# In the
# United States Court of Appeals
## For the Thirteenth Judicial Circuit

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No. 16-2132

Oscar Martinez,

*Plaintiff-Appellant*,

*v.*

State of Kensington,

*Defendant-Appellee*.

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Appeal from the United States District Court
For the Northern District of Kensington.
No. 15 CV 2019 — **Ferguson A. Jenkins**, District Judge.

MICHAEL LANGFORD, Clerk of the United States Court of Appeals for the Thirteenth Judicial Circuit, hereby certifies that the following original documents were duly filed and constitute the entire Record on Appeal in this matter:

In the
# United States District Court
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No. 15-CV-2019

Oscar Martinez,

*Plaintiff,*

*v.*

State of Kensington,

*Defendant*.

**MEMORANDUM OPINION AND ORDER**

Plaintiff Oscar Martinez filed this §1983 action (42 U.S.C. § 1983) on December 7, 2015, in the United States District Court for the Northern District of Kensington. His two-count complaint alleges claims based on eminent domain and sex discrimination. Defendant, the State of Kensington ("Kensington"), has moved to dismiss both counts pursuant to Federal Rule of Civil Procedure 12(b)(6).

Martinez owns a portion of the land where Kensington paved a pedestrian path for easy access to the football stadium at the University of Kensington ("University"). Kensington sought to alleviate traffic congestion around the University's football stadium, where its popular team, the Kensington Lions, plays. Martinez first filed suit against Kensington in the Circuit Court of Windsor County, seeking declaratory and injunctive relief. However, the circuit court denied his requested relief. Subsequently, Martinez was fired from his faculty position at the University. In this case, he seeks protection under Title VII of the Civil Rights Act of 1964, alleging that he was fired solely due to his sexual orientation. For the reasons that follow, we grant Kensington's motion and dismiss plaintiff's complaint.

**Count I - Eminent Domain**

In Count I of his complaint, Martinez generally alleges that the statute that permitted the pedestrian path to be built on his property violated his Fifth Amendment rights because it amounted to a facial taking of his property without just compensation.

The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const., amends. V, XIV. An alleged violation of the Takings Clause must be ripe for adjudication before a federal court will consider it. *Palazzo v. R.I.*, 533 U.S. 606, 618 (2001).

We find Martinez's claim premature and decline to reach its merits. The United States Supreme Court has set forth two requirements that must be met before a takings claim is considered ripe. *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The first requirement is the "finality rule," which requires that the government "has reached a final decision regarding the application of the regulation to the property at issue." *Id.* at 186. The second requirement is at issue here: that the plaintiff must first seek and be denied just compensation using the state's procedures, provided that those procedures are adequate. *Id*. at 194.

Martinez's complaint sought declaratory and injunctive relief, but did not seek to obtain compensation for the State's taking. Kensington's eminent domain laws permit property owners to bring an inverse condemnation action to obtain compensation for a taking. See Kens. Code Ann. §§ 30-17-101 to 30-17-130 (1970). Kensington state courts have interpreted these laws to allow recovery through inverse condemnation proceedings where the taking is the result of legislative action, such as here. See *Harrington v. City of Bath*, 125 Ken.2d 346 (1980). At no time did Martinez institute an inverse condemnation proceeding against Kensington. In sum, Martinez's claim based on eminent domain is not yet ripe and Count I must be dismissed.

**Count II - Title VII**

In Count II, Martinez alleges that he was fired from his faculty position due to his sexual orientation and not because of his performance. He claims that had he been married to a woman, rather than a man, he would not have received the complaints from students and colleagues. Martinez relies on Title VII's protections against sex discrimination and contends that because sex is an inextricable part of a person's sexual orientation, Title VII's protections extend to discrimination based on sexual orientation.

We acknowledge the craftiness of Martinez's argument; however, no degree of legal wizardry can suffice to convince us that when Congress enacted Title VII it intended any such protection. The language of Title VII prohibits discrimination based on "sex," which can only refer to gender – nothing more, nothing less. If Martinez seeks protection based on sexual orientation, his remedy lies with Congress, not the courts. Because Martinez cannot state a claim for sexual orientation discrimination, Count II must be dismissed.

**Conclusion**

For the abovementioned reasons, defendant's motion to dismiss Martinez's complaint is GRANTED. Accordingly, Martinez's complaint is dismissed with prejudice. Judgment is entered in favor of defendant, the State of Kensington.

/s/ Ferguson A. Jenkins, U.S. District Judge

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STATE OF KENSINGTON,

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No. 15-CV-2019 — **Ferguson A. Jenkins**, *Judge*.

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ARGUED JULY 10, 2017 — DECIDED SEPTEMBER 7, 2017

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Before SANDBERG, BANKS, and SANTO, *Circuit Judges*.

SANTO, *Circuit Judge*. This case presents two issues that have divided our fellow circuit courts. First, whether the "ripeness doctrine" set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), bars review of takings claims asserting that a law causes an unconstitutional taking on its face. Second, whether Title VII of the Civil Rights Act of 1964 ("Title VII") bars discrimination based on a person's sexual orientation.

## BACKGROUND

Plaintiff Oscar Martinez's troubles with the State of Kensington began when the state sought to improve traffic flow around the football stadium at the University of Kensington. The University is located in the town of Chelsea, where Martinez resides. He owns property near the stadium and has been a longtime season-ticket holder and fan of the football team, the Kensington Lions. The Lions are very popular and the stadium has a seating capacity of 98,501. The areas around the stadium become very congested on game days.

The State of Kensington commissioned the University's Urban Studies and Planning Department to conduct a study and to ultimately make recommendations about how to best alleviate the congestion. The Department's report recommended three possible solutions. Kensington chose to adopt "Plan A," which included new parking lots, pedestrian zones, rideshare pick up and drop off lanes, shuttle buses and contraflow routes. The plan's pedestrian zone, which consisted of a 20-foot-wide pedestrian path, overlapped with the eastern part of Martinez's property. The heavily wooded property, which is about an acre in size, includes a house where Martinez resides.

Pursuant to Plan A, Kensington's state legislature enacted Public Act 16-0337, which is entitled "Lions Stadium Congestion Relief." The legislature indicated that the purpose of the statute is to relieve traffic congestion in the neighborhoods around the stadium and to provide a safe route for pedestrian ingress and egress to the stadium. The Act applies to "the Southwest quarter of Windsor County in the town of Chelsea," and more specifically, to "Section 12, containing 60 acres of land, bordered on the north by Knightsbridge Road and on the south by Thames Boulevard." Martinez's property is located in the shadow of the stadium, within the described area also commonly known as Lot 6. The statute provides that the

20-foot-wide pedestrian path, which will be about half a mile long, is to be constructed where Lots 6 and 7 adjoin. The path will utilize five feet of the easternmost part of Lot 6 and 15 feet of the westernmost part of Lot 7. The Act stated that all affected property owners would receive compensation in the amount of $5,000.

Within weeks of the Act's enactment, Martinez received a check for $5,000. The check's memorandum line read "Compensation under Public Act 16-0337." According to the complaint, Martinez cashed the check but, he stated, he thought it was his " 'lucky day' " and did not know what it was for. Approximately one week after Martinez cashed the check, surveyors from the City's Department of Public Works marked off a five-foot section that spanned the eastern part of Martinez's property, as well as a fifteen-foot section spanning the western part of Lot 7. Shortly thereafter, several flatbed trailer trucks from Chelsea's Heavy Haulers delivered bulldozers, which plowed over the area that would comprise the pedestrian path. Cement trucks poured cement over the cleared area, which solidified the existence of the path. Signs were erected along the path that read "Kensington Lions Pedestrian Walkway - Courtesy of the State of Kensington." Despite the personal setback, Martinez was a good sport and joined the droves of pedestrians using the new walking path to cheer on the Lions at the season opener.

At the same time, however, Martinez was experiencing other, unrelated difficulties with the University, eventually leading to his termination. Martinez claims he was fired because he is gay.

Martinez self-identifies as homosexual, a fact that he does not keep secret. He and his husband have been active members of the Kensington community for many years. They both

volunteer with the local LGBTQ community-outreach program, The Kensington Center, which is well known for its low-cost health treatment for women and LGBTQ youth. It recently received substantial publicity for a fundraising gala that Martinez helped organize. Shortly after the Supreme Court's landmark decision in *Obergefell v. Hodges*, 576 U.S. ___ (2015), Martinez and his husband were able to obtain a marriage license and celebrated their wedding with their family and friends. Because it was the first legally recognized same-sex wedding in Kensington, the local newspaper featured the couple in its lifestyle section.

Martinez has taught his business accounting class at the University for six years. He consistently received positive reviews from his student evaluations, which commented in glowing terms about his preparedness for class, the fairness of his exams, and his open-door policy for office hours. He received similar praise from his supervisors. The chair of his department praised his superior work ethic and his depth of knowledge about the subject matter that he teaches. As far as the facts alleged in his complaint reveal, Martinez was a model employee.

In June of 2015, however, his relationship with his students and the University began to sour. June is widely known to be Pride month, and in celebration, Martinez posted a bulletin board outside of his office door on which he would rotate photos of historic LGBTQ figures, each accompanied by a small blurb explaining their contribution to LGBTQ history. Shortly after he put the board up, two students complained to the department chair that Martinez's open celebration of his homosexual identity made them uncomfortable. Martinez's department chair asked him to take down the bulletin board and, after expressing his objection, Martinez complied.

Over the summer, Martinez taught one course and maintained office hours. Those office hours were regularly attended. Having recently returned from a belated honeymoon traveling through Europe, Martinez had several pictures of him and his husband on display in his office. One of those pictures depicted him and his husband kissing affectionately beneath the Eiffel Tower. Again, several students complained to the department chair that the open display of his homosexuality made them uncomfortable. Several of Martinez's colleagues cited Martinez's frequent discussions of his work with the Kensington Center, and his relatively new marriage and recent honeymoon, as detrimental to their work environment and "unnecessary homosexual activism."

Martinez's department chair called him in to discuss the student and faculty complaints and asked that Martinez take down some of the photos in his office and keep his discussions with other faculty limited to work-related topics while at work. Martinez explained that his husband was very important to him, as was his advocacy work in the community. He expressed to the department chair that he did not believe he could comply with the University's requests. After receiving approval from the Dean, Martinez's department chair notified him that his position with the University had been terminated.

Martinez timely filed a two-count complaint in the United States District Court for the Northern District of Kensington. His complaint includes claims for an uncompensated taking—as a deprivation under color of law pursuant to 42 U.S.C. § 1983—and based on sex discrimination. The complaint was brought against various officials and officers of the University as defendants; however, the State of Kensington has indemnified those individuals, and on Kensington's motion, the district court substituted Kensington as the defendant in this case. *Cf. Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 719 (1978).

Count I of Martinez's complaint alleged that Kensington took his property to use for a walkway, and allowed the public to enter and traverse his property, without "just" compensation. Martinez alleged that the money he received per Public Act 16-0337 was inadequate. Attached to the complaint was an affidavit from a real estate agent who claimed the footpath land was worth at least $500,000.

Regarding sex discrimination, count II of the complaint alleged that Martinez was fired based on his sexual orientation in violation of Title VII of the Civil Rights Act of 1964. He alleged that his supervisors knew that he identified as homosexual and that the only reasons given for his firing were complaints about his openness about his sexual orientation. He alleged that Title VII's protections against discrimination on the basis of sex encompassed protections against discrimination on the basis of sexual orientation. In particular, he alleged that specific complaints leveled against him would not have been made if he had been a woman – namely the student complaints about the photos of him and his husband on their honeymoon and his discussions with colleagues about his marriage and volunteer work in the LGBTQ community. Finally, Martinez also alleged associational discrimination, claiming that had his husband instead been a woman, Martinez would not have received complaints against him and thus not been fired.

Kensington filed a motion to dismiss for failure to state a claim. As to count I, Kensington asserted that Martinez's takings claim was not ripe until he had sought and been denied just compensation using Kensington's inverse-condemnation procedures. See *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As to count II, Kensington argued, claims of discrimination on the basis of sexual orientation are not cognizable under Title VII

and that none of the discrimination alleged in Martinez's complaint could fairly be characterized as discrimination on the basis of his sex. The district court agreed and dismissed both claims. Martinez now appeals. We affirm the dismissal of count I and reverse the dismissal of count II.

## ANALYSIS

We first address Martinez's challenge to the district court's order dismissing his takings claim for lack of ripeness. Specifically, Martinez contends there is no constitutional basis for requiring him to exhaust state-law remedies for his takings claim before seeking relief in the federal courts. Therefore, according to Martinez, his takings claim was ripe for adjudication and the district erred by dismissing it.

The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const., amends. V, XIV; see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). For purposes of the Fifth Amendment, takings include "permanent physical occupation of property authorized by government," and regulations that permanently require an owner "to sacrifice all economically beneficial uses of his or her land." *Ark. Game & Fish Comm'n v. U.S.*, 568 U.S. 23, 31-32 (2012). The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, Cal.*, 482 U.S. 304, 314 (1987).

As a violation of the Takings Clause implicates constitutional rights, a plaintiff may seek relief in a federal court pursuant to § 1983, which permits redress for the deprivation of the "rights, privileges, or immunities" secured by the Constitution and laws of the United States. 42 U.S.C. § 1983 (2012);

see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-10 (1999). Like other alleged constitutional violations, an alleged violation of the Takings Clause must be ripe for adjudication before a federal court will consider it. *Palazzolo v. R. I.*, 533 U.S. 606, 618 (2001). In other words, "concrete legal issues, presented in actual cases, not abstractions are requisite." (Internal quotation marks omitted.) *United Pub. Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). Whether a claim is ripe for adjudication is a question of law and our review is, therefore, *de novo*. *Id*. *Chicquita v. Dole*, 234 F.4d 345, 346 (13th Cir. 2018).

It is difficult to imagine how, in the present case, the legal issues arising from the Lions Stadium Congestion Relief Act could possibly be more concrete when developers have already paved a portion of Martinez's land. Notwithstanding, the United States Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), identified special considerations for determining whether an alleged Takings Clause violation by state government is ripe for federal adjudication.

In *Williamson County*, a developer filed a § 1983 suit in federal court that challenged a taking by a regional planning commission. The Court held that the suit was premature, as the developer filed it without having taken an appeal to the zoning board of appeals and, as the Court explained, a takings claim "is not ripe until the government entity charged with implementing the regulations *** reache[s] a final decision." *Id*. at 186. The Court also noted a "second reason" the takings claim was not ripe—namely, the developer "did not seek compensation through the procedures the State ha[d] provided for doing so." *Id*. at 194. The Court concluded that, until the developer received a final denial of compensation through all available state procedures, he could not "claim a violation of the Just Compensation Clause" in a federal suit. *Id*. at 195-

97.

In this case, the district court relied on *Williamson County* in dismissing Martinez's § 1983 action. Kensington, in its brief on appeal, urges us to do likewise in affirming the judgment below. The record shows that Martinez did not first avail himself of Kensington's inverse-condemnation and takings laws in seeking compensation for the alleged taking. Martinez, therefore, did not exhaust all state procedures for remedying the taking of his property and, following *Williamson County*, his § 1983 action was premature.

Though we are obligated to follow *Williamson County*, we are not obligated to refrain from questioning its logic. Why is it that plaintiffs like Martinez are required to exhaust all available state remedies before seeking relief for a Takings Clause violation in federal court? The answer is troublingly elusive, as no prior Supreme Court decision suggests that plaintiffs complaining of a Takings Clause violation are required to seek relief in any other venue. Nor can we say that the reason for *Williamson County's* exhaustion requirement is self-apparent, as the rule in that case can and does lead to absurd results. For example, savvy government defendants might remove takings cases from state court to federal court, then seek to dismiss the action on the basis that, without a state court decision, the cause is unripe for adjudication. On the other hand, a plaintiff who exhausts his or her state remedies before seeking relief in a federal court might lose the ability to proceed there under some combination of *res judicata*, issue preclusion, and the *Rooker-Feldman* doctrine. And, while state courts have more experience than federal courts in resolving technical questions related to local zoning and land-use regulations, they have no more expertise in takings than in other constitutional claims that can be brought directly in federal court.

Unsurprisingly, the circuit courts are divided in responding to this dilemma. The First, Seventh, and Tenth Circuits all adhere to *Williamson County*'s state-court exhaustion requirement, and even extend the principle in cases where plaintiffs allege that a taking violated substantive or procedural due process. See, *e.g.*, *Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16, 28 (1st Cir. 2011) ("a plaintiff cannot, merely by recasting its takings claim" as due process violations, "evade the *Williamson County* ripeness requirements"); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-69 (7th Cir. 2000) (applying *Williamson County* to a substantive due process claim); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (applying *Williamson County* to a procedural due process claim); *J.B. Ranch, Inc. v. Grand Cnty.*, 958 F.2d 306, 308 (10th Cir. 1992) (applying *Williamson County* to a due process claim that "fit squarely within the analysis developed in just compensation cases").

In contrast, the Third and Eighth Circuits apply *Williamson County's* state-exhaustion requirement to claims predicated on the Takings Clause but not due process or equal protection. *Cnty. Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 168-69 (3d Cir. 2006); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997). The Second and Ninth Circuits, for their part, carve out their own exceptions to the exhaustion rule where a plaintiff alleges that a taking constituted arbitrary and capricious government conduct (*Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (1992)) or where the facts are sufficiently "egregious" (*Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003)).

Against this backdrop, we find Chief Justice Rehnquist's special concurrence in *San Remo Hotel, L.P. v. City and County of San Francisco, California*, 545 U.S. 323 (2005), to be especially prescient. As Chief Justice Rehnquist explained, "[i]t is not ob-

vious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." *Id*. at 349. Chief Justice Rehnquist also recognized, as does this court, that the "anomalies" created by *Williamson County* "all but guarantee*** that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee," even absent a clear reason why "federal takings claims in particular should be singled out to be confined to state court." *Id.* at 351. Based on the foregoing, Chief Justice Rehnquist urged that, "[i]n an appropriate case, *** the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *Id*.

Perhaps the appropriate case for resolving this issue is now before us, but we can do nothing about it. We are bound to follow *Williamson County* even if we believe that there is no valid reason to require Martinez to exhaust state-law remedies for his takings claim before seeking relief in federal court. Consequently, we must affirm the order of the district court that dismissed Martinez's § 1983 claim.

We now turn to Title VII. Title VII of the Civil Rights Act of 1964 provides, in relevant part that, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual…because of such individual's race, color, religion, sex, or national origin ***." 42 U.S.C. § 2000e-2(a)(1). The question presented in this case is whether the language "because of such individual's…sex" includes protections against discrimination on the basis of sexual orientation. Until now, we have not had the opportunity to weigh in on this question, but many other circuits have. Most of our sister circuits have found that discrimination "because

of…sex" did not constitute discrimination on the basis of sexual orientation.[1] In 2017, the Seventh Circuit parted ways in *Hively v. Ivy Tech Comm. College of Indiana*, 853 F.3d 339 (7th Cir. 2017), and held that claims of "sex" discrimination under Title VII encompass claims of discrimination on the basis of sexual orientation. The Second Circuit soon followed suit. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. docketed*, No. 17-1623 (June 1, 2018).

We find the textual analyses of the Second and Seventh Circuits to be persuasive and, taken in conjunction with developments in the law since Title VII was enacted, have no trouble concluding that claims of "sex" discrimination under Title VII include claims of discrimination on the basis of sexual orientation. Moreover, there is an emerging consensus that discrimination based on sexual orientation is wrong. *See Obergefell*, 135 S. Ct. at 2597. We therefore reverse the dismissal of count II of the complaint for failure to state a claim.

Discrimination on the basis of sexual orientation has an unfortunately brazen history in our law and amongst our people. Laws criminalizing sexual behavior on the grounds of sexual orientation were once commonplace (*see Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)), to the point where the Supreme Court had to intervene to expressly reaffirm the States' abilities to enact affirmative protections for their citizens on the basis of sexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996). In recent years, the legal landscape has changed drastically to increasingly protect sexual minorities from many forms of invidious discrimination. *See Hively*, 853 F.3d 339, 349-50 (7th

[1] *See Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464 (6th Cir. 2012); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

Cir. 2017) (collecting and discussing cases). The question before us, however, unlike those that have preceded us, does not require us to plumb the wells of our own morality for its answer. Instead the dispute in this case is resolved by statutory text and a simple syllogism: Title VII prohibits discrimination on the basis of sex; a person's sexual orientation is inextricably a function of his sex; Title VII thus prohibits discrimination on the basis of sexual orientation.

Title VII has been part of our law for decades. Congress's objectives in the passage of Title VII were "plain" – it was passed to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). While Title VII was not meant to guarantee employment without regard to an employee's qualifications, it served to remove "artificial, arbitrary, or unnecessary" barriers to employment based on nothing more than invidious discrimination predicated on impermissible classifications. *Griggs*, 401 U.S. at 430-31. The broader societal interest protected by Title VII is "efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

To that end, where an employment practice is shown to be unrelated to job performance, and excludes a particular group, it is impermissible. *Griggs*, 401 U.S. at 431. Articulating these interests in terms more directly relevant here, the Supreme Court has made clear that "gender *must be* irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (opinion of Brennan, J. joined by Marshall, Blackmun, and Stevens, JJ.) (emphasis added). In other words, sex is simply not relevant to the selection, evaluation, or compensation of employees. *Hopkins*, 490 U.S. at 239. The intent to forbid employers from taking sex into account in employment

decisions is clear from the text of the statute and we agree that it is obvious that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 432 U.S. 702, 707 n. 13 (1978)). With this framework in mind, we proceed to the question presented in this case: whether Congress's intent to forbid sex discrimination in the workplace includes protection against discrimination on the basis of sexual orientation.[2]

It is by now a legal truism that a question of statutory interpretation must begin, and if possible end, with the statute's plain language. *See Local Union No. 38, Sheet Metal Workers' Intern. Ass'n, AFL-CIO v. Pelella*, 350 F.3d 73, 81 (2d Cir. 2003). Words in a statute are not to be read in isolation, but must be considered in their proper context. *Pelella*, 350 F.3d at 81. With these basic principles in mind, we must also heed the Supreme Court's instruction that, as we have mentioned, Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Because this case turns on a question of statutory interpretation, our review is *de novo*. *See e.g. Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1172 (9th Cir. 1986).

Against this interpretive backdrop, we are confronted with three basic approaches that have been adopted to determine

[2] Perhaps because of Title VII's long history, there are multiple analytical frameworks for determining whether an employer has violated its provisions. *See* Corbet, *supra*, at 684 (discussing the divergent "disparate treatment" and "disparate impact" analyses). We need not venture, and the parties have not led us, into this analytical thicket because we are only presented with the threshold question of whether Title VII applies to appellant's claim at all. The district court will be free to determine whether a violation of Title VII has actually occurred in the first instance on remand.

whether sex discrimination includes sexual orientation discrimination. First, Martinez's claims that the inclusion of the term "sex" in Title VII is enough to answer the question because sexual orientation is an inescapable function of sex. *See Hively*, 853 F.3d at 357-59 (Flaum J., joined by Ripple, J., concurring); *Zarda*, 883 F.3d at 113-15 (majority). Second, Martinez claims that applying the "tried-and-true" comparative method, controlling for every variable but his sex, reveals that the University has discriminated against him on the basis of sex. *See Hively*, 853 F.3d at 345-47; *Zarda*, 883 F.3d at 116-19 (plurality). Finally, Martinez claims that sexual orientation discrimination constitutes sex discrimination on a theory that his associational partner – his husband – is being discriminated against because of his membership in a protected class. *See Hively*, 853 F.3d at 347-49; *Zarda*, 883 F.3d at 123-28 (majority).[3]

We agree with the majority of the Second Circuit and the two-judge concurrence in the Seventh that the simplest answer in this case is dictated by the text of the statute. Judge Flaum, writing for himself and Judge Ripple, noted that discrimination on the basis of homosexuality is discrimination, at least in part, on the basis of the homosexual person's sex. *Hively*, 853 F.3d at 358. He looked to various definitions of "homosexual" and concluded that one cannot account for a person's homosexuality without accounting for his sex. *Id.* In other words, a man can only be a homosexual if he is sexually attracted to a member of the same sex; if either he or the other person was of a different sex, he would not be homosexual. The Second Circuit, in part of its opinion that garnered a majority, agreed with this analysis. In doing so it rejected reliance

[3] While Martinez has not plead a gender-stereotyping claim and thus consideration of that theory is not necessary to our judgment, we find the facts of this case also render persuasive the Second Circuit plurality's interpretation of Title VII that encompasses gender stereotyping as a basis for sexual orientation discrimination claims. *Zarda*, 883 F.3d at 119-123 (plurality).

on legislative history, citing *Oncale*, 523 U.S. at 79-80, and noted that Title VII's text required sex to be simply a motivating factor in an employee's dismissal. *Zarda*, 883 F.3d at 115 (citing 42 U.S.C. § 2000e-2(a)(1), 2000e-2(m)). We agree and note that Martinez's complaint pleads sufficient facts for us to conclude that sex was a motivating factor in his termination. The complaints that students and faculty leveled against him – particularly those concerning the photos in his office and his discussions about his wedding – would not have been made if he were a woman sexually attracted (and married) to a man.

Because we find that the text of Title VII answers this question by a simple chain of logical inferences, we do not feel the need to comment in depth on the remaining analytical tools that the Seventh and Second Circuits employed to answer the question presented here. We do pause to note, however, that Martinez has preserved each of the legal theories that *Hively* and *Zarda* relied on, and we agree with the cogent analyses of our sister circuits in those cases.

As explained above, we affirm the dismissal of Martinez's takings claim pursuant to *Williamson County*. But having found that Title VII protects against discrimination based on sexual orientation, as sexual orientation is an inextricable function of sex, we reverse the district court's dismissal of count II of the complaint.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED

SANDBERG, *Circuit Judge*, concurring in part and dissenting in part.

The majority has a convenient view of the law: If you don't like what it says, torture it until it says what you want it to. Unlike my colleagues, I would affirm the district court's dismissal of the complaint *in its entirety*.

With respect to the first issue, the majority, with considerable reluctance, finds itself constrained to follow *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). According to the majority, *Williamson County*'s restriction on federal takings claims is nothing more than an antiquated prudential limitation—simply an inconvenient matter of policy, rather than a matter of law.

This approach does not satisfy me because it is categorically unfaithful to federalism and state's rights—the animating principles at the heart of both *Williamson County* and the Republic. It is undisputed that Kensington deprived Martinez of his property without any compensation, and unless the land near the stadium was relatively worthless (which is unlikely) Kensington may owe Martinez at least some money.

But here is what I do not understand. Kensington has courts. Kensington has laws. Its state courts even routinely interpret its state laws. What's more, it even has procedures for obtaining just compensation under those laws. In fact, Kensington courts apply the same analysis to takings claims under state law as federal courts do under federal law—which is unsurprising because *every* state follows this approach. So why then has Martinez not availed himself of Kensington's courts and sought his "just" compensation there? Could not a Kensington state court handle the scintillating legal question of how much Martinez is owed from the pilfering of his land

for a footpath? I for one think that it could. And once this relatively routine matter of real-estate valuation was resolved, the Full Faith and Credit Statute, 28 U.S.C. § 1738, would mercifully keep the matter out of federal court.

Nothing in 42 U.S.C. § 1983 requires a different result. Section 1983 was part of the Civil Rights Act of 1871; it was designed to address deprivations of federal *civil* rights that could *not* be adequately litigated in the postbellum South's state courts. Absent some claim of discrimination, a takings claim simply does not present a *civil rights* issue that requires resort to an Article III court.

Unlike the majority, I do not presume to instruct the Supreme Court on its precedents. *Williamson County* says what it says; if it didn't, then it is quite likely that federal courts would be washed away in a sea of inverse-condemnation and takings cases. Congress could not have intended that federal courts should pass upon every conceivable real-estate injustice visited upon the state's citizens by its local officials; if it did, then state courts might as well pack up and go home. See *River Park v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994).

At oral argument, Martinez's attorney explained that it was preferable to litigate in a federal forum because an elected state court judge would more likely have "grown up with" many of the University and legislative officials who were initially defendants in this case. But even if that were true, so what? Does that mean that an elected state-court judge cannot be impartial in deciding this more or less rote real-estate claim? What if the federal district judge travelled in those same circles and was acquainted with the officer defendants? The world can be a small place, but that says nothing about whether a judge has a prejudicial conflict that warrants recusal. The argument is nothing short of an indictment of all

elected judges, which is contrary to the very notion of according their decisions full faith and credit.

Martinez's neglect and disdain of Kensington's courts notwithstanding, there is no real reason he could not pursue his litigation there. I would apply *Williamson County* with zero reluctance. Accordingly, I join the majority in affirming the dismissal of count I.

With respect to the second issue, Title VII prohibits discrimination based on race, color, religion, sex, and national origin ***." 42 U.S.C. § 2000e-2(a)(1). It is widely known that the inclusion of the word "sex" was a last-minute addition to the legislation by Representative Howard W. Smith. "In fact, his effort is widely believed to have been an attempt to kill the bill at the last moment, thinking no one would vote for a bill requiring eradication of sex discrimination." Shawn Clancy, *The Queer Truth: The Need To Update Title VII To Include Sexual Orientation*, 37 J. Legis. 119, 120 (2011); see also Charles Whalen & Barbara Whalen, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT, pp. 115-117 (1985). At any rate, the following non-exhaustive list shows that despite repeated attempts, Congress has *never* amended Title VII to include sexual-orientation discrimination. See, *e.g.*, Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995); Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1995); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Protecting Civil Rights for All Americans Act of 2001, S. 19, 107th Cong. (2001); Employment Non-Discrimination Act of

2002, S. 1284, 107th Cong. (2002); Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

The judiciary had a settled understanding of this topic as well. The Supreme Court, for example, has never addressed whether Title VII prohibits sexual-orientation discrimination, likely because circuit courts had *unanimously* held that "sex," as used in the statute, does not include sexual orientation. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, N.M., 413 F. 3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 36 (3d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996); *U.S. Dep't. of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

This was the state of affairs for years, as federal judges issued brief, summary opinions dismissing sexual-orientation claims. Then, in 2015, the Equal Employment Opportunity Commission held that sexual-orientation discrimination is sex

discrimination *per se*. See *Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641, at 8 n.11 (EEOC July 16, 2015). While EEOC decisions do not bind federal courts, the Baldwin panel criticized the federal judiciary for failing to re-examine sexual orientation discrimination under Title VII. *Id*. at 4-5.

Perhaps taking their cue from the opinion of the *administrative* panel in *Baldwin*, the Second and Seventh Circuits have changed tack and held that sexual-orientation discrimination *is* covered by Title VII—at least in those circuits. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017). Contrary to the majority in this case, however, I do not see an emerging consensus on this issue. There *was* a consensus, which two circuits have decided to depart from in two deeply fractured opinions.

At best the *en banc* opinions in *Zarda* and *Hively*—particularly in *Zarda*—require a painstaking tallying of which judges joined which parts of the "majority" opinion. They more resemble a game of pick-up sticks than cogent judicial reasoning. Both opinions carefully elide the real truth of the issue, as Judge Posner pointed out while paradoxically joining the majority opinion: "It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII." *Hively*, 853 F.3d at 353 (Posner, J., concurring). If *this* is what Title VII clearly meant, then why did Congress attempt to amend it so many times? If *this* is what Title VII clearly meant, why did nearly every circuit—for decades—hold otherwise?

Today's majority sets a reckless precedent. If you don't like settled law, then just ignore it, which in turn invites disrespect of all laws. The concern in *Williamson County* was that state courts should be allowed to adjudicate matters of state law, free from federal oversight or the interference of unelected

federal judges. The concern here *vis-à-vis* Title VII is that democratic change should be had at the ballot box. If Title VII does not say what you would like it to say, then amend Title VII. Don't rob the already aggrieved of the legitimacy that can only come with true democratic change and acceptance. By short-circuiting the Tenth Amendment and the democratic process, I fear the majority has greatly enhanced the power of federal courts at the expense of the states and the separation of federal powers. These actions will have consequences.

# In the
# Supreme Court of the United States

No. 18-1113

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| OSCAR MARTINEZ, | ) | |
| | ) | |
| *Petitioner/Cross-Respondent,* | ) | |
| | ) | |
| v. | ) | No. 15-CV-2019 |
| | ) | Judge Ferguson A. Jenkins |
| STATE OF KENSINGTON, | ) | |
| | ) | |
| *Respondent/Cross-Petitioner.* | ) | |

Certiorari to the United States Court of Appeals
for the Thirteenth Judicial Circuit

May 31, 2018

The cross-petitions for writ of *certiorari* are GRANTED. On the motion of the Court, pursuant to Rule 25.4, for purposes of briefing and argument Mr. Martinez is designated the Petitioner and the State of Kensington is designated the Respondent. ***The parties are to note the emphasized directive below concerning the Court's expectations regarding the Petitioner's brief.***

The parties are directed to restrict their briefing and argument to the following issues (and any subsidiary issues):

1. Whether the "ripeness doctrine" set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), bars review of takings claims asserting that a law causes an unconstitutional taking on its face; and

2. Whether Title VII's protection against discrimination based on sex prohibits discrimination on the basis of sexual orientation. *See* 42 USC § 2000e-2(a)(1).

***Petitioner Martinez is directed to address the Title VII issue in his initial brief and argument.***

A true Copy:
Teste:

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Clerk, Supreme Court of the United States