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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES
October Term 2014

Docket No. 2014-01

BOLTON CHEMISTS CORPORATION and WALDER MEDICAL SUPPLY, GMBH,
Petitioners,

v.

STARKE PHARMACEUTICALS, LTD.,
Respondent.

Factual History

I. History of the HIV/AIDS Crisis

HIV[1]/AIDS[2] emerged in the United States in 1981. That year, the Centers for Disease Control (CDC) published a report of several young men in Los Angeles who, though otherwise healthy, had suddenly developed an aggressive form of cancer. The report mystified the medical community. Yet, within a year, 100 more U.S. cases of the as-yet-unnamed illness emerged. In 1982, the CDC reported a historical total of 771 cases and 618 deaths, and named the syndrome AIDS. By 1990, there were over 160,000 confirmed AIDS cases in the United States and more than 120,000 confirmed AIDS-related deaths. By 2000, those totals exceeded 774,000 confirmed cases and 448,000 related deaths.

Since then, the rate of new infections and AIDS-related deaths in the United States has slowed, thanks to robust awareness campaigns and aggressive treatment options. But HIV/AIDS remains incurable, and it continues to claim thousands of lives in the United States each year. To date, nearly 600,000 Americans are believed to have died from AIDS-related complications, and the CDC estimates that well over 1,000,000 Americans are HIV positive.

II. STARKE PHARMACEUTICALS LTD. AND RX SANSA

Starke Pharmaceuticals Ltd. ("Starke Pharma") is a boutique pharmaceutical company that develops and sells drugs for the treatment of HIV/AIDS. Starke Pharma was one of the first pharmaceutical research laboratories to commit significant resources to HIV/AIDS research, and it remains the only U.S. pharmaceutical company focused solely on HIV/AIDS-related research and drug development. Starke Pharma was founded in 1982 by a small group of medical research scientists concerned with the then-emerging AIDS pandemic. Starke Pharma is

[1] Human Immunodeficiency Syndrome.
[2] Acquired Immunodeficiency Syndrome.

incorporated in the state of North Westeros, United States, and has its principal place of business in Winterfallen, North Westeros.

In the mid-1980s, the search for a cure for AIDS dominated the public consciousness and made Starke Pharma a household name. The company developed several of the first promising HIV/AIDS treatments. Starke Pharma is credited with the milestone discovery that HIV/AIDS is most responsive to calibrated combinations of drugs, called cocktails. Cocktails must be formulated individually for each patient. For years, cocktails were simply combinations of pills, with the number and combination of pills varying for each patient. Each cocktail dose could comprise many pills, which imposed burdensome and sometimes problematic dosage management responsibilities on patients and caregivers. And because each individual drug in a patient's cocktail was packaged and administered separately, patients were required to obtain insurance coverage for each individual drug in their cocktail.

In 1989, Starke Pharma created a revolutionary drug called Rx Sansa ("Sansa"), a single-pill made-to-order cocktail. Sansa is composed of a fixed set of passive ingredients, a stabilizing agent, and three active, synthetic drugs: Drogonox, Rhaegapan, and Viseriol. Sansa pills are customized for each patient using a ratio of the three active ingredients found to be most effective for that individual.

Starke Pharma focuses primarily on research and development and has limited manufacturing capacity. Starke therefore outsources the commercial manufacturing of Sansa. Each of the key synthetics ingredients is made by a different facility. Drogonox is made by Targeron Chemical, Ltd. ("Targeron Chemical") in Japan. Rhaegapan is made by Tully Medical Manufacturing Company, Inc. ("Tully Medical") in Canada. And Viseriol, which comprises 40% – 50% of every Sansa cocktail, is manufactured by two separate facilities: Bolton Chemists

Corporation ("Bolton Chemists") in South Korea and Walder Medical Supply, GmbH ("Walder Medical") in Germany. The individual ingredients are delivered to a fifth facility, Tyrell Manufacturing AB ("Tyrell Manufacturing") in Sweden, where they are packaged into the custom pills for each Sansa patient.

III. PRODUCTION AND PROFITABILITY OF RX SANSA

Starke Pharma secured patents on each of the three active ingredients in Sansa as well as on the process used to combine the ingredients into a shelf-stable pill (collectively, the "Sansa Patents"). Starke Pharma applied for the Sansa Patents in 1989, the year Sansa was released for sale. The Sansa Patents issued in 1990. Starke maintained the Sansa Patents until the end of their 20-year term in 2009.

Typically, a pharmaceutical company prices a patented drug at the maximum price the market will bear in an attempt to recover the often-astronomical research and development costs before competing generic drugs enter the market. Once patent protection expires, the company sharply reduces the price in an attempt to compete directly with emerging generic alternatives. While this price cut often leads to the appearance of vanishing profits, a company that keeps its name-brand drug competitive with generic versions can maintain a steady, if reduced, profit for as long as the drug remains relevant to the market.

With Sansa, however, Starke Pharma pursued a different strategy. Rather than extract the maximum price during the patent period, Starke Pharma decided to maximize market penetration by pricing Sansa somewhat lower than the estimated maximum market price, relying on increased sales volume to compensate for reduced profit per sale. Starke Pharma reasoned that the increased market penetration gained during the patent term would create stronger brand

recognition and allow Sansa ultimately to remain competitive with generic alternatives even without drastically cutting its prices.

According to Starke Pharma project documents, the Sansa sales strategy was projected to yield sufficient profits during the patent term to allow Starke Pharma to cut the price of Sansa up to 10% in each of the first two years after the patent term. The company believed that these price cuts would be sufficient to keep Sansa within 110% of the price of competing generics. Early market research indicated that customers would be willing to pay a 10% premium for a brand name drug that had attained a certain degree of market recognition.

Sales records reveal that Starke Pharma's strategy was not entirely successful. While the lower price of Sansa did lead to a modest increase in sales during the patent term, the increased sales were insufficient to recover the profits Sansa was projected to make under a maximum-market-price sales model. As the end of the patent term approached, Starke Pharma predicted that it could reduce the price of Sansa only 5% in the first two years after the patent term and still remain profitable.

IV. PATENT EXPIRATION AND COMPETING GENERICS

Immediately upon expiration of the Sansa Patents in 2009, two generic versions, Rx Aryalite and Rx Rickontin ("Aryalite" and "Rickontin," respectively; collectively, the "Generics"), were released to the market. The Generics entered the market at 80% of Sansa's market price.

As planned, Starke Pharma prepared to lower its pricing 5% in the first year. But before it could do so, the price of Viseriol, the primary active ingredient in all Sansa prescriptions, suddenly spiked. Due to the significant increase in the price of its primary ingredient, Starke Pharma determined that it could not lower the price of Sansa in the first year after the patent

term, allowing the Generics to sell at 80% of the price of Sansa for the first year. In the second year, Starke Pharma reduced the price of Sansa 5% to bring it within 115% of the price of the Generics.

By the end of 2009, the Generics constituted 30% of all HIV/AIDS cocktails sold in the United States. By the end of 2010, the Generics had increased their market share to 46%.

V. INVESTIGATION AND ALLEGATIONS OF COLLUSION

Upon investigation of its supply chain, Starke Pharma discovered evidence of price fixing between its suppliers of Viseriol. For years, Bolton Chemists and Walder Medical had competed for the larger share of the Starke Pharma contract for Viseriol. Starke Pharma would evaluate both companies' prices and performance annually and renegotiate its contracts accordingly.

Starke Pharma's investigation, however, revealed that the companies' pricing in recent months had been consistently identical and rising. Starke Pharma learned that high-level leaders of both companies had attended a trade conference in St. Lucia in 2008. It reasoned that those executives had discussed their sales strategies and agreed to match each others' Viseriol prices and then gradually increase the price in lock step.

The Generics were unaffected by Bolton Chemists' and Walder Medical's pricing for Viseriol because the makers of the Generics manufacture their own Viseriol in-house. The extremely high cost of research and development leads most brand-name pharmaceutical companies, including Starke Pharma, to focus on research and development and outsource manufacturing. Makers of generics, on the other hand, circumvent the research and development process almost entirely and are therefore free to focus on large-scale, fully-integrated manufacturing facilities that create production efficiencies and protect against supply-chain instability.

VI. DISTRICT COURT PROCEEDINGS

In January 2010, Starke Pharma sued Bolton Chemists and Walder Medical in the Federal District Court for the District of North Westeros. Starke Pharma alleged that the suppliers' anticompetitive conduct violated the Sherman Act. After protracted discovery, the case was set for jury trial in May 2012.

A jury of 10 jurors was selected from a 20-member venire. *Voir dire* questioning was led by the judge, although counsel for each party was given an opportunity to pose additional questions to each panel member. During questioning of a member of the venire identified as Panel Member #10, the following exchange occurred:

COURT:	Panel Member #10, do you have any hobbies?
PANEL MEMBER #10:	Sure.
COURT:	Tell us about them.
PANEL MEMBER #10:	I love to sing. I sing in a church choir and in the Winterfallen Gay Men's Chorus.
	. . .
COURT:	Do you know anyone who has contracted HIV/AIDS?
PANEL MEMBER #10:	Not personally. But I remember the '80s, sitting in the bar and listening to my friends talk about people they had lost to the AIDS. I didn't lose anyone close to me—to AIDS, I mean. But during the '80s and '90s, familiar faces would disappear from the neighborhood, and everyone sort of knew why.
	. . .
COURT:	Have you tested HIV positive?
PANEL MEMBER #10:	No.
COURT:	Do you currently take, or have you ever taken, a drug manufactured by the Plaintiff in this case?

PANEL MEMBER #10: No.

COURT: If you are selected to serve on this jury, do you believe that you would be impartial and would decide this case based on my instructions and the evidence admitted at trial?

PANEL MEMBER #10: Yes, ma'am.

Neither the Court nor counsel asked Panel Member #10 to disclose his sexual orientation. The above excerpt is the entirety of the relevant discussion with Panel Member #10. At the close of questioning, defense counsel exercised a peremptory strike to remove Panel Member #10.

Plaintiff's counsel immediately asserted a *Batson* objection:

PLAINTIFF: Judge, the Defense is clearly discriminating against #10 on the basis of his sexuality.

COURT: How so?

PLAINTIFF: #10 is gay, or at least his responses lead us to understand that he is gay. And I think the Defense agrees. They want him off the jury because of the nature of this case and because they assume, his answers to your questions about bias notwithstanding, that he cannot be objective. That's discrimination, and it's unconstitutional.

COURT: [To Defense] What do you say?

DEFENSE: We're not striking #10 because we think he's gay. We don't know, first off, what his sexual orientation might be. He wasn't asked, and he didn't say.

PLAINTIFF: That's fine, your Honor, but the juror doesn't need to announce his sexuality. His answers reveal it implicitly. And Defense counsel doesn't need to admit the purpose of their strike for us to infer the real motive.

DEFENSE: #10's answers also reveal a non-discriminatory reason for the strike, Judge. He admitted to having extensive exposure to the ravages of HIV/AIDS in his community. It's eminently reasonable to wonder whether that sort of life experience might influence his deliberations. That's proper grounds for a peremptory strike. My colleague is reading too much into this one strike; she hasn't pointed to any other supposedly gay jurors that we've tried to strike.

PLAINTIFF: Yes, because #10 is the only panelist whose answers plainly reveal his sexual orientation. You've eliminated the only juror we know or have reason to believe is gay.

COURT: Alright. I hear you. I think Defendant has a reasonable concern about #10's possible bias, so I'm overruling the objection to the Defense's strike of #10. Let's move on.

After discussions of other matters, a jury was empanelled, and the case proceeded through trial. At the close of evidence, the court provided counsel with its anticipated charge to the jury. The charge included the following instruction:

> The plaintiff has alleged that defendants, which are foreign companies, engaged in anticompetitive conduct outside the United States in violation of U.S. antitrust law. Defendants' conduct occurred outside the United States. Therefore, before deciding whether defendants' conduct violated U.S. antitrust law, you must first decide whether U.S. antitrust law applies here. To be governed by U.S. antitrust law, foreign anticompetitive behavior must have a "direct, substantial, and reasonably foreseeable" effect on commerce in the United States. That means that the effect in the United States must follow as an immediate consequence of the defendants' activity.

Plaintiff's counsel filed a written objection to the above portion of the jury charge on the grounds that it articulated an improperly narrow definition of the standard for extraterritorial application of the Sherman Act, as governed by the Foreign Trade Antitrust Improvements Act. The court summarily denied the objection. The jury was so instructed, closing arguments were delivered, and the jury was sent to deliberate. Two hours later, the jury returned a verdict holding defendants not liable.

Starke Pharma's counsel timely moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 and, alternatively, for a new trial under Federal Rule of Civil Procedure 59 on the grounds that (1) the court erred in allowing the exercise of a peremptory strike on the basis of sexual orientation and (2) the court erred in instructing the jury that defendants' conduct could violate U.S antitrust law only if it had immediate effects in the United States. On November 9, 2012, the District Court denied

the motion. Starke Pharma appealed to the United States Court of Appeals for the Twelfth Circuit, which reversed the lower court's decision on August 13, 2013. Defendants petitioned the United States Supreme Court for *certiorari*, which petition was granted.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH WESTEROS

Docket No. 12-113310

STARKE PHARMACEUTICALS, LTD.,
Plaintiff,

v.

BOLTON CHEMISTS CORPORATION and WALDER MEDICAL SUPPLY, GMBH,
Defendants.

MEMORANDUM AND ORDER

BRENNAN, J.

This matter comes before this Court on Plaintiff's Motion for Judgment as a Matter of Law pursuant to FRCP 50 and in the alternative, a Motion for a New Trial pursuant to FRCP 59. Upon consideration of the submissions of the parties and the relevant law, Plaintiff's motion is DENIED.

RELEVANT BACKGROUND

Starke Pharmaceuticals, Ltd. ("Starke Pharma") manufactures RX Sansa ("Sansa"), a well-known medical "cocktail" for the treatment of HIV/AIDS. Starke Pharma, a U.S. corporation, outsources the manufacture of various components of its cocktail, as well as the ultimate assembly of the pills themselves, to numerous laboratories and manufacturers around the world. Two of those laboratories, Bolton Chemists Corporation ("Bolton Chem") and Walder Medical Supply, GmbH ("Walder Med"), are jointly responsible for supplying Viseriol. Viseriol is the largest component of the Sansa cocktail and makes up 40% – 50% of all Sansa pills.

The defendants took advantage of their virtual monopoly on Starke Pharma's supply chain to fix their prices for Viseriol. This price manipulation prevented Starke Pharma from reducing the price of Sansa sufficiently to keep it competitive with various generic options, thus costing Starke Pharma a substantial share of the U.S. market for HIV/AIDS cocktails.

Or so Starke Pharma alleges. A jury disagreed and returned a verdict in favor of defendants.

Starke Pharma now seeks to overturn that verdict on two grounds. First, it alleges that this court improperly allowed Defendants to strike a prospective juror on the basis of that juror's perceived sexual orientation. Specifically, Plaintiff alleges that Panel Member #10's responses to *voir dire* questioning strongly implied that he was homosexual and that Defendants sought to exclude him from the jury on that basis in violation of the Equal Protection Clause.

Second, Starke Pharma contends that this Court improperly instructed the jury on the test for extraterritorial application of U.S. antitrust law. Plaintiff argues that this Court's "immediate consequence" test was too strict and that U.S. antitrust law reaches foreign anticompetitive conduct as long as it has a reasonably foreseeable causal nexus with the injurious effects in the United States.

ISSUE 1: APPLICATION OF EQUAL PROTECTION TO PEREMPTORY STRIKES ON THE BASIS OF SEXUAL ORIENTATION

We turn first to Plaintiff's *Batson* challenge against the peremptory strike of Panel Member #10. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete*, 500 U.S. 614 (1991).

In making a *Batson* challenge, the movant bears the burden of making a *prima facie* case of intentional discrimination. *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2009). Once a *prima facie* case is established, the burden shifts to the non-movant to offer a neutral reason for

the peremptory strike. *Id.* Only after those two burdens are met may the court determine whether the strike was impermissibly discriminatory. *Id.* The court must conduct this analysis under the Equal Protection Clause of the United States Constitution. *Id.*; *see also Batson*, 476 U.S. at 89 (holding that the exercise of peremptory strikes is governed by the Equal Protection Clause).

I. *Prima Facie* Case and Articulation of Non-Discriminatory Basis

To establish a *prima facie* case under *Batson*, the movant must produce evidence that 1) the prospective juror is a member of a cognizable group; 2) counsel used a peremptory strike against the individual; and 3) an inference that the strike was motivated by the characteristic in question can be made by the totality of the circumstances. *See, e.g.*, *Kesser v. Cambra*, 465 F.3d 351.

Plaintiff has carried its *prima facie* burden. First, the record establishes that Panel Member #10 was a member of a cognizable group. He was—or at least Defendants reasonably believed him to be—homosexual. It seems to this Court to be beyond dispute that homosexuals are a "cognizable group" for purposes of *Batson*. Panel Member #10 stated that he sings in a gay men's chorus. In responding to a subsequent question, Panel Member #10 indicated that he socialized in bars where many people knew individuals diagnosed with HIV/AIDS. Although Panel Member #10 was never asked and never directly stated his sexual orientation, one may reasonably infer his orientation from his responses. Second, it is undisputed that Defendants exercised a peremptory strike against Panel Member #10. Third, the facts indicate at least the possibility that Defendants exercised this strike based on their perception of Panel Member #10's sexual orientation and their resulting concern that Panel Member #10 would be predisposed toward Plaintiff's case.

Defendants, for their part, have asserted a nondiscriminatory basis for striking Panel Member #10. Defendants contend that Panel Member #10's significant personal contacts with individuals immediately affected by HIV/AIDS raise a credible concern of bias. The question of whether discrimination has occurred under *Batson* is thus ripe for this Court's decision.

II. Existence of Discrimination and Level of Scrutiny

Batson, which prohibited the exercise in criminal cases of peremptory strikes against prospective jurors on account of their race or ethnicity, has since been extended to civil proceedings and to peremptory strikes on the basis of gender. *See Edmonson,* 500 U.S. 614. Plaintiff now seeks to extend *Batson* to hold that Equal Protection also requires the application of heightened scrutiny to peremptory strikes on the basis of sexual orientation.

As in many constitutional analyses, a great deal hangs in the balance of the level of constitutional scrutiny to be applied. This is perhaps even truer in this case. Generally, the application of "rational basis" review does not automatically terminate a constitutional challenge. Here, however, it arguably would do just that. The Supreme Court has held that peremptory challenges may be exercised against jurors in "any group or class of individuals normally subject to 'rational basis' review." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994). Taken at face value, the *J.E.B.* decision suggests that the only way for a peremptory strike to fail rational basis review would be for the striking party to wholly fail to offer any non-discriminatory basis for the strike.

Plaintiff argues that persuasive, if not binding, Equal Protection authority exists for the application of heightened scrutiny to classification based on sexual orientation. Nevertheless, this Court is persuaded that such a holding would in fact be an innovation, and an improper one at that.

The impasse is not the merits of applying heightened scrutiny to peremptory strikes on the basis of sexual orientation—a holding that this Court would find both reasonable and decent. Rather, the issue is that the consequences of Plaintiff's requested relief could reach far beyond the realm of *Batson* challenges. The application of heightened scrutiny in this context surely would be used as precedent for seeking a similar extension of heightened scrutiny in cases related to the recognition of gay marriage. This case, then, should be seen as more than a *Batson* challenge; it becomes a question of whether the Constitution requires States to grant the same rights and protections to same-sex marriages as to heterosexual marriages. That larger question is one of tremendous importance that should not be decided collaterally through the adjudication of a *Batson* challenge in an antitrust suit. The critical determination, therefore, is whether established precedent provides a clear basis for the extension of heightened scrutiny to classifications based on sexual orientation.

Plaintiff argues that sexual orientation already constitutes a suspect or quasi-suspect class and is therefore entitled to heightened judicial scrutiny. Plaintiff points to the Second Circuit's recent decision in *Windsor v. United States*, a case that challenged the constitutionality of the Defense of Marriage Act's ("DOMA") definition of marriage as a union between a man and a woman. 699 F.3d 169, 185 (2d Cir. 2012). There, the Second Circuit held that "homosexuals compose a class that is subject to heightened scrutiny" and that "the class is quasi-suspect." *Id.*[3]

This Court disagrees with that conclusion, which seems against the weight of authority. *See Massachusetts v. Dep't of Health and Human Servs.*, 682 F.3d 1, 9–10 (1st Cir.2012) (applying rational basis review to classification on the basis of sexual orientation); *Price–Cornelison v. Brooks*, 524 F.3d 1103, 1113 n. 9 (10th Cir. 2008) (same); *Scarbrough v. Morgan*

[3] We understand that the Government intends to seek *certiorari* to appeal the Second Circuit's holdings to the United States Supreme Court.

Cnty. Bd. of Educ.,470 F.3d 250, 261 (6th Cir. 2006) (same); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006)(same); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (*en banc*) (same); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.1996) (same); *Steffan v. Perry*, 41 F.3d 677, 684–85 (D.C. Cir. 1994) (same). We also question whether the Second Circuit needed to reach the question of standard of review in order to resolve this case.

And while there certainly was a time when this Court would easily have found homosexuals to be a suspect or quasi-suspect class, such a holding would be more difficult today. Using legislation like DOMA as a lightning rod, homosexuals have made significant strides in recent years toward demanding public recognition and equal rights. Today, homosexuals have a powerful voice in politics, society, and popular culture. This is not to suggest that they have attained legal parity with heterosexuals or that they are immune from isolated acts of bigotry. But the same could be said of many numerical minority groups in modern American society, and such minority status does equate to the type of "powerlessness" generally required for the application of heightened scrutiny under equal protection.

Thus, the necessary holding, if not the better one, is that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment." *See Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997).

Having held that rational basis review applies, this court finds no basis to overturn its determination at trial that Defendants were within their right to strike Panel Member #10. Defendants advanced a plausible, if not unassailable, nondiscriminatory basis for the strike.

However colored by his apparent sexual orientation the judgment might have been, it is not unreasonable to wonder whether Panel Member #10's personal contacts with the HIV/AIDS-positive community alone might predispose him to hostility toward Defendants' case. This Court can envision a situation in which a peremptory strike on the basis of sexual orientation would offend even rational basis scrutiny. But where, as here, the underlying litigation is generally acknowledged to be intimately entwined with the interests of the homosexual community and the juror has significant social ties to that community, a rational basis exists for the exercise of a peremptory strike.

ISSUE 2: THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW.

Plaintiff argues that this Court improperly instructed the jury as to the standard for the extraterritorial application of U.S. antitrust law.

I. The Foreign Trade Antitrust Improvements Act

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1. However, the Sherman Act does not apply to any and all foreign anticompetitive conduct. Rather, "the Sherman Act was meant to reach foreign conduct only if it was intended to and did affect United States commerce." *United States v. Aluminum Co. of Am. ("ALCOA")*, 148 F.2d 416, 443 (2d Cir. 1945). This "effects doctrine" articulated by Justice Learned Hand in *Alcoa* was long the standard for determining the Sherman Act's extraterritorial application. But this proved a difficult test to apply. *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 677 (9th Cir. 2004) (discussing the various pre-FTAIA tests devised by the courts for determining whether foreign conduct fell within the purview of the Sherman Act). Hoping to

provide some clarity, Congress passed the Foreign Trade Antitrust Improvements Act ("FTAIA") in 1982. The FTAIA states:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> > (1) such conduct has a direct, substantial, and reasonably foreseeable effect
> >
> > > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> > >
> > > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> >
> > (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 USC § 6(a).

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, the Supreme Court explained that the technical language of the FTAIA removes "all (non-import) activity involving foreign commerce" from the Sherman Act's purview and then returns it to the extent that the activity substantially affects commerce in the United States—that is, that it has a "direct, substantial, and reasonably foreseeable effect." 542 U.S. 155, 162 (2004).

II. Subject-Matter Jurisdiction verses Merits Determination

Because it is the duty of the Court to ensure jurisdiction regardless of whether it is contested, *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010), we pause briefly to confirm that the analysis of the Sherman Act's extraterritorial application goes to the

merits of the case and is not a question of subject-matter jurisdiction. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851 (7th Cir. 2012) (analyzing whether the FTAIA "affects the subject-matter jurisdiction of the district court or if, on the other hand, it relates to the scope of coverage of the antitrust laws"). In *Arbaugh v. Y & H Corp.* and its progeny, the Supreme Court articulated a bright line rule that a threshold limitation on a statute's scope is "nonjurisdictional in character" unless Congress "clearly states" to the contrary. 546 U.S. 500, 515-16 (2006). The FTAIA contains no such express jurisdictional language.

Further, the FTAIA is an element of a Sherman Act claim that requires a court to determine what conduct is prohibited. To understand what conduct the FTAIA reaches, we must understand what conduct it prohibits, which goes to the merits of a claim. In the context of the Securities Exchange Act, the Supreme Court has reasoned that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question" and not a question of subject-matter jurisdiction, which, "by contrast, refers to a tribunal's power to hear a case." *See Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010).

III. A "Direct" Effect on Commerce Must Follow As An "Immediate Consequence" of the Anticompetitive Activity.

The Circuits are split as to what conduct amounts to "direct, substantial, and reasonably foreseeable" under the FTAIA. The Seventh Circuit has held that the FTAIA requires only a "reasonably probable causal nexus." *Minn-Chem*, 683 F.3d at 857. In contrast, the Ninth Circuit has for some time held that the effect of foreign anticompetitive conduct must follow "as an immediate consequence." *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 677 (9th Cir. 2004). As further discussed below, we adopt the Ninth Circuit's "immediate consequence" analysis.

The Ninth Circuit defined "direct" effect on U.S. commerce as one that "follows as an immediate consequence of the defendant[s'] activity." *Id.* at 680. In arriving at this definition,

the Ninth Circuit relied on the Supreme Court's interpretation of similar text in the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1605(a)(2) (prohibiting sovereign immunity "in any case . . . in which the action is based upon a commercial activity . . . outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a *direct* effect in the United States" (emphasis added)). In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." 504 US 607, 618 (1992).[4]

The Supreme Court's interpretation of "direct" in *Weltover* is especially persuasive given that (1) both the FSIA and FTAIA address the directness of commercial conduct and (2) both statutes employ a "directness" requirement in the context of a commercial exception to a general rule removing conduct from the purview of otherwise applicable law.

The jury's application of the "immediate consequence" test has reached a reasonable result in this case. Although the trial record contains evidence sufficient to establish the basic allegations of price fixing, it is decidedly ambiguous as to what effect that anticompetitive conduct had in the United States. The anticompetitive conduct related to only one component of a complex and costly product, the price of which appears to depend on a complex, global supply chain. Further, record evidence regarding Plaintiff's unusual pricing strategy for Sansa raises legitimate questions as to whether Sansa's alleged inability to compete with generic alternatives was predestined by Plaintiff's misjudgment of the market.

IV. The Alternative Definition of "Directness" Is Difficult To Apply and Leads to Over-Application of U.S. Law.

The FTAIA sets out a three-prong analysis for determining whether conduct lies within the Sherman Act – directness, substantiality, and reasonable foreseeability. *LSL*

[4] The Ninth Circuit also referenced the *Webster's Third New International Dictionary* definition of "direct" as proceeding from one point to another in time or space without deviation or interruption.

Biotechnologies, 379 F.3d at 678-79. An issue therefore arises as to how to define these terms in their context.

Where the Ninth Circuit adopted the Supreme Court's approach of defining "direct" independently of the words around it, the Seventh Circuit has argued that "direct" must be read together with "substantial" and "reasonably foreseeable" to arrive at a definition that embraces all three concepts. *Minn-Chem*, 683 F.3d at 857. It is significant that the Supreme Court in *Weltover* arrived at its interpretation of "direct effect" in the FSIA only after refusing to import from the statute's legislative history any notion that an effect is 'direct' only if it is also both 'substantial' and 'foreseeable.'" The addition by Congress of "substantial" and "reasonably foreseeable" in the subsequent FTAIA legislation requires a collective interpretation. *Id*. This Court is unconvinced that the inclusion in a statute of multiple, independent criteria indicates a congressional intent to divest each word of its independent meaning and instead attempt to assign to them a collective definition.

No more persuasive is the Seventh Circuit's attempt to use the *Alcoa* opinion to analogize to the tort law concepts of causation and remoteness. *See Minn-Chem*, 683 F.3d at 857 (arguing that within the framework of the "reasonably proximate nexus" test, the word "'direct' addresses the classic concern about remoteness"). The analogy to *Alcoa* is unconvincing, since *Alcoa* addressed only the concept of "substantial effect," and the *Alcoa* court was not tasked with incorporating concepts of directness and reasonable foreseeability. *Hartford Fire Insurance Co v. California*, 509 U.S. 764, 796 (1993).

Moreover, the Seventh Circuit's approach does nothing to increase the clarity and predictability of the FTAIA in application. As the Ninth Circuit wisely noted, "[c]larity is not achieved by employing three modifiers ('direct,' 'substantial,' and 'reasonably foreseeable') as

the standard for the required effect of the challenged conduct and then telling business that . . . [not all] modifier[s] [are] relevant to Sherman Act liability." *LSL Biotechnologies*, 379 F.3d at 679.

By substituting a new vague test for the vague test articulated in *Alcoa*, the Seventh Circuit would undo the very clarity and predictability that the FTAIA was intended to provide. Questions of reasonable proximity are often difficult enough to unravel in relatively simple tort cases. In a straightforward antitrust case—if one exists—this task might prove manageable. But the difficulty of the task surely would be multiplied many times over in a complex, international antitrust case. Here, for example, how is a jury (or a judge) to determine the "reasonably foreseeable causal nexus" between the pricing of a single foreign component and domestic sales, given the vagaries of other component pricing, domestic demand fluctuations, import/export issues, long-term corporate marketing strategies, and the rest? It seems a herculean task to accomplish once, let alone with sufficient consistency as to allow manufacturers and regulators, foreign and domestic, some measure of predictability.

V. Principles of Prescriptive Comity Require a More Stringent Application of the FTAIA.

There exists a general presumption against the extraterritoriality of U.S. laws. *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting) (basing dissent in part on presumption against extraterritoriality). The presumption against extraterritoriality "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This presumption that legislators and courts defer to the sovereign authority of other nations when drafting, interpreting, and applying American laws is known as prescriptive comity. *Empagran*, 542 U.S. at 164.

Other nations also express concern that the extraterritorial application of U.S. law will interfere with their ability to regulate their own commercial affairs. *Id.* (addressing arguments from Japan, German, and Canada regarding the extraterritorial application of U.S. antitrust law).

The reasonably proximate causal nexus test advocated by the Seventh Circuit would run afoul of these principles by significantly expanding the range of foreign conduct reachable by the Sherman Act. This expanded extraterritoriality would only serve to disrupt the harmonious relationship between the potentially conflicting laws of foreign nations, "a harmony particularly needed in today's highly interdependent commercial world." *Id.* In that highly interdependent commercial world, even routine commercial activity can impact foreign markets. Therefore, it is critical that U.S. laws employ narrow tests for their extraterritorial application.

The more rigorous "immediate consequence" test strikes a better balance between protecting U.S. commerce from anti-competitive conduct and respecting sovereign nations' right to govern commercial affairs within their borders. It is not only narrower and thus less vulnerable to overreaching, but also more predictable in application, allowing foreign regulators to more precisely tailor their efforts to complement, rather than overlap, domestic enforcement actions.

For these reasons, this court affirms its prior holding that an effect is "direct" pursuant to the FTAIA where it follows as an immediate consequence of the alleged conduct.

CONCLUSION

Plaintiff's motion is DENIED in its entirety. SO ORDERED.

Dated: November 9, 2012

/s/ Mary Kate Brennan
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 12-113310

STARKE PHARMACEUTICALS, LTD.,
Plaintiff-Appellant,

v.

BOLTON CHEMISTS CORPORATION and WALDER MEDICAL SUPPLY, GMBH,
***Defendants-Appellees*.**

BEFORE Bizzoco, Brownstein, Diaz, Circuit Judge.

BROWNSTEIN, Circuit Judge.

For the reasons set forth below, the memorandum and order of the District Court is REVERSED, and this case is REMANDED to the District Court for entry of an order consistent with this decision.

BACKGROUND

The facts of this case are comprehensively set forth in the District Court opinion below and in the record on appeal. Familiarity with those facts is presumed, and this opinion references those facts only as necessary to articulate its conclusions.

DISCUSSION

We review *de novo* the propriety of the District Court's application of law in its denial of motions for judgment as a matter of law and motions for a new trial. *See United States v. Collins,* 551 F.3d 914, 919 (9th Cir.2009).

ISSUE 1: Did the District Court Err by Holding that the Exercise of Peremptory Strike on the Basis of a Prospective Juror's Apparent Sexual Orientation Did Not Violate the Equal Protection Clause?

To rule that the peremptory strike at issue here is unconstitutional, we must find that Plaintiff has proven purposeful discrimination. *Cf. U.S. v. Blaylock*, 421 F.3d 758 (8th Cir. 2005) (challenge to peremptory strike rejected despite *prima facie* showing that juror was struck on basis of sexual orientation because counsel articulated class-neutral explanation of concern for liberal education and musician background and perception as a loner). We have little difficulty finding that Plaintiff has established a *prima facie* case of purposeful discrimination. Panel Member #10 is an apparent member of a cognizable group, he was struck, and he was at least arguably struck on the basis of his sexual orientation. We agree with the District Court that Defendants have articulated a nondiscriminatory basis for the strike—purported concern of bias created by actual life experience.

Defendant further seeks to dispel the appearance of discrimination by noting that there is no allegation that it struck other jurors on the basis of sexual orientation. But that claim is not entitled to much weight. Panel Member #10 was the only juror to arguably have identified himself as gay on the record, and we find that the subject matter of the litigation is of consequence to the gay community. *Collins*, 551 F.3d 914, 921, 955.

We find that the record establishes that Defendants struck Panel Member #10 substantially, if not entirely, because they believed that his sexual orientation would deprive him of objectivity in this case. Therefore, we now turn to the fundamental legal question before us: whether peremptory strikes on the basis of sexual orientation are entitled to heightened scrutiny under the Equal Protection Clause. This question is a significant one, because peremptory strikes implicate not only the rights of individuals excluded from jury service but also the rights of defendants to unbiased juries of their peers. *Batson v. Kentucky*, 476 U.S. 79, 79 (1986).

As a matter of federal statutory law, a party may not exercise a peremptory challenge in a constitutionally impermissible manner. *See e.g.*, 28 U.S.C.A. § 1862 (2012). Yet the equal protections of our laws extend beyond statutory language, and they continue to evolve in our *living* Constitution.[5] In *Batson* which involved a black defendant in a state criminal case, the U.S. Supreme Court held that the equal protection clause of the Fourteenth Amendment is violated by a prosecutor's purposefully discriminatory exercise of peremptory challenges to remove from a venire a person of the defendant's own race. Later, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 614 (1991), the Court extended the equal protections of *Batson* to prohibit private litigants in civil cases from using peremptory challenges to exclude jurors on account of race. Similarly, the Court has declared that gender, like race, may not be the sole basis for a peremptory challenge, *i.e.*, on the assumption that prospective jurors will be biased only because of their gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)." However, "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id.* at 143. Thus, if sexual orientation is subject to rational basis review, the lower court's ruling does not require reversal. *See United States v. Santiago-Martinez*, 58 F.3d 422 (9th Cir. 1995).

I. The Appropriate Level Of Constitutional Scrutiny

A. Long-lasting History of Pervasive Discrimination

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Historically, men and women of homosexual orientation have

[5] *See generally* Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining Lawrence v. Texas*, 67 MD. L. REV. 25 (2007).

endured "pernicious and sustained hostility" and "deep-seated prejudice" in, *inter alia*, government employment, health care, military service, domestic partnership or marriage, and parental rights. *See Rowland v. Mad River Local Sch. Dist., Montgomery Cnty., Ohio*, 470 U.S. 1009, 1014, (1985) (Brennan, J., and Marshall, J., dissenting to denial of certiorari). For example, child custody rights of gays and lesbians have received mixed reception in the courts. In some instances, judges have relied upon antiquated and constitutionally inappropriate stereotypes to deny custody to a homosexual parent. *See, e.g.*, *Constant A. v. Paul C.A.*, 344 Pa. Super. 49 (1985) *overruled by*, *M.A.T. v. G.S.T.*, 2010 PA Super 8 (2010). These facts render somewhat puzzling the District Court's conclusion that homosexuals have reached a level of power and acceptance in our culture that they are no longer entitled to particular constitutional protections.

Alas, there is no substantial body of case law that stands against discrimination based on sexual orientation. There is, however, a growing recognition that there is no need to regulate people based upon their sexual orientation. And the history of prejudice, criminalization, and discrimination renders classifications on the basis of sexual orientation inherently suspect and warrants the application of heightened scrutiny. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). This Court finds that homosexuals are entitled to heightened scrutiny under the Equal Protection Clause because they are an identifiable class of persons who have historically been, and who continue to be, subject to discrimination as a class.[6]

B. Peremptory Strikes Implicate a Fundamental Right.

Heightened scrutiny is also appropriate where the action at issue implicates a fundamental right. Jury service is an integral responsibility and privilege of American citizens.

[6] Counsel has informed us that a similar case is pending in the Ninth Circuit. Since the Ninth Circuit's decision would not be binding on this Court, we will proceed without further delay.

"[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Exclusion of any class of persons from participation in this institution ought to be tested for something other than the existence of a mere rational basis.

Similarly, in the First Amendment context, courts have held that classification on the basis of sexual orientation warrants more stringent judicial review. *See, e.g.*, *Fricke v. Lynch*, 491 F. Supp. 381, 388 (D.R.I. 1980) (ruling that higher level of scrutiny than merely whether the government has a "rational basis" is required because of a showing of intrusion upon fundamental First Amendment rights). From threatening to prevent marches and demonstrations to refusing employment, governmental entities have infringed upon the rights of free expression where it involved sexual orientation.[7] This has led to decades of First Amendment-based litigation and, almost consistently, courts have acted to safeguard the right of free expression of sexual minorities. *See generally Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (per curiam) *aff'd by an equally divided court, Bd. of Educ. v. Nat'l Gay Task Force*, 470 U.S. 903 (1985) (restricting the ability of the government to suspend or dismiss teachers for advocating or encouraging homosexual activity); *see also Gay Lib v. Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978). Although the First-Amendment line of cases does not resolve the central question before us, it teaches us that discrimination—and classifications—based on sexual orientation contravene the liberty guarantees of the Constitution.

[7] *See, e.g., Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976), *citing Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (different treatment of speakers by city police triggered equal protection guarantee as well as First Amendment guarantees); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 655 (1st Cir. 1974) (injunction prohibited defendants from restricting GSO's use of university facilities and from treating GSO "differently [from] other University student organizations").

Furthermore, it is axiomatic that one may not enjoy the freedom of expression if one is not free from discrimination in access to regulated public forums. Self-determination is inextricably intertwined with the freedom of self-expression, which underlies participation in our civic and political processes. *See Lawrence v. Texas*, 539 U.S. 558, 588 (2003). This participation, be it via jury service[8] or at the election ballot, is a right implicit in the concept of ordered liberty and is equally guaranteed regardless of one's sexual orientation. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

Moreover, peremptory strikes on the basis of sexual orientation are of constitutional concern because they present dual constitutional risks: (1) they create a negative perception in the struck juror's community about their freedom and right to participate in the regulated public forum of the jury; and (2) they infringe on the litigants' or the accused's right to a jury of their peers.[9] *See United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989) (*Batson* applied to prohibit use by trial counsel of peremptory challenges to excuse court-martial panel members of the same race as the accused). Therefore, this Court finds classifications based on sexual orientation to be inherently suspect.

In 1973, Justice Brennan's plurality opinion expanded recognition of suspect groups with a declaration that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect, and must therefore be subjected to close judicial scrutiny." *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). [H]omosexuals constitute a significant and insular minority of this country's population." *Rowland v. Mad River Local Sch. Dist., Montgomery Cnty., Ohio*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial

[8] *See Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986) (refusing to review prosecutor's use of preemptory challenges to exclude African-Americans from jury).
[9] *Batson*, 476 U.S. at 96 (noting that to establish a prima facie challenge, a defendant "must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race").

of certiorari). In light of the long-lasting history of pervasive discrimination, we fail to see why classifications based on sexual orientation are—constitutionally—unlike classifications based on gender and thus should not be subjected to close judicial scrutiny. A more careful scrutiny is warranted whenever government action appears to be motivated in substantial part by illegitimate motives. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). This court did not find any controlling or persuasive authority that precludes us from extending equal protection of the Constitution to homosexual men and women as a suspect class. In doing so, we are among the first of our sister circuits to apply heightened scrutiny to an equal protection claim arising out of classification based on sexual orientation, albeit we do not write on a blank slate.[10]

While this Circuit may be the first to expressly apply heightened scrutiny to sexual orientation, this novation is evolutionary rather than revolutionary. The District Court ominously characterizes the application of heightened scrutiny to sexual orientation as a leap into the void. We disagree. In fact, the Supreme Court has implicitly applied heightened scrutiny to classifications based on sexual orientation in the contexts of Due Process and Equal Protection. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (J. O'Connor, concurring).

In *Romer v. Evans*, 517 U.S. 620, 632 (1996), the Court invalidated a state constitutional provision that prohibited the state legislature or any local legislature in the state from passing laws that barred discrimination against persons on the basis of their sexual orientation. The constitutional wrong in *Romer* was a state-sanctioned barrier to the political process that was

[10] *See Massachusetts v. Dep't of Health and Human Servs.*, 682 F.3d 1, 9–10 (1st Cir. 2012) (applying rational basis review); *Price–Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir.2008) (same); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (same); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (en banc) (same); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (same); *Steffan v. Perry*, 41 F.3d 677, 684–85 (D.C. Cir. 1994) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same).

imposed on a defined group of persons—homosexual men and women.[11] The Court stated that "the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Id*. at 632. As with other decisions involving actions based upon hostility towards politically unpopular groups, *Romer* is widely understood to apply a less deferential, more rigorous equal protection scrutiny than the articulated rational basis cited in the ruling.[12] *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (recognizing that the Defense of Marriage Act (DOMA) because was motivated by an improper animus or purpose); *Lawrence*, 539 U.S. at 580 ("when a law exhibits such a desire to harm a politically unpopular group[,]" recognizing "a more searching form of rational basis review to strike down such laws under the Equal Protection Clause"). Importantly, the *Romer* Court recognized classification by sexual orientation as suspect.

C. Persuasive, If Not Binding, Equal Protection Precedent Exists for the Application of Heightened Scrutiny to Classifications Based on Sexual Orientation.

Partly on the heels of *Romer*, the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidated a state statute that criminalized sexual relations between persons of the same sex. Justice Kennedy, the author of the *Romer* decision, wrote for the plurality that the state law violated the Due Process Clause of the Fourteenth Amendment. Justice O'Connor concurred only in the judgment of the Court in *Lawrence*; she would have preferred to invalidate the law based on the Equal Protection Clause. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (O'Connor, J., concurring in the judgment), *on remand* 2003 WL 22453791 (Tex.App.2003). Importantly,

[11] We conceptualize this class to encompass lesbian, gay, transgender, and bi-sexual men and women.
[12] *See generally* John F. Niblock, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 154 (1993).

Justice O'Connor did not believe that the Court would have been justified in invalidating this law under the rational basis test. *See id.* at 578–86.

Subsequently, when the Court had an opportunity to apply the Equal Protection Clause to a law that discriminated on the basis of sexual orientation, the majority in effect applied a level of scrutiny that is unquestionably higher than rational basis review. *See United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). The *Windsor* Court did not follow the analytical roadmaps of the tiered levels of scrutiny under equal protection but ruled that the federal statute was invalid, essentially *per se*, because no legitimate purpose can aim to disparage and to injure one's personhood and dignity, which was the effect of DOMA. *See id*. The manner in which the Court reached its ruling, however, is dispositive of the question of the appropriate level of scrutiny in this case—heightened scrutiny. In *Windsor*, the Court evaluated the "essence" of the law, reviewing the legislative history of DOMA. *Windsor*, 133 S.Ct. at 2693. The *Windsor* Court demanded that Congress's purpose "*justify* disparate treatment of the group." *Windsor*, 133 S.Ct. at 2693 (emphasis added). *Windsor* requires a "legitimate purpose" to "overcome[ ]" the "disability" on a "class" of individuals. *Id.* at 2696. Such inquiry is antithetical to rational basis inquiry and is a hallmark of heightened scrutiny. Thus to the extent *Romer* and *Lawrence* left any room for doubt whether classification based on sexual orientation would be scrutinized closely, we find that doubt was resolved by the Court in *Windsor*. *See id. at* 2693. The *Windsor* ruling confirms that level of scrutiny for classifications based on sexual orientation is unquestionably higher than rational basis review.

Having reached the conclusion that classifications based on sexual orientation require heightened judicial scrutiny, we also conclude that *Batson* applies to a classification based on sexual orientation. In *J.E.B.*, reasoning from the actual experience of women being excluded

from jury services based on "individual group stereotypes," the Court extended *Batson* principles to apply to discrimination against women. *J.E.B.*, 511 U.S. at 135–36. Here, the instances of past and continuing phobias, prejudices, and irrational fears of homosexual men and women—often institutionalized and perpetuated throughout our nation's history—need not be recounted. Peremptory strikes on the basis of sexual orientation perpetuate these reprehensible biases.[13] Accordingly, we now extend rigorous equal protections of our laws to homosexual men and women against irrational phobia, pervasive hostility, and suspect motives, by adopting heightened scrutiny of classifications based thereon.

We hold that heightened scrutiny applies to classifications based on sexual orientation. Applying heightened scrutiny to this case makes clear that a *Batson* challenge occurred here. Unlike the District Court, we are unpersuaded by Defendants' supposedly non-discriminatory basis for striking Panel Member #10. Counsel cannot credibly claim to have been "unaware" of Panel Member #10'S sexual orientation. Further, Panel Member #10's responses suggest that his contacts with the HIV/AIDS pandemic were circumstantial and not personal or especially intimate such that there may be a legitimate concern as his objectivity. Furthermore, Panel Member #10 warranted under oath that he could remain objective in this case, and Defendants did not take advantage of their opportunity to further interrogate Panel Member #10 as to the sincerity of these representations. We therefore remand this case for a new trial.

ISSUE 2: Did the District Court Err by Instructing the Jury that Foreign Anticompetitive Conduct Was Governed by the Sherman Act only if the Domestic effect of that Conduct Was an "Immediate Consequence" Thereof?

The FTAIA offers a general rule that all non-import activity involving foreign commerce, with some exceptions, remains outside the scope of the Sherman Act. *F. Hoffmann-La Roche*

[13] *See generally* Todd Brower, *Twelve Angry-and Sometimes Alienated-Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669, 670 (2011).

Ltd v. Empagran SA (Empagran), 542 US 155, 162 (2004). The statute then claws back as exceptions the activity having a "direct, substantial, and reasonably foreseeable effect" on domestic [non-import] trade or commerce. *Id.*

Our circuit court has not yet provided any guidance regarding what degree of conduct is sufficient to constitute a "direct, substantial, and reasonably foreseeable effect." To date, only two other circuit courts, the Seventh and Ninth, have directly confronted the issue.[14]

The District Court below adopted the standard of the Ninth Circuit, which issued the first and most restrictive ruling on the issue. Under the standard articulated by the Ninth Circuit, conduct has a "direct" effect under § 6a "if it follows as an *immediate consequence* of the defendant[s'] activity." *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004) (emphasis added). While struggling to interpret what Congress meant by using the term "direct" in subsection (1)(A), the court in *LSL* relied on the Supreme Court's interpretation of the same word in a provision of the Foreign Sovereign Immunities Act ("FSIA"). *Id.* (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, (1992)).

We acknowledge that the uses of the word "direct" in the FSIA and the FTAIA appear analogous at first glance. But they are, in fact, distinct in both overall intent and specific context. The District Court argues that the two statutes both use the term "direct" in the context of commercial "claw-back" exceptions to statutes excluding certain conduct from statutory coverage. That summary is true of the FTAIA, whose exception is used to claw back within the scope of the Sherman Act certain commercial conduct that would otherwise be excluded from coverage under the FTAIA. In contrast, the "directness" test in the FSIA is not employed to

[14] We understand that at the time of this opinion, a similar case is pending before the Second Circuit, but we need not indefinitely delay our determination in anticipation of merely persuasive authority.

bring certain conduct back within the coverage of U.S. laws. Rather, it is used to omit specific conduct from the laws granting sovereign immunity to nation states and their representatives.

But we need not dwell on this fine distinction, since Congress saw fit to couch the directness test in the two statutes in different language, emphasizing the fact that it did not intend for the term "direct" to be used in the FTAIA in the same way that the Supreme Court had interpreted that term under the FSIA. The Supreme Court's interpretation of "direct" under the FSIA was based on the Court's refusal to incorporate into the statutory interpretation legislative history that suggested that "an effect is not 'direct' unless it is both 'substantial' and 'foreseeable.'" *Republic of Argentina v. Weltover, Inc.*, 504 US 607, 617 (1992). After refusing to read the words "substantial" and "foreseeable" into the contractual language, the Supreme Court proceeded to define the solitary word "direct" as required an "immediate consequence."

When it drafted the FTAIA, Congress did not give the courts the opportunity to read "substantiality" or "foreseeability" out of the statute; instead, it wrote them directly into the statute as equal partners of the requirements of "directness." It is odd indeed that under these circumstances courts would consider the FTAIA's test of "directness" to warrant the same interpretation as that in the FSIA.

Further, we do not share the District Court's apparent deference to the amicus briefs of foreign regulatory agencies in other cases. We do not mean to marginalize those stakeholders or minimize their concerns. However, many of the amicus briefs referenced by the District Court were primarily concerned with the extraterritorial application of U.S. antitrust laws to provide a remedy for *foreign plaintiffs who had suffered injuries abroad*, a situation not at issue in the case currently before us. In any event, as improvident as it would be for U.S. courts to overextend U.S. antitrust laws, it would be at least an equal folly if we were to fail to protect our domestic

commerce from anticompetitive conduct having a reasonably proximate effect in the United States.

We note that these concerns already existed when the FTAIA was enacted. *See United States v. Aluminum Co. of America*, 148 F.2d 416, 443-444 (2d Cir. 1945) (L. Hand, J.). Congress deliberately considered the language in the provision at issue here so that the statute was sufficiently confined to conduct that had a domestic effect without intruding on the sovereign authority of other nations. *See Empagran*, 542 US at 165-166. The judicial branch need not import a more restrictive interpretation, particularly when it appears to contradict congressional intent.

Therefore, we are persuaded by the opinion of the Seventh Circuit, which has adopted a definition of "directness" articulated by the Department of Justice. *Minn-Chem, Inc. v. Agrium Inc.*, 683 F. 3d 845, 856-57 (7th Cir 2012) (*en banc*) (citing filings and other writings by the Department of Justice). The Department of Justice viewed the FTAIA as merely a codification of traditional antitrust law that involved trade or commerce with foreign nations. *United States v. LSL Biotechnologies*, 379 F. 3d 672, 683 (9th Cir. 2004) (Aldisert, J., dissenting). What the DOJ viewed to be the "traditional antitrust law" is not entirely clear, but the Supreme Court, in a post-FTAIA decision, acknowledged that it had been well established before the passage of the FTAIA that the Sherman Act "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (citing *United States v. Aluminum Co. of Am. ("Alcoa")*, 148 F.2d 416, 444 (2d Cir. 1945) (Hand, J.)). In *Minn-Chem*, the court held that the term "'direct' means only a reasonably proximate causal nexus. " *Minn-Chem*, 683 F. 3d at 856-57.

We are persuaded that, as articulated by the Seventh Circuit, the FTAIA only requires that foreign anticompetitive conduct have a "reasonably proximate causal nexus" with its domestic effect. *Minn-Chem, Inc. v. Agrium Inc.*, 683 F. 3d 845 (7th Cir 2012) (*en banc*). The more flexible nature of this test is not a demerit. Rather, it enables the U.S. regulators and courts on a case-by-case basis to judiciously extend the reach of U.S. law to protect domestic businesses and markets from foreign interference.

Similarly, the District Court's criticism of the nuance of the "reasonably proximate causal nexus test" is a poor reason not to adopt it. It does, as the District Court notes, make the analysis more complex. But a causal nexus that is too attenuated or opaque is likely simply to result in dismissal—exactly the type of judicial restraint that the District Court advocates.[15]

CONCLUSION

For the reasons set forth above, the memorandum and order of the District Court is REVERSED and this case is REMANDED to the District Court for entry of an order consistent with this decision. SO ORDERED

Dated: August 13, 2013

Boris Brownstein
Boris Brownstein, Circuit Judge

[15] Without implying that it should be so, we note that the record on appeal in this case arguably provides ample basis for a finding that no "reasonably proximate causal nexus" exists between the foreign anticompetitive conduct and the domestic market effects.

Sixty-Fifth Annual
National Moot Court Competition

SUPREME COURT OF THE UNITED STATES
October Term 2014

Docket No. 2014-01

BOLTON CHEMISTS CORPORATION and WALDER MEDICAL SUPPLY, GMBH,
Defendants-Appellants,

v.

STARKE PHARMACEUTICALS, LTD.,
***Plaintiff-Appellee*.**

Petition for certiorari is GRANTED. The Court certifies the following questions:

1. Did the Twelfth Circuit properly hold that the exercise of a *Batson* challenge to strike a potential juror on the basis of perceived sexual orientation violated the Equal Protection Clause?

2. Did the Twelfth Circuit properly hold that foreign anticompetitive conduct is governed by the FTAIA if the foreign conduct bears a "reasonably foreseeable causal nexus" with it its alleged domestic effects?