No. 18-1113

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

OSCAR MARTINEZ,

Petitioner,

vs.

STATE OF KENSINGTON.

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

BRIEF FOR RESPONDENT

TEAM NO. 5
CHRISTINA ROSENDAHL
JUAN ANTONIO SOLIS
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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the "ripeness doctrine" set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* 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.

PARTIES TO THE PROCEEDING

On December 7, 2015, Petitioner, Oscar Martinez, alleged an uncompensated taking and sex discrimination by the University of Kensington. The Respondent is the State of Kensington, seeking dismissal of Petitioner's takings and sex discrimination claims pursuant to the Fifth Amendment and Title VII, respectively.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Kensington, granting Respondent's motion to dismiss Petitioner's complaint, is reported at *Martinez v. State of Kensington*, No. 15-CV-2019 (N.D. Kens. 2015) and can be found in the Record at 2-3.

After that decision, the United States Court of Appeals for the Thirteenth Circuit affirmed the lower court's dismissal of Petitioner's Eminent Domain complaint and reversed and remanded the lower court's dismissal of Petitioner's Title VII complaint. The opinion is reported at *Martinez v. State of Kensington*, No. 16-2131 (13th Cir. 2017), and can be found in the Record at 4-25.

STATEMENT OF JURISDICTION

The District Court for the Northern District of Kensington had jurisdiction pursuant to 28 U.S.C. § 1331 because Martinez raised a constitutional issue. The United States Court of Appeals for the Thirteenth Judicial Circuit had jurisdiction pursuant to 28 U.S.C. § 1292. The Thirteenth Circuit entered judgment on September 7, 2017. On May 31, 2018 this Court granted Petitioner's timely petition for writ of certiorari and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution
42 U.S.C. § 2000e-2(a)(1)

STATEMENT OF THE CASE

A. Statement of Facts

This case is about efficiency, not about closing the courthouse doors or denying people their rights. This case is about asking Americans to go to their state courts first to resolve their eminent domain disputes and to allow their states to expand gay rights beyond what has already been done federally.

Oscar Martinez was an accounting professor with the University of Kensington and lives near the University's football stadium in the town of Chelsea. R. at 5, 7. With an increasingly popular football team, the area surrounding the stadium has experienced significant congestion and overcrowding. R. at 5. In an attempt to relieve traffic congestion in the surrounding neighborhoods, the University conducted an urban planning study to recommend safer routes for fans to and from the stadium. R. at 5. After reviewing multiple recommendations, Kensington's state legislature adopted "Plan A," which included a 20-foot wide pedestrian path to the stadium (the "Pedestrian Path"). R. at 5. As a result, Kensington's state legislature enacted Public Act 16-0337, "Lions Stadium Congestion Relief" (the " Pedestrian Act"), to construct the Pedestrian Path. R. at 5.

A five-foot section that spanned the easternmost part of Martinez's heavily-wooded property fell within the Pedestrian Path. R. at 6. Pursuant to the Pedestrian Act, Martinez and all the other affected property owners received a $5,000 check for the inconvenience. R. at 6. Despite the expressly written memorandum line of "Compensation under Public Act 16-0337," however, Martinez claims that he did not understand the purpose of the check. R. at 6. After Martinez

cashed the check, Kensington promptly completed construction of the Pedestrian Path. R. at 6. Upon its completion, Martinez used the Pedestrian Path, joining the multitude of pedestrians to cheer on the Lions at their season opener. R. at 6.

Around the same time, Martinez's department chair at the University began receiving complaints. R. at 7. Two students complained to the department chair that Martinez's open celebration of his homosexual identity made them uncomfortable. R. at 7. Martinez had a bulletin board posted outside of his office door on which he rotated photos of historic LGBTQ figures, each accompanied by a small blurb explaining their contribution to LGBTQ history. R. at 7. Martinez's department chair asked him to take down the bulletin board and, after expressing his objection, Martinez complied. R. at 7.

In his office, Martinez had several pictures of him and his husband on display, one of which depicted him and his husband kissing. R at 8. Again, several students complained to the department chair that the open display of his homosexuality made them uncomfortable. R at 8. Martinez's department chair discussed the student and faculty complaints with him. R. at 8. He asked him to take down some of the photos in his office and keep his discussions with other faculty limited to work-related topics while at work to make students feel more comfortable. R at 8. Martinez expressed that he could not comply, and therefore, the Dean was left with no choice but to terminate his employment. R at 8.

B. Procedural History

Professor Martinez first filed suit against the State of Kensington in the Circuit Court of Windsor County, seeking declaratory and injunctive relief for the

taking of a narrow strip of his property. R. at. 2. After the circuit court denied his relief, Martinez then filed this two-count complaint in the United States District Court for the Northern District of Kensington. R. at 8. Martinez claims, pursuant to 42 U.S.C. § 1983, that Kensington took a strip of his land without just compensation. R. at 9. In his second count, Martinez claims that the University of Kensington fired him solely due to his sexual orientation. R. at 9. Kensington has since indemnified the University officials named in Martinez's lawsuit and remains the only defendant. R. at 8. The State of Kensington moved to dismiss both counts pursuant to Federal Rule of Civil Procedure 12(b)(6). R. at 2.

The District Court granted Kensington's motion to dismiss Martinez's complaint. R. at 3. After Martinez appealed to the United States Court of Appeals for the Thirteenth Circuit, the court affirmed in part, reversed in part, and remanded. R. at 19. The Thirteenth Circuit held that Martinez's takings claim was premature for review because he had not sought just compensation in Kensington's state courts, but the court also held that Title VII protects against discrimination based on sexual orientation. R. at 19.

SUMMARY OF THE ARGUMENT

I. Petitioner cannot circumvent the Williamson County Test by asserting that a law causes an unconstitutional taking on its face because he did not first exhaust adequate state procedures.

The Thirteenth Circuit Court of Appeals correctly held that Petitioner Martinez's takings claim is not ripe for review because he did not first seek just compensation using Kensington's state procedures. The Williamson County Test requires claimants to seek just compensation through a state's procedures before bringing a takings claim to federal court. First, because no Fifth Amendment violation has occurred until a state denies just compensation, Martinez should not be able to circumvent the Williamson County Test by making a facial challenge under § 1983. Kensington has not denied Martinez just compensation, and unless it does, his takings claim will remain premature for federal review.

Second, the Williamson County Test applies squarely to Martinez's takings claim because Kensington provides adequate state procedures for obtaining just compensation. Kensington has state inverse condemnation laws through which Martinez could have sought just compensation for the alleged taking of his property. However, Martinez refused to avail himself of Kensington's adequate procedures. In addition, none of the exceptions that courts have adopted for the Williamson County Test apply here because Martinez's § 1983 complaint is inextricably related to his takings claim.

Finally, Martinez's mere preference for a federal forum contravenes the text of the Fifth Amendment and should not be the basis for circumventing thirty-three

years of Supreme Court precedent. Martinez ignores the fact that the federal courthouse doors are not always open to anyone who raises a constitutional issue. In addition to the fact that Martinez's claim is facially premature, concerns over comity and abstention overcome his preference for a federal forum. The Williamson County Test ensures that property owners know where to seek just compensation, which helps avoid a patchwork of federal and state claims that conflict on the same issue. Therefore, this Court should reaffirm *Williamson County* and hold that Martinez's takings claim remains premature for consideration in federal court.

II. Title VII of the Civil Rights Act does not prohibit discrimination on the basis of sexual orientation.

The Thirteenth Circuit Court of Appeals was incorrect in upholding Petitioner Martinez's Title VII claim of sex discrimination. Statutory construction begins first with the language of the statute itself. If the language is clear and unambiguous, courts simply apply the statute as written. Section 703 of Title VII plainly prohibits employment discrimination "because of…sex." A textual and structural analysis of § 703 shows that sex (*i.e.*, the male/female dichotomy) unambiguously excludes sexual orientation.

Contrary to the majority approach, Martinez asks the Court to give this statutory language new meaning beyond its common, ordinary usage – in effect, asking the Court to pencil in "sexual orientation" at the end of § 703's list of expressly protected classes. Martinez bases his claim on the misguided reasoning of the Second and Seventh circuits, arguing 1) the definitional approach, 2) the

comparative test, and 3) the associational theory of discrimination. None of these arguments justify a judicial rewriting of the statute.

The plain language interpretation of Title VII coincides with its overall history and purpose. Repeated legislative attempts to amend Title VII to include sexual orientation demonstrate Congressional awareness of the statute's limited scope. Likewise, successful amendments to the statute show Congress' deliberate denial of sexual orientation protections. The inclusion of sexual orientation as a protected class in the broader legal landscape is an additional sign that Congress understands "sex" to carry its plain meaning. Legislative history confirms that, since its inception, Title VII has never contemplated sexual orientation.

Until that day, claimants should look to state-created remedies. To allow Martinez to circumvent state procedural processes would violate Title VII and open the courthouse doors to other claimants also seeking to disregard Congressional action. Therefore, this Court should reverse the Thirteenth Circuit's decision and hold that Martinez failed to state a claim under Title VII for alleged discrimination based on sexual orientation.

ARGUMENT

I. Petitioner cannot circumvent the Williamson County Test by asserting that a law causes an unconstitutional taking on its face because he did not first exhaust adequate state procedures.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals as to Petitioner Martinez's takings claim and hold that it is premature because he did not first seek compensation through Kensington's State procedures. When asked to analyze the ripeness of a claim alleging a violation of the Takings Clause, this Court applies the two-step framework announced in *Williamson County Reg'l Planning Comm'n, et al. v. Hamilton Bank of Johnson City* (the "Williamson County Test"). 473 U.S. 172, 186, 194 (1985).

The first requirement, which is not at issue here, states that a takings claim is not ripe until "the government…has reached a final decision regarding the…regulations to the property at issue" (the "Finality Rule"). *Williamson County*, 473 U.S. at 186. This case does not involve government regulations. Rather, it involves Martinez's claim that Kensington Public Act 16-0337 ("the Act"), which authorizes Kensington to condemn private property for the construction of a pedestrian path, amounts to a facial taking without just compensation. R. at 3, 5-6.

The second requirement, which is at issue here, states that a claimant must unsuccessfully exhaust state procedures for seeking just compensation, so long as the state's procedures are adequate (the "State Exhaustion Rule"). *Williamson County*, 473 U.S. at 194. In other words, individuals who wish to challenge a taking of their property in federal court must first be denied just compensation through

adequate state procedures. Martinez neither sought compensation through Kensington's state procedures nor argued why Kensington lacks adequate procedures for seeking just compensation. R. at 12, 21. Therefore, Martinez's takings claim is not ripe for a federal court to review.

Both the district court and court of appeals correctly dismissed Martinez's takings claim because he did not first seek just compensation under Kensington's inverse condemnation laws. R. at 3, 14. Martinez, however, attempts to circumvent the plain text of the Fifth Amendment and the Williamson County Test by arguing that no constitutional basis exists requiring him to exhaust state procedures before pursuing his takings claim in federal court. R. at 10. The Williamson County Test, however, is both consistent with the text of the Fifth Amendment and substantive due process. Therefore, this Court should affirm its adherence to the Williamson County Test and hold that Martinez's takings claim is premature because he has not sought relief in Kensington's state courts.

A. A takings claim must be ripe before it can be filed in federal court.

A taking of private property for public use is not alone sufficient to bring a constitutional challenge against the government in federal court. *See Williamson County*, 473 U.S. at 194.[1] Before a federal court can review a takings claim, the claim must be ripe; a takings claim is not ripe until the claimant unsuccessfully

[1] Though not raised in the courts below, the Act validly grants the taking of private property for public use because it is meant to relieve traffic congestion and provide safer pedestrian routes for attendees of Kensington's football games. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (concluding that land is taken for public use if it "is rationally related to a conceivable public purpose"); *see also Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923) (Fifth Amendment requires neither that the "entire community" nor "even a considerable portion" directly benefit from a taking of property).

seeks just compensation under a state's procedures, so long as the procedures are adequate. *Id.* at 194-95. Martinez's affidavit claiming the condemned strip of land from his property was worth around $500,000 does not show that Kensington has deprived Martinez of just compensation. R. at 9. Nor does the affidavit show that Kensington has refused to further compensate Martinez for his property. Martinez's affidavit merely shows that he disagrees with the amount of money that Kensington has given him to take a strip of property from his land. Therefore, Martinez must resort to Kensington's state courts to seek the compensation he believes is just, and until he does, his federal claim will remain premature.

1. The Fifth Amendment does not provide a remedy until a state has denied just compensation for the taking of property.

Martinez claims that the Act constituted a facial taking of his property without just compensation but provides no proof that Kensington has denied him just compensation through its state procedures. R. at 2. The Takings Clause of the Fifth Amendment states that "private property" shall not "be taken for public use, *without just compensation*." U.S. Const. Amend. V. (emphasis added).[2] The words "without just compensation" (the "Just Compensation Clause") are an integral component of this Amendment, for they enable the government to carry out its functions as a sovereignty. *Kohl v. United States*, 91 U.S. 367, 368 (1875) (explaining that to ignore the Just Compensation Clause would negate the "constitutional grants of power" and make the government "dependent for its

[2] The Fifth Amendment is made applicable to the States through the Fourteenth Amendment. U.S. Const., Amends. V, XIV; *see also Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 583-84 (1897).

practical existence upon the will of a…private citizen"). More than 100 years after *Kohl*, this Court has consistently held that the plain language of the Fifth Amendment "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

Thus, if a State provides an adequate means of obtaining compensation for a taking, and the process leads to just compensation, then no Fifth Amendment violation has occurred. *Williamson*, 473 U.S. at 194-195. As long as an adequate procedure exists at the time of the taking, the Fifth Amendment does not require the government to pay "in advance or even contemporaneously with the taking." *Id.* at 194.[3] Martinez filed this suit before he even complained to Kensington's officials that $5,000 was not just compensation for taking a narrow strip of his land. R. at 12. He has not shown that Kensington will deny him just compensation through its court system, and no evidence in the Record suggests that Kensington's decision to send Martinez a $5,000 check reflected its final valuation of his property.

Judge Posner said it best. Until a claimant exhausts remedies for obtaining just compensation from the state, "he cannot know whether he has suffered the only type of harm for which the just-compensation provision of the Constitution entitles him to a remedy." *Gamble v. Eau Claire County*, 5 F.3d 285, 286. (7th Cir. 1994).

[3] The adequacy of Kensington's state procedures is discussed later in the brief. Kensington provides an adequate state procedure, however, because it has laws governing inverse condemnation proceedings.

Judge Posner's reasoning is consistent with the Williamson County Test and the Fifth Amendment since it recognizes that a constitutional wrong does not occur simply because the government has taken private property for public use. *See Williamson County*, 473 U.S. at 194. Therefore, because Martinez cannot claim that Kensington has denied him just compensation, as this Court has interpreted the Just Compensation Clause, his takings claim remains premature for review.

2. A takings claim under § 1983 cannot circumvent the Williamson County Test.

Martinez's takings claim alleges a deprivation of his property under color of law pursuant to 42 U.S.C. § 1983. R. at 8. Under § 1983, a person who acts under color of law may be liable for subjecting any citizen "to the deprivation of any rights…secured by the Constitution." 42 U.S.C. § 1983 (2012). Accordingly, the appropriate inquiry in a § 1983 claim is whether a citizen "has been deprived of a right 'secured by the Constitution.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979). As just discussed, however, the government does not violate the Fifth Amendment merely by taking private property if there is an adequate procedure in place that could lead to just compensation. *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 265, 297 (1981).

Additionally, by making a facial challenge to the constitutionality of the Act, Martinez attempts to couch his claims under § 1983 as opposed to a violation of the Just Compensation Clause.[4] Notwithstanding his broad constitutional challenge,

[4] Some courts have suggested that property owners cannot avoid the Williamson County Test through label technicalities in their takings claims. *See, e.g., River Park, Inc. v. City of Highland*

Martinez cannot avoid the State Exhaustion Rule by merely alleging a § 1983 claim because Kensington had adequate state procedures at the time of the taking. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (allowing a property owner to proceed in federal court under § 1983 because California did not provide a remedy for "temporary regulatory takings").

Therefore, a takings claim, whether it is premised on Fourteenth Amendment substantive due process or Fifth Amendment just compensation theories, is not ripe for review in federal court until the claimant first seeks and is denied just compensation under adequate state procedures. *Williamson County*, 473 U.S. at 194, 200; *see also Hodel*, 452 U.S. at 297, n. 40 (1981) (concluding that even facial challenges where a taking is undisputed are "not unconstitutional *unless* just compensation is unavailable") (emphasis added). Therefore, a takings claim cannot circumvent the State Exhaustion Rule merely by alleging a § 1983 claim as opposed to a Fifth Amendment violation of the Just Compensation Clause. *See Williamson County*, 473 U.S. at 199-200; *see also Unity Ventures v. County of Lake*, 841 F.2d 770, 775) (interpreting the Williamson County Test to apply to equal protection and due process claims).

In *Williamson County*, a land developer filed suit in federal court against a county's regional planning commission, alleging that the commission's zoning laws and regulations constituted a taking under the Fifth Amendment. *Williamson County*, 473 U.S. at 175. Like Martinez, the land developer in *Williamson County*

Park, 23 F.3d 164, 167 (7th Cir. 1994) (property owners cannot avoid the Williamson County Test simply by "applying the label 'substantive due process'" or "procedural due process" to their claims).

based his complaint pursuant to § 1983. R. at 8; *Williamson County*, 473 U.S. at 182. In concluding that the land developer's claim was premature, this Court held that property owners do not suffer a constitutional wrong until they "unsuccessfully attempt[] to obtain compensation through" adequate state procedures. *Id.* at 195. This holding remains consistent with the text of the Fifth Amendment, which provides no remedy until adequate state procedures fail to lead to just compensation. *Id.*

The Thirteenth Circuit Court of Appeals' majority opinion, however, indicated that the Third and Eighth Circuits have exempted property owners from the State Exhaustion Rule on takings claims premised on substantive due process. *See County 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 Third and Eighth Circuits, however, analyzed substantive due process in the context of state regulations that, for all practical purposes, had amounted to takings. Unlike Martinez's claim, however, *Roxbury* and *McKenzie* did not involve actual takings of property. *Roxbury* involved a twelve-year dispute over an application for a site plan approval, while the dispute in *McKenzie* arose after a city planning commission refused to grant building permit applications until it received an easement. 442 F.3d at 163; 112 F.3d at 315.[5] Because *Roxbury* and *McKenzie* did not involve

[5] More specifically, the White Hall Planning Commission refused to approve certain division and building permits until the property owners granted the city an easement through their residential neighborhood's privacy buffer. *McKenzie*, 112 F.3d at 315. The court recognized, however, that "when the state provides an adequate process for obtaining just compensation, no Fifth Amendment violation occurs until compensation is denied." *Id.* At 317.

physical takings, the pivotal issue in those two cases was whether a taking had occurred. Martinez's case, however, is distinguishable because neither party disputes that a taking occurred. Rather, the issue here is whether Martinez can avoid the State Exhaustion Rule before he can claim that Kensington has denied him just compensation.

This Court's holding in *Williamson County* is consistent with previous case law that has similarly analyzed deprivation of property in § 1983 claims. In *Parratt v. Taylor*, for example, this Court held that a person who suffers a deprivation of property does not state a claim for relief under § 1983 simply by claiming a violation of substantive due process. 451 U.S. 527, 544 (1981).[6] Although the facts differed from those here, this Court's reasoning in *Parratt* applies squarely to Martinez's § 1983 claim. In *Parratt*, this Court concluded that no substantive due process violation had occurred because the plaintiff's challenge was not to an "established state procedure lacking in due process," but rather, to a claim alleging property damage arising out of state misconduct. *Id.* at 542. Such is the case with Martinez's claim. Martinez has not claimed that Kensington's means of obtaining just compensation lack due process, and therefore, his § 1983 claim is inadequate for the relief he seeks.

Conversely, to recognize any alleged injury resulting from state action under color of law pursuant to § 1983 would be wholly inconsistent with the intent of the

[6] Overruled on other grounds by *Daniels v. Williams*, to the extent that *Parratt* stated that an official's "mere lack of due care" may deprive somebody of "life, liberty, or property under the Fourteenth Amendment." 474 U.S. 327, 330-31 (1986). The idea that the Fifth Amendment does not require a pre-deprivation process, however, remains good law.

Fourteenth Amendment. *Parratt*, 451 U.S. at 544 (concluding that such a decision "'would make of the Fourteenth Amendment a font of tort law to be superimposed upon'" state systems) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). This Court should not allow Martinez to circumvent this Court's longstanding precedent through a technicality when his underlying cause of action is premised on a takings claim. To do so would allow aggrieved property owners in every jurisdiction to avoid the Williamson County Test by merely alleging a § 1983 claim as opposed to a Fifth Amendment takings claim.

B. The State Exhaustion Rule controls the facts of this case.

The State Exhaustion Rule controls the facts of this case for three principal reasons. First, Kensington provides adequate state procedures for property owners to seek just compensation for the taking of their property. If a state provides adequate procedures for obtaining just compensation, then no Fifth Amendment violation occurs until the state denies just compensation. *Williamson County*, 473 U.S. at 196; *see also McKenzie*, 112 F.3d at 317. Second, Martinez did not seek compensation through Kensington's procedures before filing this suit, and therefore, he has not shown that the State denied him just compensation. Third, none of the exceptions to the State Exhaustion Rule that federal appellate courts have established apply to this case.

1. Martinez did not comply with the State Exhaustion Rule before filing this suit.

First, Kensington has adequate procedures that allow property owners to seek just compensation. As the district court recognized, Kensington has eminent

domain laws that allow property owners to initiate inverse condemnation suits against the government. *See* Kens. Code Ann. §§ 30-17-101 to 30-17-130 (1970).[7] Additionally, Kensington state courts have held that its eminent domain laws provide a means of obtaining just compensation for takings that result from legislative action. *See Harrington v. City of Bath*, 125 Ken.2d 346 (1980). Martinez has not argued why Kensington's inverse condemnation laws are inadequate for the compensation he seeks, and therefore, no reason exists to hold that Kensington state procedures are inadequate.

Counsel for Martinez even suggested that the reason behind filing suit in federal court was not due to inadequate state procedures, but rather, a mere preference in a federal forum to avoid potential bias. R. at 21. That argument, however, avoids the question of whether Kensington has adequate procedures for obtaining just compensation, which is the underlying basis of his § 1983 claim. Potential bias is not unique to state courts, and Martinez has no basis in the law for avoiding the Williamson County Test due to the mere possibility of judge bias. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1917 (2016) ("[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice").[8] If, after filing a state inverse condemnation suit, the presiding Kensington judge manifests a bias against Martinez, then he can file a motion to

[7] Black's Law Dictionary defines an inverse condemnation as, "an action brought by a property owner for compensation from a governmental entity that has taken the property owner's property without bringing formal condemnation proceedings." *Inverse Condemnation*, *Black's Law Dictionary* (10th ed. 2015).
[8] Quoting 3 William Blackstone, *Commentaries on the Laws of England*, 361 (1768).

change venue. *See id.* at 1905. Before that occurs, however, Martinez's unsupported claim that Kensington state judges will act prejudiced against him should not be the basis for avoiding well-established precedent.

Second, before filing this suit, Martinez sought declaratory and injunctive relief in the Kensington state court of Windsor County, but he did not initiate an inverse condemnation proceeding to seek just compensation. R. at 2, 3. Unlike an inverse condemnation suit, a suit seeking injunctive relief does not provide Martinez with a means of obtaining just compensation.[9] To comply with the State Exhaustion Rule, however, a property owner must seek compensation for the state's taking, such as through an inverse condemnation proceeding. *See Williamson County*, 473 U.S. at 196 (an inverse condemnation action allows a property owner to "obtain just compensation for an alleged taking of property"). Conversely, some courts have held that a state does not provide adequate procedures for seeking just compensation if the state does not have statutory procedures governing inverse condemnations. *See, e.g., Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700 (6th Cir. 1996) (holding that to recognize an action in mandamus, without state-governed procedures for inverse condemnation, did not amount to an "adequate provision for obtaining compensation").

Martinez attempts to sidestep the Williamson County Test by premising his takings claim on due process theories, but the Fifth Amendment does not mandate the government to provide hearings before taking private property. *Ruckelshaus v.*

[9] An injunction merely grants a court order, which commands or prevents an action. *Injunction, Black's Law Dictionary* (10th ed. 2015).

Monsanto Co., 467 U.S. 986, 1016 (1984). As long as adequate state procedures are in place at the time of the taking, a post-deprivation compensation is sufficient to comply with the Fifth Amendment. *Williamson County*, 473 U.S. at 194. Here, Martinez does not argue that Kensington lacks the adequate procedures to grant just compensation. He has also not proved that Kensington denied him just compensation through a state inverse condemnation proceeding. To accept Martinez's argument that a § 1983 claim requires a pre-deprivation process before the government can take private property, however, would alter the text of the Fifth Amendment. In other words, Martinez would have this Court require the government to provide pre-deprivation procedures when it has repeatedly held that the Fifth Amendment does not require them. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (citing *Cherokee Nation v. S. Kansas Ry. Co.*, 135 U.S. 641 (1890). Therefore, Martinez has not complied with the State Exhaustion Rule and, therefore, his claim remains premature for review.

2. None of the exceptions to the State Exhaustion Rule that circuit courts have developed apply to this case.

Although the State Exhaustion Rule applies squarely to Martinez's takings claim, he nonetheless urges this Court that his claim is not premature. R. at 10. The Thirteenth Circuit's majority opinion acknowledged Martinez's argument and discussed a few of the exceptions to the State Exhaustion Rule that its sister courts have established. R. at 13. Despite that this Court is bound by none of those exceptions, the facts from those cases are distinguishable and should not influence the analysis of this case. Therefore, this Court should look to nothing other than the

Williamson County Test to adjudicate this case and dismiss Martinez's takings claim as premature for consideration.

The Second Circuit in *Southview Assoc., Ltd. v. Bongartz*, for example, held that substantive due process claims premised on "arbitrary and capricious government conduct" do not need to comply with the State Exhaustion Rule. 980 F.2d 84, 96-97 (2d Cir. 1992). In *Bongartz*, a group of developers sued members of the Vermont Environmental Board for discriminatorily denying them certain land use permits. *Id.* at 87. The court expressly limited its exception, however, to substantive due process claims "premised on arbitrary and capricious government conduct." *Id.* at 97. In reaching its conclusion, the court differentiated a violation of the Just Compensation Clause, which is subject to the Williamson County Test, from "arbitrary and capricious government conduct," which was "largely unrelated" to the takings claim. *Id.* The court held, however, that both the Finality Rule and State Exhaustion Rule applied to the property owner's Just Compensation claim and its substantive due process claim that "a regulation had gone 'too far.'" *Id.* at 97. Here, Martinez has not alleged arbitrary or capricious government conduct, nor is there evidence thereof. Rather, Martinez claims that the Act constitutes a facial taking of his property without just compensation, which is more akin to a Just Compensation Clause violation. R. at 2. Therefore, the *Bongartz* exception to the State Exhaustion Rule does not apply to this case, and Martinez's claim remains subject to the State Exhaustion Rule.

Additionally, the Ninth Circuit recently held that, in case of "egregious" governmental behavior, a plaintiff alleging a Fifth Amendment takings violation need not comply with the State Exhaustion Rule. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 8310-31 (9th Cir. 2003). In *Carpinteria*, however, Santa Barbara's Planning Department (the "Planning Department") singled a property owner out and treated his permit application differently than other similarly situated property owners.[10] *Id.* at 827-28. The court concluded that the Planning Department's "'go tough' policy and…nine-year delay in reaching a decision" on the property owner's permit applications were "discrete constitutional violations" independent of the alleged taking. *Id.* at 831-32. Those independent violations, the court held, were not subject to any ripeness analysis, but the court refused to overrule the Williamson County Test for other kinds of takings claims. *Id.* at 831.

None of the egregious or discriminatory governmental conduct that took place in *Carpinteria*, however, is present in this case. Martinez does not claim that Kensington has singled him out or has unreasonably delayed in reaching a final decision on his property. Moreover, he does not argue that the Act authorized an unconstitutional process that amounted to an injury *separate* from the taking. According to the Record, Martinez seeks just compensation because he believes "the money he received per [the Act] was inadequate." R. at 9. Therefore, *Carpinteria* is entirely distinguishable and does not apply to Martinez's claim.

[10] The plaintiff in *Carpinteria* had applied for permits that would allow him to use a portion of his property for private, recreational polo. *Carpinteria*, 344 F.3d at 827-28.

C. This Court should reaffirm the Williamson County Test.

When this Court faces the opportunity to overturn its precedents, it treads carefully, and it has emphasized the important role of *stare decisis* in this country's jurisprudence. *See Payne v. Tennessee*, 501 U.S. 808, 827 (*stare decisis* "promotes the evenhanded, predictable, and consistent legal development of legal principles" and "contributes to the…integrity of the judicial process"). The Williamson County Test has been the law of this country for over thirty-three years, and it underlies the core governmental right to take private property for public use. Overturning *Williamson County* would ignore the principles of comity and abstention that should keep takings claims like Martinez's, at least initially, in state courts.

1. The Williamson County Test recognizes that state courts are best equipped to resolve local property matters.

The Thirteenth Circuit's majority opinion questioned the reasoning behind the Williamson County Test, finding no prior Supreme Court decision requiring property owners to first exhaust state remedies. R. at 12. The majority, however, fails to recognize that the Williamson Test is not a "new" rule. The Williamson Test requires a property owner to exhaust state remedies because only until a state has denied just compensation can a property owner allege a Fifth Amendment violation. *Williamson County*, 473 U.S. at 194. Therefore, to determine whether a taking has occurred, or a state has denied just compensation, states legislatures have conferred their courts with the authority to decide inverse condemnation claims. *See, e.g., City of Bath*, 125 Ken.2d 346.

Whether they involve constitutional or statutory claims, state courts "possess sovereignty concurrent with that of the Federal Government…to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Even if a case meets all the formal jurisdictional requirements to appear in federal court, federal courts may choose, out of abstention and comity, to not hear a case until the resolution of a state law question. *See Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (describing comity as "the recognition which one nation allows within its territory to the…judicial…acts of another nation" or state).[11] Justice Holmes wisely explained that "eminent domain is a prerogative of the state, which…may not be exercised except by an authority which the state confers. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 257 (1905) (dissenting). Therefore, because resolution of Martinez's claim at this preliminary stage hinges on the fact that Kensington has not denied Martinez just compensation, comity should keep this matter out of federal court for now.

The Williamson Test has an advantage because it tells property owners where to take their claims. Conversely, overturning *Williamson County* would create a patchwork of claims filed in federal and state courts that analyze the same state law issue, the Act, in distinct ways. That, in turn, could lead to a more problematic issue of comity where state and federal case law clashes regarding the

[11] Abstention is defined as, "A federal court's relinquishment of jurisdiction when necessary to avoid needless conflict with a state's administration of its own affairs. *Abstention, Black's Law Dictionary* (10th ed. 2015).

same statute.[12] These problems can be avoided, however, by reaffirming *Williamson County* and holding that Martinez cannot claim a constitutional violation in federal court unless and until Kensington denies him just compensation under state procedures.

2. The Williamson County Test does not lead to absurd results.

The Thirteenth Circuit's majority opinion maintains that the Williamson County Test leads to "absurd results." R. at 12. The majority argues, for example, that savvy government defendants could play a game of civil procedure to prevent both state and federal courts from ever reviewing a takings claim. R. at 12. According to the majority, a government defendant could remove a takings case from state to federal court, only to remand the case back to state court for noncompliance with the State Exhaustion Rule. R. at 12. The law, however, does not hold a place for manipulative procedural tactics like those the majority describes, nor should it.

Neither party to this case argues that Martinez should be deprived of his day in court, but resolving the majority's concerns does not require this Court to overturn *Williamson County*. This Court has held that "where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby." *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) (emphasis added). Therefore, a government defendant who craftily removes a state

[12] This in addition to the influx of federal inverse condemnation proceedings that would overwhelm the federal court system. *See* Douglas W. Kmiec, *At Last, the Supreme Court Resolves the Takings Puzzle*, 19 Harv. J.L. & Pub. Pol'y 147, 158 (1995) (recognizing that the Williamson County Test helps alleviate the "limited nature of judicial resources").

takings case to federal court could effectively waive its rights to remand the case. *See Clark v. Barnard*, 108 U.S. 436, 447 (indicating that a state's voluntary "appearance in a court of the United States would be a…submission to its jurisdiction"). Although the abovementioned authority arose out of Eleventh Amendment disputes, nothing prevents this Court from asserting that manipulative techniques like those described by the majority will amount to a submission to a federal court's jurisdiction.[13]

The majority raises a second concern that *res judicata*, issue preclusion, and the *Rooker-Feldman* doctrine might prevent a plaintiff who complies with the State Exhaustion Rule from subsequently bringing a claim in federal court.[14] This concern, however, ignores the possibility that district courts may still be able to hear cases arising out of state inverse condemnations. Neither the Williamson County Test nor *res judicata* would preclude, for example, a plaintiff from going to district court and claiming that the state's proceeding somehow lacked due process, because that would be a violation separate from the takings claim. *See* U.S. Const. Amend. XIV (protecting individuals from the deprivation of "property, without the due process of law"). In that instance, which does not present itself here, the plaintiff would not relitigate the same issues from the state proceeding and, thus, would not be barred under any doctrine of issue preclusion.

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[13] The Eleventh Amendment states that, "The Judicial power of the United Sates shall not be construed to extend to ay suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI.

[14] The *Rooker-Feldman* Doctrine, as this Court has explained it, established that district courts cannot exercise appellate jurisdiction over state court judgments. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005).

Additionally, no reason or precedent exists that requires federal courts to hear every claim involving a federal or constitutional issue, and takings claims are no exception. *See, e.g., Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (precluding federal courts, out of comity, from considering a taxpayer's challenge to an allegedly unconstitutional favorable tax treatment because state courts provided an adequate forum); *see also Younger*, 401 U.S. at 53-54 (barring an individual from bringing a Fourth Amendment violation claim in federal court until there had been a conviction in state court). Martinez has not argued why his § 1983 claim is immune from well-established abstention doctrines, and a mere preference for a federal forum should not suffice to avoid or overturn thirty-three years of Supreme Court precedent.

The State Exhaustion Rule controls the facts of this case because Martinez did not seek just compensation through Kensington's adequate state procedures. Martinez's arguments attempt to avoid the State Exhaustion Rule by asserting a facial challenge under § 1983, but the Williamson County Test applies to claims like his, which seek just compensation for property. *Williamson County*, 473 U.S. at 194-95. No reason exists to exempt Martinez from the State Exhaustion Rule and allow him to claim that Kensington denied him just compensation before he initiated a state inverse condemnation proceeding. Therefore, this Court should affirm the Thirteenth Circuit Court of Appeals' decision as to Martinez's takings claim and hold that it is not ripe for review because he has not sought just compensation under Kensington's state procedures.

II. Title VII of the Civil Rights Act of 1964 does not prohibit discrimination on the basis of sexual orientation.

With respect to Count II of the complaint, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals and hold that Title VII's protections against sex discrimination do not extend to sexual orientation. In construing statutes, this Court begins with the language of the statute itself and asks whether Congress has spoken on the subject. *Kingdomware Tech. Inc. v. U.S.*, 136 S. Ct. 1969, 1976 (2016). If the intent of Congress is clear, that is the end of the matter, for the Court must give effect to the unambiguously expressed intent of Congress. *Id.* The plain language at issue here is the "because of…sex" clause found in the prohibited practices provision of § 703.[15] Based on the clear and unambiguous language of the statute, Petitioner Martinez does not have a Title VII claim for sex discrimination.

In Count II of his complaint, Martinez alleged that the University of Kensington fired him from his teaching position because of his homosexuality. R. at 3. Martinez asserted a claim of Title VII sex discrimination under the theory that sexual orientation is inextricably tied to sex. R. at 3. The United States District Court for the Northern District of Kensington properly dismissed Count II of the claim, declaring it a form of "legal wizardry." R. at 3. The United States Court of Appeals for the Thirteenth Circuit then reversed the dismissal of Count II, siding with the Second and Seventh Circuits, and holding that Title VII extends to sexual orientation discrimination. R. at 14-19; *see generally*, *Hively v. Ivy Tech Community*

[15] Section 703 of Title VII has since been codified in 42 U.S.C. § 2000e-(a)(1).

College of Indiana, 853 F.3d 339 (7th Cir.2017); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018). This Court should reverse and hold that Title VII does not afford protections on the basis of sexual orientation in accordance with the statute's plain language, purpose, and history.

A. The unambiguous plain language of § 703 controls.

The plain language of § 703 conclusively and unambiguously establishes that Title VII does not prohibit discriminatory employment practices based on sexual orientation. If a statute's language is unambiguous, the inquiry ceases, and courts simply apply the statute as written. *Kingdomware Tech.,* 136 S. Ct. at 1976. In this case, both the textual and structural aspects of the statute flatly demonstrate that sexual orientation falls outside the scope of § 703's prohibited practices provisions, thereby precluding Martinez' claim.

1. The statutory text refers to "sex," not to "sexual orientation."

The statutory text refers to "sex," not to "sexual orientation," an important distinction that Martinez refuses to acknowledge. As with any question of statutory interpretation, resolution of this issue begins with the cardinal canon that words should be understood "as taking their ordinary, contemporary, common meaning… *at the time Congress enacted the statute*." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (emphasis added). Thus, the proper inquiry begins in the 1960's, a time when homosexuality was both stigmatized and criminalized. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (noting that homosexuality was classified as a

mental disorder by the American Psychiatric Association and that same-sex relations remained outlawed in many states).

To determine the word's ordinary, common meaning, this Court then turns to contemporaneous dictionary definitions as objective evidence of such meaning. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227-229 (2014); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1353 (Fed. Cir. 2005); *see also*, *United States v. Rodgers*, 466 U.S. 475, 479 (1984) (citing *Webster's Third New International Dictionary* 1227 (1976) in its interpretation of the statutory term "jurisdiction"). In 1961, Webster's narrowly defined sex as "one of the two divisions of organisms formed on the distinction of male and female; males and females collectively." *Sex, Webster's New Collegiate Dictionary* (1961); *See also*, *Sex, Webster's Third New International Dictionary of the English Language* (1961) ("one of the two divisions of organic esp. human beings respectively designated male or female"); *Sex, Webster's Seventh New Collegiate Dictionary* (1965) ("either of two divisions of organisms distinguished respectively as male or female"). This narrow definition makes no mention of "sexual orientation," but instead characterizes "sex" as the male/female dichotomy. The two terms are simply not synonymous, a linguistic fact that holds true today.[16]

Notwithstanding the common, ordinary meaning of a word, legal dictionaries in particular have also aided this Court in deciding the meaning of a statutory term. *See FAA v. Cooper*, 566 U.S. 284, 292 (2012). It is a cardinal canon of construction that when a statute uses a term of art, this Court assumes that Congress intended

[16] *Sex*, Dictionary by Merriam-Webster, https://www.merriam-webster.com (then search "sex").

it to have that established meaning. *Id*. In searching for the established meaning, this Court has turned to Black's Law Dictionary, which defines "sex" as "the sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." *Sex*, *Black's Law Dictionary* (10th ed. 2015). *See Molzof v. United States*, 502 U.S. 301, 307 (1992). Additionally, technical terms used in a statute are presumed to have their technical meaning. *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 16 (10th Cir. 1990). The meaning of "sex," in its technical sense, further corroborates its ordinary meaning.[17]

All dictionaries aside, common sense remains a fundamental guide to statutory construction. *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989). Just as "lightning" does not mean "lightning-bug," the layperson does not understand "sex" to mean "sexual orientation." A birth certificate, voter registration form, and driver's license all provide for one's sex, yet the box marked "M" or "F" does not inquire into one's romantic life. The plain language understanding of sex clearly comports with its everyday usage as a mere biological marker, whereas Martinez's broadening of the word defies dictionaries and common sense alike. Harriet Beecher Stowe once said, "Common sense is seeing things as they are, and doing things as they ought to be."[18] Rather than jump through Martinez's definitional hoops, this Court ought to confirm what most courts

[17] *See Sex*, Medical Dictionary by Merriam-Webster, https://www.merriam-webster.com/ ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as male or female").
[18] KAREN WEEKES, WOMEN KNOW EVERYTHING!: 3,241 QUIPS, QUOTES & BRILLIANT REMARKS, 230 (Quirk Books, 2007).

(and people) have known since the enactment of Title VII: sex does not include sexual orientation. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). To hold otherwise would contravene the statute's plain language and its everyday usage, leaving the lower courts with little interpretive guidance.

2. The statutory structure impliedly excludes sexual orientation.

The statutory structure of § 703 impliedly excludes sexual orientation from its list of expressly protected classes. As a general rule, courts neither omit nor add to the language of a statute. *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009). Further, when a statute creates an associated group of words, courts apply the classic canon of *expressio unius est exclusio alterius*, or "express mention and implied exclusion." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). The canon speaks to legislative intent, stating that when Congress has expressly mentioned certain items in a statute, items not mentioned were excluded "by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). Section 703 creates an associated group of class labels in its enumeration of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Accordingly, this associated group warrants the application of *expressio unius est exclusio alterius*. It follows that Congress was deliberate, not inadvertent, in its exclusion of sexual orientation from the statute. Until Congress takes deliberate action to include sexual orientation in the statute, Martinez has no claim. In the words of Justice Ginsburg, "However sensible (or not) the Court of Appeals' position, a reviewing

court's 'task is to apply the text [of the statute], not to improve upon it.'" *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 1600 (2014).

B. Petitioner's reliance on *Hively* and *Zarda* cannot overcome the plain language of § 703.

Martinez's unwavering reliance on the *Hively* and *Zarda* decisions simply cannot overcome the plain language of § 703. Until these two decisions, every circuit court to have considered the issue agreed that "sex," as used in the statute, does not include sexual orientation. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F3d 138, 143 (4th Cir. 1996); *Blum*, 597 F.2d at 938; *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 143 F.3d 1131, 1135 (10th Cir. 2005); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017).

Despite decades of judicial unanimity, the Seventh Circuit parted ways from its sister courts in 2017 and held that a lesbian professor's allegation of sexual orientation discrimination amounted to a Title VII sex discrimination claim. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 341 (7th Cir.2017). The Second Circuit soon followed suit, holding that discharge of a gay sky-diving instructor on the basis of his homosexuality constituted sex discrimination *per se*. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 114 (2d Cir. 2018). Neither opinion

presents a united front on the issue, as pointed out in Justice Sandberg's dissent. R. at 24.

Just prior to *Hively* and *Zarda*, the Equal Employment Opportunity Commission issued its 2015 decision that "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015). This Court need not consider the reasonableness of this decision in this case, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). Congress could not have spoken more clearly on the issue. Title VII prohibits discriminatory employment practices on the basis of race, color, religion, sex, or national origin; nothing more, nothing less. 42 U.S.C. § 2000e-2(a)(1). Although a charging agency's interpretation of a statute may have persuasive value, administrative interpretation contrary to the statute's plain language deserves no deference. *Demarest v. Manspeaker*, 503 U.S. 921 (1991). The EEOC decision flies in the face of the unambiguous plain language of Title VII and does not deserve *Chevron* deference.

Despite the clarity of § 703, the divergent Second, Seventh, and now Thirteenth Circuits have relied unequivocally on this panel's non-binding decision, each flaunting the following three arguments: 1) the definitional approach, 2) the comparative method, and 3) the associational theory of discrimination. In this case,

Martinez asserts the same three arguments, using the same flawed reasoning, as a backdoor means of adding sexual orientation into the statute.

1. Any definition of "sexual orientation" is irrelevant to the analysis.

Martinez first defends his Title VII claim by defining "sexual orientation" as "an inescapable function of sex." However, the plain language analysis does not require that we define sexual orientation. On the contrary, statutory interpretation begins with the language of *the statute itself*. *Levin v. United States* 568 U.S. 503, 513 (2013) (emphasis added). Because Title VII makes no mention of sexual orientation anywhere in the statute, any definition thereof is irrelevant to this Court's analysis—no matter how creative that definition may be.

The correct analysis instead lies with the relevant phrase "because…of sex," defined above as the male/female dichotomy. To put it plainly, this court must decide whether sex encompasses sexual orientation—not whether sexual orientation encompasses sex. Absurd results are to be avoided in construing the meaning of a statute. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 574 (1982). Nevertheless, Martinez reframes the issue in an anomalous request, asking this Court to interpret words absent from the statute (*i.e.*, "sexual orientation") in order to interpret the statute. Doing so would confound the interpretive process from its beginning and violate the cardinal canons of construction, as well as common sense.

2. The comparative test does not apply to claims of sexual orientation discrimination.

Martinez next attempts to sidestep the statute with a major misapplication of the comparative test. The comparative test functions as a basic but-for analysis,

controlling for all variables except the statutorily protected class that is the alleged basis for discrimination. *See, e.g.*, *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding that sex discrimination had occurred where a departmental policy required female employees to pay higher pension fund contributions than their male counterparts because the policy treated the female employees "in a manner which but for that person's sex would be different."). As Justice Sykes of the Seventh Circuit aptly explained:

> "The comparative method of proof is a useful technique for uncovering the employer's real motive for taking the challenged action…But the comparative method of proof is an evidentiary test; it is not an interpretive tool. It tells us *nothing* about the meaning or scope of Title VII…An *evidentiary test* like the comparative method of proof has no work to do here and is utterly out of place."

Hively, 853 F.3d 339, 366 (Sykes, J., dissenting). This basic evidentiary purpose is Martinez's first oversight in his misapplication of the comparative test. Because the Title VII question before this Court is purely interpretive, application of the test is premature at best. Yet Martinez's argument raises a second concern: the test serves to identify discrimination based on "*statutorily forbidden*" motivations, not those which may be viewed as morally wrong. *Id.* at 365 (emphasis added). Under these circumstances, the test serves no real purpose since Martinez alleges discrimination on the basis of his homosexuality, which is not a statutorily forbidden motivation.[19]

[19] Here too, the comparative test fails on the merits. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1259 (2017). Even if comparing Martinez to a similarly situated female professor yields a different result, the comparison ignores the effect of sexual orientation as a confounding variable. Therefore, the test cannot conclusively prove sex discrimination as distinguished from sexual orientation discrimination.

3. The associational theory of discrimination does not apply to claims of sexual orientation discrimination.

Martinez makes his final statutory dodge with a misapplication of the associational theory of discrimination, a judicial concept created to combat hostilities towards interracial couples. The associational theory is best understood as protecting "individuals who, though not members of a protected class, are 'victims of discriminatory animus toward [protected] third persons with whom the individuals associate.'" *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (2009*); see also Zarda* 883 F.3d 100 at 126 (Lynch, Gerard E., dissenting). Until *Zarda* and *Hively*, federal appellate courts applied this theory only within the context of racial discrimination. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1205 (7th Cir. 1971); *Zarda* 883 F.3d at 158, n. 27 (Lynch, Gerard E., dissenting). For example, if a white employee is fired because his daughter is biracial, he experiences associational discrimination. *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988 (6th Cir. 1999). The employer's discriminatory motive was not the employee's race alone, but rather, the employee's race in association with his daughter's race. *Id*. Much like the comparative method, the associational theory is evidentiary in nature and misplaced in a question of statutory interpretation.

However, Martinez also overlooks a key element in his application of the theory: "protected" third-persons. *See Barrett* 556 F.3d. at 512. The associational theory in effect imputes a third party's Title VII protections onto the discriminated employee by association. The theory only works when the third party is a member of

a statutorily protected class, such as race or sex. By asserting the theory in this case, Martinez asks this court to treat homosexuality as a statutorily protected class, a decision which lies squarely in the hands of Congress.

C. Title VII's overall history and purpose is consistent with the plain language view that sexual orientation falls outside the scope of § 703.

Both the history and purpose of Title VII support the plain language, narrow interpretation of "because of…sex." The legislative purpose of a statute is best expressed by the ordinary meaning of the words used. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Additionally, an amendment to an existing statute is no less an "act of Congress" than a new, stand-alone statute. *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 381 (2004). Where a statute's plain language settles the question before the court—as does § 703's "because of…sex"—the final step is to look to the legislative history only for "clearly expressed legislative intention" to the contrary. *Id.*

1. Title VII's statutory history and broader context support the plain language interpretation of § 703.

Title VII's statutory history and broader context lend additional support to the plain language interpretation of § 703. To begin, this Court assumes that Congress is aware of existing law when passing legislation. *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014). Additionally, an amendment to an existing statute is no less an "act of Congress" than a new, stand-alone statute. *Jones,* 541 U.S. at 381.

In a 1978 amendment, Congress added subsection (k) to § 701 of Title VII, the "Definitions" section, now codified in 42 U.S.C. § 2000e. 42 U.S.C. 2000e,

amend. §§ (k). The definition of a term in the definitional section of a statute controls the construction of that term throughout the statute. *In re Etchin*, 128 B.R. 662, 668 (Bankr. W.D. Wis. 1991). Generally, the statutory definition of a term also excludes any other meaning. *Burgess v. United* States, 128 S.Ct. 1572 (2008). Subsection (k) expressly defines "because of…sex" to mean "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e (2012). The definition makes specific reference to one of the two sexes (*i.e.*, women, and mothers in particular). More to the point, the definition clearly does not contemplate homosexuality. *Id*. This express definition, which is consistent with the ordinary, common meaning of sex, controls throughout Title VII and provides no support for Martinez' broad interpretation of § 703. Congress presumptively legislates with knowledge of these types of canons (and thus, the expectation that courts will give effect to its express definition of a term). *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Yet, Martinez would have this Court disregard this clear evidence of the Title VII's purpose. The result would render this 1978 amendment inoperative, giving no effect to a deliberate act of Congress. Instead, this Court should look to the classic canon that statutes should be construed such that every word has some operative effect. *See U.S. v. Nordic Village*, 503 U.S. 30, 36 (1992).

On all other occasions when Congress has chosen to amend Title VII, sexual orientation has never made the cut. *See e.g.*, Civil Rights Act of 1991, Pub. L. No. 102—166, 105 Stat. 1071 (1991). Given these multiple legislative attempts, courts have given much weight to Title VII's deliberate exclusion of sexual orientation.

See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (2001) (noting that "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation"). When Congress adopts new law incorporating sections of prior law, it can be presumed to have had knowledge of that interpretation given to the incorporated law, at least insofar as it affects the new statute. *St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 50 (2d Cir. 1985). Undoubtedly, Congress has been keenly aware of the repeated circuit court opinions that sexual orientation falls outside the scope of Title VII. For this very reason, Congress has attempted, on multiple occasions, to amend the statute accordingly (with no success). *See e.g.*, Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). This Court recognizes that rewriting a statute is not the province of the judiciary, so until Congress is successful in its ongoing attempt to expand Title VII, Martinez has no claim. *See Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) (observing that "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

In the broader context of anti-discrimination law, similar acts by Congress call for this Court to honor the plain meaning of § 703. Unlike Title VII, subsequent acts by Congress with similar nondiscrimination provisions include sexual orientation as an expressly protected class, in addition to sex. *See e.g.*, Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013). Under the canon of *in pari materia*, two statutes addressing similar

subject matter should be read as if they were one law. *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 126 S. Ct. 941 (2006). Similarly, when these two statutes are capable of coexistence, it is the duty of the courts to regard each as effective. *Burgess*, 128 S.Ct. at 1578-1580. Under Martinez' interpretation, sexual orientation is implicit in sex. R. at 18. However, this construction renders other major pieces of legislation inoperative to the extent they include "sexual orientation." In other words, if sexual orientation is truly implicit in sex, then any express statutory mention of "sexual orientation" would necessarily be construed as mere surplusage, a result that courts tend to avoid. *See McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016).

2. The legislative history behind Title VII does not conflict with § 703's plain meaning.

A brief review of Title VII's legislative history further substantiates the plain meaning of § 703's "because of…sex." Reliance on legislative history in divining the intent of Congress is a step to be taken cautiously. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008). But, in the absence of a conflict between the statute's plain meaning and the legislative history, the words of the statute must prevail. *Aaron v. SEC*, 446 U.S. 680, 100 S. Ct. 1945 (1980).

Legal scholars have long debated the significance behind Title VII's inclusion of sex as protected class, split among two competing narratives. *See* Rachel Osterman, Comment, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 Yale J.L. & Feminism 409, 409-410 (2009). Many believe that the inclusion of sex in Title VII

(commonly known as the "Smith Amendment") originated as a joke by Congressman Howard Smith, a long-time opponent to the Civil Rights Act. *Id.* Others, however, view this amendment as a serious effort by Smith. *Id.* But one thing is clear: the original drafters of Title VII never contemplated the inclusion of sexual orientation in the prohibited practices provision of § 703. *See* Equal Employment Opportunity Comm'n, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (1968). In the absence of any legislative history to the contrary, the plain language of the statute answers this question of statutory interpretation — Title VII protections do not, and have never, extended to sexual orientation discrimination claims. Congress alone has the power to make that change.

CONCLUSION

This Court should affirm the Thirteenth Circuit's decision as to Martinez's takings claim because he did not seek just compensation in Kensington's state courts. Additionally, this Court should reverse the Thirteenth Circuit's decision, thereby refusing to expand Title VII to include protections not expressly granted by Congress based on sexual orientation.

APPENDIX A – Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B – 42 USC § 2000e-2(a)(1)

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

2018 ALA Moot Court Competition Certification of Compliance

The undersigned counsel certifies that the Respondent's Brief complies with the word limitation specified in Rule C(3)(d)(B) of the ALA Moot Court Competition Rules. The Respondent's Brief contains 10,895 words, including all sections and pages. The word count function for Microsoft Word was relied upon for totaling the number of words in the Respondent's Brief.

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