

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

Case No. 17-cv-264

v.

STATE OF WISCONSIN DEPARTMENT  
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

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**PLAINTIFFS' RESPONSE AND OBJECTIONS TO DEFENDANTS'  
PROPOSED VOIR DIRE QUESTIONS**

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Plaintiffs, Alina Boyden and Shannon Andrews (collectively "Plaintiffs"), through their undersigned attorneys, respectfully submit the following brief in support of their response to Defendants' proposed *voir dire* questions.

**Objections to Proposed Question No. 1**

Plaintiffs object to Proposed Question No. 1, including each sub-question, because it seeks to reveal extremely sensitive personal information, including confidential medical information. The U.S. Supreme Court has held that "[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 512 (1984). A person's gender identity and medical history are both deeply personal matters that should not be revealed during

*voir dire*. Even if jurors are asked not to reveal the name of or relationship with the transgender person they know, transgender people may still be identified by a prospective juror's response to Proposed Question No. 1. Transgender people across the United States, including Wisconsin, have historically faced discrimination and harassment simply for being transgender. As such, being identified in open court may expose transgender people to discrimination and harassment. Worse still, Proposed Question No. 1 seeks extremely sensitive personal and medical information about people who are not present, have no connection to or awareness of this litigation, and *who have not consented to having their identity as a transgender person exposed to the public*.

Even setting aside the serious privacy considerations implicated by Proposed Question No. 1, whether a person has a "friend, co-worker, or relative" who is transgender or who has had "transgender-related surgery" has no connection to juror bias. Courts have held that *voir dire* questions about private matters may be excluded when balanced against potential to indicate bias. *See, e.g., United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979) (finding that limiting *voir dire* is reasonable when questions are not relevant and concern private matters); *Brandborg v. Lucas*, 891 F.Supp. 352, 360-61 (E.D. Tex. 1995) ("[The interest in an open trial and the interest in an impartial jury] must be balanced to determine whether a prospective juror should have to answer questions which are deemed to be private in nature.").

Similarly, just as membership in a protected class cannot serve as a basis for exclusion from a jury, knowing someone who belongs to a protected class should not serve as a basis for exclusion. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (“the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant”); *see SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014) (“equal protection prohibits peremptory strikes based on sexual orientation.”).

Given the limited potential to reveal actual bias and the certain potential to expose extremely sensitive personal and medical information that could endanger or harm transgender people, Proposed Question No. 1 should be excluded.

#### **Objections to Proposed Question Nos. 1 and 5**

Plaintiffs object to Proposed Question Nos. 1 and 5 on the basis that they seek to reveal extremely sensitive personal and medical information. As with Proposed Question No. 1, Proposed Question No. 5 may cause a prospective juror to reveal that a friend, co-worker, or relative is transgender. Further, Proposed Question No. 5 may also force prospective jurors to reveal that they themselves are transgender. As *discussed supra*, membership in a protected class (or knowing someone who belongs to a protected class) should not serve as a basis for exclusion from a jury. *See Batson*, 476 U.S. at 89 (1986); *see SmithKline Beecham*, 740 F.3d at 474. Additionally, Proposed Questions No. 1 and 5 may reveal that a potential juror is transgender or

may identify a third party as transgender, creating risk of harassment or discrimination that far outweighs any potential benefit of asking these questions.

Additionally, Plaintiffs object to Proposed Question Nos. 1 and 5 because the term “transgender-related surgery” is vague, ambiguous, and likely to mislead the jury. It is not clear whether “transgender-related surgery” seeks information about any surgery that transgender people may have – for example, a transgender person who has had or wants to have an appendectomy, or who had or wants to have a mastectomy due to having a high risk of breast cancer. To the extent Defendants seek information about any surgery a transgender person may have, Plaintiffs object on the ground that these questions are irrelevant to this case and do not have any potential to reveal actual bias.

Should Defendants be allowed to ask any question referencing a surgical procedure to treat gender dysphoria, it should be described either as “surgery to treat gender dysphoria” or “gender confirmation surgery.” However, Proposed Question Nos. 1 and 5 should be excluded because they have limited potential to reveal actual bias and seek to reveal extremely sensitive personal and medical information.

**Objections to Proposed Question Nos. 6 and 7**

Plaintiffs also object to Proposed Question Nos. 6 and 7 because they require disclosure of membership or association in violation of the prospective jurors’ First Amendment rights. The U.S. Supreme Court has held that compelled disclosure of membership or association, particularly in connection to advocacy groups, can implicate First Amendment rights. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 462

(1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [] effective [] restraint on freedom of association . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”)); *see also Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539 (1963) (finding that the Florida Legislative Investigation Committee could not compel disclosure of the NAACP’s membership records due to a lack of compelling state interest to justify “the substantial abridgement of associational freedom which such disclosures will affect”) (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

In addition to abridging the prospective jurors’ First Amendment rights, Proposed Question Nos. 6 and 7 do not seek information that has potential to reveal actual bias. A juror may be dismissed for cause due to actual bias if, “the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). However, courts have found that a juror’s association or membership must not serve as the basis to find actual bias, without more: “[t]o allow trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of a juror threatens the heretofore guarded right of an accused to a fair trial by an impartial jury as well as the integrity of the judicial process as a whole.” *United States v. Salamone*, 800 F.2d 1216 (3d Cir. 1986). The court in *Salamone* further warned that allowing group membership or association to serve as

a proxy for actual bias could lead to practically anyone with interests or opinions of any kind being prevented from serving on a jury:

Taken to its illogical conclusion, the government's position would sanction, *inter alia*, the summary exclusion for cause of NAACP members from cases seeking the enforcement of civil rights statutes, Moral Majority activists from pornography cases, Catholics from cases involving abortion clinic protests, members of NOW from sex discrimination cases, and subscribers to Consumer Reports from cases involving products liability claims.

*Id.* at 1225. The Seventh Circuit has also adopted this principle: “[a] trial judge may not determine juror eligibility based on external associations that are irrelevant to the base before him, regardless of what assumptions the judge himself may harbor about those associations.” *Tyus v. Urban Search Management*, 102 F.3d 256, 262 (7th Cir. 1996) (citing *Salamone*, 800 F.2d at 1225)). As such, group membership alone provides insufficient basis for a for-cause removal from the jury panel, as well as raising significant constitutional concerns. Proposed Question Nos. 6 and 7 should therefore be excluded.

#### **Objections to Proposed Question No. 8**

Plaintiffs further object to Proposed Question No. 8 on the basis that it seeks to reveal sensitive personal information about prospective jurors or about third parties not associated with this litigation. Asking prospective jurors to admit to and explain attending “protests or rallies regarding LGBTQ issues” (which appears to include LGBTQ pride celebrations or events), or to reveal whether they know people who have attended such events, risks revealing the sexual orientation or gender identity of prospective jurors or third parties. As discussed *supra*, a person's gender

identity and sexual orientation are deeply personal matters that should not be revealed during *voir dire* – a principle that has been upheld by the U.S. Supreme Court. *See Press-Enterprise*, 464 U.S. at 512 (1984) (“The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.”). As with gender identity, exposing a person’s sexual orientation in open court could expose potential jurors or third parties to discrimination or harassment. Furthermore, sexual orientation is not a permissible basis upon which to exclude a juror. *See SmithKline Beecham*, 740 F.3d at 474.

Even to the extent that a prospective juror or a relative or close friend have attended “protests or rallies regarding LGBTQ issues” only as allies to the LGBTQ community, Proposed Question No. 8 impermissibly seeks personal information regarding association. As discussed *supra*, “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *NAACP*, 357 U.S. at 462.

For all these reasons, Plaintiffs respectfully request that this Court reject Defendants’ Proposed Question Nos. 1 and 5-8.

Dated this 14th day of September, 2018.

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