Price Waterhouse*. First, the bill's stated purpose is "to provide a *comprehensive* Federal prohibition of employment discrimination on the basis of gender identity."[27] Second, the bill explicitly does not allow *disparate impact* claims of gender identity

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[20] *City of Belleville v. Doe*, 523 U.S. 1001 (1998). The Court remanded and instructed the court below to determine whether harassment had occurred "because of sex." However, the case settled before the Seventh Circuit could rehear the case.

[21] "[The plaintiff] must always prove that the conduct at issue was not merely tinged with offensive sexual connotations." *Oncale*, 523 U.S. at 81.

[22] H.R. 3686 § 2(a)(6).

[23] H.R. 3686 § 14. This section also disavows preemption of any state discrimination law.

[24] *United States v. Fausto*, 484 U.S. 439, 452-453 (1988).

[25] *Id.* at 453 (emphasis added). Justice Scalia, writing for the majority, further stated "[R]econciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *Id.*

[26] *Id.* at 453-454.

[27] H.R. 3686 § 1(1) (emphasis added). *Cf. United States v. Fausto*, 484 U.S. at 454 (holding that the comprehensive nature of the Civil Service Reform Act supported implicit repeal of the Back Pay Act's previous interpretation).

discrimination, while Title VII appears to.[28] Third, *Price Waterhouse* sex stereotypes brought under Title VII would apply to religious institutions generally, while H.R. 3686 explicitly appears not to apply to religious organizations and schools.[29] If the intent of H.R. 3686 is to leave *Price Waterhouse* as it stands, the purpose of the drafters' inclusion of these last two limits is substantially less clear. Therefore, a court might conclude that H.R. 3686, if enacted, was meant to supplant the *Price Waterhouse* sex stereotype theory currently viable under Title VII.

However, one should *not* take this to mean that H.R. 3686 is exactly coterminous with *Price Waterhouse* under Title VII. For example, if an employer refused to hire any applicant that had undergone gender transition, regardless of the applicants' sex, that act likely would not violate Title VII, but appears to be prohibited by a plain reading of H.R. 3686.[30] Other cases of gender identity discrimination may not be so clear cut. Were an employer to refuse to promote or hire any applicant that was simply too "aggressive," regardless of sex, it is likely that this adverse employment action would pass muster under Title VII, but it is not totally clear whether H.R. 3686 would prohibit it. Courts have not yet determined what appearances or mannerisms are "gender related" as would be required by these bills. Given the etymology of a gender-loaded word such as "macho," its classification as "gender related" seems reasonable. However, characteristics such as "aggressive," "vulgar," or "demure," may be more difficult as they arguably bear no relationship to gender beyond crude stereotypes. Nevertheless, such characteristics could easily be used to mask discrimination on the basis of gender identity. In these cases, it remains to be seen how far beyond existing law H.R. 3686 would extend.

Interestingly, with respect to sex stereotyping under Title VII, courts have been careful to refrain from explicitly defining what the traditional masculine or feminine stereotypes are. Instead, courts have generally looked to the intent of the employer, finding sex discrimination where the employer's words or actions indicated reliance upon stereotypical attributes of men or women.[31] It is possible that courts would continue to use this methodology to determine when employment decisions are made on the basis of "gender related characteristics" under H.R. 3686.

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[28] *See, infra* notes 37-38 and accompanying text for a discussion of H.R. 3686's provisions regarding disparate impact.

[29] *See, infra* text accompanying note 46 for a discussion of religious exemptions under Title VII and H.R. 3686.

[30] Other sections of H.R. 3686 refer to employees that are undergoing or have undergone gender transition. Therefore, "gender identity" appears to include, at a minimum, trans-gender individuals. H.R. 3686 § 7(a)(3, 4).

[31] *Price Waterhouse v. Hopkins*, 490 U.S. at 236; *Smith v. Salem*, 378 F.3d at 572; *Barnes v. Cincinnati*, 401 F.3d at 735, 737; *Jespersen v. Harrah's Operating Co.*, 444 F.3d at 1112; *Etsitty v. Utah Transit Auth.*, ___ F.3d at *17-18.

Employment Practices Prohibited by H.R. 3686

For the most part, the *types* of employment actions prohibited by H.R. 3686 dovetail with Title VII's prohibitions against discrimination on the basis of race, color, sex, national origin, and religion.[32] Notwithstanding this overall similarity, the provisions of the bill do go beyond Title VII's provisions in two main ways: (1) prohibiting discrimination on *perceived* characteristics; and (2) textually creating associational rights under the act. That is not to say, however, that the protections of H.R. 3686 appear uniformly at least as extensive as Title VII's protections, as the bill explicitly *disallows* victims of gender identity discrimination from pursuing a disparate impact claim. Each of these differences is discussed in detail below.

***Perceived* gender identity discrimination is prohibited.** H.R. 3686 would prohibit discrimination on the basis of actual or *perceived* gender identity.[33] The text of Title VII contains no comparable prohibition against discrimination on the basis of the *perceived* race, color, sex, national origin, or religion of a person. The Americans with Disabilities Act ("ADA"), however, does include in its definition of disability "*being regarded* as having a [physical or mental impairment]."[34] The semantic similarity between "perceived" and "regarded" suggests that existing judicial interpretation of that language in the ADA may be instructive for courts, agencies, or employers attempting to interpret what is meant by "perceived gender identity." In other words, to the extent that "being regarded" as disabled under the ADA has been held to require an examination of an *employer's* subjectively held beliefs, courts may read H.R. 3686 to require the same.

Associational rights are protected. H.R. 3686 would additionally prohibit adverse employment actions taken against an individual on the basis of the actual or perceived gender identity of a person who *associates* with that individual.[35] Although Title VII contains no analogous text, associational rights under Title VII have been recognized by federal courts in the context of interracial marriage.[36]

Disparate gender identity impact claims are disallowed. H.R. 3686 would disallow disparate impact claims on the basis of gender identity.[37] Therefore,

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[32] *Compare* H.R. 3686 § 3(a-d) *with* Civil Rights Act of 1964, P.L. 88-352, tit. vii, § 703(a-d) (codified at 42 U.S.C. § 2000e-2(a-d)). H.R. 3686 would also limit applicability to those employers with fifteen or more employees, as does the current version of Title VII. *Compare* H.R. 3686 § 3(a)(4)(A) *with* 42 U.S.C. § 2000e(b).

[33] H.R. 3686 § 3(a-f).

[34] 42 U.S.C. § 12102(2)(C). For further discussion of the definition of disability under the ADA, *see*, CRS Report RL33304, *The Americans with Disabilities Act (ADA): The Definition of Disability*, by Nancy Lee Jones.

[35] H.R. 3686 § 3(e).

[36] *E.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-892 (11th Cir. 1986).

[37] H.R. 3686 § 3(g). Some members of Congress noted in testimony before the House Subcommittee on Health, Employment, Labor and Pensions that allowing disparate impact claims in this context would require litigants to intrude upon the privacy of fellow applicants

(continued...)

whereas a Title VII claim could proceed where the plaintiff showed that a particular job requirement disproportionately impacted one racial or religious group, it does not appear that this bill would allow a plaintiff to show that a particular job requirement disproportionately impacts one gender identity over another.[38] H.R. 3686 would also explicitly allow employers to enforce segregated changing and shower facilities and gender specific grooming codes.[39] In both circumstances, the employer would be required to assign the employee to the appropriate facility or grooming code based upon the self identified gender identity of the individual (1) at the time of hire, or (2) upon notifying the employer that the employee is undergoing, or has completed, gender transition.[40]

Religious Organizations Under H.R. 3686

In all likelihood, H.R. 3686 would not impose new requirements on "religious organizations" as the term is defined under Title VII. Additionally, religious organizations would likely remain free from defending claims of any type of discrimination with respect to their selection of clergy and certain other positions related to worship.

Definitions of *religious organizations*. Section 5 of H.R. 3686 states that the bill would not apply to religious organizations. Further, Section 2 of the bill defines religious organizations in a manner that appears similar to the statutory religious exemption clauses of Title VII. H.R. 3686 defines religious organizations generally as

> (A) a religious corporation, association, or society; or (B) a school, college, university, or other educational institution or institution of learning, if — (i) the institution is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion.[41]

This definition appears comparable with language in Title VII that exempts any "religious corporation, association, educational institution, or society"[42] as well as educational institutions

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[37] (...continued)
and employees in order to investigate their gender identities.

[38] For an example of how a disparate impact claim of racial discrimination is established under Title VII, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate impact claims available under Title VII likely would not be affected by H.R. 3686.

[39] There are similar, but not identical, limits on the protections available under a sex stereotype claim with respect to facilities. *See, supra* note 13-14 and accompanying text.

[40] H.R. 3686 § 7(a)(3, 5).

[41] H.R. 3686 § 2(a)(8).

[42] 42 U.S.C. § 2000e-1(a).

> if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[43]

Neither H.R. 3686 or Title VII further explain which entities qualify as religious. Federal courts have held that the question requires inquiry into whether an entity's "purpose and character are primarily religious."[44] The Third Circuit, in *LeBoon v. Lancaster Jewish Community Center*, identified nine factors other courts have considered when determining if an institution is religious, none of which are determinative:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[45]

Although, as discussed above, H.R. 3686 would not apply to religious organizations, neither it nor Title VII exempt qualifying religious entities from defending claims of *sex* discrimination. Therefore, gender identity claims brought under a sex stereotype theory may still be viable against a religious entity, insofar as H.R. 3686 does not supersede *Price Waterhouse* and its progeny.[46]

The *ministerial exception*. At a minimum, claims of gender identity discrimination, whether brought under H.R. 3686 or Title VII, would likely not be applicable to religious organizations' selection of *certain positions* involved in worship or ritual. Discrimination on the basis of race, sex, national origin, or religion has been held to be permissible, in these positions, under the judicially created

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[43] 42 U.S.C. § 2000e-2(e)(2). For a more detailed discussion of Title VII's definition of religious schools, see Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 Hofstra Lab. & Emp. L. J. 1 (2004).

[44] *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988). *See also EEOC v. Kamehameha Schools*, 990 F.2d 458, 461 (9th Cir. 1993).

[45] *LeBoon v. Lancaster Jewish Comm. Ctr. Ass'n.*, 2007 U.S. App. LEXIS 22328, 19-20 (3rd Cir. 2007) (decided Sept. 19, 2007). *See also*, CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religious Organizations*, by Cynthia Brougher.

[46] *See also*, *supra* text accompanying notes 23-29 for a discussion of the effect of H.R. 3686 on existing Title VII protections.

"ministerial exception" to Title VII. This exception was created to reconcile some of Title VII's prohibitions with the Free Exercise Clause of the federal Constitution. It has been adopted in eight federal circuits and applies to employees whose "primary duties include teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship."[47] This exception to Title VII allows discrimination on the basis of any characteristic, including race and sex, but only with respect to "a religious institution's choice as to who will perform spiritual functions."[48] Because the rationale for this exception is derived from the federal Constitution, and not the text of Title VII, it would likely be wholly applicable to H.R. 3686 as well.

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[47] *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 (3rd Cir. 2006) (citing favorable opinions in the 4th, 5th, 7th, 8th, 9th, 11th, and D.C. Circuits).

[48] *Petruska v. Gannon*, 462 F.3d at 305.