Nos. 18-2175 & 18-2176

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREATER PHILADELPHIA CHAMBER OF COMMERCE,

Appellee/Cross-Appellant,

v.

CITY OF PHILADELPHIA and
PHILADELPHIA COMMISSION ON HUMAN RELATIONS,

Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Civil Action No. 2:17-cv-01548-RGA (Hon. Mitchell S. Goldberg)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE/CROSS-APPELLANT URGING AFFIRMANCE IN PART

Richard A. Samp
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302

Dated: November 28, 2018

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Not applicable.

Dated: November 28, 2018

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 States.[1] 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., CTIA v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017), *vacated and remanded,* 138 S. Ct. 2708 (2018); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). 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 Ass'n v. Sorrell*, No. 15-1504, *appeal withdrawn pursuant to FRAP 42(b)* (2d Cir., Aug. 5, 2016); *Educational Media Co. at Virginia Tech v. Insley*, 731 F.3d 291 (4th Cir. 2013).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 filed a brief in support of Appellee/Cross-Appellant when this matter was before the district court.

WLF is concerned that the Philadelphia ordinance at issue here, § 9-1131 of

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[1] Pursuant to Fed.R.App.P. 29(a)(4)(E), 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 the brief. All parties have consented to the filing of the brief.

the Philadelphia Code (the "Ordinance"), prohibits truthful, nonmisleading speech on the basis of its content and the identity of the speaker. Such content-based 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, the district court appropriately enjoined enforcement of the Ordinance's Inquiry Provision.

WLF agrees with Appellee/Cross-Appellant Greater Philadelphia Chamber of Commerce (the "Chamber") that the Ordinance's two challenged provisions—its Inquiry Provision and its Reliance Provision—both violate the First Amendment rights of the Chamber's members. WLF writes separately to focus solely on the constitutional deficiencies of the Inquiry Provision.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the Chamber's brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

The Ordinance provides that it is an unlawful employment practice to, among other things, (1) inquire about a prospective employee's wage history (the

Inquiry Provision); or (2) rely on the wage history of a prospective employee in determining the wages for that individual (the Reliance Provision). Phila. Code § 9-1131(2)(a). The Ordinance creates an exception to the reliance prohibition if the applicant knowingly and willingly discloses his or her wage history. 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 § 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).

In April 2017, 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 First Amendment. It simultaneously filed a motion for a preliminary injunction against enforcement of the Ordinance.

The district court's April 2018 Memorandum Opinion (JA5-65) granted the motion in part; it enjoined enforcement of the Inquiry Provision but rejected the constitutional challenge to the Reliance Provision.[2]

The parties disagreed about what level of First Amendment scrutiny should apply to the speech restrictions imposed by the Inquiry Provision. Philadelphia argued that the provision should be subject to "intermediate" First Amendment scrutiny because the speech it restricts is properly classified as "commercial speech." The Chamber argued that "strict" scrutiny should apply, both because the affected speech does not qualify as "commercial" and because the Supreme Court mandates heightened scrutiny of speech restrictions that are (as here) content-based and speaker-based. The district court concluded that it did not need to determine the proper level of scrutiny because the Inquiry Provision "does not pass muster" even under the more relaxed, "intermediate" review standard set out in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). JA17. The court then explained at length its conclusion that, under *Central Hudson*, the Inquiry Provision violates the First Amendment rights of the Chamber's members. JA17-41.

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[2] The court held that the Chamber was unlikely to prevail in its challenge to the Reliance Provision; it concluded that the provision regulates conduct, not speech, and thus is not subject to First Amendment constraints. JA41-46.

First, it rejected Philadelphia's assertion that *Central Hudson* provides no constitutional protection for an employer's wage-history inquiries. JA18-21. Philadelphia argued that such inquiries are unprotected because they relate to illegal activity; that is, they relate to an activity prohibited by the Ordinance: relying on wage history in determining wages. The court disagreed, explaining that "to inquire into wage history is not an offer to engage in otherwise illegal activity, as information gathered through a wage history inquiry could be used for many activities other than relying upon it to determine a salary." JA21.

After examining the evidence submitted by Philadelphia in support of its speech restriction, the court held that the City failed to demonstrate that the Inquiry Provision will "directly advance" its interest in "reducing discriminatory wage disparities and promoting wage equity." JA41. The court held that Philadelphia's evidence consisted largely of unsubstantiated opinions that permitting nondiscriminating employers to make wage inquiries perpetuates and contributes to discriminatory wage disparities, JA35-40, and that such evidence is insufficient to satisfy *Central Hudson*'s required showing that the challenged speech restriction will "directly advance" the government's asserted interests. JA40-41. While stating that the judiciary owes some degree of deference to a legislative body's predictions regarding the likely effects of a speech restriction, the court held that

deference is unwarranted when, as here, the predictions are not based on "empirical evidence"—such as studies demonstrating the effects of similar speech restrictions adopted elsewhere. JA40.

The district court did not address an additional First Amendment argument raised by the Chamber: that the Inquiry Provision does not pass muster under *Central Hudson* because it restricts more speech than is necessary to further Philadelphia's interests. The court explained that it need not address that additional argument in light of its holding that the Inquiry Provision flunks *Central Hudson*'s "directly advance" requirement. JA41.

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. The prohibition is also speaker-based: it applies to prospective employers but to no other category of speakers.

Both the Third Circuit and the Supreme Court have repeatedly recognized

that content-based and speaker-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).

In a 2018 opinion that post-dated the district court's decision, the Supreme Court made clear that content-based speech restrictions are "presumptively unconstitutional" without regard to whether the speech at issue is properly categorized as commercial speech. *Nat'l Institute of Family and Life Advocates v. Becerra* ["*NIFLA*"], 138 S. Ct. 2361, 2371 (2018). The Court explained that "[t]his stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id*. (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)).

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 discriminatory wage disparities between men and women. Philadelphia has made no attempt to demonstrate that the Ordinance survives scrutiny under the heightened standard of review applicable to content-based restrictions, nor could it do so.[3]

Moreover, the Court need not address the proper 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, as even Philadelphia recognizes, has numerous legitimate uses. The district court concluded that wage inquiries qualify as "commercial speech" because they

[3] WLF fully agrees with the Chamber that both the Reliance Provision and the Inquiry Provision are content-based speech restrictions that violate the First Amendment rights of the Chamber's members. This brief focuses solely on the Inquiry Provision's constitutional infirmities.

are "related to the economic interests of the speaker" and are "necessary to the consummation of a commercial transaction." JA13, 15. But the Supreme Court has never defined "commercial speech" so broadly; indeed, the speech at issue in *NIFLA* would have been classified as "commercial speech" under that broad definition.

In any event, 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 determining whether it can afford to hire the job applicant. Philadelphia has not introduced the reliable evidence necessary to meet its burden of demonstrating that its speech restriction will alleviate the effects of past gender-based employment discrimination "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Theories and unsupported opinions do not suffice to demonstrate that wage inquiries perpetuate discriminatory wage disparities or that banning such inquiries will eliminate those disparities. Nor has

Philadelphia established that its speech restrictions are narrowly tailored; the City could further its goals without interfering with First Amendment rights.

ARGUMENT

I. THE ORDINANCE IS SUBJECT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT, A SCRUTINY IT CANNOT SURVIVE

A. Content-Based and Speaker-Based Speech Restrictions Are Permissible Only if They Are Necessary to Serve a Compelling State Interest and Are No Broader Than Necessary to Achieve That End

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance government control over the content of messages conveyed by private individuals. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989). While the Supreme Court has very occasionally upheld content-based speech restrictions, it has always imposed on the government a heavy burden of demonstrating the necessity for such restrictions. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (applying strict scrutiny to content-based restrictions on the types of assistance that individuals may provide to foreign terrorist organizations); *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (applying "exacting scrutiny" to content-based restrictions on speech in vicinity of polling places). Indeed, the "general" rule articulated by the Supreme Court is that content-based speech restrictions are

"presumptively unconstitutional and may be upheld only if the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138 S. Ct. at 2371 (quoting *Reed*, 135 S. Ct. at 2226).

The Supreme Court has never indicated that content-based speech restrictions are less objectionable when they target speech classified as "commercial" in nature. To the contrary, *Sorrell* rejected claims that a Vermont law imposing content-based speech restrictions should be subjected to less-exacting constitutional scrutiny simply because it targeted commercial speech. *Sorrell*, 564 U.S. 566-67. *NIFLA* catalogued the very limited instances in which strict scrutiny is inapplicable to laws that impose content-based speech regulation (*e.g.*, state tort laws that "incidentally" burden the speech of professionals) without ever suggesting that "commercial speech" is among the exempted categories. *NIFLA*, 138 S. Ct. at 2371-73.[4] Similarly, this Court in *King* rejected claims that content-based speech restrictions are less objectionable when applied to categories of speech (like commercial speech) not ordinarily entitled to full First Amendment protection:

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[4] *NIFLA* explained that the Court "has been especially reluctant to exempt a category of speech from the normal prohibition on content-based restrictions" and that "[t]his Court's precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Id.* at 2372 (citations omitted).

> Ordinarily, content-based regulations are highly disfavored and subjected to strict scrutiny. ... And this is generally true even when the law in question regulates unprotected or lesser protected speech.

King, 767 F.3d at 236 (citing *Sorrell*, 564 U.S. at 565, and *R.A.V.*, 505 U.S. at 381-86).[5]

There is no serious dispute that the Inquiry Provision imposes a content-based restriction on truthful speech. It prohibits employers from initiating one and only one topic of conversation with a job applicant: the applicant's wage history. That prohibition applies regardless whether there is reason to believe that the current salary of the applicant—whether male or female—is the product of any gender-based pay discrimination.[6] *Sorrell* explained that a law is deemed content-based when the government restricts speech "because of disagreement with the message it conveys" and that "content-neutral speech regulations are those that are

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[5] *King* ultimately declined to apply strict scrutiny to the content-based New Jersey speech restriction at issue in that case because it determined that the New Jersey law regulated "professional speech," a category of speech the Court held was exempt from the normal prohibition on content-based restrictions. 767 F.3d at 237. As Philadelphia recognizes (at 36 n.9), *NIFLA* expressly overruled that portion of *King*, ruling that no such exemption exists for "professional speech." 138 S. Ct. at 2372.

[6] Applying the content-based speech restriction to inquiries made to *male* applicants is particularly puzzling in light of the Ordinance's premise: that the Inquiry Provision is necessary to avoid perpetuating discrimination against women whose past wages may reflect that discrimination. In other words, the Ordinance does not posit that the past salaries of male applicants are in any sense "tainted."

j*ustified* without reference to the content of the regulated speech." 564 U.S. at 566 (citations omitted) (emphasis in original). Philadelphia does not contest that it justifies the Inquiry Provision based solely on the content of the targeted speech: wage-history inquiries. As such, Philadelphia cannot and does not contest that the Inquiry Provision is a content-based speech restriction.

Moreover, the speech restriction is also speaker-based: it applies only to prospective employers and not to other categories of speakers. For example, Philadelphia does not prevent banks from inquiring about wage history when approached by consumers seeking loans. Content-based speech restrictions are particularly suspect when they are imposed on some speakers and not others. *Sorrell* held that "strict scrutiny applies to regulations reflecting 'aversion' to what 'disfavored speakers' have to say." 564 U.S. at 565 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) ("*Turner I*")).

Applying strict scrutiny to content-based and speaker-based speech restrictions in a commercial context does nothing to upset established commercial-speech case law. That case law permits the government to more closely regulate speech that proposes a commercial transaction (*e.g.*, commercial advertising or labeling), so long as the regulation relies on a content-neutral justification. For example, commercial speech restrictions that impose across-the-board restrictions

on false or misleading speech—*i.e.*, without regard to the subject matter of the speech—are permissible so long as they satisfy the *Central Hudson* standards. *See, e.g.*, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). But when the government seeks to suppress speech because it objects to the subject matter and the views being expressed, the justification for judicial deference disappears.

In the absence of any argument by Philadelphia that the Inquiry Provision is narrowly tailored to serve a "compelling" government interest, the Court should affirm the district court's decision striking down the Inquiry Provision.

B. Wage-History Inquiries Are Fully Protected Noncommercial Speech

The Inquiry Provision is subject to strict scrutiny for an additional reason: the wage-history inquiries that it prohibits are fully protected, noncommercial speech. Philadelphia's assertion that the Inquiry Provision is subject to intermediate review under *Central Hudson* is based on the premise that an employer's wage-history inquiries are properly categorized as "commercial speech." That premise is faulty.

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, as even Philadelphia recognizes, has numerous legitimate uses. *See* JA 20 (district court noted that, even discounting conduct prohibited by the Reliance Inquiry, multiple employer uses of wage history are entirely legal; "[f]or example, acquisition of wage history is allowed in other contexts such as for gathering market information or identifying applicants whom employers can or cannot afford."). Asking a job applicant about her wage history may *ultimately* lead to an offer of employment, but it cannot itself be characterized as a "proposal" for a commercial transaction.

In addition, wage inquiries do not exhibit any of the related characteristics that the Supreme Court has on occasion used in identifying commercial speech. For example, none of the three guideposts for classifying speech as "commercial," set out in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), are applicable here. First, a wage inquiry is not an "advertisement" under the common understanding of that term. *Id.* at 66. Second, wage inquiries make no reference to any product or service being offered by the speaker for a fee. *Id.* Third, employers have no economic motivation for their speech. *Id.* at 67. Employers ask about wage history to assist with the hiring process, not in hopes that their inquiry will directly produce income.

The district court concluded that employer wage-history inquiries should be classified as "commercial speech." JA 13-15. It reasoned that all speech that "relates to attempts to hire and hiring" is designed to consummate a commercial transaction (*i.e.*, an agreement between two parties to enter into an employer-employee relationship) and thus is akin to the sorts of speech that the Supreme Court has previous classified as "commercial." JA14-15. That reasoning expands the concept of "commercial speech" far beyond anything contemplated by the Supreme Court.

Indeed, because the ultimate aim of *all* activity undertaken by a for-profit corporation is the maximization of profits, virtually anything said by corporate officials would fit within the district court's definition of "commercial speech." But the Supreme Court has made clear that the proper definition is not nearly so capacious. It has explained that fully protected speech is not transformed into commercial speech merely because the speaker is drawing a salary (or otherwise seeking to maximize profits) while speaking. *Board of Trustees v. Fox*, 492 U.S. 469, 482 ("Some of our most valued forms of fully protected speech are uttered for a profit. *See, e.g.*, *New York Times 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 a newspaper for a paid advertisement in which

the advertiser solicited monetary contributions.

The Inquiry Provision restricts fully protected, noncommercial speech and does so in a content-based manner. In the absence of any assertion by Philadelphia of a "compelling" reason for its speech restriction, the district court's preliminary injunction against enforcement of the Inquiry Provision should be affirmed.

II. THE ORDINANCE VIOLATES THE FIRST AMENDMENT EVEN IF SCRUTINIZED UNDER THE *CENTRAL HUDSON* STANDARD

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.[7] 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.

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[7] In *Central Hudson*, 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.

A. Wage-History Inquiries Neither Propose Nor Otherwise Implicate an Illegal Transaction

Philadelphia argues that the Chamber's First Amendment challenge to the Inquiry Provision does not survive the first prong of the *Central Hudson* test because wage-history inquiries "are related to illegal activity under the Ordinance." Opening Br. at 54-59 (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973)). Philadelphia concedes that employers may properly make use of wage history for legitimate purposes (*i.e.*, uses unrelated to the conduct prohibited by the Reliance Provision) and that employers regularly do so. Philadelphia nonetheless asserts the authority to prohibit *all* wage-history inquiries on the ground that such inquiries sufficiently "relate to" the prohibited activity. *Id.* at 54.

Neither *Pittsburgh Press* nor any of the other cases cited by Philadelphia support that sweeping assertion. *Pittsburgh Press* addressed a constitutional challenge to a Pittsburgh ordinance that prohibited newspapers from segregating "help wanted" advertisements by sex. Contrary to Philadelphia's assertion, the Court did not reject that challenge simply because sex-segregated employment advertising bore *some* relationship to sex discrimination by employers (which was also prohibited by the ordinance). Rather, the Court upheld the prohibition

because it determined that the advertising directly "aid[ed]" employers who wished "to indicate illegal sex practices": "the advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions." 413 U.S. at 389. In likening the prohibited advertisements to "a want ad proposing a sale of narcotics or soliciting prostitutes," *id*. at 388, the Court made clear that it viewed them as an open invitation for sex-discriminatory hiring.

In marked contrast, a wage-history inquiry cannot appropriately be viewed as speech designed to aid a prohibited practice. While it is theoretically possible that an employer will use responses to a wage-history inquiry in making a salary offer (and thereby violate the Reliance Provision), it is at least as likely that the employer will use the response for some other, wholly legitimate purpose. The Supreme Court has repeatedly rejected efforts to ban truthful speech that does not solicit illegal activity, based on government fears that the information thus obtained will be misused. *See, e.g., Western States*, 535 U.S. at 375 (stating that "[i]t is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us") (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

Philadelphia's reliance on *Village of Hoffman Estates v. Flipside, Hoffman*

Estates, Inc., 455 U.S. 489 (1982), is equally unavailing. *Hoffman Estates* involved a First Amendment challenge to an ordinance that restricted the manner in which retailers could display their merchandise. The plaintiff retailer complained that the government interfered with his expressive activities when it prohibited him from displaying drug-related literature in close proximity to drug paraphernalia (*e.g.*, water pipes and cigarette rolling papers) that he offered for sale to the public. The Court rejected that First Amendment claim, explaining:

> We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information—with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.

Hoffman Estates, 455 U.S. at 496 (citing *Pittsburgh Press*, 413 U.S. at 388). A wage-history inquiry self-evidently is not "speech proposing an illegal transaction," in light of the many legitimate uses that employers can make of the information received in response to such an inquiry. *Hoffman Estates* is thus inapposite.

In sum, the first prong of the *Central Hudson* test is no obstacle to the Chamber's First Amendment claim, given that the speech at issue involves lawful activity.

B. Philadelphia Has Failed to Demonstrate that the Ordinance Will Directly Advance Its Interests to a Material Degree

The Supreme Court holds 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). 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, to the extent that such disparities are the product of past intentional discrimination against women.[8] But Philadelphia has not met its burden

[8] For purposes of this appeal, WLF does not contest Philadelphia's assertion that at least a portion of the wage disparity can be attributed to discrimination against female workers. WLF notes, however, that every study cited by Philadelphia concedes that a significant majority of the wage disparity is attributable to factors other than discrimination. Moreover, a recent empirical study suggests that the wage disparity may be *entirely* attributable to factors other than discrimination. *See* Valentin Bolotnyy and Natalia Emanuel, *Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators*, Working Paper (Nov. 19, 2018), available at https:/scholar/harvard.edu/files/bolotnyy/files/be_gendergap.pdf. *See also* "Review & Outlook: Parsing the Gender Pay Gap," *Wall Street Journal* at A14 (Nov. 23, 2018) ("A new study suggests choices, not sexism, explain pay gap.").

of demonstrating that its prohibition of wage-history inquiries will directly advance its interests. It has produced no studies demonstrating that the prohibition will reduce discriminatory wage disparities.[9]

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*, 507 U.S. at 770-71. "[M]ere speculation or conjecture" is insufficient to fulfill the requirements. *Id*. at 770. 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.

Philadelphia argues that the district court imposed an impossibly high

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[9] WLF agrees with the Chamber that Philadelphia has also failed to the demonstrate that the Reliance Provision can withstand First Amendment scrutiny. But if the Court upholds the Reliance Provision, Philadelphia's justifications for the Inquiry Provision would be rendered even less tenable. Philadelphia has presented no evidence suggesting that, in the absence of the Inquiry Provision, employers would use the information garnered from wage-history inquiries to knowingly and surreptitiously violate the Reliance Provision.

standard for satisfying *Central Hudson*'s "directly advance" requirement. It complains that it "could not possibly possess demonstrative proof that salary-question bans close the wage gap because there had *never been one* in effect before; the Wage Equity Ordinance was the first salary-question ban to become effective." Opening Br. 37. But First Amendment standards are not lowered in order to provide every municipality a "sporting chance" of successfully defending its speech restrictions against constitutional challenge. The novelty of Philadelphia's Inquiry Provision may make it more difficult for the City to compile the evidence necessary to establish its constitutionality, but that is not a reason to excuse the City's failure to demonstrate that the speech prohibition will reduce discriminatory wage disparities "to a material degree."

To the contrary, this Court has cautioned that the judiciary should be *more* wary of potential constitutional violations when (as here) the justifications for speech restrictions are novel. Under those circumstances, courts should *increase* "the quantum of empirical evidence needed" to satisfy *Central Hudson*'s "directly advances" prong. *King*, 767 F.3d at 238 (stating that the quantum of required evidence "will vary up or down with the novelty and plausibility of the justification raised"). Courts are willing to accept legislative determinations regarding the effects of a speech restriction when past experience suggests that those

determinations are plausible. For example, courts readily accept a determination that restrictions on product advertising will lead to decreased demand for the product. *See, e.g.*, *44 Liquormart. Inc. v. Rhode Island,* 517 U.S. 484 (1996). But where, as here, the challenged speech restriction is novel and its justification lacks inherent plausibility, the Court should demand far more evidence than what Philadelphia has produced thus far before determining that the City has satisfied its "directly advances" burden.

Finally, the Ordinance's exceptions substantially undermine Philadelphia's contention that the Inquiry Provision will directly advance its substantial interests. In particular, the Ordinance permits an employer to rely on wage history in determining wages whenever a job applicant "knowingly and willingly disclosed his or her wage history to the employer." It is logical to assume that the job applicants most likely to volunteer their wage histories are those with higher past salaries—that is, the employees who are least likely to have been victims of past discrimination. One of the Ordinance's basic premises is that employers generally offer higher salaries to new employees who have received higher past salaries. Thus, the Ordinance's voluntary-disclosure exception is likely to substantially undercut the Inquiry Provision's ability to "directly advance" its intended purpose, because the exception increases the likelihood that those with lower past salaries

will continue to be offered salaries lower than those offered to those with higher past salaries.

C. Philadelphia's Unsupported Predictions Regarding the Effects of the Ordinance Are Not Entitled to Judicial Deference

Philadelphia also faults the district court for paying "mere lip service to the deference that a legislative policymaking judgment requires." Opening Br. 34. Citing *Turner I*, it contends that because "definitive empirical evidence is not available," the district court should have deferred to the City's "forecast[s]" and "plausible predictive judgments." *Id.* at 35.

Philadelphia's "deference" argument is based on a misreading of *Turner I* and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). *Turner I* and *Turner II* involved First Amendment challenges to a content-neutral speech restriction. Neither decision supports deference to speech regulations that are (as here) content-based. To the contrary, the Supreme Court has repeatedly held that content-based speech regulations are presumptively unconstitutional.

Turner I and *II* addressed a challenge to a federal statute that required cable television companies to devote a percentage of their available channels to the transmission of local broadcast stations. *Turner I* determined that the "must carry" provisions were content-neutral; that is, the government's interest (ensuring the

continued availability of free, over-the-air stations) was unrelated to the suppression of free expression and thus was subject to the relaxed standard of First Amendment scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). *Turner I*, 391 U.S. at 377. Following remand for additional fact-finding, *Turner II* concluded that the must-carry provisions passed muster under the *O'Brien* test.

In determining whether the must-carry provisions could meet the *O'Brien* test, the Court said that it was appropriate for courts to defer to the extensive congressional fact-finding regarding the need for those provisions, and whether those provisions would actually further the federal government's goals. *Turner I*, 512 U.S. at 665; *Turner II*, 520 U.S. at 195. Thus, the Court in *Turner II* deferred to Congress's factual conclusion that the cable industry posed a threat to broadcast television. *Id.* at 199, 208, 211.

But nothing in *Turner I* and *II* suggests that the deference accorded robust congressional findings made in connection with content-neutral statutes should extend to legislative findings made in connection with statutes, such as the Ordinance, that quite clearly are *not* content-neutral.[10] Moreover, the Court made

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[10] Justice Stevens's separate opinion stated explicitly that *Turner I*'s statements regarding deference apply only in the context of *content-neutral statutes* whose primary focus is economic regulation and whose speech regulation is only secondary. He explained:

clear that it did intend to foreclose independent judicial review of congressional fact-finding. *Turner I*, 512 U.S. at 666 ("[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.").

When, as here, the government has adopted content-based speech restrictions, the Supreme Court has never deemed it appropriate to defer to the legislature's predictive judgment regarding the effects of the restrictions. Any such deference would be inconsistent with the Court's mandate that content-based speech restrictions are presumptively unconstitutional unless "the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138 S. Ct. at 2371. As the Court explained, "This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id*. (quoting *Reed*, 135 S. Ct. at 2226).

> [W]e cannot abdicate our responsibility to decide whether a restriction on speech violates the First Amendment. But the factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech.

Turner I, 512 U.S. at 671 n.2 (Stevens, J., concurring in part and concurring in the judgment). Because Justice Stevens's vote provided the crucial fifth vote for the majority in *Turner I*, his opinion is particularly meaningful.

D. The Ordinance Is Not Narrow Tailored to Achieve Philadelphia's Interests

The district court found that Philadelphia failed to demonstrate that the Inquiry Provision passes muster under the third prong of the *Central Hudson* test and thus had no need to address the fourth prong. The record is nonetheless plain that the Inquiry Provision is unconstitutional for the additional reason that its speech prohibitions are considerably broader than necessary to serve Philadelphia's interest in reducing discriminatory wage disparities. While *Central Hudson*'s fourth prong 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. *Western States*, 535 U.S. at 371-72. 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 Chamber cites (at 59) research suggesting that "employer self-evaluation" has proven to be effective tool in reducing wage disparities. Yet Philadelphia has declined to consider whether legislation designed to encourage adoption of self-evaluation programs would be sufficient to achieve its stated goals. To the contrary, Philadelphia's response has been to assert (at 62) that it is

"not constitutionally required" to consider this alternative. That response misinterprets *Central Hudson*; the fourth prong's narrow-tailoring requirement permits the government to impose speech restrictions only after determining that suggested alternatives (that entail fewer speech restrictions) would be inadequate.

If the Court ultimately upholds the Reliance Provision, the deficiencies in Philadelphia's defense of the Inquiry Provision become all the more glaring. The combined impact of those two provisions on employers' speech rights is significantly greater than the impact of the Reliance Provision when considered in isolation. Yet Philadelphia has never sought to explain why the Reliance Provision by itself would be insufficient to achieve Philadelphia's stated goals. The record fails to demonstrate insufficiency. There is every reason to conclude that employers will fully comply with the Reliance Provision even if (in the absence of the Inquiry Provision) they continue to ask job applicants about their wage histories. And such compliance would fully satisfy the goals of the Ordinance. Under those circumstances, the Inquiry Provision does not qualify as "narrowly tailored" and thus does not pass muster under *Central Hudson*'s fourth prong.

CONCLUSION

Amicus curiae WLF respectfully requests that the Court affirm the district court's grant of a preliminary injunction as to the Inquiry Provision and reverse the district court's denial of a preliminary injunction as to the Reliance Provision.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302

Dated: November 28, 2018

CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH WORD COUNT AND TYPEFACE REQUIREMENTS, AND VIRUS CHECK

I, Richard A. Samp, counsel for *amicus curiae* Washington Legal Foundation, certify, pursuant to Local Appellate Rule 28.3(d), that I am a member in good standing of the Bar of this Court. I further certify, pursuant to Federal Rules of Appellate Procedure 32(a)(5)-(7) and Local Appellate Rules 31.1(c) and 32.1(c), that the foregoing brief of Washington Legal Foundation is proportionately spaced and has a typeface of 14-point Times New Roman, and contains 6,369 words, and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to Local Appellate Rule 31.1(c), that I scanned the electronic file using a virus detection program (VIPRE Business, Version 5.0.4464), and it did not detect a virus.

Dated: November 28, 2018

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2018, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to Local Appellate Rule 31.1, seven paper copies of this brief (identical to the electronic version) were deposited in the U.S. Mail on November 28, 2018, addressed to the Clerk of the Court.

/s/ Richard A. Samp
Richard A. Samp