Nos. 18-2175 & 18-2176

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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

v.

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

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Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania (Goldberg, J.) Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunctive Relief
No. 17-1548

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# BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES AND AFFIRMANCE IN PART AND REVERSAL IN PART

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September 28, 2018

## CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 & 29(a)(4), amicus curiae Public Citizen, Inc. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of Public Citizen, Inc.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Ordinance** **Pages**

## INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Public Citizen, Inc., is a non-profit advocacy organization that appears on behalf of its nationwide membership before Congress, agencies, courts, and state and local governments on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public, and promotes open and fair governmental processes. Public Citizen supports the elimination of wage inequality. Public Citizen is also concerned that claims for First Amendment protection of ordinary economic activity, such as those in this case, do not serve to protect the free flow of speech and ideas, but rather to inhibit legitimate government actions aimed at protecting the interests of workers, consumers, and the general public.

In this action, the Chamber of Commerce for Greater Philadelphia (the Chamber) asserts that laws regulating its members' conduct in determining salaries and related commercial speech are subject to strict First Amendment

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[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

scrutiny. Public Citizen believes that applying strict scrutiny to either challenged provision of the City of Philadelphia's Wage Ordinance, Phila. Code § 9-1131, would be contrary to precedent, would unjustifiably limit the City's ability to combat wage disparities, and could impede many important laws designed to protect workers, consumers, and citizens. Accordingly, Public Citizen submits this brief addressing only the first preliminary injunction factor, the likelihood of success on the merits, with respect to Count I of the operative complaint, JA30 at ¶¶ 61-65.

## SUMMARY OF ARGUMENT

The Chamber's broad facial First Amendment attack on the City's Wage Ordinance challenges two separate legal prohibitions. The first, the "Inquiry Provision," Phila. Code § 9-1131(2)(a)(i), prohibits employers from asking prospective employees about their wage history. The second, "the Reliance Provision," *id.* § 9-1131(2)(a)(ii), bars employers from relying on prospective employees' wage history in determining their wages. Neither provision violates the First Amendment or is subject to strict scrutiny: The first legitimately regulates commercial speech, and the second regulates non-expressive conduct.

As the district court correctly held, the Inquiry Provision regulates commercial speech. A restriction on such speech is properly evaluated under the intermediate scrutiny framework of *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). That standard remains applicable under recent Supreme Court decisions—none of which holds that strict scrutiny applies to "content-based" restrictions on commercial speech. The district court erred, however, in concluding that the Inquiry Provision fails to meet this standard. The speech restricted by the Inquiry Provision relates to unlawful activity, and, in any event, the restriction directly advances the City's substantial interest in wage equality.

As for the Reliance Provision, the district court correctly concluded that it does not restrict speech or expressive activity at all. Determining wages is analogous to setting prices, which courts have consistently held is not protected under the First Amendment. *See, e.g.*, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

## ARGUMENT

### I. The district court erred in concluding that the Inquiry Provision likely violates the First Amendment.

#### A. The Inquiry Provision is subject to *Central Hudson* intermediate scrutiny.

##### 1. The Inquiry Provision regulates commercial speech.

"The Supreme Court has long recognized a '"commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."'" *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 792 (3d Cir. 1999) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978))). "Commercial speech is accorded a lesser degree of First Amendment protection than other kinds of speech." *Id.*; *see also Dwyer v. Cappell*, 762 F.3d 275, 280 (3d Cir. 2014) (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)). Commercial speech is afforded less protection because, where speech is integrally linked to an economic transaction, "the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *King v. Governor of State of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)),

*disapproved on other grounds, Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). Here, the district court correctly treated the Inquiry Provision as a regulation of commercial speech. *See* JA13-15.

In determining whether speech is commercial, courts have looked to three indicia derived from the Supreme Court's *Bolger* decision: whether "(1) the speech is an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for the speech." *United States v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005) (citing *Bolger*, 463 U.S. at 66-67). All three characteristics need not be present for speech to be commercial. *Bolger*, 463 U.S. at 67 n.14. The speech restricted by the Inquiry Provision is commercial speech under this test because it is an integral part of an economically motivated transaction—the potential creation of an employment relationship.

For these reasons, courts have regularly characterized speech in the process of hiring and recruiting employees as "commercial speech." In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), for example, the Supreme Court concluded that classified job advertisements are "classic examples of commercial speech" because "[e]ach [ad] is no more than a proposal of possible employment." Similarly, several

courts have concluded that roadside offers of employment to day laborers are commercial speech. *See, e.g.*, *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013) ("A motorist who pulls over and either hires or attempts to hire a day laborer has proposed a commercial transaction. By the same token, a day laborer soliciting work from the roadside proposes a commercial transaction."); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017) ("It is well settled that speech that is no more than a proposal of possible employment is a classic example of commercial speech.") (internal quotation marks omitted).

Cases outside the employment context similarly explain that negotiations over the provision of goods and services for money are commercial speech. *See, e.g., Ohralik*, 436 U.S. at 455 (attorney's in-person solicitation of potential clients over the course of several days constituted commercial speech because it related solely to attorney's economic interests); *Campbell v. Robb*, 162 F. App'x 460, 471-72 (6th Cir. 2006) (landlord's statement to housing inspector about potential tenant was "inextricably linked to the underlying rental transaction" and was thus commercial speech).

The Inquiry Provision, like laws on roadside solicitation, regulates speech that is part of a "proposal of possible employment." At all stages of the hiring process where it comes into play—soliciting applicants, selecting interviewees, interviewing, making offers of employment, and negotiating over terms and conditions of employment—an employer's inquiries relate to its and the potential employee's economic interests, *cf. Ohralik,* 436 U.S. at 455, and are "inextricably linked" to the underlying hiring transaction, *cf. Campbell,* 162 F. App'x 471-72. As in *Pittsburgh Press* and the day laborer cases, these communications are part and parcel of "proposal[s] of possible employment" and thus are commercial speech. *See Pittsburgh Press*, 413 U.S. at 385; *Valle del Sol*, 709 F.3d at 818.

Below, the Chamber argued that only "advertising" constitutes commercial speech. ECF 32-1 at 17. But neither *Bolger* nor other decisions define commercial speech so narrowly. Indeed, this Court's statement that commercial speech is "*generally* in the form of a commercial advertisement" assumes that things other than advertisements can be commercial speech. *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (emphasis added). Moreover, in *Pittsburgh Press*, the Supreme Court explained that the "fact that it relates to an advertisement" is not what makes

speech "commercial." 413 U.S. at 384. Rather, the dispositive factor in *Pittsburgh Press* was the advertisement's connection to an employment transaction; the Court relied on the ad's offer of employment to distinguish it from ads expressing social or political views. *Id.* at 384-85. That is, while speech in the form of advertising is an indication that the communication concerns a commercial transaction, an ad's connection to the consummation of an economic transaction—including employment—qualifies the communication as commercial speech.

**2. Intermediate scrutiny applies under *Central Hudson.***

**a. *Central Hudson* applies to content-based restrictions of commercial speech.**

First Amendment challenges to commercial-speech restrictions are evaluated under the intermediate scrutiny standard of *Central Hudson*. *See, e.g.*, *Heffner v. Murphy*, 745 F.3d 56, 89-90 (3d Cir. 2014); *Dwyer*, 762 F.3d at 280; *Riel v. City of Bradford*, 485 F.3d 736, 752-53 (3d Cir. 2007). Below, the Chamber asked the court to apply strict scrutiny instead because, it asserted, *Central Hudson* does not apply to "content-based regulations" of commercial speech. ECF 32-1 at 17-18; ECF 79 at 7-9. That argument is unfounded, and

this Court should reaffirm its precedent applying intermediate scrutiny to restrictions on commercial speech. JA17.

Citing *Central Hudson*, this Court has recognized "that content-based distinctions are more easily tolerated in the commercial speech context." *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 89 n.3 (3d Cir. 1984); s*ee also Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004) (Alito, J.) (applying *Central Hudson* to a "content-based restriction of speech"). The archetypal commercial speech case involves content-based regulations. In *Central Hudson* itself, the challenged law was plainly content-based—regulating advertisements that promoted use of electricity. *See* 447 U.S. at 557. Likewise in other cases, the Supreme Court has repeatedly applied intermediate scrutiny to content-based restrictions on lawful, non-misleading commercial speech. *See*, *e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176, 183–84 (1999) (applying intermediate scrutiny to prohibition on broadcast advertising of legal casino gambling ); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (applying intermediate scrutiny to law prohibiting display of alcohol content on beer labels); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (applying intermediate scrutiny to prohibition on attorneys sending written solicitations to prospective clients

relating to an "accident or disaster"); *Bolger*, 463 U.S. at 61, 68–69 (applying intermediate scrutiny to statute that prohibited unsolicited contraceptive advertisements); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (applying intermediate scrutiny to rule barring attorney advertisements from identifying jurisdictions in which attorneys were licensed). In each case, the restrictions turned on the subject matter of the speech and the identity of the speaker. In each case, the Court applied intermediate scrutiny.

**b. Subsequent case law does not require strict scrutiny.**

The Chamber's argument is essentially that *Central Hudson* and each of the other cases cited above are no longer good law. None of the cases on which it or the district court discussed below—*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), or *King*, 767 F.3d 216—supports such a conclusion.

*R.A.V.* concerned an ordinance outlawing bias-motivated disorderly conduct and did not involve, let alone mandate strict scrutiny for, content-based commercial-speech restrictions. On the contrary, Justice Scalia's opinion for the Court explicitly approved of content-based commercial-speech prohibitions. 505 U.S. at 388-39. Thus, *R.A.V.* and *Central Hudson* have

coexisted in their separate spheres of application for the past 26 years, with the Court continuing to apply *Central Hudson* to content-based restrictions on commercial speech. *See supra* pp. 9-10 (citing cases); *see also United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012) (explaining that *R.A.V.* requires strict scrutiny for content-based government regulations of speech *other* than commercial speech, as to which intermediate scrutiny applies); *BellSouth Telecommc'ns, Inc. v. Farris*, 542 F.3d 499, 504 (6th Cir. 2008) (contrasting *Central Hudson*'s intermediate scrutiny standard for commercial speech with "more rigorous scrutiny that applies to content-based regulations of other types of protected speech" per *R.A.V.*).

In *Sorrell*, the Supreme Court struck down on First Amendment grounds a Vermont law that barred pharmacies, health insurers, and similar entities from sharing prescriber-identifying information for marketing purposes, and barred drug manufacturers from using that information for marketing. 564 U.S. at 563. The Court held that the law imposed a "speaker- and content-based burden on protected expression," *id*. at 571, as it allowed dissemination and use of the information by "private or academic researchers," *id*. at 563, and for non-marketing purposes, such as "educational communications," *id.* at 564. The Court therefore concluded

that "heightened judicial scrutiny" was warranted. *Id.* at 565. The Court went on to explain that two types of "heightened" scrutiny could potentially apply: "a special commercial speech inquiry or a stricter form of judicial scrutiny." *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial because, even under the less stringent "commercial speech inquiry," the law was unconstitutional. *See id.* at 571–72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s express distinction between intermediate scrutiny and a "stricter" standard supports the continued application of intermediate scrutiny to commercial speech.

As *Sorrell* makes clear, "heightened scrutiny" does not necessarily refer to strict scrutiny; it is a generic term indicating scrutiny more demanding than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (Thomas, J., concurring) (referring to "any form of heightened scrutiny"). For example, the Supreme Court's equal protection precedents frequently use "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See*, *e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689, 1690 (2017); *United States v. Virginia*,

518 U.S. 515, 533, 555 (1996). The Court has also referred to the intermediate First Amendment scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). In similarly using the term "heightened scrutiny" as a general description of scrutiny above a rational-basis test, not as a synonym for strict scrutiny, *Sorrell* is consistent with the continued application of intermediate scrutiny to content-based commercial-speech restrictions.

Likewise, *Reed* offers no support for universal application of strict scrutiny to content-based regulations. *Reed* struck down a law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs. *See* 135 S. Ct. at 2224–25. The law did not, however, exempt the (noncommercial) signs plaintiffs sought to display. *Id.* at 2225. The Court cited noncommercial-speech cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. The Court cited *Sorrell* in defining the phrase "content based," explaining that "[g]overnment regulation of speech is content based if a law

applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell*, 564 U.S. at 565). And it found that ordinance in *Reed* was content-based because it "single[d] out specific subject matter for differential treatment." 135 S. Ct. at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of fully protected, *noncommercial* speech. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based commercial-speech restrictions. Had the Court intended to overrule its many decisions applying intermediate scrutiny to content-based commercial speech restrictions, its opinion would undoubtedly acknowledge such an important aspect of the decision. The Supreme Court, like Congress, "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Reed* provides no hint that it is concealing such an elephant. The Court's opinion does not use the term "commercial speech" even once.

That *Reed* does not sweep so broadly as to require strict scrutiny of *any* content-based speech restriction is confirmed by the Supreme Court's subsequent decision in *Expressions Hair Design*, 137 S. Ct. 1144. *Expressions Hair Design* concerned a statute prohibiting merchants from imposing

surcharges on purchases made with credit cards. The Court determined that the law regulated speech but did not determine whether it was properly viewed as a speech prohibition or a disclosure requirement. *See* 137 S. Ct. at 1151 & n.3. Under either view, the law was "content-based" in that its application either prohibited or required speech with particular content. Nonetheless, the Court's opinion does not suggest that the law might be subject to strict scrutiny. Rather, the Court remanded the case for consideration of the law either under *Central Hudson* intermediate scrutiny (if it was ultimately determined to be a speech restriction) or the less demanding "reasonable relationship" test of *Zauderer* (if it was determined to be a disclosure requirement). *See id.* at 1151.

The Court's decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), also confirms that *Reed* does not undercut the application of *Central Hudson*. *Matal* concerned a federal statute prohibiting registration of offensive trademarks, viewed as a content-based speech restriction. But neither the Court's lead opinion, joined in relevant part by four Justices, nor the opinion of Justice Kennedy (also representing the views of four Justices) held that the law was subject to strict scrutiny solely because it was content-based. The lead opinion applied the *Central Hudson* standard to the law and held it

unconstitutional because the interest in suppressing socially offensive speech is not legitimate. 137 S. Ct. at 1764. The opinion of Justice Kennedy (*Sorrell*'s author) for four Justices applied strict scrutiny because the law was *viewpoint*-based. At the same time, that opinion reiterated that, by contrast, "content based discrimination" is not "of serious concern in the commercial context." *Id*. at 1767 (citing *Bolger*, 463 U.S. at 65, 71–72).

Since *Reed* and *Sorrell*, courts of appeals have continued to apply *Central Hudson* to "content-based" regulations. *See, e.g.*, *In re Brunetti*, 877 F.3d 1330 (Fed. Cir. 2017) (applying *Central Hudson* to prohibition on registration of immoral and scandalous trademarks); *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295 (8th Cir. 2017) (applying *Central Hudson* to regulations limiting alcohol sellers' advertising of certain promotions); *Am. Academy of Implant Dentistry v. Parker*, 860 F.3d 300 (5th Cir. 2017) (applying *Central Hudson* to regulation of dentists' advertising); *Dana's R.R. Supply v. Att'y Gen., State of Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015) (citing *Sorrell* to hold that *Central Hudson* intermediate scrutiny applies to commercial speech). Every court of appeals to determine whether *Sorrell* or *Reed* somehow *sub silentio* overruled *Central Hudson* has answered in the negative. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (en banc); *Contest*

*Promotions, LLC v. City & Country of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017); *Mo. Broadcasters*, 846 F.3d at 300 n.5.

This Court's decision in *King* likewise stated expressly that content-based commercial-speech restrictions are not generally subject to strict scrutiny. 767 F.3d at 236–37. *King* concerned a statute prohibiting licensed counselors from engaging in "sexual orientation change efforts" with minors. 767 F.3d at 220-21. The Court concluded that such "efforts" constituted speech, *id*. at 224-29, before turning to the question of "the level of First Amendment protection afforded to speech that occurs as part of the practice of a licensed profession." *Id.* at 229. In addressing that question, the Court reasoned that "professional speech" was subject to the same standard as commercial speech—the *Central Hudson* standard. *Id.* at 233-35.[2] The Court did not suggest that *Central Hudson* no longer applied to "content-based" commercial speech. Indeed, the Court rejected the plaintiffs' argument that

[2] On this point, *King* has been disapproved by *Becerra*, which rejected "treating professional speech as a unique category that is exempt from ordinary First Amendment principles." 138 S. Ct. at 2375. *Becerra* did not modify commercial speech doctrine and, indeed, indicated that the regulation at issue would have been subject to lesser scrutiny if it concerned solely commercial speech. *See id*. at 2372.

the challenged law "should be subject to strict scrutiny because it discriminates on the basis of content and viewpoint." *Id.* at 236.

The Court in *King* agreed that "[*o*]*rdinarily*, content-based regulations are highly disfavored and subjected to strict scrutiny." 767 F.3d at 236 (emphasis added) (citing *Sorrell*, 564 U.S. at 565-66). Quoting *R.A.V.*, 505 U.S. at 388, however, it explained that within "unprotected or lesser protected categories of speech, the Supreme Court has held that a statute does not trigger strict scrutiny 'when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.'" 767 F.3d at 236. Commercial speech, it explained, receives diminished protection under the First Amendment because such speech is "linked inextricably" to the commercial transactions government has undoubted power to regulate. *Id.* at 234 (quoting *Edenfield*, 507 U.S. at 767).[3]

Here, the link to an economic transaction is both the reason the class of commercial speech is regulable and the reason that the particular

[3] Below, the Chamber suggested *R.A.V.* stands for the proposition that the only reason commercial speech is proscribable is "because of its 'risk of fraud,'" ECF 32-1 at 18, quoting *R.A.V.*, 505 U.S. at 388. *R.A.V.* says the opposite: that the risk of fraud is "*one of* the characteristics of commercial speech that justifies depriving it of full First Amendment protection." 505 U.S. at 388 (emphasis added).

communications addressed in the Inquiry Provision are regulated. *King*'s reasoning and the long line of Supreme Court precedent thus support application of intermediate scrutiny here.

**B. The Inquiry Provision passes the *Central Hudson* test.**

*Central Hudson*'s threshold inquiry is whether regulated speech is protected by the First Amendment. 447 U.S. at 566. If the restricted speech facilitates unlawful activity or is misleading, it is unprotected, and the inquiry ends. *Heffner*, 745 F.3d at 90. If not, courts proceed to ask (1) "whether the asserted governmental interest is substantial"; (2) "whether the regulation directly advances the governmental interest asserted," and (3) "whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

**1. Speech regulated by the Inquiry Provision facilitates unlawful activity.**

The Chamber's challenge to the Inquiry Provision fails to pass *Central Hudson*'s threshold inquiry because the regulated speech facilitates unlawful activity. The City Council has made it unlawful to rely on salary history in calculating salaries. An inquiry into salary history information from prospective employees facilitates this unlawful activity.

In *Pittsburgh Press*, the Court explained that commercial speech (there, advertisements) relating to unlawful activity is not protected because First Amendment interests that it might otherwise serve are "altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. at 389. Here, the speech restriction is similarly incidental to a valid limitation on economic activity. The district court distinguished *Pittsburgh Press* on three grounds, but none renders the case's core holding inapplicable.

First, the district court noted that not all uses of wage history are illegal, giving as an example "gathering market information or identifying applicants whom employers can or cannot afford." JA20. This point does not distinguish *Pittsburgh Press*. The ordinance at issue there included a "bona fide occupational exemption" to its prohibition on sex-based employment discrimination. 413 U.S. at 378. The Court nonetheless upheld a finding that separate "men-only" and "women-only" categories for job advertisements was unlawful, even though it would have been possible to publish a list of "men-only" jobs where such discrimination was not illegal. Moreover, this case poses a *facial* challenge to the ordinance. The existence of some conceivable lawful purpose for the speech at issue would not justify vacating

the entire law, particularly because "the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1984).[4]

Second, the district court stated that, "unlike discrimination, the existence of wage history is not in and of itself illegal." JA20. But the Inquiry Provision does not bar statements about the "existence of wage history." It bars asking a candidate to divulge that wage history to a prospective employer. Similarly, being a woman or a man was not prohibited by the law at issue in *Pittsburgh Press*; using sex as a factor in employment was.

Finally, the district court noted that here, unlike in *Pittsburgh Press*, the plaintiff is challenging the lawfulness of the underlying conduct prohibition as well as the related speech restriction. At the same time, however, the district court concluded that the Reliance Provision was constitutional. The

[4] It is unclear whether the district court's examples reflect lawful activity. The declarations of the Chamber and its members suggest that these examples are *reasons* why they use salary history to calculate salaries—not that they do not use salary history to set salary. *See, e.g.*, JA234-36. The City's regulations also allow an employer to ask about a prospective employee's "salary requirements or expectations," JA328, so the law does not prohibit employers from determining whether they could "afford" an employee.

existence of an *unsuccessful* challenge to the Reliance Provision thus does not alter the fact that the Inquiry Provision relates to unlawful activity.

This case is thus controlled by *Pittsburgh Press* and other cases finding that government may make activity unlawful, and then restrict speech advancing that unlawful activity without triggering the First Amendment. For example, in *Hoffman Estates*, 455 U.S. 489, the Supreme Court found that prohibiting the marketing of drug paraphernalia did not trigger the First Amendment, as any regulated speech "promoted or encouraged" illegal drug use. The district court distinguished *Hoffman Estates* on the ground that it involved "regulations of advertising or promotion of activity that directly furthered entirely illegal activity." JA61 n. 8. But the prohibited speech in *Hoffman Estates* did not further *entirely* illegal activity: rolling papers and pipes have lawful uses. The speech at issue here facilitates unlawful behavior—consideration of salary history—to the same degree as the speech at issue in *Hoffman Estates*.

**2. The City has a substantial interest in pay equity.**

Even if the Chamber's challenge survives the threshold inquiry under *Central Hudson*, it does not survive the remaining three steps. The district court only cursorily evaluated the City's interest, concluding that the parties

were in agreement that it is substantial. JA21. But this conclusion ignored differences in the parties' respective definitions of that interest, with consequences for the remainder of the analysis. Below, the Chamber stated the City has only a "substantial interest in wage disparities *caused by discrimination*." ECF 32-1 at 19-20 (emphasis in original). The City, however, asserted a broader interest in "promoting wage equity and reducing the wage disparity, based upon gender as well as upon race and ethnicity." ECF 63 at 12.

The difference between the interests stated by the parties is not semantic. In the City's eyes, the wage gap itself is a problem, regardless of its cause. The Chamber, by contrast, asserts that the City has only an interest in unequal pay provably caused by "discrimination," which it defines by essentially incorporating case law under the Equal Pay Act. But while that Act allows many factors to excuse gender-based pay disparities, *see, e.g.*, *Rhoades v. Young Women's Christian Ass'n*, 423 F. App'x 193, 198 (3d Cir. 2011), Philadelphia is not required to do so. The theory behind the City's ordinance is that discrimination in past workplaces and the job market has spillover effects into an employee's next job; that theory is supported by expert evidence. *See, e.g.*, JA120 (Phila. Code § 9-1131(1)(d)) ("basing wages

upon a worker's wage at a previous job only serves to perpetuate gender wage inequalities); JA296-97 (Affidavit of Dr. Madden) (explaining that "[t]o the extent that salary histories also reflect discrimination in the general labor market towards women and/or members of minority racial and ethnic groups, salary histories are a 'tainted' criterion that serve to perpetuate the effects of past discrimination").

Acceptance of the Chamber's narrow framing infects the district court's entire *Central Hudson* analysis. *See, e.g.*, JA40 (refusing to consider evidence for failure to show "discriminatory" wage gap). Under *Central Hudson*, courts may not "supplant the precise interests put forward by the [government] with other suppositions." *Edenfield*, 507 U.S. at 768. Nor may the challengers. Thus, the Inquiry Provision's constitutionality must be tested against the City's broad interest "in promoting wage equity and reducing the wage disparity."

**3. The Inquiry Provision is tailored to advance the City's interest in pay equity.**

The district court erred in finding insufficient evidence to conclude that inquiries into salary history perpetuate lower salaries. JA39. "[U]nder intermediate scrutiny[,] states are 'allowed to justify speech restrictions by

reference to studies and anecdotes,' and also by reference to 'history, consensus, and simple common sense.'" *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *cited in Drake v. Filko*, 724 F.3d 426, 438 (3d Cir. 2013).

The submission of labor economist Dr. Janice Madden, discussed at JA26-27, is sufficient to show how salary histories are tainted by discrimination. Moreover, the district court incorrectly discounted evidence explaining how the undisputed wage gap is perpetuated by using tainted salary histories as a factor in determining compensation. *See* JA37. Conclusions of experts in the field are entitled to at least some weight; the district court gave them none. *See id.* Even without such evidence, though, plain logic would have sufficed. The existence of a wage gap is undisputed. If a man made $100,000 a year in a job, and a woman made $80,000 in the same job, considering these salary histories in setting pay in a new job would naturally result in the man being paid more than the woman. Logic similarly suffices to justify the next step—connecting the ban on inquiries into salary history with the use of salary history in calculating pay. If consideration of prior salary would propagate salary disparities, preventing decisionmakers from learning prior salaries *directly* addresses that problem.

Thus, although the district court did not reach the final *Central Hudson* question—whether the Inquiry Provision sweeps further than necessary; the record and common sense show that it does not. Once a decisionmaker knows what a potential employee has earned in prior jobs, there is no way to ensure that information does not affect the compensation decision. *Cf. United States v. Ferguson*, 876 F.3d 512, 516 (3d Cir. 2017) (noting a district court's consideration of permissible factors in sentencing cannot "unring the bell" of earlier consideration of impermissible factor); *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. CIV. 09-290, 2011 WL 1044652, at *3 (W.D. Pa. Mar. 18, 2011) ("[I]t is difficult to 'unring the bell' once something is read."). Even the best-intentioned people tasked with determining an employee's salary will do so conscious of information they have about the employee's earning history. Preventing contamination of the process amply justifies the Inquiry Provision's scope.

Notably, the Inquiry Provision does not prohibit all speech relating to salaries or salary histories. It bars only inquiries to a *prospective employee*, defined by regulation as "[a]n individual who is seeking a position with a new Employer, and whom the Employer is considering hiring for a position located within the City." JA328. Thus, the Chamber's claims that its

members' ability to obtain market information about salaries would be hampered are greatly overblown. Employers have ample means to obtain market information other than asking individual job candidates what they were paid by different employers. And the ordinance does not bar asking potential employees about salary requirements or expectations, or asking candidates questions about experience, seniority, or aptitude—questions far more probative of their qualifications than wage history.

The Chamber also suggested below that the Ordinance is flawed because it bars employers from seeking salary information from white men, not just from women and minorities. *See* ECF 32-1 at 25. A law that carved out white men for differential treatment would raise its own constitutional concerns. More basically, though, this argument fails to understand what a wage disparity is. A system that perpetuates higher salaries for men based on their higher salary histories is no better than one that perpetuates lower salaries for women based on their lower salary histories.

Finally, the Chamber argued that the City needed to explain why "encouraging employers to conduct voluntary self-evaluations, providing job training for women, or more aggressively enforcing existing equal-pay laws" was not enough to eliminate wage disparities. ECF 32-1 at 25.

Intermediate scrutiny, however, does not require such a rigid least-restrictive-means analysis. *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-78 (1989).

## II. The Reliance Provision does not regulate First Amendment-protected activity.

The district court correctly found the Chamber unlikely to prevail on the merits of its First Amendment challenge to the Reliance Provision because that provision does not regulate First Amendment-protected activity. JA41. The Reliance Provision regulates factors an employer can use in calculating pay. It does not regulate speech because setting wages is neither speech nor expressive conduct.

The Chamber's argument that the Reliance Provision bars employers "from using wage history to express a particular message about the value of an applicant's labor" would convert a vast range of employment regulation into infringement on speech rights. Do minimum wage laws implicate the First Amendment because an employer wants to express a message about the value of its workers' labor by paying them less than $7.25 an hour? What about occupational safety laws? Could an employer challenge a law

requiring safety equipment by claiming that it wants to express a message about the necessity for the equipment by not providing it?

The answer comes from well-established precedent. Fifty years ago, the Supreme Court held that it could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Muraveva v. Toffoli*, 709 F. App'x 131, 134 n.5 (3d Cir. 2017) (quoting *O'Brien*). Rather, "conduct is protected by the First Amendment when 'the nature of the activity, combined with the factual context and environment in which it was undertaken,' shows that the 'activity was sufficiently imbued with elements of communication to fall within the First Amendment's scope.'" *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002) (quoting *Spence v. Washington*, 418 U.S. 405, 409-10 (1974)) (alterations omitted). It is "the putative speaker [that] bears the burden of proving that his or her conduct is expressive." *Id.* at 161.

The Chamber cannot meet its burden of establishing that setting wages is expressive. Establishing wages is no more expressive than any other form of price-setting. When a company sets the price of a widget, it could also claim to be conveying a "message about the value" of that widget. Yet courts

have consistently held that price-setting in and of itself is not First Amendment activity, including the Supreme Court in *Expressions Hair Design*, 137 S. Ct. 1144, 1150-51. *See also Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71, 78 (1st Cir. 2013); *Nicopure Labs, LLC v. FDA,* 266 F. Supp. 3d 360, 415 (D.D.C. 2017); *cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 358 (2002) (noting that prohibition on offering drugs at wholesale price to certain entities would be "non-speech-related"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (stating that a regulation mandating higher prices "would not involve any restriction on speech").

In *Expressions Hair Design*, the Court distinguished a law regulating how prices were *displayed* from a "typical price regulation"—for example, one that "would simply regulate the amount that a store could collect." 137 S. Ct. at 1150. The former, which regulated "how sellers may communicate their prices," was a speech regulation. *Id.* The latter, however, would not regulate First Amendment-protected expressive activity. *Id.* Contrary to the Chamber's argument that the Reliance Provision effectively prohibits speech because it has the effect of prohibiting the communication of an unlawful salary offer, *see* ECF 79 at 10-11, the Court explained that price regulations

do not restrict expressive activity just because prices are typically communicated in some fashion. The Court gave the example of a law requiring delis to charge $10 for sandwiches. 137 S. Ct. at 110. Such a law only regulates unprotected conduct, even though, "in order to actually collect that money, a store would likely have to put '$10' on its menus or have its employees tell customers that price." *Id.*

> Those written or oral communications would be speech, and the law—by determining the amount charged—would indirectly dictate the content of that speech. But the law's effect on speech would be only incidental to its primary effect on conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

137 S. Ct. at 1150–51 (citations omitted). Determining the price of an employee's services is no more inherently expressive than setting the price of a sandwich. When a government regulates either, it is regulating conduct.

Below, the Chamber relied heavily on *Sorrell* and *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc), in arguing otherwise. Both are easily distinguishable. *Sorrell* was in fact cited in *Expressions Hair Design* in explaining why price regulations, although they may have the incidental effect of restricting speech, are *not* restrictions on

expressive activity. *See* 137 S. Ct. at 1150-51. Indeed, *Sorrell* explicitly distinguished the law it invalidated from "restrictions on economic activity," because it prohibited the dissemination of truthful information. 564 U.S. at 567.

*Wollschlaeger* is inapposite. The regulations at issue there—prohibitions on recording notes, asking patients questions, and speaking to patients—restricted written and oral communications. Thus, although "[i]n cases at the margin, it may sometimes be difficult to figure out what constitutes speech protected by the First Amendment," *Wollschlaeger* was "not a hard case in that respect." 848 F.3d at 1307. This case is similar only in that it is not a hard one. Here, however, the regulation falls well on the other side of the speech-conduct margin.

## CONCLUSION

The decision of the district court should be reversed with respect to the Inquiry Provision and affirmed with respect to the Reliance Provision, and the preliminary injunction should be vacated.

Respectfully submitted,

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September 28, 2018

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September 28, 2018

/s/ Adam R. Pulver
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## CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, the foregoing brief has been served through this Court's electronic filing system upon counsel of record for all parties.

/s/ Adam R. Pulver
Adam R. Pulver