

CASE NOTES

Smithkline Beecham Corp. v. Abbott Laboratories: The Ninth Circuit Utilizes Heightened Scrutiny To Resolve a Sexual Orientation Equal Protection Claim

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I. INTRODUCTION

During jury selection for a civil suit regarding a licensing agreement and the pricing of HIV medications, Abbott Laboratories used its first preemptory strike to exclude Juror B, the only self-identified homosexual member of the venire.¹ Counsel for the opposing party, Smithkline Beecham Corporation (GSK), challenged Abbott’s strike, arguing that the exclusion of the gay member of the venire violated *Batson v. Kentucky*, which prohibits certain discriminatory preemptive strikes in *voir dire*.² The district court judge offered an opportunity for Abbott to provide a nondiscriminatory justification for the preemptory strike.³ Abbott declined to offer any justification but suggested that he did not know whether Juror B was gay, despite the fact that Juror B had referenced his male partner several times.⁴ The district court judge allowed the strike and, following trial, the jury returned a mixed verdict.⁵

Abbott Laboratories appealed the verdict and GSK cross-appealed, asking for a new trial on the basis that Abbott’s preemptory strike of Juror B was unconstitutional.⁶ In the noted case, the United States Court of Appeals for the Ninth Circuit first considered whether the juror strike constituted a *Batson* violation and next contemplated whether a *Batson* inquiry can be properly applied to sexual orientation discrimination.⁷ The court determined that the critical inquiry as to whether *Batson* applies to sexual orientation is whether sexual orientation equal

1. Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir 2014).

2. *Id.* at 475.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 474.

protection complaints are subject to heightened scrutiny.⁸ In *Smithkline Beecham Corp. v. Abbott Laboratories*, the court *held* that discrimination based on sexual orientation is subject to heightened scrutiny, that Juror B was stricken on the basis of sexual orientation, and that preemptory strikes based on sexual orientation are forbidden by equal protection.⁹

II. BACKGROUND

The connection between equal protection and the right to serve on a jury was first announced by the United States Supreme Court in *Strauder v. West Virginia*. In *Strauder*, a black criminal defendant challenged a West Virginia statute prohibiting blacks from serving on juries on the basis that the statute violated equal protection.¹⁰ The Supreme Court in *Strauder* held the statute unconstitutional, reasoning that equal protection forbade excluding blacks from the right to a jury of their peers.¹¹ According to the Court in *Strauder*, the equal protection clause of the Fourteenth Amendment was ratified in order to protect blacks against unconstitutional discrimination, and the Virginia statute had the clear purpose of perpetuating such prejudices.¹²

Batson extended the principle announced in *Strauder*—that jury discrimination based on race violates equal protection—to the venire process. In *Batson*, the Supreme Court prohibited a preemptory jury challenge from being used to strike a juror on the basis of his race.¹³ The Court reasoned that a racially discriminatory strike damages society by perpetuating the false and stereotypical notion that blacks are unable to provide competent jury service.¹⁴ Normally a preemptory strike enables counsel to dismiss jurors for any reason; the Supreme Court in *Batson* rescinded the previously unlimited privilege in cases where purposeful racial discrimination was found.¹⁵

Batson also provides a test for determining whether a preemptory juror strike is impermissibly discriminatory.¹⁶ The first step of the test requires the moving party to establish a *prima facie* case of impermissible discrimination.¹⁷ A *prima facie* case is proven when the

8. *Id.*

9. *Id.*

10. *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879).

11. *Id.* at 310.

12. *Id.*

13. *Batson v. Kentucky*, 476 U.S. 79, 80 (1986).

14. *Id.* at 87-88.

15. *Id.* at 91.

16. *Id.* at 93-94.

17. *Id.*

movant shows that the prospective juror is part of a cognizable group, counsel used a preemptory strike against the juror, and the totality of circumstances raises an inference that the strike was motivated by the characteristic in question.¹⁸ Once a prima facie case is proven, the nonmoving party must give nondiscriminatory reasons for the strike, and the court must determine whether the moving party has proven intentional discrimination on the totality of circumstances.¹⁹

Since *Batson*, potential venire discrimination cases based on factors other than race have been decided using the reasoning in *Batson*. The Supreme Court in *J.E.B. v. Alabama* held that juror strikes based on gender amount to unconstitutional equal protection violations under *Batson*.²⁰ The Court in *J.E.B.* reasoned that using a preemptory strike solely based on gender is harmful to the litigants because it allows prejudice into the proceedings and is harmful to the community because it perpetuates harmful stereotypes and suggests that certain groups are incompetent as jurors.²¹ The Court in *J.E.B.* explained their extension of *Batson* by discussing the history of gender based discrimination and noting the fact that women, like black people, have been injured by discriminatory state action and historically excluded from juries.²²

J.E.B. also announced a new interpretive principle for *Batson*. The Court in *J.E.B.* stated that preemptory challenges are permissible when a group is subject to rational basis review.²³ Because the impermissible strike in *J.E.B.* was based on gender classifications, which are subject to heightened scrutiny, it follows that *J.E.B.* indicates that preemptory challenges are subject to *Batson* analysis when the group in question is subject to heightened scrutiny.

Historically, the Ninth Circuit has applied rational basis review to resolve equal protection claims based on sexual orientation.²⁴ For example, in *High Tech Gays v. Defense Industry Security Clearance Office*, the court rejected an equal protection challenge to the Department of Defense's routine of denying security clearance to known homosexuals.²⁵ The court in *High Tech Gays* reasoned that sexual

18. *Id.* at 96.

19. *Id.* at 97.

20. *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1421 (1994).

21. *Id.* at 1427.

22. *Id.* at 1425.

23. *Id.* at 1429.

24. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Phillips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

25. *High Tech Gays*, 895 F.2d at 577.

orientation is subject to rational basis review and that the Department's rejection of homosexuals for security clearance was rationally related to a concern that counterintelligence organizations might target homosexuals.²⁶ The court in *High Tech Gays* expounded on its understanding of the appropriate level of scrutiny for sexual orientation. It reasoned that sexual orientation was not subject to heightened scrutiny because homosexuals are politically powerful as a group and that although homosexuals have suffered a history of discrimination, they do not exhibit obvious or immutable traits that define them as a discrete group.²⁷ Further, security clearance is not a fundamental right that would necessarily mandate heightened scrutiny.²⁸

The Ninth Circuit reached a similar result in *Phillips v. Perry*, where it upheld a military discharge of a homosexual under "Don't Ask, Don't Tell."²⁹ The court in *Phillips* utilized rational basis review, which it held was appropriate given its earlier use of the same level of scrutiny in *High Tech Gays*.³⁰ The court in *Phillips* held that the discharge of a homosexual military member was proper and reasoned that, under rational basis review, the policy of "Don't Ask, Don't Tell," which mandates removing known homosexuals from the military, is rationally related to maintaining the armed forces.³¹

More recently, the Ninth Circuit in *Witt v. Department of the Air Force* strayed from its tradition of strictly applying rational basis review. In formulating their holding, the court examined the recent Supreme Court ruling in *Lawrence v. Texas* and determined that *Lawrence* mandated holding substantive due process claims to a higher standard than rational basis review.³² The court in *Witt*, however, declined to apply heightened scrutiny to equal protection claims, reasoning that *Lawrence* did not address equal protection.³³ The court in *Witt* instead held that equal protection claims based on sexual orientation are still subject to rational basis review under *Phillips*.³⁴ The court in *Witt* went on to dismiss petitioner's equal protection claim under rational basis review, reasoning

26. *Id.* at 576.

27. *Id.* at 573.

28. *Id.* at 577.

29. *Phillips*, 106 F.3d at 1429.

30. *Id.* at 1425.

31. *Id.* at 1425-26.

32. *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008).

33. *Id.* at 821.

34. *Id.*

that the policy of “Don’t Ask, Don’t Tell” is rationally related to the government’s interest in maintaining the military.³⁵

United States v. Windsor is the most recent Supreme Court precedent on sexual orientation. In *Windsor*, the Supreme Court held that the Defense of Marriage Act (DOMA), a federal statute that defines marriage as between a man and a woman, violates equal protection.³⁶ The Court in *Windsor* reasoned that because the purpose of DOMA appears to be clearly discriminatory and the effect of DOMA is to injure members of a cognizable group, the law violates equal protection.³⁷

Windsor examined “the design, purpose, and effect of DOMA,” rejecting the government’s various post hoc rationalizations for the law.³⁸ *Windsor* asserted that the true purpose of DOMA is to impose inequality, which has the effect of injuring a certain group: a clear equal protection violation.³⁹

Windsor is currently the controlling Supreme Court precedent on sexual orientation equal protection claims. The noted case is the first case in which the Ninth Circuit has addressed the issue since the *Windsor* holding was issued. As such, the court in the noted case was faced with the novel task of analyzing their equal protection question under the reasoning in *Windsor* and using the level of scrutiny mandated by *Windsor*. The Court in *Windsor*, however, does not explicitly indicate the level of scrutiny utilized to make its decision. In the noted case, the court thus interprets *Windsor* to mandate the use of heightened scrutiny in cases of sexual orientation discrimination.⁴⁰

III. COURT’S DECISION

In the noted case, the Ninth Circuit first conducted a *Batson* inquiry to determine whether Juror B was stricken due to sexual orientation. It went on to hold that heightened scrutiny applies to sexual orientation discrimination under *Windsor*. The court explained that, under *Batson*, there is a three-step test for determining whether a preemptory strike is impermissibly discriminatory: the party challenging the strike must first show a prima facie case of intentional discrimination, the striking party must next give a nondiscriminatory reason for the strike, and finally the court must determine whether the party challenging the strike has made a

35. *Id.*

36. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

37. *Id.* at 2693.

38. *Id.* at 2694.

39. *Id.* at 2695-95.

40. *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014).

valid showing of purposeful discrimination.⁴¹ Here, the court easily concluded that the petitioner made a prima facie case.⁴² To prove a prima facie case under *Batson*, the petitioner must show that the prospective juror is part of a cognizable group, that the preemptory strike was used against the individual, and that the totality of the circumstances indicate that the strike was driven by the juror's characteristic in question.⁴³ Juror B, a self-identified homosexual, was clearly part of a cognizable group.⁴⁴ His references to his male partner made this fact obvious.⁴⁵ Additionally, Juror B was indisputably subject to a preemptory strike.⁴⁶ Finally, the court reasoned that factors indicated that the strike was motivated by his homosexuality.⁴⁷ The court notably relied on *J.E.B.* to affirm that when the subject matter of the case corresponds with the characteristic in question, a prima facie case is probable.⁴⁸ In the noted case, Juror B's relevant characteristic is his homosexuality and the litigation concerns HIV medications, which are of significant interest to the gay community.⁴⁹ Accordingly, there was a strong potential for discrimination, and a prima facie case was established.⁵⁰

The next facet of a *Batson* analysis—whether the nonmoving party can provide a nondiscriminatory reason for the strike—also falls in favor of a *Batson* violation, because counsel for Abbott failed to provide any such justification for striking the juror.⁵¹ The court in the noted case first reasoned that, at trial, counsel failed to justify his strike when asked by the judge.⁵² Counsel did arguably make two statements in justification: (1) that he did not know whether Juror B was gay and (2) that the strike could not have been discriminatory because it was the first strike he exercised.⁵³ The court in the noted case considers these comments invalid justifications. First, the record indicates that Juror B referred to his male partner using the masculine pronoun several times, which refutes counsel's contention that he did not know whether Juror B was gay.⁵⁴

41. *Id.* at 476.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 477.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

Next, there is no logical basis for the claim that because Juror B was stricken first, he could not have been stricken for a discriminatory reason.⁵⁵ Because GSK proved a prima facie case and Abbott provided no nondiscriminatory purpose for striking Juror B, the court determined that the totality of circumstances indicated a *Batson* violation and that Juror B was stricken due to his sexual orientation⁵⁶.

Once the court determined that Juror B was stricken due to sexual orientation, the court next analyzed whether *Batson* applies to sexual orientation discrimination.⁵⁷ Using reasoning from *J.E.B.*, the court determined that the question of whether *Batson* can be applied to sexual orientation centers on whether sexual orientation discrimination inquiries are subject to heightened scrutiny.⁵⁸ In *J.E.B.*, the court held that if a group is subject to rational basis review, parties may exercise preemptory challenges against jurors of that group without being subject to a *Batson* analysis.⁵⁹ It follows, the court reasoned, that if a group is subject to heightened scrutiny, the juror strike is subject to a *Batson* analysis.⁶⁰

The court in the noted case determined that *Batson* applies to sexual orientation by advancing the position that *Windsor*, the controlling Supreme Court precedent on sexual orientation equal protection claims, utilizes heightened scrutiny.⁶¹ Although the Court in *Windsor* does not explicitly state the level of scrutiny used to strike down DOMA under equal protection, the court's analysis of *Windsor* shows that heightened scrutiny was used.⁶² The court in the noted case uses its interpretation of *Windsor* to apply heightened scrutiny to the analysis the court in *Witt* performed to determine that *Lawrence* applied heightened scrutiny.⁶³ The court in *Witt* held that, because *Lawrence* applied heightened scrutiny to strike down Texas' sodomy laws, heightened scrutiny was controlling.⁶⁴ Similar to the court in the noted case, which interpreted *Windsor* as having applied heightened scrutiny without explicitly naming the level of scrutiny used, the court in *Witt* interpreted *Lawrence* as having applied heightened scrutiny even though the court in *Lawrence* did not state its own level of scrutiny.⁶⁵ The court in the noted case observed that the

55. *Id.*

56. *Id.* at 479.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 480.

61. *Id.* at 481.

62. *Id.*

63. *Id.* at 480.

64. *Id.*

65. *Id.*

court in *Witt*, using a three-part analysis, came to this conclusion: (1) “*Lawrence* did not consider the possible post-hoc rationalizations for the law,” (2) *Lawrence* required a that a legitimate state interest be advanced to justify the harm that the Texas sodomy law inflicted, and (3) all the cases that *Lawrence* relied upon in its decision applied heightened scrutiny.⁶⁶ Through these reasons, the court in *Witt* came to the conclusion that *Lawrence* applied heightened scrutiny in striking down the Texas sodomy law.⁶⁷ Through this three-part reasoning, the court in the noted case determines that heightened scrutiny is appropriate under *Windsor*.⁶⁸

First, the court in the noted case finds it significant that *Windsor* did not look at possible post hoc rationalizations for the strike.⁶⁹ Looking to possible post hoc rationalizations rather than the state’s actual purpose is a rational basis requirement because if any conceivable rational purpose can be purported for the law’s making, the law stands.⁷⁰ Under heightened scrutiny, however, the court must look at the law’s actual purposes.⁷¹ According to the court in the noted case, *Windsor* examined the actual purpose of the law by looking at the House Report and considering Congress’s actual purpose—protecting marriage from the immorality of homosexuality—rather than relying on the post hoc reasons for DOMA’s enactment advanced by the Bipartisan Legal Advisory Group in their Supreme Court brief.⁷² The fact that the Court in *Windsor* looked to the actual purpose of the law rather than post hoc rationalizations indicates that the Court exercised heightened scrutiny.⁷³

Next, the court in the noted case found that the Court in *Windsor* relied on legitimate state interest: the standard traditionally used when a case is being analyzed under heightened scrutiny.⁷⁴ Similar to *Lawrence*, where the Court required that a legitimate state interest be advanced to justify the harm of Texas’ sodomy law, the Court in *Windsor* required that Congress’s purpose in enacting DOMA justify the disparate treatment of homosexuals.⁷⁵ The “legitimate state interest standard” used in *Windsor* provides further evidence that heightened scrutiny was used.⁷⁶

66. *Id.* at 480-81.

67. *Id.* at 480.

68. *Id.* at 481.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 481-82.

73. *Id.* at 482.

74. *Id.*

75. *Id.*

76. *Id.*

The court in the noted case admits that the final factor—whether the cases that *Windsor* cited relied on strict scrutiny or rational basis review—cuts both ways in terms of providing evidence that *Windsor* applied heightened scrutiny.⁷⁷ The court in the noted case states that because there are both rational basis and heightened scrutiny cases cited in *Windsor*, this third factor does not decisively support heightened scrutiny.⁷⁸ The court also notes, however, that the final *Witt* factor is the least important and the fact that there are two heightened scrutiny cases and only one rational basis case “leans in favor” of heightened scrutiny.⁷⁹ Even without clear evidence on the third factor, the court in the noted case states that the first two factors strongly suggest that *Windsor* is a heightened scrutiny case and decides to apply *Windsor* as such.⁸⁰ The court then uses this finding to support the contention that *Batson* must apply to sexual orientation because *J.E.B.* clearly states that *Batson* applies to cases where heightened scrutiny is followed.⁸¹ Because *Batson* applies to sexual orientation and because the preemptory strike of Juror B was made due to discrimination based on his sexual orientation, the strike was impermissible under *Batson*.⁸²

Abbott puts forth two defenses, both of which the court rejects. First, Abbott theorizes that applying *Batson* to sexual orientation would deprive jurors of their privacy.⁸³ The court rejects this argument, stating that courts can easily safeguard against privacy violations. Moreover, because *Batson* only applies once a juror’s sexual orientation is revealed, it does not mandate that jurors reveal their sexual orientation.⁸⁴ Next, the court rejects the defendant’s contention that the strike of Juror B constituted a “harmless error.”⁸⁵ The court in the noted case states that it is a well-established principle that harmless error review does not apply to *Batson* violations because it is impossible to determine whether a jury verdict would have been different if a jury was constitutionally chosen and because *Batson* violations both personally harm the stricken juror and the integrity of a trial.⁸⁶

77. *Id.* at 483.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 484.

82. *Id.*

83. *Id.* at 486-87.

84. *Id.* at 487.

85. *Id.*

86. *Id.*

IV. ANALYSIS

Although the decision in the noted case overrules prior Ninth Circuit jurisprudence advising that sexual orientation equal protection claims be analyzed under rational basis review, the decision in the noted case is consistent with other circuits' interpretation of *Windsor*. Post-*Windsor*, many circuits have strayed away from rational basis review in sexual orientation equal protection claims. For example, the United States Court of Appeals for the Fourth Circuit in *Bostic v. Shaffer* applied strict scrutiny in its holding that Virginia statutes and constitutional provisions banning same sex marriage violate equal protection.⁸⁷ The Tenth Circuit in *Bishop v. Smith* similarly applied strict scrutiny to strike down an Oklahoma constitutional amendment prohibiting same sex marriage.⁸⁸ Further, the Supreme Court recently declined to grant certiorari on these and other appellate court sexual-orientation equal protection cases, indicating its endorsement of the usage of higher levels of scrutiny.⁸⁹

The noted case also properly discounts the defendant's questionable arguments against applying *Batson* to sexual orientation. For example, the defendant argued that applying *Batson* to sexual orientation discrimination in *voir dire* would deprive homosexuals of their privacy.⁹⁰ The court explained that the holding in no way mandates that individuals divulge their sexual orientation in *voir dire*.⁹¹ The first aspect of the *Batson* test requires that the movant make a prima facie case for intentional discrimination, and the first step in proving a prima facie case is to show that the juror is part of a cognizable group.⁹² On the facts of the noted case, the movant easily proved that Juror B was part of a cognizable group by simply reviewing the juror's own voluntary statements.⁹³ Juror B spoke of his male partner several times and later used masculine pronouns to describe said partner.⁹⁴ In considering a different situation in which a juror wished to conceal his homosexuality, a juror could just as easily decline to use masculine pronouns or abstain from referring to a male partner during *voir dire*. If a juror did decline to

87. *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014).

88. *Bishop v. Smith*, 760 F.3d 1070, 1079 (10th Cir. 2014).

89. Amy Howe, *Today's Orders: Same-Sex Marriage Petitions Denied*, SCOTUSBLOG (Oct. 6, 2014, 10:41 AM), <http://www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitins-denied/>.

90. *Smithkline Beecham Corp.*, 740 F.3d at 486-87.

91. *Id.* at 487.

92. *Id.* at 476.

93. *Id.* at 477.

94. *Id.*

divulge his sexual preference, it follows that the movant would have difficulty proving that the juror was part of a cognizable group. Therefore, the movant would be unable to prove a prima facie case of intentional discrimination. Without the ability to satisfy this pivotal first step in a *Batson* analysis, it is difficult to conceive of a *Batson* action brought based on sexual orientation discrimination against a juror who actively seeks to keep his sexual orientation private. The court in the noted case also notes that courts have the opportunity to employ safeguards to prevent infringement onto juror privacy.⁹⁵

Even given the possibility that a juror's sexual orientation might be revealed by a *Batson* claim, the public policy implications of allowing jurors to be stricken based on sexual orientation far outweighs the potential for harm. Allowing a juror to be stricken based on sexual orientation hurts not only the excluded group but also adversely affects the judicial system and society as a whole.

Most obviously, allowing a juror to be stricken based on his sexual orientation sends the message to the juror that the court negatively views him based on his homosexuality, which is degrading and harmful to his personal sense of dignity.⁹⁶ Further, the strike is harmful to homosexuals as a group, who will properly view the court's actions as endorsing the idea that homosexuality is indicative of an inability to serve competently as a juror, which is patently untrue.⁹⁷ Perhaps even more harmful, permitting jury strikes based on sexual orientation would deny homosexuals the chance to serve on a jury: a fundamental right in our democracy. Allowing juror strikes based on sexual orientation would harm homosexuals by depriving them of both opportunity and personal dignity.⁹⁸

Further, allowing juror strikes based on immutable traits that have no relationship to a person's ability to contribute to society devalues the court. A juror strike based on inaccurate stereotypes of homosexuals has the propensity to be seen as court sponsorship of harmful stereotypes.⁹⁹ Rational members of society, then, would have little faith in a court system that allows action based on discrimination. If the court were to allow juror strikes based on homosexuality, this would undermine public

95. *Id.* at 487.

96. Brief for Lambda Legal et al. as Amici Curiae Supporting Plaintiff-Appellee at 8, *Smithkline Beecham Corp.*, 740 F.3d 471 (No. 4:07-CV-05702).

97. *Id.* at 16.

98. *Smithkline Beecham Corp.*, 740 F.3d at 484.

99. *Id.*

perception of the court's ability to make rationally sound and wise judgments.

Finally, allowing juror strikes based on sexual orientation harms society by perpetuating untrue stereotypes and furthering a history of government-sanctioned discrimination of homosexuals. The court in the noted case expounds on the harmful stereotypes that allowing this practice might promulgate.¹⁰⁰ As the court in the noted case explains, although homosexuals have not been excluded from juries per se, past government action has sent the clear message that homosexuality is a trait worthy of government exclusion.¹⁰¹ The court in the noted case mentions that homosexuals face a history of firings from federal employment, revocations of professional licenses, and denials of immigration admittances as a result of their homosexuality.¹⁰² The court in the noted case makes its position clear: these past discriminatory actions are “deplorable.”¹⁰³ Thus, *Batson* should apply to sexual orientation *voir dire* discrimination, because permitting a juror strike like the one in the noted case might continue to send the false message that homosexuals are not able to be fair and competent on juries and that they deserve to be excised from aspects of society.¹⁰⁴ The court in the noted case is appropriately concerned with dispelling stereotypes and ensuring that gays and lesbians receive equal protection in their right to participate on a jury—a right “of great import to the community [and] the nation.”¹⁰⁵

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100. *Id.* at 486.

101. *Id.* at 484.

102. *Id.*

103. *Id.* at 485.

104. *Id.*

105. *Id.*

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