NOS. 18-2175, 18-2176

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GREATER PHILADELPHIA CHAMBER OF COMMERCE
Plaintiff-Appellee/Cross-Appellant,

v.

CITY OF PHILADELPHIA AND PHILADELPHIA COMMISSION ON HUMAN RELATIONS,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF MASSACHUSETTS, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, ILLINOIS, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PUERTO RICO, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PHILADELPHIA

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INTERESTS OF AMICI

The Commonwealth of Massachusetts, with the District of Columbia, the Commonwealths of Puerto Rico and Virginia, and the States of Connecticut, Delaware, Illinois, New Jersey, New Mexico, New York, Oregon, Vermont, and Washington, respectfully submit this brief in support of the City of Philadelphia and the Philadelphia Human Relations Commission pursuant to Fed. R. App. P. 29.

The *Amici* States share a strong interest in combatting sex discrimination in the workplace. Sex discrimination manifests in many ways, including in a persistent gender wage gap that harms women and families across the country. To close this gap, many of the *Amici* States have augmented general antidiscrimination statutes with laws that specifically prohibit gender-based wage discrimination. This problem is stubborn, however, in part because employers' use of prior pay to determine future wages perpetuates wage disparities. Thus, as a further means of addressing the pay gap and ending this cycle of discrimination, many jurisdictions, including many of the *Amici* States, have taken measures to prohibit employers from relying on salary history. The *Amici* States therefore have strong interests in defending the constitutionality of the particular ordinance at issue in this case and, more generally, in preserving states' and localities' ability to fight persistent discrimination.

The *Amici* States also share a strong interest in upholding the First Amendment and the fundamental freedoms it protects. However, as courts have long recognized, laws like Philadelphia's—redressing discrimination in the employment context—are consistent with the First Amendment.

The *Amici* States therefore join Philadelphia in urging this Court to uphold its equal pay ordinance in its entirety for the reasons further discussed below.

ARGUMENT

I. Using Salary History to Set Wages Perpetuates the Gender Wage Gap.

Women in the United States still earn less than men do: in nearly every occupation, and even after controlling for factors like experience and education. This persistent gender wage gap is the continuing result of gender discrimination in the workplace—and employers' use of salary history in setting wages perpetuates the gap further still.

A. The Gender Wage Gap Persists and Is Due, in Large Part, to Factors That Are Not Gender-Neutral.

In 1945, Massachusetts became one of the first states in the country to pass an equal pay law. Mass. Gen. Laws ch. 149, § 105A. Many other states passed similar laws in the years that followed,[1] and Congress enacted the federal Equal

[1] *See* Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 Me. L. Rev. 23, 24-25 (2003) (describing history of equal pay acts).

Pay Act, 29 U.S.C. § 206(d), in 1963. Yet, more than 50 years later, the gender pay gap persists, and progress in closing the gap has been stalled for more than a decade.[2] It is against this backdrop that Philadelphia and many other jurisdictions have recently enacted additional measures tackling barriers to achieving wage equity, including limitations on the use of salary history.[3]

Nationally, women working full-time earn just under 82% of what men earn.[4] A gender pay gap exists in every state and the District of Columbia, and women in Pennsylvania fare worse than the national average, earning only 79% of what men earn.[5] The gap is even wider for some women of color. Nationally,

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[2] National Women's Law Center ("NWLC"), *The Wage Gap Is Stagnant for a Decade* (Sept. 2016), https://www.nwlc.org/wp-content/uploads/2016/09/Wage-Gap-Stagnant-2016.pdf; *accord* U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2017*, at 1 (Aug. 2018) ("BLS Report"), https://www.bls.gov/opub/reports/womens-earnings/2017/pdf/home.pdf (noting lack of change since 2004).

[3] Ten states (California, Connecticut, Delaware, Hawaii, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, and Vermont), Puerto Rico, and ten localities (San Francisco, Chicago, Louisville, New Orleans, Kansas City, New York City, New York's Albany and Westchester counties, Philadelphia, and Pittsburgh) have adopted some form of limitation on using salary history. *See* HRDive, *Salary History Bans: A Running List* (Aug. 24, 2018), https://www.hrdive.com/news/ salary-history-ban-states-list/516662/ (collecting laws). Recognizing the same problem, additional jurisdictions have enacted laws providing that a person's salary history is not a defense to a gender-based wage discrimination claim. *See*, *e.g.*, Wash. Rev. Code § 49.58.020(3)(d).

[4] BLS Report, *supra* note 2, at 1.

[5] *Id.* at 50-52.

Black women earn only 68% of what White men earn, while Hispanic women earn only 62%.[6] Thus, although we and others frequently speak in shorthand of a "gender wage gap" as if it reflects a one-dimensional problem, in fact, women from different backgrounds experience different wage gaps—some far worse, likely reflecting, at least in part, pervasive race discrimination as well as gender discrimination.

Women earn less than men in nearly every industry and occupation. There are only two occupations (out of 121 for which the Bureau of Labor Statistics reports wage data) in which women's median earnings are slightly higher than men's, while there are 107 occupations in which women's median earnings are 95% or less of men's.[7] Women's earnings are thus lower than men's in both jobs predominantly performed by women and jobs predominantly performed by men.[8]

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[6] Institute for Women's Policy Research ("IWPR"), *The Gender Wage Gap: 2017—Earnings Differences by Race and Ethnicity*, at 2 (Mar. 2018), https://iwpr.org/wp-content/uploads/2018/03/C464_Gender-Wage-Gap-2.pdf. These figures are based on the Bureau of Labor Statistics' measure of median *weekly* earnings. *See id.* Comparisons of median *annual* earnings from the American Community Survey show a larger pay gap. *See, e.g.*, NWLC, *Equal Pay for Black Women*, at 1 (July 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/07/Equal-Pay-for-Black-Women.pdf.

[7] IWPR, *The Gender Wage Gap by Occupation 2017 and by Race and Ethnicity*, at 1 (Apr. 2018), https://iwpr.org/wp-content/uploads/2018/04/C467_2018-Occupational-Wage-Gap.pdf.

[8] *Id.*

Women begin experiencing a pay gap as soon as they enter the workforce. Just one year out of college, full-time working women earn, on average, only 82% of what their male peers earn.[9] Overall, women under the age of 35 earn 88-91% of what men earn.[10] The wage gap then increases; women age 35 and over earn only 77-81% of what men earn.[11]

These significant gaps harm women and their families. Women in the United States lose billions of dollars every year due to the wage gap.[12] Many are the sole or primary breadwinners in their families.[13] Estimates suggest that the overall poverty rate for working women would be halved if they were paid on par with comparable men, with a proportionate reduction in the number of children of working mothers living in poverty.[14]

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[9] Christianne Corbett & Catherine Hill, *Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation*, Am. Ass'n of Univ. Women ("AAUW"), at 1 (Oct. 2012), https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf.

[10] BLS Report, *supra* note 2, at 9.

[11] *Id*.

[12] National Partnership for Women and Families, *America's Women and the Wage Gap*, at 2 (Apr. 2018), http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf.

[13] *Id*.

[14] Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy*, IWPR Briefing Paper, at 1-3, 6 (Apr. 2017), https://iwpr.org/wp-content/uploads/2017/04/C455.pdf.

To be sure, the gender pay gap in part reflects differences between the male and female workforces overall, including differences in education levels, occupations, and labor-market experience.[15] Even after controlling for these "neutral" factors,[16] however, as much as 38% of the wage gap remains unexplained.[17] A third of the gap for recent college graduates is similarly unexplained—or, rather, readily explainable only as based on gender.[18]

That this otherwise-unexplained portion of the wage gap reflects ongoing gender discrimination in the workplace is supported by voluminous independent evidence of discrimination, including forms of discrimination directly affecting pay. Women are likely to be offered lower starting salaries than men with identical resumes.[19] Women are more likely than men to be penalized for negotiating their

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[15] *See generally* AAUW, *The Simple Truth About the Gender Pay Gap*, at 17-20 (Spring 2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth.

[16] This is not to say that these factors are entirely unrelated to gender or do not reflect, among other things, broader differences in educational and work opportunities for women and girls. *See id.*

[17] Francine D. Blau & Lawrence M. Khan, *The Gender Wage Gap: Extent, Trends & Explanations*, Nat'l Bureau of Econ. Res., at 8 (Jan. 2016), http://www.nber.org/papers/w21913.

[18] Corbett & Hill, *supra* note 9, at 20-21.

[19] Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 Proc. Nat'l Acad. Sci. 16474, 16474 (Oct. 2012), http://www.pnas.org/content/pnas/109/41/16474.full.pdf.

salaries.[20] Working mothers experience discrimination in hiring and salary determinations that working fathers do not.[21] Not only do traditionally "female" occupations generally pay less,[22] but, as more women enter "male" fields of work, overall wages in those fields tend to decrease.[23] And sex discrimination claims filed with the U.S. Equal Employment Opportunity Commission (EEOC) have remained steady in recent years—approximately 25,000-30,000 annually—and continue to result in hundreds of millions of dollars in settlements and judgments.[24]

B. Salary History Is Not a Gender-Neutral or Necessary Proxy for Job Qualifications.

Due in part to discrimination, salary history is not a gender-neutral measure of a person's potential value to a future employer. Nor need employers inquire about or rely on it.

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[20] *See* Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 Org. Behav. & Hum. Decision Processes 84, 84 (2007), https://www.cfa.harvard.edu /cfawis/bowles.pdf; Maria Konnikova, *Lean Out: The Dangers for Women Who Negotiate*, The New Yorker (June 10, 2014), https://www.newyorker.com/science/ maria-konnikova/lean-out-the-dangers-for-women-who-negotiate.

[21] Shelly J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297, 1330 (Mar. 2007), https://sociology.stanford.edu/sites/default/ files/publications/getting_a_job-_is_there_a_motherhood_penalty.pdf.

[22] IWPR, *supra* note 7, at 1-2.

[23] AAUW, *supra* note 15, at 19-20.

[24] EEOC, *Sex-Based Charges FY 1997-FY 2017*, https://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm.

Innumerable factors together determine why a past employer paid an employee a particular salary, and many have nothing whatsoever to do with the particular employee's merits as compared with other potential candidates. These factors include the employer's resources, industry, and geographic location; whether seniority-based or other nondiscretionary pay scales applied; and benefits an employer may provide in exchange for accepting a below-market salary. Most importantly, in too many cases, employees' past salaries may have been the product of intentional discrimination, unconscious bias, or the systemic undervaluing of certain categories of work associated with and disproportionately performed by women. *See supra* at 6-7. That is, female job applicants—and especially many women of color—are likely to have earned less in the past than their male counterparts for reasons that have no bearing on their own qualifications.[25]

Accordingly, using salary history to set compensation—while seemingly neutral—often perpetuates discrimination. The Ninth Circuit recently recognized

[25] In addition, because women are more likely than men to reduce their hours or leave the workforce to attend to family caregiving responsibilities, their salary histories are more likely to be outdated when they apply for a position, not reflecting current market conditions or their current qualifications. *See, e.g.*, NWLC, *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, at 2 (June 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com /wpcontent/uploads/2017/06/Asking-for-Salary-History-Perpetuates-Discrimination.pdf.

as much in holding that a female employee's prior salary does not qualify as a "factor other than sex" under the federal Equal Pay Act that can justify paying her less than a male employee who performs substantially equal work. *Rizo v. Yovino*, 887 F.3d 454, 460-61 (9th Cir. 2018) (en banc). Prior pay, the court found, simply "is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex . . . but the relationship is attenuated." *Id.* at 467. "More important," the court found, prior pay "may well operate to perpetuate the wage disparities prohibited under the [Equal Pay Act]." *Id*. The Ninth Circuit therefore concluded that, "[r]ather than us[ing] a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best[.]" *Id.*[26]

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[26] Other courts have similarly held that prior salary alone cannot justify paying men and women differently for equal work. *See, e.g.*, *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (Equal Pay Act "precludes an employer from relying solely upon a prior salary to justify pay disparity") (citation omitted); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated"); *but see, e.g.*, *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468-70 (7th Cir. 2005) (holding that prior salary alone can justify wage disparities). The EEOC also advises that prior salary cannot, by itself, justify a compensation disparity because job candidates' prior salaries can reflect sex-based discrimination. EEOC Compliance Manual, No. 915.003 § 10-iv.F.2.g (Dec. 2000), https://www.eeoc.gov/policy/docs/compensation.html.

Employers and human resource professionals, too, increasingly recognize the fallibility of relying on salary history as a proxy. Many compensation consultants already advise against it in favor of other methods.[27] And a number of large companies—including Amazon, Wells Fargo, American Express, Cisco, Google, and Bank of America—reportedly have already eliminated the use of questions about pay history.[28]

Other means thus exist by which businesses can determine competitive salaries. Employers can probe candidates' own qualifications during the interview process or by speaking directly with former employers. To understand the market rate for a particular job, or for a particular set of skills and experience, they can draw on salary surveys and other appropriate third-party sources of aggregated compensation information, many of which are now readily available online.[29] And

[27] *See, e.g.*, Barbara Mitchell, *What's the Right Salary to Offer?*, Association CareerHQ, https://www.associationcareerhq.org/recruitment-strategies/whats-the-right-salary-to-offer; *see also* Adam Heitzman, *5 Tips to Determine a Salary Scale for Employees*, Inc. (Mar. 29, 2016), https://www.inc.com/adam-heitzman/5-tips-to-determine-a-salary-scale-for-employees.html.

[28] Yuki Noguchi, *More Employers Avoid Legal Minefield By Not Asking About Pay History*, NPR (May 3, 2018), https://www.npr.org/2018/05/03/608126494/ more-employers-avoid-legal-minefield-by-not-asking-about-pay-history.

[29] *See, e.g.*, Heitzman, *supra* note 27 (explaining that, in light of online resources, "[d]eciding what to pay employees does not have to be difficult"); Bob Corlett, *Determining Salary for a New Hire? Think Like a Compensation Pro*, Staffing Advisors (Oct. 21, 2013), https://blog.staffingadvisors.com/2013/10/21/

to manage expectations, employers can advertise jobs with salary ranges.[30] Thus, while it may seem convenient simply to ask a prospective employee about her prior pay, doing so is not necessary.[31]

While Plaintiff's *amici* complained below that eliminating the "long-standing and universally-accepted practice of inquiring about and relying on" wage histories will deprive businesses of "critical information in making wage determinations," it is precisely *because* businesses use prior pay to identify "the best candidates" and set wages that laws like Philadelphia's are needed.[32] Such laws address the increasing recognition that "justify[ing] a wage differential between men and women on the basis of salary history is wholly inconsistent with" eradicating discrimination, because salary history itself reflects gender-based disparities. *Rizo*, 887 F.3d at 460.

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determining-salary-for-a-new-hire-think-like-a-compensation-pro-2 (outlining framework to determine appropriate rates of pay).

[30] *See* Noguchi, *supra* note 28.

[31] Indeed, in a recent survey, nearly half of employers reported that implementing a salary history ban was "very" or "extremely" simple. *See* WorldatWork, *Banning the Use of Salary History in Job Offers Proves Less Difficult Than Anticipated* (Mar. 20, 2018), https://www.worldatwork.org/press-room/banning-the-use-of-salary-history-in-job-offers-proves-less-difficult-than-anticipated.

[32] Brief of *Amici Curiae* African-American Chamber of Commerce of Pennsylvania et al., No. 2:17-cv-01548, Dkt. No. 49-1, at 1-3, 7 (E.D. Pa. July 25, 2017).

C. Employers Routinely Inquire About and Rely on Salary History to Set Wages, Thereby Perpetuating the Gender Wage Gap.

As Plaintiff's *amici* suggest, employers routinely inquire about and rely on salary history to set wages of prospective employees—and do so at the expense of perpetuating the gender wage gap. Such reliance is multifaceted: the product of both express policies (that prohibitions on reliance can eliminate) and unconscious biases (that are far more difficult to eradicate).

There is no question that employers frequently inquire about and rely on wage histories during the hiring process. A 2017 survey revealed that 43% of job applicants were asked about their pay history.[33] Another recent survey found that 80% of hiring managers and recruiters relied on candidates' salary history in determining compensation offers.[34] Plaintiff's own members aver that they rely on salary history to evaluate candidates and make salary offers.[35] This practice allows them to quickly determine the lowest salary that a prospective employee will likely accept.[36] As part of this practice, many employers intentionally set starting salaries

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[33] *See* Payscale.com, *The Salary History Question: Alternatives for Recruiters and Hiring Managers*, http://hrprofessionalsmagazine.com/the-salary-history-question-alternatives-for-recruiters-and-hiring-managers/.

[34] WorldatWork, *supra* note 31.

[35] *See* Phila. Br. 18 n.6 (collecting record citations).

[36] Employers also sometimes use prior pay to screen out candidates, assuming that higher-paid candidates will not be interested in lower-paying jobs, or that lower-paid candidates are unqualified. *See, e.g.*, NWLC, *supra* note 25, at 1.

at an applicant's immediate past salary plus a certain percentage (*e.g.*, 10 percent).[37] Such practices thereby inevitably perpetuate any already-existing gender-based disparities.

In addition to intentionally relying on salary history in setting wages, employers also unconsciously rely on it—and can be expected to do so even if they understand that an applicant's prior pay does not accurately reflect his or her qualifications, or even if they know that reliance is unlawful. Such is the strength of the "anchoring" effect, a cognitive bias that leads people to give undue weight to the first number introduced into a negotiation.[38] This bias has been demonstrated, for instance, in an experiment in which participants were asked to set salaries for recently hired employees.[39] Groups of employers were each given the same information about the candidates, except that members of the experimental group

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[37] *Id.* (citing Lynda Spiegel, *How Job Seekers Should Handle Salary History Requests*, Wall St. J., Apr. 20, 2017, https://blogs.wsj.com/experts/2017/04/20/how-job-seekers-should-handle-salary-history-requests/ ("hiring managers tend to benchmark their offer at 10% to 15% above a candidate's most recent salary")).

[38] *See* Harvard Law School Program on Negotiation, *Example of the Anchoring Effect and How it Can Impact Your Negotiation* (Feb. 12, 2018), https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/.

[39] Todd J. Thorsteinson, *Initiating Salary Discussions With an Extreme Request: Anchoring Effects on Initial Salary Offer*, 41 J. Applied Soc. Psychol. 1774, 1778-81 (2011).

were also told that the candidates responded to a question about salary expectations with either "$100,000" or "$1" and also said "but really I'm just looking for something that is fair."[40] By comparison with the control group, which was not exposed to these numbers, the experimental group offered the candidates who mentioned $100,000 a significantly higher salary and offered candidates who mentioned $1 slightly less.[41]

Many other experiments demonstrate the anchoring effect that an initial number—even a patently unreliable one—can have.[42] In another study, for example, legal professionals were asked to decide on a sentence for a hypothetical criminal defendant.[43] The participants were given sentencing recommendations from both the prosecution and the defense—and then told that the prosecutor's recommendation was generated randomly.[44] Participants nevertheless gave longer

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[40] *Id.* at 1779.

[41] *Id.* at 1179-80.

[42] Adrian Furnham & Hua Chu Boo, *A Literature Review of the Anchoring Effect*, 40 J. Socio-Econ. 35, 35-42 (2011) (collecting studies of the effects on legal judgments, valuations and purchasing decisions, forecasting, and self-efficacy).

[43] Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 Personality & Soc. Psychol. Bull. 188, 188-200 (2006), http://www.eucim-te.eu/data/dppsenglich/File/PDFSStudien/PSPB_32(1).pdf.

[44] *Id.*

sentences when the prosecutor's random recommendation was high as compared to when it was low.[45]

Inquiries into and reliance on prior pay are thus fundamentally intertwined. Even if employers understand that they should not consider salary history, if this information is introduced into negotiations, it will likely function as an "anchor," to the detriment of lower-paid female candidates, perpetuating the persistent gender wage gap.

II. Limiting Employers' Reliance on Salary History Is a Constitutional Means to Close the Gender Wage Gap.

Joining jurisdictions across the country, Philadelphia has taken up the challenge of closing the gender wage gap. It prohibits employers from asking about or otherwise requiring disclosure of a prospective employee's wage history (the "Inquiry Provision") and prohibits employers from relying on wage history in determining wages (the "Reliance Provision"). Phila. Code § 9-1131(2)(a) (the "Ordinance"). The District Court below erred in concluding that the Inquiry Provision violates the First Amendment. That provision governs commercial speech that is related to unlawful conduct and is therefore freely regulable, and, in any event, the measure readily meets intermediate scrutiny. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

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[45] *Id.*

A. The First Amendment Permits Prohibiting Discriminatory Conduct and the Means by Which Such Conduct Occurs.

As the District Court correctly held, because the Reliance Provision simply prevents employers from using salary history to set wages, it regulates solely conduct and requires no First Amendment scrutiny. JA 41-46; *see also, e.g.*, *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 66 (2006) ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."). The Inquiry Provision, in turn, is constitutional—like other similar antidiscrimination statutes —because it regulates commercial speech concerning such unlawful activity. *Central Hudson*, 447 U.S. at 566.

1. Philadelphia Employers' Inquiries Regarding Prospective Employees' Salary History Relate to Unlawful Conduct.

Under *Central Hudson*'s intermediate scrutiny for commercial speech, "[t]he threshold inquiry is whether the speech at issue involves unlawful activity or is misleading"; "[i]f so, the government may restrict it and the inquiry ends." *United States v. Bell*, 414 F.3d 474, 480 (3d Cir. 2005). The analysis here need not extend beyond this threshold question.

The Inquiry Provision is constitutional because it regulates commercial speech involving unlawful activity: offering wages unfairly influenced by prior

pay, a practice Philadelphia has made unlawful through the Reliance Provision. *See Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (a "proposal of possible employment" is a "classic example[ ] of commercial speech"); *see also, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) ("In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."). Like the restrictions on newspapers' placing "help-wanted" ads in sex-designated columns upheld in *Pittsburgh Press*, prohibiting employers from asking prospective employees about their prior pay during the hiring process is incidental to Philadelphia's valid prohibition on discrimination. *See Pittsburgh Press*, 413 U.S. at 388 ("Discrimination in employment is not only commercial activity, it is illegal commercial activity under the [o]rdinance."). As such, any First Amendment interest on the part of the employer in this commercial transaction is "altogether absent." *Id.* at 389.

The underlying activity here is not, as the District Court suggested below, "hiring employees" generally. JA 21. To accept the court's logic is to assume away the entrenched disparities the Ordinance is meant to redress. Moreover, other courts have rejected similar sleights of hand. In *Tobacco Outlets*, for example, the First Circuit examined the constitutionality of an ordinance that prohibited the sale of tobacco products by way of coupons and multi-pack

discounts and then also prohibited licensed tobacco retailers from accepting or offering to accept such coupons. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013). The court concluded that because the latter provision prohibited retailers from offering to engage in illegal underlying commercial activity—"that is, sales of tobacco products by way of coupons and multi-pack discounts"—such offers could be "freely regulated." *Id*. In other words, the underlying commercial activity was selling tobacco products in a particular unlawful fashion, not the selling of tobacco generally. Likewise, here, the underlying commercial transaction is the practice of using a metric to set wages that Philadelphia has found to perpetuate discrimination and has made unlawful. Employers' eliciting that metric during the hiring process may therefore be freely regulated.

The District Court's concern that upholding the Inquiry Provision could allow a jurisdiction to "pass any law with two provisions, one of which impermissibly regulates commercial speech, so long as the other provision renders *one* use of the underlying commercial speech unlawful," is unfounded. JA 21 (emphasis added). Philadelphia is not seeking to regulate all speech concerning prior pay in such an overbroad fashion, nor is the Reliance Provision in any way a pretext for unlawful speech regulation. Rather, to combat a widely acknowledged harm perpetuated by employers' reliance on salary history in the hiring process,

Philadelphia has prohibited precisely such reliance. To make that prohibition more effective, it has also barred eliciting salary history—but *only* during the hiring process, *i.e.*, when there is the greatest risk that the information will be relied upon (whether consciously or not) to set wages to the detriment of female employees.

Because Philadelphia employers' inquiries to prospective employees regarding their past salary history thus "involve[] unlawful activity," Philadelphia "may restrict" them. *Bell*, 414 F.3d at 480.

2. Restricting Pre-Employment Inquiries That Are Closely Related to Unlawful Discrimination Is a Common and Effective Means of Redressing Discrimination.

Moreover, the method by which the Ordinance combats discrimination is by no means unusual. Many jurisdictions have long prohibited employers from making inquiries that are likely to facilitate discrimination. This is unsurprising: if a legislature wishes to preclude employers from relying on a characteristic for decision-making purposes, prohibiting them from requiring candidates to disclose the characteristic during the hiring process concretely advances this goal.

This method is used, for example, in some federal antidiscrimination statutes prohibiting employer inquiries related to protected characteristics. *See, e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12112(d)(2) (providing, with limited exceptions, that "a covered entity shall not . . . make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or

severity of such disability”); Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff-1(b) (prohibiting employers from “request[ing], requir[ing], or purchas[ing] genetic information with respect to an employee or a family member of the employee,” with limited exceptions.). And, while many other statutes prohibit employment discrimination without expressly prohibiting related inquiries, some of these laws have been interpreted to prohibit such inquiries. For example, the EEOC’s regulations on sex discrimination prohibit any inquiry that “expresses, directly or indirectly, any limitation, specification, or discrimination as to sex . . . . unless based upon a bona fide occupational qualification.” 29 C.F.R. § 1604.7. Courts have interpreted this regulation to render “questions about pregnancy and childbearing . . . unlawful per se[,] in the absence of a bona fide occupational qualification.” *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258 n.2 (8th Cir. 1984).[46]

Many states similarly prohibit employers from both relying on certain protected characteristics to discriminate and asking prospective employees about

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[46] EEOC guidance likewise advises employers not to make inquiries about an applicant’s intention to become pregnant. *See* EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015), https://www.eeoc.gov/laws/ guidance/pregnancy_guidance.cfm.

those characteristics. *See, e.g.*, Mass. Gen. Laws ch. 151B, § 4(3); 43 Pa. Stat. § 955(b)(1).[47]

Regulating pre-employment inquiries thus plays a critical role in governmental efforts to ensure that non-discrimination protections are effective. Lawmakers across the country have drawn a similar commonsense conclusion: where possible, the best way to prevent unlawful discrimination is to eliminate the source of discrimination.[48] Philadelphia has done the same here.

B. Philadelphia's Ordinance Also Directly Advances a Substantial Governmental Interest and Is Narrowly Tailored.

Even if *Central Hudson*'s threshold inquiry did not compel the conclusion that the Inquiry Provision is constitutional because it pertains to unlawful

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[47] Many jurisdictions have also enacted additional limitations on pre-employment inquiries that are not directly tied to protected characteristics, but further other important aims—for example, prohibitions on seeking applicants' credit or criminal histories. *See, e.g.*, Mass. Gen. Laws ch. 151B, § 4(9 ½). Restrictions on inquiries related to protected characteristics are common in other contexts as well. For example, fair housing laws often limit such inquiries by housing providers and mortgage lenders. *See, e.g.*, 24 C.F.R. §100.202 (Fair Housing Act regulations); Mass. Gen. Laws ch. 151B, §§ 4(6)-(7); *see also* 12 C.F.R. §§ 202.5(d)(3), (5) (Equal Credit Opportunity Act regulations).

[48] *See, e.g.*, EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, at n.14 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html ("Congress . . . concluded that the only way to protect employees with nonvisible disabilities is to prohibit employers from making disability-related inquiries and requiring medical examinations that are not job-related and consistent with business necessity.").

commercial conduct, the Ordinance is constitutional because it directly advances Philadelphia's substantial interest in preventing gender-based wage discrimination and is narrowly tailored to advance that interest. *See Central Hudson*, 447 U.S. at 564.[49]

1. The Ordinance Directly Advances Philadelphia's Substantial Interest in Closing the Gender Wage Gap.

Plaintiff has not disputed Philadelphia's substantial interest in eradicating gender-based wage discrimination, a persistent problem that has defied decades of attempted solutions. Faced with this history, Philadelphia made a reasoned legislative judgment that barring employers from eliciting prospective employees' salary histories during the hiring process will directly advance its interests in closing the gender wage gap. Logic and evidence both support this conclusion.

a. State and Local Governments Are Entitled to Deference in Fashioning Remedies for Discrimination.

To begin with, state and local legislatures are entitled to considerable deference in fashioning remedies for discrimination, even when those remedies incidentally regulate speech. While a reviewing court has an "obligation to

[49] No basis exists for subjecting this regulation of commercial speech to heightened scrutiny; it does not, for example, "on its face burden[] disfavored speech by disfavored speakers." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). In any event, for all the reasons the statute satisfies intermediate scrutiny, it would also satisfy heightened scrutiny.

exercise independent judgment when First Amendment rights are implicated," *Turner Broad System, Inc. v. FCC*, 512 U.S. 662, 666 (1994), it "do[es] not review a legislature's empirical judgment *de novo*," *King v. Governor*, 767 F.3d 216, 238 (3d Cir. 2014) (quotation omitted), *abrogated on other grounds*, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).[50] Instead, a court's role is to "determine[ ] whether the legislature has drawn reasonable inferences based on substantial evidence." *Id*. (quotation omitted). Such deference is due because legislatures are in a better position than the judiciary to "amass and evaluate" data on "complex and dynamic" problems, *Turner*, 512 U.S. at 665-66 (quotation omitted), including matters of "the relation of employer and employed," *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937).

Moreover, when a legislature's judgment is challenged, all available evidence may be considered, whether or not it was presented before the legislature. *Phillips v. Borough of Keysport*, 107 F.3d 164, 178 (3d Cir. 1997) (en banc). This deference reflects that "individual legislators [may] base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense[.]" *Id*.

[50] In *King*, this Court held that the commercial speech doctrine's intermediate scrutiny should apply to content-based regulations of "professional speech." 767 F.2d at 237. While the Supreme Court has since clarified that such restrictions are subject to strict scrutiny, *Becerra*, 138 S. Ct. at 2371, *King* nevertheless still stands insofar as it articulates the commercial speech doctrine.

And there is no minimum amount of empirical evidence that a government must put forward in order to substantiate a legislative body's conclusions. Instead, "[t]he quantum of empirical evidence needed . . . will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Indeed, in some circumstances, "litigants [may] justify . . . restrictions . . . based solely on history, consensus, and simple common sense." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (quotation omitted).

b. Precluding Reliance on Salary History Directly Advances the Cause of Ending Gender-Based Wage Discrimination.

Here, both "simple common sense" and voluminous evidence support the Ordinance. *Id.* As described, a longstanding gender wage gap begins early in women's careers, cannot be explained away by "neutral" factors, and is due at least in part to gender-based discrimination—of which there is myriad independent evidence. *See supra* at 4-7. Accordingly, salary history is not gender-neutral. *See supra* at 7-9. Yet employers frequently elicit such information from prospective employees and knowingly rely on it to set future wages. *See supra* at 12-13. Even in the absence of overt reliance, such information risks "anchoring" compensation offers and negotiations. *See supra* at 13-14. Preventing employers from eliciting and thus from relying (consciously or unconsciously) on salary history at this

crucial juncture is therefore likely to help narrow the gender wage gap by breaking the causal chain that otherwise relentlessly drags past disparities into the future.

The District Court erred in disregarding this compelling logic and evidence. The court's reliance on *Wollschlaeger v. Governor* was particularly misplaced. 848 F.3d 1293 (11th Cir. 2017) (en banc); *see* JA 30-31. In *Wollschlaeger*, the Eleventh Circuit considered a constitutional challenge to a law that, among other things, restricted medical professionals' inquiries to their patients about their ownership of firearms. *Id*. at 1302-03. This restriction ran contrary to recommendations from the American Medical Association and other national organizations encouraging physicians to make such inquiries in order to prevent firearm-related deaths and injuries. *Id*. at 1301. Legislative history revealed that the law was based solely on six anecdotes involving patients who had objected to their physicians' inquiries or comments about firearms: "There was no other evidence, empirical or otherwise, presented to or cited by the Florida Legislature." *Id.* at 1302, 1312. Ultimately, applying heightened scrutiny to this content-based restriction on professional speech,[51] the court concluded that, "in a state with more than 18 million people," these "six anecdotes (not all of which address[ed] the same concerns)" were insufficient to demonstrate that the alleged harms were "not

[51] *Wollschlaeger* thus was decided under a more stringent standard than the *Central Hudson* intermediate scrutiny applicable here. *See* 848 F.3d at 1307-11.

merely conjectural, such that the [law would] in fact alleviate these harms in a direct and material way." *Id.* at 1312 (quotation omitted).

Unlike in *Wollschlaeger*, there can be no claim here that Philadelphia's law addresses a conjectural problem. Moreover, given the highly plausible nature of the intervention Philadelphia has crafted to combat the problem—a two-part prohibition employed in many other state and federal antidiscrimination statutes—little or no empirical evidence should be required. *King*, 767 F.3d at 238. In any case, however, Philadelphia's City Council made legislative findings based on robust evidence in the form of oral and written testimony from advocates, experts, and scholars. Phila. Br. 7-13 & n.3. And Philadelphia further substantiated these conclusions in the court below with additional research, data, and analysis. *See id.* at 13-16; *King*, 767 F.3d at 238 ("Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review[.]").[52]

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[52] Although the effects of salary history restrictions have yet to be determined in an empirical study, recent research suggests that the laws will indeed ameliorate the wage gap. *See* Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence From a Field Experiment* (2017) (under review for publication), http://john-joseph-horton.com/papers/WageHistory.pdf. Researchers found that employers responded to being deprived of salary history by asking candidates "more—and more substantive—questions"; evaluating and hiring workers with lower wage histories; and paying such workers 9% higher

Philadelphia was not required to produce conclusive empirical evidence to justify the Ordinance. That burden of proof would grind policy innovation to a standstill and require governments to "wait for conclusive scientific evidence before acting to protect its citizens"—an outcome squarely rejected by this Court in *King*. 767 F.3d at 239. Instead, "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner*, 512 U.S. at 665. A reasonably flexible standard is particularly warranted in a case like this, where the underlying problem to be remedied is workplace discrimination—a complex and pervasive problem that persists despite decades of efforts to combat it.[53]

Philadelphia's commonsense approach to tackling the gender wage gap—an approach adopted by an increasing number of jurisdictions, *see supra* at 3 n.3—thus directly advances its interest in eradicating such discrimination.

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wages. *Id.* at 2-5. Noting the recent passage of Philadelphia's ordinance, the researchers observed that their "findings suggest that [such laws] would more or less have the intended effects, benefiting those with relatively low wages," who "would benefit both from being more likely to be evaluated by employers, and perhaps also by being able to strike a better wage." *Id.* at 5, 34.

[53] *See, e.g.*, Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, Employee Rts. and Employment Pol'y J., Vol. 9, No. 1 (Winter 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=795409.

2. The Ordinance Is Narrowly Tailored.

The Ordinance is also narrow in scope and directly proportionate to Philadelphia's substantial interest in eliminating one contributor to the gender wage gap. *King*, 767 F.3d at 239 (narrow tailoring requires a fit between legislative goals and methods that "represents not necessarily the single best disposition[,] but one whose scope is in proportion to the interest served" (quotation omitted)).

The Inquiry Provision directly advances Philadelphia's goal, and goes no further. An employer may not "inquire about a prospective employee's wage history, require disclosure of wage history, or condition employment or consideration of an interview or employment on disclosure of wage history[.]" Phila. Code § 9-1131. Notably, however, this provision does not prohibit applicants from volunteering salary history information in the event they believe disclosure may be helpful. Nor does it prohibit employers from inquiring of employees after the hiring process has concluded or obtaining salary market information from other available sources, *see supra* at 10-11. The Ordinance is thus not a bar on the sharing of salary history information generally. *Cf. Virginia State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (statute "single[d] out speech of a particular content and s[ought] to prevent its dissemination completely"). Rather, it simply prohibits employers from making

a particular demand at a specific point in time—after a prospective employee has applied for a job and before he or she is hired—when there is the greatest risk of unlawful conduct that perpetuates discrimination.

By thus limiting consideration of salary history, Philadelphia's law is directly targeted at and proportional to its goal of ensuring that a "second-rate surrogate" for a candidate's qualifications is not used during the hiring process to perpetuate the gender wage gap. *Rizo*, 887 F.3d at 467.

CONCLUSION

For the foregoing reasons, the *Amici* States join in asking the Court to reverse the District Court's decision insofar as it granted, in part, Plaintiff's motion for a preliminary injunction.

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Dated: September 28, 2018

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I hereby certify that on September 28, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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