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

THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, on behalf of its members, Plaintiff, v. CITY OF PHILADELPHIA and PHILADELPHIA COMMISSION ON HUMAN RELATIONS, Defendants.	Civil Action No. 17-01548

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Chamber of Commerce for Greater Philadelphia (the "Chamber"), pursuant to Rule 65 of the Federal Rules of Civil Procedure, moves the Court for a preliminary injunction prohibiting Defendants City of Philadelphia and the Philadelphia Commission on Human Relations, and their officers, employees, agents, and attorneys, as well as any other persons acting in concert or participation with Defendants, from enforcing or giving effect to an ordinance that amends the City's "Fair Practices Ordinance: Protections Against Unlawful Discrimination," Chapter 9-1100 of the Philadelphia Code, by adding a new Chapter on wage equity. *See* Phila. Code §§ 9-1103, 9-1131 (the "Ordinance") (attached as Exhibit A).

As set forth in the accompanying memorandum of law in support of the Chamber's motion, the Chamber satisfies each of the elements for securing a preliminary injunction. The Ordinance violates the First and Fourteenth Amendments and the Due Process and Commerce Clauses of the United States Constitution, as well as Pennsylvania law, and thus the Chamber is likely to succeed on the merits of its claim; the Chamber's members will be irreparably harmed by enforcement of the Ordinance; Defendants cannot establish that an injunction will harm their

interests; and the public interest strongly favors enjoining Defendants from enforcing this unconstitutional law.

The Chamber respectfully requests oral argument on this motion.

Dated: April 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2017, true and correct copies of the foregoing **MOTION FOR A PRELIMINARY INJUNCTION** and **PROPOSED ORDER** were filed pursuant to the Court's electronic filing procedures using the Court's CM/ECF system and was served via hand delivery on the following:

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

A job applicant's wage history has long been an essential tool in the hiring process. Wage history helps employers identify applicants they cannot afford, evaluate the market for comparable positions, and, in some cases, formulate appropriate salary offers. Until now, asking about and relying on wage history have been almost universally viewed as legitimate employer practices—so much so that reliance on an applicant's wage history is ordinarily treated as an affirmative defense under federal equal-pay laws. In a recently enacted Ordinance, however, the City of Philadelphia ("City") has staked out a different position. According to the City, wage history should play no part in salary decisions because it only perpetuates gender-based wage disparities. Based on that supposition—for which the City cites zero empirical evidence or even reliable anecdotal support—the City has enacted a sweeping Ordinance that prohibits employers from asking about an applicant's wage history and from basing salary decisions on that history unless it is "knowingly and willingly" disclosed. *See* Ex. A. In effect, the City has asserted the authority to restrict any speech that it believes could conceivably perpetuate the effects of past discrimination; on that radical and unconstitutional theory, employers could equally be barred from asking applicants about previous job positions and responsibilities entirely.

Plaintiff Chamber of Commerce for Greater Philadelphia (the "Chamber")—like its members—abhors discrimination in any form, and is strongly committed to eliminating artificial barriers to the professional advancement of women. The Chamber also fully supports equitable pay for women and recognizes the City's unquestionably significant interest in eliminating pay disparities attributable to gender discrimination. In fact, the Chamber actively participated in the legislative process that led to the Ordinance's enactment and proposed alternatives that would meaningfully address such disparities. As enacted, however, the Ordinance does not advance the City's interest in remedying gender discrimination; instead, it sacrifices important freedoms to

haphazardly target pay disparities caused by non-discriminatory factors—such as differences in training, skill, and experience—and significantly intrudes on the constitutional rights of Philadelphia employers. Because the Ordinance will have no perceptible effect on gender-based pay discrimination and will substantially impair Philadelphia employers' legitimate business practices, the Chamber seeks a preliminary injunction to prevent enforcement of the Ordinance.

The requirements for a preliminary injunction are plainly met here. Most importantly, the Chamber is likely to succeed on the merits because the Ordinance has serious constitutional flaws. *First*, the Ordinance violates employers' First Amendment rights. Its content- and speaker-based speech restrictions are subject to strict scrutiny, which they cannot conceivably meet. There simply is no substantial basis for prohibiting wage-history inquiries and reliance when the applicant is, for example, a high-level executive who must be lured away from her current employer, a partner in a law firm with a lock-step compensation structure, or a man whose salary (on the City's own theory) reflects the non-discriminatory top of the wage "gap" that the City seeks to "close." The Ordinance fares no better even if intermediate scrutiny applies because, among other reasons, it indirectly targets discriminatory wage disparities without any evidence that its speech restrictions will actually ameliorate those disparities, much less materially so. *Second*, the Ordinance is unconstitutionally vague because it does not clearly define when an employer can safely rely on wage-history information "knowingly and willingly" disclosed by an applicant. And *third*, the Ordinance regulates hiring decisions that occur outside the City (and, indeed, Pennsylvania) in violation of the U.S. Constitution and Pennsylvania law.

The loss of First Amendment rights for even a short time is irreparable injury. Absent an injunction, the Chamber's members thus will suffer irreparable harm because their protected speech will be chilled by the threat of onerous sanctions for violating the Ordinance's ill-defined

prohibitions. Moreover, the balance of harms and the public interest weigh decisively in favor of vindicating employers' First Amendment rights and preventing the City from transgressing the constitutional and statutory limits on its authority. The Chamber and its members strongly support the City's objective of eliminating wage disparities caused by gender discrimination. But the Ordinance's speech restrictions sweep far too broadly and combat discrimination far too indirectly to achieve the City's remedial objective. A preliminary injunction is warranted.

BACKGROUND

I. On November 22, 2016, the City's Committee on Law and Government held a hearing on a proposed bill that would ultimately become the Ordinance. Although the Chamber has a longstanding commitment to gender wage equality, it opposed the proposal, testifying that the Ordinance's effect was "unknown" and warning that its severe penalties could force small businesses to close. Ex. B at 2. The Chamber explained that wage history gives employers "a better understanding of whether a candidate is worth pursuing" and helps employers ascertain "the market value or salaries for comparable positions." *Id.* at 1.

The Ordinance's supporters acknowledged that it would not solve the problem of gender-based wage inequities, Council of the City of Phila., Comm. on Law & Gov't, Hr'g Tr. 13, 35 (Nov. 22, 2016) ("Hr'g Tr."), available at http://bit.ly/2kOuRPp, but merely "ha[d] the potential to help close the gender gap," *id.* at 11. Consistent with this testimony, several supporters conceded that not all previous wages reflect discrimination. Supporters treated the salaries of white males, for example, as the baseline market rate, *see*, *e.g.*, *id.* at 71—the benchmark for the "gap" that they desired to "close"—and there was no testimony that those salaries reflect gender discrimination. Witnesses further agreed that "compensation decisions are based on a number of different factors, such as market value, internal equity, funding limitations and competition." Ex.

B at 1; *see also* Hr'g Tr. 30, 49. Although Committee members and the Ordinance's supporters worried that employers might lower a salary offer based on an applicant's wage history, *see*, *e.g.*, Hr'g Tr. 7-8, 35, 39, no witness provided any statistics, studies, or even anecdotes to substantiate this presumed practice.

During the legislative process, the Chamber proposed two alternative measures to narrow the gender wage gap without restricting employers' speech. In written testimony, the Chamber described its success in conducting a self-evaluation to ensure that its employees receive fair market wages and recommended that the City encourage other employers to do the same. Ex. B at 2. And before the Ordinance was signed into law, the Chamber offered an amendment that would have allowed wage-history inquiries but barred employers from relying solely on that history to make a salary determination.

II. Notwithstanding the equivocal legislative record, the City enacted the Ordinance and, in so doing, rejected both of the Chamber's alternative proposals without explanation. The Ordinance, which will take effect on May 23, 2017, amends the City's "Fair Practices Ordinance: Protections Against Unlawful Discrimination," Phila. Code § 9-1101 *et seq*.

The Ordinance relies on the City Council's "[f]indings" that women in Pennsylvania "are paid 79 cents for every dollar a man makes"; "[s]ince women are paid on average lower wages than men, basing wages upon a worker's wage at a previous job only serves to perpetuate gender wage inequalities"; and "[s]alary offers should be based upon the job responsibilities of the position sought and not based upon the [applicant's] prior wages." Phila. Code §§ 9-1131(1)(a), (d), (e). No empirical studies or even anecdotal evidence is cited in support of these "findings."

On the basis of these unsubstantiated findings, the Ordinance establishes two new prohibitions. *First*, an employer may not "inquire about a prospective employee's wage history,

require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosure of wage history." Phila. Code § 9-1131(2)(a)(i). To "inquire" is defined as "to ask a job applicant in writing or otherwise." *Id.* § 9-1131(2)(c). *Second*, an employer may not "rely on the wage history of a prospective employee . . . in determining the wages for such individual" unless the applicant "knowingly and willingly disclosed" that history to the employer. *Id.* § 9-1131(2)(a)(ii). The phrase "knowingly and willingly disclosed" is not defined. These prohibitions apply to any "employer"—*i.e.*, "[a]ny person who does business in the City . . . through employees" or "employs one or more employees" in the City—and, by their terms, are not limited to hiring activity in the City. *Id.* § 9-1102(h).[1] Employers who violate the Ordinance face significant penalties, including compensatory damages, *id.* § 9-1105(1)(c), punitive damages of up to $2,000 per violation, *id.* § 9-1105(1)(d), and—for a repeat offense—an additional fine of up to $2,000 and imprisonment for up to 90 days, "or both," *id.* § 9-1121(2).

ARGUMENT

The Court should enjoin enforcement of the Ordinance because it would severely burden the constitutional rights of the Chamber's members without meaningfully advancing the City's interest in eliminating wage disparities caused by gender discrimination. Each requirement for a preliminary injunction is met here: The Chamber is likely to succeed on the merits because the Ordinance violates the First Amendment, due process, the Commerce Clause, and Pennsylvania law; absent an injunction, the Chamber's members will be irreparably harmed by the deprivation

[1] The Ordinance's prohibitions also apply to any "employment agency." For simplicity, the Chamber refers to the objects of the Ordinance's prohibitions collectively as "employers."

of their constitutional rights; and neither the City nor the public has an interest in enforcing this unconstitutional measure. *See Stilp* v. *Contino*, 613 F.3d 405, 409 (3d Cir. 2010).[2]

I. THE CHAMBER IS LIKELY TO PREVAIL ON THE MERITS BECAUSE THE ORDINANCE IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS.

For multiple reasons, the Chamber is likely to prevail on the merits of its challenges. *First*, the Ordinance violates the First Amendment by prohibiting employers from inquiring about, or relying on, an individual's wage history and thereby communicating the message that wage history is important to the job-application process. The Ordinance's content-based and speaker-based provisions plainly cannot withstand First Amendment scrutiny because, among other flaws, they restrict far more speech than necessary to serve the City's interests. *Second*, the Ordinance is unconstitutionally vague because it does not provide fair notice of when an employer can safely rely on an applicant's disclosure of wage-history information. And *third*, the Ordinance's extraterritorial reach beyond the bounds of the City and Commonwealth violates due process, the Commerce Clause, and Pennsylvania law.

A. The Ordinance's Content-Based And Speaker-Based Restrictions On Employer Speech Cannot Survive Strict Scrutiny.

The Ordinance imposes content-based and speaker-based restrictions on employer speech that are "presumptively unconstitutional" and can be upheld only if they satisfy strict scrutiny. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Application of that most demanding standard of First Amendment scrutiny is fatal here.

[2] The Chamber has associational standing: Its membership includes Philadelphia employers who individually have standing because they are directly subject to the Ordinance; the interests the Chamber seeks to vindicate are germane to its organizational interests; and neither the claims asserted nor the declaratory and injunctive relief requested requires the participation of the Chamber's individual members. *See Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also* Decl. of Robert C. Wonderling (attached as Ex. C).

1. The Ordinance restricts speech in two ways: employers cannot "inquire about" wage history with the applicant, Phila. Code §§ 9-1131(2)(a)(i), (2)(c), and they cannot "rely on" wage history "in determining . . . wages" unless that history is "knowingly and willingly disclosed" by the applicant, *id.* § 9-1131(2)(a)(ii). Both prohibitions burden speech because they "restrict [the] ability to communicate and/or convey a message." *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) (holding that a law "expressly limit[ing]" doctors' ability to inquire about and use a patient's firearm ownership information restricted speech). The inquiry provision is an outright prohibition on employer speech that "act[s] to prevent [employers] from obtaining [wage history] information." *Linmark Assocs.* v. *Willingboro*, 431 U.S. 85, 96 (1977). And even if employers succeed in obtaining that information from another source, they are prohibited from *using* that information in communicating their salary expectations to the applicant, which is itself protected speech. By imposing "'restraints on the way in which the information might be used' or disseminated," the reliance provision squarely "implicate[s]" employers' "right to speak." *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 (1984)).

These content- and speaker-based restrictions prohibit employers—and employers alone—from communicating a disfavored message. Employers can disseminate the City's message that "[s]alary offers should . . . not [be] based upon the [applicant's] prior wages," Phila. Code § 9-1131(e), but they cannot communicate the message that "your prior salary is important to see if we are a good fit for each other" by inquiring into an applicant's wage history. And while reliance on wage history in determining a salary is permitted if *applicants* communicate this message by volunteering their wage history, *id.* § 9-1131(2)(a)(ii), reliance is prohibited if the employer seeks to communicate the same message in the absence of such a

voluntary disclosure. In fact, anyone other than a prospective employer—including financial institutions processing a loan application, apartment leasing offices evaluating a rental application, and unemployment agencies setting the amount of unemployment benefits—can inquire about and rely on an individual's salary history. Thus, like the pharmaceutical marketers in *Sorrell*, who alone were prohibited from obtaining and using prescriber-identifying information (absent the prescriber's consent), *see* 564 U.S. at 559, 564, employers are uniquely prohibited from inquiring about and using an applicant's wage history for salary purposes (absent the applicant's consent).[3]

2. Because the Ordinance's speech restrictions are content-based and speaker-based, they can be upheld only if they satisfy strict scrutiny, which requires that they be "narrowly tailored to serve [a] compelling state interest[]." *Reed*, 135 S. Ct. at 2226. Even assuming that the City has a compelling interest in remedying gender-based pay disparities *caused by discrimination*, the Ordinance plainly is not narrowly tailored to serve that interest.[4]

First, the Ordinance prohibits wage-history inquiries and reliance even where neither activity could possibly perpetuate gender-based wage discrimination. When an employer seeks

[3] For that reason, even if the reliance provision is viewed in isolation as regulating conduct, it still would impair employers' First Amendment rights by using content- and speaker-based restrictions to target conduct that is wholly derivative of expressive activity (communicating with others to learn the applicant's wage history) and that, in any event, independently communicates a message about the importance of wage history to the job-application process. The First Amendment is squarely implicated where "the conduct triggering [liability] consists of communicating a message." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

[4] Although the City also asserts an interest in alleviating poverty, that interest is ultimately no different from the City's anti-discrimination interest because the City aims to alleviate poverty solely by reducing gender wage disparities. Moreover, the Ordinance is not narrowly tailored to alleviating poverty because, for example, prohibiting inquiries into, and reliance on, the prior wages of applicants with a history of high-paying jobs does not remotely further that interest.

to lure a high-level executive away from her current employer by offering a premium on her current salary, for example, or when the applicant's salary is based on a lock-step compensation system, there is no substantial basis for assuming that wage-history inquiries or reliance would perpetuate gender discrimination. Giving the most charitable reading to the legislative record, moreover, the wages of women are, at most, only "likely" to reflect inequities due to discrimination, Hr'g Tr. 67, which means that the wages of a significant number of women reflect no gender disparity at all or, at most, a disparity caused by gender-neutral factors—such as experience, training, and hours worked. And on the City's own theory, the salaries of male employees are not tainted by gender discrimination at all, but instead establish the baseline rate for measuring the "wage gap" that the City hopes to close. *See*, *e.g.*, Phila. Code § 9-1131(1)(a) (comparing wages of women and minorities to "every dollar a [white] man makes"). Accordingly, with respect to a sizeable plurality (if not majority) of the workforce, the Ordinance does not serve the City's interest in eliminating *discriminatory* pay disparities. The inquiry provision likewise fails to serve that interest when the employer intends to use wage history for non-salary purposes, such as to identify unaffordable applicants or evaluate the market for comparable positions.

Second, in addition to being vastly overinclusive, the Ordinance is severely underinclusive because it *permits* employers to rely on wage history that has been "knowingly and willingly disclosed," Phila. Code § 9-1131(2)(a)(ii)—even where doing so would perpetuate discriminatory wage disparities. Even crediting the City's theory that female applicants' wages reflect past discrimination, the record provides no basis for concluding that voluntarily disclosed wage history is somehow less likely to reflect gender discrimination. The Ordinance is therefore drawn both too broadly and too narrowly to achieve its asserted objectives. *See Brown* v. *Entm't*

Merchs. Ass'n, 564 U.S. 786, 802-04 (2011) (striking down a statute prohibiting the sale of violent video games to minors that was "seriously underinclusive" in protecting minors because it permitted such sales if the parent consented, and was "vastly overinclusive" in aiding parental authority because it prohibited such sales even if parents did not care about the sale).

Finally, the City cannot "expla[in] why remedies other than content-based rules would be inadequate," *Sorrell*, 564 U.S. at 575, or demonstrate that the Ordinance is the "least restrictive means" of achieving the City's interests, *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). One content-neutral alternative, successfully undertaken by the Chamber, would be to encourage employers to conduct self-evaluations to ensure their employees receive a fair market wage. Ex. B at 2. The City also could provide more training for women to improve on-the-job skills and outcomes in the application process, or more aggressively enforce existing equal-pay laws. *See*, *e.g.*, *IMDB.com, Inc.* v. *Becerra*, No. 3:16-cv-06535-VC, Dkt. 54, at 2 (N.D. Cal. Feb. 22, 2017) (preliminarily enjoining a law prohibiting a website from publishing actors' birthdates because "the government fail[ed] to explain why more vigorous enforcement of [anti-discrimination] laws would not be at least as effective"). And even if the City retained the Ordinance's general framework, it could adopt a less restrictive alternative by, for example, permitting wage-history inquiries while prohibiting employers from relying solely on wage history (as opposed to other neutral factors) to justify a wage differential. For all of these reasons, the Ordinance does not come close to satisfying the exacting requirements of strict scrutiny.

B. The Ordinance's Speech Restrictions Also Fail Intermediate Scrutiny.

The City will likely argue that the Ordinance should be examined, instead, under *Central Hudson*'s intermediate-scrutiny test for restrictions on commercial speech. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). The *Central Hudson*

framework does not apply to the Ordinance; but, even if it did, the Ordinance would still violate the First Amendment because it is supported only by speculation, rather than concrete evidence and analysis, and is insufficiently tailored.

1. *Central Hudson* Is Inapplicable To The Ordinance.

For at least two reasons, the Ordinance must meet strict scrutiny, rather than be examined under *Central Hudson*'s standard for commercial speech. *First*, wage-history inquiries are not "commercial speech." Commercial speech is *advertising*, *i.e.*, "speech that does no more than propose a commercial transaction." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014) (quoting *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001)). The commercial-speech doctrine thus distinguishes between "speech proposing a commercial transaction" and all "other varieties of speech." *U.S. Healthcare, Inc.* v. *Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)). Wage-history inquiries and reliance do not advertise anything, let alone propose a commercial transaction. Because inquiring about information *related* to a commercial transaction simply is not a case of "'I will sell you . . . X . . . at the Y price,'" it is not commercial speech. *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Second, even if the Ordinance restricted commercial speech, strict scrutiny still would apply because "content-based regulations are . . . subjected to strict scrutiny . . . even when the law in question regulates . . . lesser protected speech." *King* v. *Governor of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014); *see also Reed*, 135 S. Ct. at 2226 (requiring strict scrutiny for laws "that target speech based on its communicative content"). Intermediate scrutiny applies to content-based restrictions of commercial speech only where "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *King*, 767 F.3d at 236 (quoting *R.A.V.*, 505 U.S. at 388). Commercial speech is proscribable because of its

"risk of fraud," *R.A.V.*, 505 U.S. at 388, and protected because of its "informational function," *Cent. Hudson*, 447 U.S. at 563. Yet the Ordinance *proscribes* wage-history inquiries because they might inform employers and *protects* applicants who might mislead employers by not revealing the market value of their labor. By turning the commercial-speech doctrine on its head, the Ordinance eviscerates "the First Amendment['s] presum[ption] that some accurate information is better than no[ne]." *Cent. Hudson*, 447 U.S. at 562. Strict scrutiny thus applies.

2. The Ordinance Is Unconstitutional Under *Central Hudson*.

In any event, the Ordinance fails *Central Hudson* scrutiny. Because the speech restricted by the Ordinance (1) concerns lawful conduct and is non-misleading, the City must show that its restrictions (2) further a substantial government interest, (3) directly and materially advance that interest, and (4) are "not more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 566. The City cannot meet its burden on the third and fourth elements of *Central Hudson* for many of the same reasons that the Ordinance fails strict scrutiny.

a. Wage History Concerns Lawful Activity And Is Not Misleading.

Wage-history inquiries and reliance undisputedly are not misleading. And while the City can prohibit commercial speech about a commercial transaction "when the commercial activity itself is illegal," *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973), hiring employees obviously is not illegal in Philadelphia.

Wage-history inquiries do not pertain to an unlawful activity simply because the Ordinance bars employers from using wage history to make a salary offer. Were that the case, the City could censor commercial speech at will simply by declaring the discussion of certain subjects "illegal." The "proper inquiry . . . is whether the *underlying* commercial transaction is lawful"—*i.e.*, entering into an employment agreement with an applicant—not whether the City

has outlawed one step in the process that precedes the transaction. *Katt* v. *Dykhouse*, 983 F.2d 690, 697 (6th Cir. 1992). Regardless, that information *might* be used for an unlawful purpose does not warrant prohibiting inquiries made for all other purposes. *See Dunagin* v. *City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) ("The commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally. Peanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade."). Thus, if the *Central Hudson* framework applies here, the City must show that the Ordinance satisfies each element of *Central Hudson*.

b. The City's Anti-Discrimination Interest Is Substantial.

The Chamber acknowledges the City's substantial interest in reducing discriminatory wage disparities and fully supports measures—such as equal-pay laws—that advance that objective.[5] The City's substantial interest in reducing wage disparities *caused by discrimination* does not extend, however, to eliminating disparities caused by legitimate factors such as seniority, training, experience, or quality of work. Those legitimate distinctions among employees are essential in an economy where the market, not the government, sets salaries.

c. The Ordinance's Speech Restrictions Do Not Directly And Materially Advance The City's Interests.

To satisfy *Central Hudson*'s third element, the City must show that the Ordinance advances its interests "in a direct and material way." *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). The City cannot make either showing.

[5] Unlike with rational basis review, a court applying the *Central Hudson* test (or strict scrutiny) cannot "sustain[] statutes on the basis of hypothesized justifications" and can rely only on the government's asserted interests. *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

i. It is a fundamental First Amendment principle that the government cannot "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers." *Sorrell*, 564 U.S. at 577. Yet, the Ordinance does just that. As the legislative record makes clear, the City enacted the Ordinance not to prevent employers from discriminating in making salary offers, but to reduce the alleged effects of *previous* discrimination. Employers' speech inquiring into, and relying on, wage history is only remotely and indirectly related to that aim. As Councilman Oh explained, the Ordinance would not "very much narrow the disparity between equal workers who are being discriminated [against] . . . . and I [say] that from the experience of being an employer for 18 years." Hr'g Tr. 26.

Sorrell lays bare the deficiencies in the City's roundabout approach to remedying discriminatory wage disparities. There, Vermont enacted a measure that barred pharmacies from marketing prescriber-identifying information to pharmaceutical manufacturers and barred manufacturers from using that information when marketing their products to doctors because it worried that the manufacturers might "influence prescription decisions" and thereby jeopardize public health. *Sorrell*, 564 U.S. at 577. The Supreme Court struck down the Vermont law, reasoning that "the 'fear that people would make bad decisions if given truthful information[]' cannot justify content-based burdens on speech." *Id.* (quoting *Thompson*, 535 U.S. at 374). So too here: the City cannot restrict employers' constitutionally protected speech merely because it fears that female applicants' previous salaries *might* be depressed by the effects of discrimination and that employers *might* inadvertently perpetuate that discrimination by relying in part on wage history.

In the City's view, the possibility of gender-based wage discrimination justifies restricting any speech that could conceivably perpetuate that discrimination. But on that

reasoning, the City could prohibit inquiries into previous job positions and responsibilities entirely because that information, too, presumably could reflect the effects of gender discrimination. The City "may generally believe that [employers] should not ask about" wage history, "but it 'may not burden the speech of others in order to'" further its policy preferences. *Wollschlaeger*, 848 F.3d at 1313-14 (quoting *Sorrell* 564 U.S. at 578-79). In short, the City has failed to "advance [its interests] in a permissible way." *Sorrell*, 564 U.S. at 577.

ii. The City is also unable to satisfy the third element of *Central Hudson* because it has failed to show that the Ordinance "will *in fact* alleviate [the asserted harms] to a material degree." *Edenfield*, 507 U.S. at 770-71 (emphasis added). "[M]ere speculation or conjecture" is not enough, the Supreme Court has cautioned, lest government "eas[ily] restrict commercial speech in the service of other objectives" that could not justify the restriction. *Id.*

Although the City need not adduce "conclusive empirical evidence" to satisfy its First Amendment burden, *King*, 767 F.3d at 238-39, it must cite at least *some* concrete evidence, *see Edenfield*, 507 U.S. at 771-72 (striking down a ban on in-person CPA solicitation because the State had adduced only "conclusory statements" that such solicitation actually results in fraud, overreach, or compromised independence). The en banc Eleventh Circuit recently struck down a law for precisely this reason: In restricting doctors' ability to inquire about or rely on a patient's firearm ownership information, the Florida legislature had relied on "six anecdotes and nothing more. There was no other evidence, empirical or otherwise, presented to or cited by the Florida Legislature." *Wollschlaeger*, 848 F.3d at 1312. If six anecdotes are not enough, then *a fortiori* the total absence of anecdotal or any other evidence presented by the City fatally undermines the Ordinance.

In fact, neither the Ordinance nor its legislative history identifies *any* studies, reports, or anecdotes indicating that the Ordinance will alleviate discriminatory wage disparities, which should come as no surprise because the Ordinance makes no attempt to curb the discrimination that the City believes may explain such disparities. Witnesses were thus compelled to concede that the Ordinance would not solve gender-based wage inequities, Hr'g Tr. 13, 35, but had, at most, merely "*the potential* to help close the gender gap," *id.* at 11 (emphasis added), or to make it so that women "will *maybe* be able to get a higher salary," *id.* at 56 (emphasis added). Even those forecasts are speculative. There is no finding on how often Philadelphia employers rely on wage history to set salaries, or, more importantly, to what extent (if any) that practice perpetuates discriminatory wage disparities. Nor is there any empirical evidence or even anecdotes that employers actually rely on wage history to reduce a salary below what they otherwise would offer; one witness's *conjecture* on this point is insufficient. *See id.* at 39. And if that practice does in fact occur, it can continue any time an applicant volunteers her wage history. *See* Phila. Code § 9-1131(2)(a)(ii). Thus, it is anybody's guess how much the Ordinance will reduce discriminatory wage disparities (if at all).

The City Council found that relying on wage history "only serves to perpetuate gender wage inequalities." Phila. Code § 9-1131(1)(d). But no evidence supports that finding. That women's wages are "on average" lower than men's does not mean that any particular disparity between employees was caused by discrimination rather than legitimate factors such as education, training, hours worked, or years of experience. In fact, courts have repeatedly rejected this assumption of discrimination in concluding that wage history is a legitimate "factor other than sex" under the Equal Pay Act and hence a permissible basis for salary differentials. 29 U.S.C. § 206(d)(1)(iv); *see also*, *e.g.*, *Wernsing* v. *Dep't of Human Servs.*, 427 F.3d 466, 470

(7th Cir. 2005); *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982). If the City disagrees with these courts' assessments and seeks to override an affirmative defense under federal law, it needs to offer concrete evidence, not merely its own *ipse dixit*. It has not done so.

Courts have not hesitated to strike down well-intentioned laws that were likewise supported by nothing more than speculation and conjecture. In *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), for example, the Supreme Court rejected the government's reliance on "common sense," "anecdotal evidence[,] and educated guesses" that prohibiting the display of alcohol content on beer labels would prevent brewers from engaging in a "strength war" by increasing the alcohol content of their beers. *Id.* at 487, 490. The Court reasoned that there was "little evidence that American brewers intend to increase alcohol content." *Id.* at 489 n.4. Similarly, in *Pitt News* v. *Pappert*, 379 F.3d 96 (3d Cir. 2004) (Alito, J.), the Third Circuit struck down a ban on alcohol advertising in on-campus media because Pennsylvania "ha[d] not pointed to any evidence that eliminating ads in this narrow sector will do any good." *Id.* at 107. Rejecting the Commonwealth's speculation that the rate of underage and abusive drinking would fall if there were no alcoholic beverage ads in campus publications, the court emphasized that students still could be exposed to similar ads in many other publications and still could locate places to purchase alcoholic beverages near campus. *Id.*

As in *Wollschlaeger*, *Rubin*, and *Pitt News*, there is no evidence to substantiate the City's assumption that prohibiting inquiries into, and reliance on, wage history will eliminate wage disparities that are the product of gender discrimination. The "'mere speculation [and] conjecture'" that the City has mustered fall well short of its First Amendment burden. *Rubin*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 770-71).

d. The Ordinance's Blanket Restriction Of Speech Is Far More Extensive Than Necessary.

The Ordinance also fails the fourth element of *Central Hudson* because its speech restrictions are far "more extensive than necessary" to serve the City's stated purposes. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (internal quotation marks omitted).

In this respect, the Ordinance shares the same deficiencies as other statutes that courts have found to be inadequately tailored to satisfy *Central Hudson*. In *Sorrell*, for example, the Supreme Court concluded that the Vermont prohibition on the marketing of prescriber-identifying information failed both "heightened judicial scrutiny" and *Central Hudson* because it was not narrowly tailored to ensure physician confidentiality and protect doctors from harassing sales behaviors. *See* 564 U.S. at 573-76. In particular, pharmacies could still share prescriber-identifying information "with anyone for any reason" except marketing purposes, *id.* at 572-73, and Vermont had offered "no explanation" why less restrictive alternatives—such as posting "No Solicitation" signs in doctors' offices—would have been inadequate to prevent harassment, *id.* at 575. Likewise, in *Pitt News*, the Third Circuit concluded that the Commonwealth's ban on alcohol advertising in on-campus media was both "severely over- and under-inclusive" in combating underage and abusive drinking because most students lawfully could purchase alcohol, students would "still be exposed to a torrent of beer ads" from other sources, and the Commonwealth had not shown that it "engage[d] in aggressive enforcement" of existing laws against underage drinking. 379 F.3d at 107-08; *see also Wollschlaeger*, 848 F.3d at 1313 (explaining that it is "problematic" when a blanket prohibition does not create exceptions where restricting speech would not serve the government's interests).

Like those unconstitutional measures, the Ordinance is both overinclusive and underinclusive because, among other reasons explained above, it prohibits wage-history inquiries

and reliance that could not possibly perpetuate discriminatory wage disparities. There is no substantial basis for the Ordinance's prohibitions where the applicant receives a lock-step salary or the employer tries to lure a talented employee away from her current employer by, for example, offering to double her salary. And here again, the fact that the Ordinance restricts wage-history inquiries even as to male applicants shows that it restricts vastly more speech than necessary to advance the City's asserted interest. The City also has not explained why "remedies other than content-based rules"—such as encouraging employers to conduct voluntary self-evaluations, providing job training for women, or more aggressively enforcing existing equal-pay laws—"would be inadequate." *Sorrell*, 564 U.S. at 575. The First Amendment requires the City to deploy a more precisely tailored alternative when restricting constitutionally protected speech. *See Cent. Hudson*, 447 U.S. at 570-71 (striking down a ban on all advertising that promoted the use of electricity during an energy crisis because the State could have adopted a more targeted ban that did not "suppress[] information about electric devices or services that would cause no net increase in total energy use").

The Ordinance therefore fails multiple elements of the *Central Hudson* standard.

C. The Ordinance Is Unconstitutionally Vague.

The Ordinance further violates the First Amendment and due process because it subjects employers to significant civil and criminal penalties without giving them "fair notice of conduct that is forbidden." *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). "[C]larity in regulation is essential" so that regulated parties "know what is required of them." *Id.* "When speech is involved, rigorous adherence to th[is] requirement[] is necessary to ensure that ambiguity does not chill protected speech." *Id.*

The Ordinance does not provide fair notice of the activity it prohibits. Although it includes a safe-harbor permitting employers to rely on wage-history information "knowingly and willingly disclosed," Phila. Code § 9-1131(2)(a)(ii), it provides no guidance, let alone clarity, on when the safe-harbor is satisfied. Employers are left to guess from whose perspective this standard is evaluated, and whether a disclosure is "knowing[] and willing[]" if it is made during a job interview—rather than on a resume or application—or in response to a question that may be "likely to elicit" disclosure. *Cf. Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Employers who guess wrong face compensatory and punitive damages and even imprisonment for a repeat violation. The chilling effect of these potential penalties—significant enough to "force[]" some small businesses "to close if found in violation," Ex. B at 2—is unconstitutional. *See Wollschlaeger*, 848 F.3d at 1319, 1322 (holding that a ban on "unnecessarily" harassing patients about firearm ownership was "incomprehensibly vague" for failing to specify "[w]ho is to know—and who is to decide—when good-faith persistence devolves into unnecessary harassment").

D. The Ordinance's Extraterritorial Effect Violates The U.S. Constitution And Pennsylvania Law.

The Ordinance is also unlawful because it applies to activity outside the geographical bounds of the City (and the Commonwealth). As long as an "employer" merely "does business in the City" or "employs one or more employees" in the City, Phila. Code § 9-1102(h), the Ordinance appears to govern all of the employer's hiring practices—no matter where it makes its hiring decisions or where the prospective employee will work. The Ordinance's staggering extraterritorial reach violates bedrock principles of the U.S. Constitution and Pennsylvania law.

Due process prohibits a State or municipality from "impos[ing] economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." *BMW of N.*

Am., Inc. v. *Gore*, 517 U.S. 559, 572 (1996). This principle follows from concerns about comity, which "constrain[]" localities "to respect the interests of other States," *id.* at 571, and fair notice, *id.* at 574. The Ordinance disregards both of these interests by purporting to restrict employers' right to make, and rely on, wage-related inquiries anywhere in the country as long as they have one employee in Philadelphia or transact some business in the City. This extraterritorial power grab neither "respect[s] the interests of other States" in regulating hiring practices, *id.* at 571, nor provides fair notice to employers who are based in other jurisdictions but whose operations across the country are now subject to the Ordinance's prohibitions.

The Ordinance similarly violates the Commerce Clause of the U.S. Constitution, which "precludes the application of a state statute to commerce that takes place wholly outside the State's borders." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (internal quotation marks omitted). The relevant inquiry is whether the "practical effect" that would arise "if not one, but many or every, State adopted similar legislation" "is to control conduct beyond the boundaries of the State." *Id.* Here, the Ordinance regulates activity "occurring wholly outside the boundaries" of Pennsylvania, *id.*, by prohibiting an employer with Philadelphia employees or business ties from inquiring into, or relying on, wage history in any hiring setting—even where the job interview occurs in or is for a job located in another State. If "many or every" State adopted the same measure, the practical effect would be to burden interstate commerce by imposing redundant penalties on employers who do business in more than one State. *Id.*

Finally, for similar reasons, the Ordinance violates Pennsylvania law. The Pennsylvania Constitution authorizes a municipality with a home rule charter—such as Philadelphia—to "exercise any power . . . not denied by . . . the General Assembly." Penn. Const. art. IX, § 2. The General Assembly, in turn, has prohibited the City from "exercis[ing] any powers or

authority beyond the city limits." 53 Pa. Stat. § 13133; *see also Devlin* v. *City of Philadelphia*, 862 A.2d 1234, 1248 (Pa. 2004). The Ordinance violates these provisions by regulating all hiring activity by an employer who employs at least one person, or conducts the slightest amount of business, in the City—even if the prohibited activity occurs outside the City and the prospective employee neither lives nor works in the City.

E. Striking Down The Ordinance Will Not Call Into Question Other Laws.

Invalidating the Ordinance will not threaten the validity of other, appropriate hiring laws. Many employment laws do not prohibit employers from inquiring into a protected status, *see*, *e.g.*, 29 U.S.C. § 623(a) (age); 42 U.S.C. §§ 2000e, 2000e-2(a) (race); Phila. Code § 9-1103 (age, race, and sex, among others), and the Ordinance is readily distinguishable from those that do.

Laws such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII all include exceptions for legitimate business-related inquiries unrelated to discrimination. *See* 29 U.S.C. § 623(f)(1) (permitting consideration of age where it is "a bona fide occupational qualification reasonably necessary to . . . the particular business"); 42 U.S.C. § 12112(d)(2)(B) (permitting inquiries "into the ability of an applicant to perform job-related functions"); 29 C.F.R. § 1604.7 (permitting inquiries about sex "made in good faith for a nondiscriminatory purpose"). The Ordinance, in stark contrast, imposes an across-the-board prohibition on all wage-history inquiries to an applicant regardless of the purpose of the inquiry.

Laws prohibiting inquiries into credit history or criminal-conviction history are also unlike the Ordinance because they create clear exceptions for certain employers and jobs where an inquiry would serve a legitimate business purpose. The City, for example, permits credit-history inquiries by law-enforcement agencies and financial institutions, as well as by employers filling a job that is managerial or involves significant financial responsibility, among other

exceptions. *See* Phila. Code § 9-1130(2). Other laws carve out similar bright-line exceptions. *See*, *e.g.*, Colo. Rev. Stat. § 8-2-126(3)(a) (2016); Md. Code Ann., Lab. & Empl. §§ 3-711(a)(2), (c)(1) (West 2016). The City also permits inquiries into criminal convictions by a Criminal Justice Agency, Phila. Code § 9-3505(2), and after a conditional employment offer has been made, *id.* § 9-3504(2). As explained above, however, the Ordinance does not create any exceptions for the legitimate use of wage history by specific types of employers or with respect to specific types of jobs—let alone a clear safe-harbor that employers can easily follow.

Because the Ordinance's far-reaching speech restrictions are not nearly as tailored or as clear as any of these laws, invalidating the Ordinance would not call into question their validity.

II. THE REMAINING FACTORS WEIGH OVERWHELMINGLY IN FAVOR OF AN INJUNCTION.

In the First Amendment setting, a likelihood of success on the merits leads virtually inexorably to a preliminary injunction because, in the absence of relief, the plaintiff will suffer an irremediable deprivation of its First Amendment rights. That is precisely the case here.

Absent a preliminary injunction, the Chamber's members will suffer irreparable harm. It is well-settled that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also B.H. ex rel. Hawk* v. *Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) ("Prevent[ing] [a person] from exercising their right to freedom of speech . . . unquestionably constitutes irreparable injury." (internal quotation marks omitted)). The Ordinance will indisputably chill speech by forcing members—on pain of substantial civil and criminal penalties—to refrain from inquiring about or relying on wage history. *See* Phila. Code §§ 9-1105(c)-(d), 9-1121; Wonderling Decl. ¶¶ 16-19. To ensure that they adhere to the Ordinance and avoid the risk of significant sanctions, members will need to incur substantial

compliance costs, such as retraining staff and developing new policies regarding salary determinations and hiring. *See* Wonderling Decl. ¶ 21. These harms to the constitutional rights and financial interests of the Chamber's members plainly warrant a preliminary injunction. *See Miller* v. *Mitchell*, 598 F.3d 139, 147 n.8 (3d Cir. 2010) ("Because . . . the Does have shown a likelihood of success on the merits of their [First Amendment] claim, they have necessarily shown that irreparable harm would result absent an injunction."); *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 206 (3d Cir. 1990) ("[T]he unsatisfiability of a money judgment can constitute irreparable injury . . . .").

The final two prerequisites are also met because granting a preliminary injunction will not harm the City or the public. "[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU* v. *Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) (quoting *ACLU* v. *Reno*, 217 F.3d 162, 181 (3d Cir. 2000)). While the public clearly has an interest in combatting gender discrimination, that "interest is best served by eliminating the unconstitutional restrictions imposed by [the Ordinance] while at the same time permitting the City to attempt, if it wishes, to frame a more tailored regulation that serves its legitimate interests." *Swartzwelder* v. *McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002) (Alito, J.).

CONCLUSION

For the foregoing reasons, this Court should enter a preliminary injunction preventing Defendants from giving effect to or enforcing the Ordinance pending resolution of the merits of the Chamber's claims.

Dated: April 6, 2017

Respectfully submitted,

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Attorneys for Plaintiff The Chamber of Commerce for Greater Philadelphia

*Applications for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2017, true and correct copies of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** was filed pursuant to the Court's electronic filing procedures using the Court's CM/ECF system and was served via hand delivery on the following:

City of Philadelphia
Law Department
One Parkway Building
17th Floor
1515 Arch Street
Philadelphia, PA 19102

Philadelphia Commission on Human Relations
601 Walnut Street
Suite 300 South
Philadelphia, PA 19106

/s/ Marc J. Sonnenfeld
Marc J. Sonnenfeld

EXHIBIT A

City of Philadelphia

(Bill No. 160840)

AN ORDINANCE

Amending Title 9 of The Philadelphia Code, entitled "Regulation of Businesses, Trades and Professions," by adding a new Chapter on wage equity prohibiting employers from inquiring about salary history, including definitions, duties, penalties, posting requirements, a private right of action and other related items regarding wage equity; all under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Chapter 9-1100 of The Philadelphia Code, entitled "Fair Practices Ordinance: Protections Against Unlawful Discrimination," is hereby amended as follows:

CHAPTER 9-1100. FAIR PRACTICES ORDINANCE: PROTECTIONS AGAINST UNLAWFUL DISCRIMINATION

* * *

§ 9-1103. Unlawful Employment Practices.

(1) * * *

* * *

(i) For any person subject to this Section *or Section 9-1131 (relating to Wage Equity)* to fail to post and exhibit prominently, in any place of business where employment is carried on, any fair practices notice prepared and made available by the Commission, which the Commission has designated for posting.

* * *

§ 9-1131. Wage Equity.

(1) Findings. The City Council of the City of Philadelphia finds that:

(a) In Pennsylvania, women are paid 79 cents for every dollar a man makes, according to a United States Census Bureau 2015 report. Women of color are paid even less. African American women are paid only 68 cents to the dollar paid to a

man, Latinas are paid only 56 cents to the dollar paid to men, and Asian women are paid 81 cents to the dollar paid to men.

(b) The gender wage gap has narrowed by less than one-half a penny per year in the United States since 1963, when the Congress passed the Equal Pay Act, the first law aimed at prohibiting gender-based pay discrimination, according to the National Committee on Pay Equity.

(c) In August of 2016, Massachusetts became the first state to enact a law prohibiting employers from seeking or requiring a prospective employee's wage history.

(d) Since women are paid on average lower wages than men, basing wages upon a worker's wage at a previous job only serves to perpetuate gender wage inequalities and leave families with less money to spend on food, housing, and other essential goods and services.

(e) Salary offers should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant.

(2) Prohibition on Inquiries into Wage History.

(a) It is an unlawful employment practice for an employer, employment agency, or employee or agent thereof:

(i) To inquire about a prospective employee's wage history, require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosure of wage history, or retaliate against a prospective employee for failing to comply with any wage history inquiry or for otherwise opposing any act made unlawful by this Chapter.

(ii) To rely on the wage history of a prospective employee from any current or former employer of the individual in determining the wages for such individual at any stage in the employment process, including the negotiation or drafting of any employment contract, unless such applicant knowingly and willingly disclosed his or her wage history to the employer, employment agency, employee or agent thereof.

(b) This subsection (2) shall not apply to any actions taken by an employer, employment agency, or employee or agent thereof, pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of wage history for employment purposes.

City of Philadelphia

(c) For purposes of this Section 9-1131, "to inquire" shall mean to ask a job applicant in writing or otherwise, and "wages" shall mean all earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation and including fringe benefits, wage supplements, or other compensation whether payable by the employer from employer funds or from amounts withheld from the employee's pay by the employer.

* * *

SECTION 2. This Ordinance shall take effect 120 days from the date of enactment into law.

Explanation:
Italics indicate new matter added.

City of Philadelphia

BILL NO. 160840 continued

Certified Copy

CERTIFICATION: This is a true and correct copy of the original Bill, Passed by the City Council on December 8, 2016. The Bill was Signed by the Mayor on January 23, 2017.

Michael A. Decker
Chief Clerk of the City Council

EXHIBIT B

THE CHAMBER
of Commerce for Greater Philadelphia

January 10, 2017

Testimony by: Rob Wonderling, President and CEO, Chamber of Commerce for Greater Philadelphia in reference to Bill No 160840. This testimony was given on November 22, 2016.

Good morning, Councilman Greenlee and members of the Committee on Law and Government. I am Rob Wonderling, President and CEO of the Chamber of Commerce for Greater Philadelphia. Thank you for the opportunity to testify on Bill No. 160840.

Much like members of this body, the Chamber shares concerns over wage inequality that exists among women and minorities when compared to white or male counterparts. The Chamber thanks City Council for its concern and willingness to take action to even the playing field for all employees.

However, we remain concerned about the proposed Wage Equity legislation due to a number of reasons including government overreach, absence of important information in the overall hiring process, varying business needs, potential lawsuits and unknown consequences.

The Chamber's mission is to attract, retain and grow jobs for the city and region. We follow principles of economic competitiveness to guide our public policy. We believe that "Government rules and regulations should provide for safe and responsive business operations, but should not be onerous, costly, or out of context with competitive locations. These regulations should be appropriate for the level of government enacting them (local, state, or Federal). Government must be conscious of the overall cost of doing business — taxes, fees, insurance, regulatory expense — so as to provide a competitive business environment."

Using this framework, we believe that Bill No. 160840 goes too far in dictating how employers can interact with potential hires.

When employers look at a candidates' salary history, they have a better understanding of whether a candidate is worth pursuing based on previous compensation levels as well as the market value or salaries for comparable positions. A salary history can serve as a benchmark to ensure that an organization is in fact paying a market-value wage for positions.

In speaking with our members, particularly those serving in a human resources capacity, we hear that compensation decisions are based on a number of different factors such as market value, internal equity, funding limitations and competition. It is not made based on a candidate's past salary history, gender or race.

Another reason that we remain concerned about this legislation is that not all businesses and organizations are alike—they range in size, industry, geography and talent needs. They should be able to utilize a full set of tools in order to find the right employees for their organization.

Passing this legislation at a local level, rather than at a state or federal level, will place a greater strain on those business and organizations with locations outside of Philadelphia because it requires changes in policies and procedures.

It will also impact small businesses or nonprofits in Philadelphia without robust HR departments as salary history can often indicate whether a candidate is worth pursuing.

THE CHAMBER
of Commerce for Greater Philadelphia

Some of our members worry that the legislation as currently written could leave employers open to potential lawsuits. The Chamber respectfully asks for consideration of alternative language related to a few matters if the legislation moves forward, particularly around inquiry of history. We do understand that some steps are being made to alter this language.

Delete part of the definition of "to inquire" in Section 9-4502(3) to simply state that it means "to ask a job applicant in writing or otherwise." If "to inquire" includes searching publicly available records or reports, one could violate the law by conducting a basic internet search of an applicant, including looking him or her up on LinkedIn or a similar site. An entity can't control what information about an applicant internet searches will reveal; if one comes across wage information, even accidentally, an entity could violate the proposed law.

Delete the "knowingly" requirement from Section 9-4503(1)(b). It's good that the bill allows one to use voluntarily disclosed wage history, but how is one to know if such disclosure was made "knowingly"? In the same section, also delete the phrase "at any stage in the employment process, including the contract." It seems that the bill is trying to prevent inquiries into only prospective employees' wages, but including this phrase could create some confusion as to whether an entity can use an employees' wages as a baselines for future wage changes further along in the "employment process," i.e., after the employee has already started working for the entity.

Incorporate "Nothing herein shall prohibit an employer from verifying or relying on wage history, willingly disclosed by a prospective employee, for employment determinations or current or future wage determinations" into Section 9-4503 (b). Once a salary history is willingly given to an employer by an applicant, that employer may choose use that knowledge as they like.

Decrease the payment of punitive damages listed in Section 9-4506(d) from $2000 to $500. Lowering this penalty will decrease the chance that businesses, particularly small businesses, will be forced to close if found in violation. Instead, a lower fine will still encourage businesses to follow the law and be able to adjust employees' salaries accordingly.

The Chamber asks City Council to consider encouraging employers to do self-evaluations on wages. We did this voluntarily as an organization in order to ensure that the Chamber pays its employees fair market wages, and it was useful in identifying where adjustments needed to be made. This exercise is encouraged in the Massachusetts wage equity law. According to that law, doing so also helps protect employers who are taking steps to correct wage inequality if reasonable progress is demonstrated.

Finally, we caution against legislation that could have unintended consequences for our economy. It is unknown what the effect of this legislation is in Massachusetts or what the effect would be here in Philadelphia. The Chamber urges thoughtful and deliberate analysis when considering broad business regulations. We are happy to serve as partners in guiding legislation so as to best effectuate a policy's intent.

Thank you for the opportunity to testify on Bill No. 160840.

cc: District Council Members, Philadelphia
Council Members At-Large, Philadelphia

EXHIBIT C

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

THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, on behalf of its members, Plaintiff, v. CITY OF PHILADELPHIA and PHILADELPHIA COMMISSION ON HUMAN RELATIONS, Defendants.	Civil Action No.: 17-1548

DECLARATION OF ROBERT C. WONDERLING

I, Robert C. Wonderling, declare as follows:

1. I am President and Chief Executive Officer at the Chamber of Commerce for Greater Philadelphia ("the Chamber"). I received a B.A. from Allegheny College and a Master's in Government Administration from the University of Pennsylvania.

2. I have been President and Chief Executive Officer for seven years. As the Chief Executive Officer, I am responsible for representing member companies as the voice of the Greater Philadelphia region's business community and advocating for public policy that promotes growth and economic development in the 11-county Greater Philadelphia region. In connection with my responsibilities at the Chamber, I am familiar with the matters discussed in this Declaration. Specifically, I am familiar with the operations and day-to-day business of the Chamber. I also regularly engage with the Chamber's members and have general knowledge of their business practices as they relate to recruiting, hiring, and retaining employees.

3. The Chamber is a Pennsylvania non-profit organization with its principal place of business in the City of Philadelphia ("City"). Dedicated to promoting regional economic growth

and advancing public policies that encourage employment, economic growth, and sensible regulation, the Chamber represents thousands of member companies with approximately 600,000 employees across eleven counties in the three States of the Greater Philadelphia region. The Chamber represents small and large businesses alike in a range of industries including the education, health care, retail, and technology sectors. The Chamber also has a number of members who are executive recruiters, soliciting talent and finding employees for other companies. The interests that the Chamber seeks to protect in this lawsuit are germane to its purposes.

4. The Chamber condemns discrimination of any form and is strongly committed to eliminating discriminatory barriers to the professional advancement of women and minorities, including discriminatory pay disparities. The Chamber has taken a leading role in promoting equality and opportunity for a wide array of diverse populations, including women. Through its Diversity and Inclusion Series, for example, the Chamber has offered practical strategies to members to position diversity at the center of their business growth. Since 2000, the Chamber has offered scholarships to more than 100 women as part of its Paradigm Scholarship for Working Women program, which is designed to ensure that women in Philadelphia can bridge the skill and education gap to increase their incomes. The Chamber also has launched a CEO Access Network to diversify the Chamber's leadership and membership, advance minorities' and women's entrepreneurship, and improve economic conditions in the City and Greater Philadelphia region.

5. Representing its members' interests, the Chamber actively participated in the legislative process that culminated in the enactment of Philadelphia City Council Bill No. 160840 (as amended) (the "Ordinance"), which amended the City's "Fair Practices Ordinance:

Protections Against Unlawful Discrimination" to include prohibitions on inquiring into and relying on the wage history of prospective employees. Although the Chamber strongly supports the City's unquestionably significant interest in eliminating pay disparities attributable to gender discrimination, the Chamber opposed the Ordinance because it would restrict wholly unobjectionable hiring practices, and unjustifiably restrict employers' constitutionally protected speech, without having any meaningful effect on eliminating discriminatory gender-based wage disparities. The Chamber therefore proposed two alternatives that would more meaningfully address gender-based pay discrimination without curtailing employers' constitutional rights. The Chamber recommended that the City encourage employers to undertake voluntary self-evaluations to identify and eliminate improper wage disparities, and offered an amendment that would have allowed wage-history inquiries but barred employers from relying solely on that history to justify a gender-wage differential. The City, however, did not adopt either of those alternatives.

6. The Chamber has more than one thousand members who either do business in the City through employees or employ one or more employees in the City. For purposes of this declaration, I refer to only those members. Because some of those members have operations outside the City (and, indeed, outside the Commonwealth of Pennsylvania), some of the hiring practices that I describe take place not only inside the City, but also (as noted, where relevant) outside the City and the Commonwealth.

7. As described below, the Chamber's members will be irreparably harmed by the Ordinance because they will no longer be able to inquire into an applicant's wage history or rely on wage history when making a salary determination, and will be required to incur unrecoverable compliance costs.

USE OF WAGE HISTORY BY THE CHAMBER'S MEMBERS

8. The Chamber's members inquire about and rely on wage history—and would continue to do so but for the Ordinance—for various reasons, depending on the size and nature of the member's business, its compensation model, the responsibilities and seniority of the position at issue, budgetary considerations, and other factors.

9. The Chamber's members commonly inquire about or require disclosure of a job applicant's current or previous compensation and wage history (collectively, "wage history") during the job application process. Based on my knowledge of the business of the Chamber's members, I am aware that members inquire about wage history in a number of ways. For example, among member companies that either do business in the City through employees or employ one or more employees in the City:

a. Some members request an applicant's wage history through written application forms. Others ask the job applicant directly during a job interview. For example, one member discusses compensation history and expectations during the hiring process as part of formulating an offer. But for the Ordinance, this member and others would continue to inquire about wage history during the application process.

b. Some members require disclosure of an applicant's wage history by conditioning an employment offer or consideration for an interview on disclosure of that history. For example, one member requires applicants to disclose their wage history prior to a job interview. But for the Ordinance, this member and others would continue to require disclosure of an applicant's wage history during the interview and hiring process.

10. The Chamber's members typically inquire about wage history to conserve time and resources during the job application process. Based on my knowledge of the business of the Chamber's members, I am aware of the following practices:

a. Some members rely on wage history to determine whether they can offer a particular applicant competitive compensation. To be able to lure away attractive candidates from their current employer, members need to know what those candidates currently earn. If an applicant's current compensation exceeds the member's budget for the available position, the member may determine that it cannot offer a competitive salary and will instead target a similarly qualified candidate whose past earnings are more compatible with the member's budget. For example, one member relies on having a full understanding of the components of a candidate's current compensation, such as base salary, incentive compensation, stock options, and fringe benefits, when determining whether it will be able to make an appropriate compensation offer. But for the Ordinance, this member and others would continue to rely on wage history for this purpose.

b. Where the market wage for the available position is unknown, some members rely on wage history to ascertain the market wage for similar positions. This information is valuable in helping the members determine not only how much to offer prospective employees but also when to adjust the salaries of their current employees to be more competitive. For example, some members rely on applicants' wage history and the components of their compensation to help determine the market wages for similar positions. But for the Ordinance, these members and others would continue to rely on wage history for this purpose.

c. In situations where professional candidates assert that they have a book of business that they can bring to the firm, members often rely on wage history to assess the applicant's aptitude, past job performance, and the reasonableness of the assertion. Because wages in such jobs typically are based in part on the size of a book of business, one member uses wage history as an especially effective tool for comparing applicants' abilities and as an important part of the due diligence process. But for the Ordinance, this member and others would continue to rely on wage history for this purpose.

11. In some circumstances, certain members also rely on wage history in making salary determinations. Based on my knowledge of the business of the Chamber's members, I am aware of several ways in which members rely on wage history:

a. For some positions, wage history is an essential starting point for putting together a competitive compensation package or beginning negotiations with a specific candidate. When seeking to hire a senior executive for a newly created position, some members have looked to the precise combination of an applicant's previous or current compensation—such as stock options, salary, and fringe benefits—to determine an initial salary offer. For example, one member takes into account the amount that the candidate is leaving behind in unvested awards when determining an appropriate compensation offer. Because inquiring about and relying on such an applicant's wage history is necessary to prepare an employment offer that is likely to be attractive to the candidate, this member and others would continue relying on wage history for this purpose but for the Ordinance.

b. Where some members were previously uncertain of the market wage for a particular position, they have used wage-history information obtained from applicants in

formulating a salary offer. For example, certain members use a combination of wage history, market analysis, and internal compensation comparisons in formulating salary offers, particularly for new positions. But for the Ordinance, these members and others would continue to rely on wage history for this purpose.

c. Some members who use wage history to evaluate an applicant's aptitude and past job performance take that evaluation into account when making a salary offer. For example, when some members see a professional candidate whose compensation has varied significantly over the years, they may adjust the offer to reflect that individual's inconsistent performance. But for the Ordinance, these members and others would continue to rely on wage history for this purpose.

12. Based on my knowledge of the business of the Chamber's members, I am aware that the hiring practices that I have described take place not only inside the City, but also outside the City and the Commonwealth. For example:

a. Some members interview and hire applicants in the City for positions in Pennsylvania locations outside the City, and some for positions outside Pennsylvania.

b. Some members interview and hire applicants in Pennsylvania locations outside the City for positions in the City, some for positions in Pennsylvania locations outside the City, and some for positions outside Pennsylvania.

c. Some members interview and hire applicants outside Pennsylvania for positions in the City, some for positions in Pennsylvania locations outside the City, and some for positions outside Pennsylvania.

13. I am not aware of any member using wage history to discriminate on the basis of gender, race, or any class protected by federal, state, or local law. Nor am I aware of a member's

relying on an applicant's wage history as the sole basis for reducing the salary that the member would otherwise offer an applicant.

IMPACT OF THE ORDINANCE ON THE CHAMBER'S MEMBERS

14. As I understand it, the Ordinance prohibits employers from inquiring about or requiring disclosure of a prospective employee's previous or current wages, salary, or compensation. Phila. Code §§ 9-1131(2)(a)(i), (2)(c). The Ordinance also prohibits employers from relying on wage history in making a salary determination for a job applicant, except where the applicant "knowingly and willingly disclosed" that history to the employer. *Id.* § 9-1131(2)(a)(ii). These prohibitions take effect on May 23, 2017.

15. It is my understanding that the penalties for a violation of the Ordinance may include compensatory damages, *id.* § 9-1105(1)(c), and punitive damages of up to $2,000 per violation, *id.* § 9-1105(1)(d), and that a repeat offense subjects the offender to an additional fine of up to $2,000, up to 90 days in prison, or both, *id.* § 9-1121(2).

16. If the Ordinance is allowed to stand, it will harm the Chamber's members by preventing them from making wage-history inquiries that they otherwise normally would make and from relying on wage history in making salary and other relevant employment determinations, as described above.

17. The Chamber's members will be forced to choose between complying with the Ordinance, on the one hand, and significant liability and the threat of severe sanctions, including imprisonment, on the other hand. The inevitable result will be a substantial chilling of members' constitutionally protected speech.

18. As a result of the Ordinance, human-resources professionals, business owners, and other personnel involved in hiring processes and decisions at the Chamber's members will

not risk asking an applicant about the applicant's wage history. In fact, members may be deterred from asking any question or beginning any line of inquiry that approaches the topic of wage history. For example, in an interview or salary negotiation, members will be unlikely to ask an applicant to identify the factors upon which his or her proposed salary is based because such an inquiry readily could be interpreted as a prohibited inquiry into the applicant's wage history.

19. As a result of the Ordinance, the Chamber's members also will steer clear of relying on an applicant's disclosure of wage-history information when making a salary determination. Because the Ordinance does not define or clarify when an applicant has "knowingly and willingly" disclosed his or her wage history, members will have to guess whether it is safe to rely on disclosures made by applicants during a job interview. Even where the wage-history information might benefit an applicant, members will be hesitant to rely on that information in making a salary determination out of fear that the disclosure may later be deemed not to have been "knowingly and willingly" made.

20. The inability to inquire about or rely on wage history will create many practical difficulties for the Chamber's members. The Ordinance will injure members by making it more difficult to identify candidates whose past salaries exceed the member's budget and make it unlikely that the candidate would accept the member's employment offer; to ascertain market salaries for positions; to evaluate the proficiency and past work performance of applicants whose prior jobs involved compensation based on a book of business; and to determine the baseline for offers or negotiations with individuals applying to positions for which compensation is variable. These difficulties will complicate hiring immeasurably, forcing the Chamber's members to spend more time on hiring and less time on other critical business tasks.

21. The Chamber's members will be injured in advance of the Ordinance's effective date by being forced to develop compliance strategies and policies, rewrite and reprint application forms, and retrain personnel who participate in hiring processes and decisions. The Chamber's members will also have to work with vendors to change applicant-tracking software applications.

22. The Chamber's members will be further injured after the Ordinance's effective date by the chilling of their constitutionally protected speech, and by being forced to devote increased personnel time to monitoring for potential violations, updating compliance strategies and policies, and conducting periodic evaluations and trainings. The Chamber's members will also spend additional time negotiating salary offers and counteroffers and filling positions when offers are declined because they are not sufficient. Members also will spend additional funds with temporary staffing agencies to fill position gaps until permanent replacements can be hired.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on this 5 day of April, 2017 at Philadelphia, Pennsylvania.

Robert C. Wonderling

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

THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, on behalf of its members, Plaintiff, v. CITY OF PHILADELPHIA and PHILADELPHIA COMMISSION ON HUMAN RELATIONS, Defendants.	Civil Action No. 17-cv-01548

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Upon consideration of the Complaint and Motion for a Preliminary Injunction filed by Plaintiff Chamber of Commerce for Greater Philadelphia (the "Chamber"), Defendants' opposition thereto, and the arguments of counsel, it is hereby **ORDERED** that Plaintiff's motion for a preliminary injunction is **GRANTED**.

It is further **ORDERED** that Defendants City of Philadelphia and the Philadelphia Commission on Human Relations, and their officers, employees, agents, and attorneys, as well as any other persons acting in concert or participation with them, are enjoined from implementing, enforcing, applying, or taking any action whatsoever pursuant to the Ordinance amending the City's "Fair Practices Ordinance: Protections Against Unlawful Discrimination," Phila. Code § 9-1101 *et seq.*, which was enacted on January 23, 2017.

SO ORDERED.

Date: _____

_____

Mitchell S. Goldberg
United States District Judge