IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, individually and on behalf of its members, Plaintiff, v. **CITY OF PHILADELPHIA** and, **PHILADELPHIA COMMISSION ON HUMAN RELATIONS**, Defendants.	)	CA No. 2:17-cv-01548 (MSG) Hon. Mitchell Goldberg

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) [1] is a public-interest law firm and policy center with supporters in all 50 States, including many in Pennsylvania. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has litigated frequently in support of the speech rights of market participants, appearing in numerous federal courts in cases raising commercial-speech issues. *See, e.g., Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *Retail Digital Network, Inc. v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (*en banc*); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *NFIB v. Perez*, 2016 WL 3766121 (N.D.Tex. 2016). In particular, WLF has repeatedly urged courts to apply heightened scrutiny to content-based government regulation of speech. *See, e.g., Grocery Mfrs. Ass'n v. Sorrell*, No. 15-1504, *appeal withdrawn pursuant to FRAP 42(b)* (2d Cir., Aug. 5, 2016); *Educational Media Co. at Virginia Tech v. Insley*, 731 F.3d 291 (4th Cir. 2013).

WLF is concerned that the Philadelphia ordinance at issue here, § 9-1131 of the Philadelphia Code (the "Ordinance") prohibits truthful, nonmisleading speech on the basis of its content and the identity of the speaker. Such speech bans are presumptively unconstitutional, particularly when (as here) the speech at issue does not meet the Supreme Court's definition of commercial speech—that is, there is no plausible basis for asserting that the speech proposes a commercial transaction. Because such First Amendment violations inflict irreparable harm on speakers, a preliminary injunction against enforcement of the ordinance is warranted.

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[1] WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

The Ordinance provides that it is an unlawful employment practice to, among other things, (1) inquire about a prospective employee's wage history; or (2) rely on the wage history of a prospective employee in determining the wages for that individual. The Ordinance creates an exception to the reliance prohibition if the applicant knowingly and willingly discloses his or her wage history.[2] Among the Ordinance's findings are that female employees in Pennsylvania are paid, on average, 79% of the average salary paid to men employed in the Commonwealth; that basing wages upon a worker's wages at a previous job "only serves to perpetuate gender wage inequalities"; and that salary offers "should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant." Phila. Code

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[2] As amended by the Ordinance, the City's Fair Practices Ordinance now states in pertinent part:

> (a) It is an unlawful employment practice for an employer, employment agency, or employee or agent thereof:
>
> (i) To inquire about a prospective employee's wage history, require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosure of wage history, or retaliate against a prospective employee for failing to comply with any wage history inquiry or for otherwise opposing any act made unlawful by this Chapter.
>
> (ii) To rely on the wage history of a prospective employee from any current or former employer in determining the wages for such individual at any stage in the employment process, including the negotiation or drafting of any employment contract, unless such applicant knowingly and willingly disclosed his or her wage history to the employer, employment agency, employee or agent thereof.

Phila. Code § 9-1131(2)(a).

§ 9-1131(1).

Employers who violate the Ordinance face significant penalties, including compensatory damages, § 9-1105(1)(c), punitive damages of up to $2,000 per violation, § 9-1105(1)(d), and (for a repeat offense) a fine of up to $2,000 and imprisonment for up to 90 days, "or both." § 9-1121(2).

On April 6, 2017, the Chamber of Commerce for Greater Philadelphia (the "Chamber") filed suit against the City of Philadelphia and its Commission on Human Relations (collectively, "Philadelphia"), seeking a judgment declaring, *inter alia*, that the Ordinance violates its rights under the U.S. Constitution. It simultaneously filed a motion for a preliminary injunction against enforcement of the Ordinance. The Chamber's amended memorandum of law in support of the motion asserts, *inter alia*, that both the Ordinance's inquiry prohibition and its reliance prohibition violate: (1) the First Amendment; (2) due process (because they are overly vague); (3) the Commerce Clause; and (4) Pennsylvania law. The Chamber asserts that it has met each of the prerequisites for a preliminary injunction because: (1) it is likely to succeed on the merits; (2) the Chamber and its members will suffer irreparable harm in the absence of an injunction; (3) neither the City nor the public has an interest in enforcing an unconstitutional measure.

WLF agrees with each of the claims set forth in the preliminary injunction motion. WLF writes separately to focus on the Chamber's First Amendment claims. In particular, WLF explains why the prohibition on wage inquiries cannot withstand First Amendment scrutiny.

SUMMARY OF ARGUMENT

The Ordinance imposes a content-based restriction on truthful speech. While employers are free to speak to prospective employees on a virtually unlimited variety of topics, they are

prohibited from addressing one very specific topic: any inquiry into the job applicant's wage history. That prohibition applies regardless whether there is any reason to believe that the current salary of the applicant—whether male or female—is the product of any gender-based pay discrimination.

Both the Third Circuit and the Supreme Court have repeatedly recognized that content-based speech restrictions are "highly disfavored" and ordinarily "subjected to strict scrutiny." *King v. Governor of State of New Jersey*, 767 F.3d 216, 236 (3d Cir. 2014); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011). Indeed, content-based speech restrictions are "presumptively invalid" under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Philadelphia seeks to overcome that presumption by pointing to the allegedly commercial character of the speech banned by the Ordinance. But content-based restrictions are no less constitutionally disfavored when the speech in question falls into a "lesser protected categor[y] of speech," such as commercial speech. *King*, 767 F.3d at 236. Philadelphia is not attempting to restrict speech on the basis of some content-neutral justification (such as a restriction on all speech that is likely to deceive consumers). Rather, it is prohibiting truthful speech whose content it disfavors because it fears that the speech might perpetuate disparities between the average salaries of men and women. Philadelphia cannot demonstrate that the Ordinance survives scrutiny under the heightened standard of review applicable to content-based restrictions.

Moreover, the Court need not address what level of review to apply to commercial-speech restrictions, because the speech at issue here—an inquiry into wage history—does not

qualify as commercial speech. In general, "commercial speech" is defined as "speech which does no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). When an employer asks a job applicant about his or her wage history, it is not proposing any kind of commercial transaction. Rather, the employer is expressing an interest in factual information that is highly relevant to whether to make an offer of employment. Employers can reasonably infer, all other things being equal, that an applicant with a history of higher wages—particularly, a history of steadily increasing wages—has been judged by other employers as a superior worker. An employer who expresses a desire to learn that history is not proposing a commercial transaction; rather, it is seeking information that (along with other information) is highly relevant to its employment decision.

Nor can Philadelphia plausibly assert that there exists some sort of fiduciary relationship between an employer and a job applicant that would justify regulation of the employer's speech. The Third Circuit has recognized that a reduced level of First Amendment protection is afforded to the speech of a professional when she is speaking to a client "as part of the practice of her profession." *King*, 767 F.3d at 232. But that reduced level of protection is inapplicable when, as here, the speaker is not providing expert advice to a client or to anyone else to whom it owes a fiduciary duty.

Finally, the prohibition on wage-history inquiries violates the First Amendment even if scrutinized under the intermediate standard of review normally applied to commercial-speech restrictions. A request for wage information does not propose (or otherwise implicate) an illegal transaction. Even if one concedes the constitutional validity of the prohibition against reliance

on wage history when establishing the salaries of new employees—which WLF does not concede—Philadelphia does not contest that there are other, legitimate employer uses for wage history, such as in deciding whom to hire. Nor can Philadelphia establish that its speech prohibition directly advances its interest in eliminating the effects of past gender-based employment discrimination. Nor can it establish that the prohibition is narrowly tailored; the City could further its goals without interfering with First Amendment rights.

ARGUMENT

I. THE ORDINANCE IS A CONTENT-BASED AND VIEWPOINT-BASED SPEECH RESTRICTION THAT IS SUBJECT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT, A SCRUTINY IT CANNOT SURVIVE

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). While the courts have very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 666 (2005) (affirming grant of a preliminary injunction where the federal government had failed to show that it was likely to prevail on the merits and holding that "[a]s the Government bears the burden of proof on the ultimate question of [the challenged Act's] constitutionality, respondents [the movants] must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective

than [enforcing the Act]"); *R.A.V. v. St. Paul*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid," and the government bears the burden to rebut that presumption.); *Burson v. Freeman*, 504 U.S. 191, 198 (1992). In the procedural context of this motion for a preliminary injunction, the burden rests on Philadelphia to demonstrate the compelling interest that justifies its speech restrictions.

WLF does not expect Philadelphia to contend that the speech restrictions imposed by the Ordinance are not content-based. The Ordinance quite clearly targets speech based solely on its content and the viewpoint expressed. *See, e.g.*, Phila. Code § 9-1131(2)(a)(i) (declaring that it is an "unlawful employment practice" for an employer to "inquire about a prospective employee's wage history"). Under the Ordinance, employers arer free during an employment interview to express virtually any view to prospective employees, but they are prohibited from expressing one very specific view: a desire to learn the applicant's wage history. The Ordinance makes clear that Philadelphia does not want employers to convey that message. The Supreme Court has held that any such speech restrictions should be deemed content-based. *See, e.g., Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas expressed are content-based."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (laws are considered "content-based regulations of speech" if they "cannot be justified without reference to the content of the speech" or "were adopted by the government because of disagreement with the message the speech conveys.").

Because it is a content-based and viewpoint-based speech restriction, the wage-inquiry prohibition is subject to an exacting scrutiny that very few such restrictions can even hope to

survive. *See, e.g.*, *Burson*, 504 U.S. at 198 (content-based speech restrictions are subjected to "exacting scrutiny," and will be upheld only if the government can show that the restrictions are necessary to serve a "compelling state interest" and are "narrowly drawn to achieve that end."). Strict scrutiny applies to speech restrictions without regard to "the government's justifications or purposes for enacting" the Ordinance. *Reed*, 135 S. Ct. at 2227.

Philadelphia seeks to overcome the presumption of invalidity of its content-based and viewpoint-based speech restriction by pointing to the allegedly commercial character of wage-history inquiries. Philadelphia asserts that businesses hire employees for the ultimate purpose of generating profits and that the First Amendment provides reduced protection to speech uttered within that context. But content-based and viewpoint-based restrictions are no less constitutionally disfavored when the speech in question falls into a "lesser protected categor[y] of speech," such as commercial speech. *King*, 767 F.3d at 236. For example, the Supreme Court held in *Sorrell* that "heightened" First Amendment scrutiny applies "whenever the government creates a regulation of speech because of disagreement with the message it conveys," even when (as in that case) the speech in question qualified as "commercial speech." *Sorrell*, 564 U.S. at 566. The Court held that "commercial speech is no exception" to the presumptive invalidity of content-based and viewpoint-based speech restrictions, noting that a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Ibid* (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977)).

Sorrell explained that government regulation of commercial speech is subject to somewhat relaxed First Amendment scrutiny when the regulation has "a neutral justification," such as "protecting consumers" from fraud and "false and misleading speech" and other

"commercial harms." *Id.* at 579. Philadelphia does not advance any sort of "neutral justification" for its prohibition of wage-history inquiries; it simply objects to the content of such speech. Under those circumstances, the Ordinance is subject to exacting First Amendment scrutiny even if the speech it prohibits could properly be categorized as "commercial speech."[3]

The Chamber's memorandum of law explains in detail why Philadelphia cannot demonstrate a compelling interest in banning truthful speech regarding wage histories. WLF will not repeat that explanation here, particularly because we doubt that even Philadelphia will assert that it can meet the compelling-interest standard. We note merely that Philadelphia has produced no studies demonstrating that its speech ban will have any appreciable effect on gender-based wage disparities.

II. WAGE-HISTORY INQUIRIES ARE FULLY PROTECTED NONCOMMERCIAL SPEECH AND THUS THE BAN ON SUCH SPEECH IS NOT SUBJECT TO RELAXED FIRST AMENDMENT SCRUTINY

As explained above, the Ordinance's content-based and viewpoint-based speech restrictions are subject to heightened First Amendment scrutiny regardless whether the restricted speech falls into a "lesser protected categor[y] of speech," such as commercial speech. *King*, 767 F.3d at 236. The Court need not, however, address that issue because the speech at issue

[3] Nor can the ban on wage-history inquiries plausibly be characterized as a regulation of conduct and not a regulation of speech. The Ordinance is not a regulation of commerce that has a mere "incidental burden on protected expression"; rather it is "directed at certain content and is aimed at particular speakers." *Sorrell*, 564 U.S. at 567. While the information that employers are barred from seeking may be economic and statistical in character, *Sorrell* rejected those characteristics as a basis for placing information (and access to such information) outside the protection of the First Amendment. *Id.* at 570. The Court held that "the creation and dissemination of information are speech within the meaning of the First Amendment," noting that "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Ibid.*

here does not fall into a lesser-protected category of speech; it is fully protected, noncommercial speech.

In general, "commercial speech" is defined as "speech which does no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. Indeed, the Supreme Court has "characteriz[ed] the proposal of a commercial transaction as '*the test* for identifying commercial speech.'" *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (emphasis in original) (quoting *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473-74 (1989)). Fully protected speech is not transformed into commercial speech merely because the speaker is drawing a salary (or otherwise making a profit) while speaking. *Id*. at 482 ("Some of our most valued forms of fully protected speech are uttered for a profit. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)."). In *New York Times*, the Court granted full First Amendment protection to the speech of a for-profit corporation that appeared in a paid advertisement. *New York Times*, 376 U.S. at 260.

The speech at issue here does not qualify as commercial speech. When an employer expresses a desire to learn the wage history of a job applicant, it is not proposing any sort of commercial transaction. It is not seeking to sell any product to the applicant. Nor is it even proposing to enter into an employment contract with the applicant; it is simply seeking information that may, in conjunction with other information, motivate the employer at some future date to offer employment to the applicant.

Every action taken by a for-profit enterprise can, of course, to some degree be deemed profit-motivated. But the Supreme Court has rejected assertions that speech should be deemed

commercial any time it is issued in the name of a for-profit corporation. *See First National Bank of Boston v. Bellotti* 435 U.S. 765, 777 (1978). Moreover, "the fact that [a business] has an economic motivation for [its speech is] insufficient by itself to turn [the speech] into commercial speech." *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 67 (1983). Nor is Philadelphia's ban on wage-history inquiries based on a desire to ensure that "the stream of commercial information runs cleanly as well as freely," a principal justification for subjecting "commercial speech" restrictions to less-than-heightened judicial review. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772. Philadelphia's sole basis for prohibiting speech is a fear that employers *might* use information they thereby acquire in ways that Philadelphia does not approve. But the Supreme Court has never deemed fear that truthful information might be misused as a sufficient justification for suppressing its dissemination. *Id.* at 770.

The Third Circuit has also recognized that a reduced level of First Amendment scrutiny may be appropriate when government seeks to regulate speech by one who has a pre-existing fiduciary relationship with those with whom he or she is communicating. The appeals court concluded that "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession." *King*, 767 F. 3d at 232. But the court made clear that this "professional speech" exception to full First Amendment protection is limited in scope. It applies only when the speech at issue "is used to provide personalized services to a client based on the professional's expert knowledge and judgment." *Ibid*.

The "professional speech" doctrine provides no support for the Ordinance's speech restrictions. A job applicant is not a prospective employer's "client" and has no pre-existing

relationship—fiduciary or otherwise—with the employer. Consequently, if Philadelphia seeks to prevent an employer from expressing specific views to job applicants, it must demonstrate a compelling interest in doing so if it hopes to overcome the strong presumption that such speech restrictions violate the First Amendment.

III. THE PROHIBITION AGAINST WAGE-HISTORY INQUIRIES CANNOT SURVIVE THE "INTERMEDIATE" LEVEL OF FIRST AMENDMENT SCRUTINY NORMALLY APPLIED TO COMMERCIAL SPEECH

Even if scrutinized under the intermediate standard of review normally applied to commercial-speech restrictions, the Ordinance's prohibition on wage-history inquiries violates the First Amendment.[4] Philadelphia cannot demonstrate that the prohibition directly advances a substantial government interest, nor does the prohibition qualify as a narrowly tailored means of achieving its asserted interests.

A. Philadelphia May Not Ban Wage-History Inquiries Based on Their Alleged Relationship to Illegal Activity

The first prong of the *Central Hudson* test examines whether the commercial speech at issue is either inherently misleading or proposes an illegal transaction. If so, the government may ban the speech, and no further First Amendment analysis is necessary. Philadelphia's efforts to rely on this first prong are unavailing.

Central Hudson illustrated application of the illegal-transaction prong by citing the

[4] In *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Supreme Court established a four-part test for determining whether a restriction on commercial speech complies with the First Amendment. Under *Central Hudson*, the government may regulate commercial speech that (1) is not inherently misleading and concerns "lawful activity," only upon a showing that: (2) the government has a substantial interest that it seeks to achieve; (3) the regulation directly advances the asserted interest; and (4) the regulation serves that interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566.

Court's earlier decision in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). In *Pittsburgh Press*, the Court rejected a First Amendment defense to government charges that a newspaper violated a sex-discrimination ordinance by publishing employment advertisements that listed the employers' preferences for male or female job applicants. The Court held that the newspaper's commercial speech was not entitled to First Amendment protection because it proposed an illegal activity: discrimination on the basis of sex in hiring decisions. *Id.* at 388-89.

Inquiries regarding wage history cannot be similarly faulted. Philadelphia notes that under the Ordinance it is now illegal for an employer to rely on wage history in formulating a salary offer. For all the reasons set forth in the Chamber's memorandum of law, WLF agrees with the Chamber that the prohibition against reliance on wage history is unconstitutional. But even accepting the validity of the reliance prohibition, inquiring about wage history cannot plausibly be deemed an effort to facilitate an illegal transaction. An employer may legitimately make use of wage-history information without running afoul of the Ordinance. In particular, employers routinely utilize such information, along with other relevant information, in making hiring decisions. Employers can reasonably infer, all other things being equal, that an applicant with a history of higher wages—particularly, a history of steadily increasing wages—has been judged by other employers as a superior worker.

B. Philadelphia Cannot Demonstrate that Its Speech Prohibition Directly Advances Its Interest in Reducing Gender-Based Wage Disparities

The Supreme Court has made clear that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Ibanez v. Florida Dep't of Bus. & Prof. Regulation, 512 U.S. 136, 146 (1994). Accordingly, because the allegedly commercial speech at issue here is truthful and concerns lawful activity, the burden shifts to Philadelphia to demonstrate that its speech restrictions are permissible under the remaining *Central Hudson* factors.

Philadelphia has a substantial interest in eliminating disparities in average pay for men and women, particularly to the extent that such disparities are the product of past intentional discrimination against women. But Philadelphia has not met its burden of demonstrating that its prohibition of wage-history inquiries will directly advance its interest in eliminating gender-based wage disparities. It has produced no studies suggesting that its speech prohibition will have its desired impact on wage disparities.

Under the third prong of the *Central Hudson* test, "the restriction must *directly* advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564 (emphasis added). In order to satisfy that requirement, "a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). "[M]ere speculation or conjecture" is insufficient to fulfill the requirements. *Id*. at 770. The government's burden is not met when a "[s]tate offer[s] no evidence or anecdotes in support of its restrictions." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson*, 504 U.S. at 211). Philadelphia cannot meet its burden merely by hypothesizing that depriving employers of wage-history information might reduce gender-based wage disparities that may be the product of past intentional discrimination.

When scrutinizing speech restrictions under the *Central Hudson* framework, the Third Circuit has explained that "the quantum of empirical evidence needed" to satisfy the "directly advances" prong "will vary up or down with the novelty and plausibility of the justification raised." *King*, 767 F.3d at 238. Both the novelty and plausibility factors cut against Philadelphia's "directly advances" claim and suggest that the Court should hold Philadelphia to a heavy evidentiary burden. The City's effort to ban wage-history inquiries is novel; no jurisdiction within the United States attempted to impose this sort of speech restriction on employers before 2017. Indeed, as the Chamber notes, Pltf. Br. 17, courts have long recognized that basing salary offers on wage history is a permissible basis for salary differentials and thus is a defense to alleged violations of the federal Equal Pay Act.

Nor is Philadelphia's "directly advances" claim particularly plausible; there is little reason to presume that employers will offer a significantly different wage to a desired job applicant depending on whether or not it knows the applicant's wage history. In both instances, the employer is likely to offer whatever wage it estimates is necessary to induce the applicant to accept its offer rather than an offer from another prospective employer. In the absence of intentional discrimination (which is prohibited by law), that employer estimate will not vary based on the sex of the applicant. The employer's estimate may be somewhat less accurate if it is unaware of the applicant's wage history, an inaccuracy that generally serves no one's interests. But there is no empirical evidence to suggest that requiring employers to make less accurate estimates of market conditions will tend to reduce overall wage disparities between men and women.

Philadelphia's hypothesis that its speech prohibition will reduce wage disparities

founders on its fundamental misunderstanding of how wages are set. The Ordinance states that "[s]alary offers *should* be based upon the job responsibilities of the position sought." Phila. Code § 9-9-1131(1)(e) (emphasis added). That is not how salaries are, or have ever been, established in our free-market economy. Instead, a rational for-profit entity will establish salaries based on what it must pay to attract competent employees. If the market requires higher salaries to attract and retain sewer workers than public-relations officials, the entity will pay higher salaries to the former group, regardless of how one might compare the "job responsibilities" of the two groups. So long as market supply and demand continue to be the principal determinants of salary levels, restricting employers' speech rights and depriving employers of helpful information is unlikely to have any salutary effect on the salaries they offer.

C. The Speech Prohibition Is Not a Narrowly Tailored Remedy

The Ordinance cannot pass muster under *Central Hudson*'s fourth prong because its speech prohibitions are considerably broader than necessary to serve Philadelphia's interest in reducing gender-based wage disparities. While commercial-speech jurisprudence does not require the government to use the least restrictive means of advancing its asserted interests, it must make an effort reasonably to fit its means to its ends. *Thompson v. Western States Medical Center*, 535 U.S. 357, 371-72 (2002). In particular, the "narrow tailoring" prong requires that if the government can "achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371.

The *amicus* brief of the Chamber of Commerce of the United States has identified several non-speech alternatives that would likely be at least as effective as the speech ban in reducing gender-based wage disparities. In particular, it noted that Philadelphia could encourage

employers to conduct audits to evaluate gender-based pay differences within the employer's own work force. *Amicus* Br. 11. That brief notes that a study of such employer self-evaluations, conducted by the American Association of University Women, concluded that those evaluations have had a "great effect" in reducing gender-based pay disparities. *Ibid.* To the extent that Philadelphia is most concerned about eliminating intentional sex discrimination—as opposed to pay disparities that may result from other, gender-neutral factors, such as experience, training, and hours worked—the most obvious non-speech alternative is increased enforcement of anti-discrimination laws. Because Philadelphia has not demonstrated that non-speech alternatives would be less effective in advancing its interests in reducing gender-based wage disparities, its Ordinance cannot survive scrutiny under *Central Hudson*'s fourth prong.

Moreover, the speech restrictions are wildly over-inclusive. Philadelphia does not contend that men have been adversely affected by the dissemination of wage-history information; indeed, it contends that the average male salary is the "baseline" from which to measure the effects of discrimination against women. Yet, the Ordinance prevents employers from asking any job applicants—whether male or female—their wage histories.

In sum, even if wage-history inquiries could properly be classified as commercial speech (and they cannot) and their suppression were subject to only an intermediate level of review, the Ordinance's speech restrictions still cannot survive First Amendment scrutiny under either the third or fourth prong of the *Central Hudson* test.

CONCLUSION

WLF respectfully requests that the Court grant the Chamber's motion for a preliminary injunction. The Chamber has demonstrated a likelihood of success on the merits, that it will suffer irreparable harm in the absence of an injunction, and that neither Philadelphia nor the public has an interest in enforcing the Ordinance's unconstitutional scheme.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2017, I electronically filed this proposed *amicus curiae* brief of Washington Legal Foundation with the Clerk of the Court for the U.S. District Court for the Eastern District of Pennsylvania by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Kevin M. Siegel
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