IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case Nos. 18-2175 & 18-2176

Greater Philadelphia Chamber of Commerce,
***Appellants/Cross-Appellees*,**

v.

City of Philadelphia, Philadelphia Commission on Human Relations,

***Appellees/Cross-Appellants*.**

Appeal from the April 30, 2018 Order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 17-1548, granting in part and denying in part Plaintiff's Motion for Preliminary Injunctive Relief (Goldberg, J.)

BRIEF OF *AMICI CURIAE* WOMEN'S LAW PROJECT AND 36 ORGANIZATIONS DEDICATED TO GENDER WAGE EQUITY IN SUPPORT OF APPELLEES/CROSS-APPELLANTS CITY OF PHILADELPHIA, PHILADELPHIA COMMISSION ON HUMAN RELATIONS AND AFFIRMANCE IN PART AND REVERSAL IN PART OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 36.1 and 29(a)(4), the undersigned counsel for *amici curiae* Women's Law Project, et al, states that *amici* are non-profit public interest organizations, none of which have parent corporations, and none of which issue public stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are Women's Law Project and 36 civil rights groups and non-profit organizations committed to preventing, combating, and redressing discrimination and protecting the equal rights of women in the United States, including by researching the pay gap and advocating for its elimination. Detailed statements of interest are included in the accompanying Appendix A.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Defendants' appeal from the District Court's decision that partially granted and partially denied Plaintiff's Motion for a Preliminary Injunction. The District Court correctly concluded that the Reliance Provision, which prohibits employers from relying on salary history in employment decision-making, is a valid exercise of the government's legislative power. However, the District Court erred in two ways when it enjoined the Inquiry Provision of Philadelphia's wage equity ordinance, which prohibits employers from asking job applicants about their salary history. First, the court erred by choosing to apply intermediate scrutiny to the Inquiry Provision as a threshold matter, failing to recognize that the Provision regulates unprotected commercial speech related to the illegal activity of relying on salary history to set future wages. Second, the court erred when applying intermediate scrutiny by requiring too high

an evidentiary burden on the City regarding the connection between the Inquiry Provision and the city's substantial interest in reducing discriminatory pay disparities.

Research shows that women and people of color receive lower wages than their similarly situated white male colleagues, resulting in a loss of income that burdens not only the worker, but also families, communities, and the entire economy. Recognizing that existing laws have not succeeded in eliminating this harmful wage gap, and understanding that discrimination based on gender, race, and other identities contributes to that gap, Philadelphia City Council unanimously adopted, and the mayor signed into law, the ordinance with the intention of significantly reducing this discriminatory pay gap.

By prohibiting employers from relying on an applicant's prior pay to determine her compensation, the ordinance targets a common employer practice that perpetuates discriminatory pay based on the erroneous presumption that prior pay accurately reflects the skills and experience of an applicant, untainted by discrimination. To make this Reliance Provision meaningful, the ordinance includes an Inquiry Provision, as substantial research indicates that employers use information about past wages—which themselves reflect discrimination — as an "anchor" upon which to set new hires' salaries, thus perpetuating discriminatory pay and contributing to the wage gap.

For these reasons, *amici* urge the Court to reverse the District Court's decision enjoining the Inquiry Provision and affirm its decision upholding the Reliance Provision.

ARGUMENT

I. THE PHILADELPHIA ORDINANCE IS A TRADITIONAL EMPLOYMENT LAW THAT MAKES EMPLOYERS' RELIANCE ON A SPECIFIC CHARACTERISTIC ILLEGAL, AND THEN PROVIDES THE MEANS FOR THE RELIANCE PROVISION'S MEANINGFUL ENFORCEMENT.

Legislatures have long exercised their power to enact employment laws that protect workers, laws that often include additional measures to ensure their meaningful enforcement. The Philadelphia ordinance is the archetypal example of traditional employment law that is within the City's power to enact. The ordinance's Reliance Provision prohibits employers from relying on salary history in making employment decisions, while its Inquiry Provision prohibits employers from asking about the characteristic that is now an illegal basis for employment decisions. The District Court correctly determined that the provision banning employers' reliance on prior pay is a valid exercise of governmental power but failed to apprehend the role of the Inquiry Provision as an essential — and commonplace — means of enforcing the Reliance Provision.

A. The Philadelphia City Council — Like Other Legislatures — Has The Constitutional Power To Regulate Employment, Including The Power To Prohibit Employers From Relying On Certain Characteristics Or Experiences.

Courts have traditionally given legislatures wide latitude to regulate the employment sphere. As the United States Supreme Court explained in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937):

> In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

The legislature's decisions about whether and when to regulate the employment relationship generally receive deference so long as those decisions bear a rational relationship to a legitimate governmental purpose. *See, e.g. Hartman v. City of Allentown*, 880 A.2d 737, 743 (Pa. Commw. Ct. 2005); *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423 (1952).

Federal, state, and local legislatures often enact antidiscrimination laws that prohibit employers from relying on certain characteristics when making employment decisions. Employers, workers, and others may disagree (and often do) about the wisdom of the legislature's choices as a matter of employment policy — but those decisions are for the legislature rather than the judiciary, subject only

to rational-basis review. *See Railway Mail Asso. v. Corsi*, 326 US 88, 89 (1945) (upholding New York State's antidiscrimination laws).

With Philadelphia's wage equity ordinance, the City's law-making body has concluded that employers should not consider wage history in making employment decisions because the moral, economic, and discriminatory costs of such reliance outweigh their benefits. Philadelphia joins many other federal, state, and local jurisdictions that prohibit employers from relying on certain characteristics in making employment decisions when the legislature has determined that it is immoral, unfair, or unwise to do so.

Examples of these reliance bans are commonplace and longstanding. Many of these laws forbid employers from relying on a person's membership in a protected class because the legislature has determined that it is inefficient or wrong to do so. For example, Title VII of the Civil Rights Act prohibits employers from relying on "race, color, religion, sex, or national origin" in making employment decisions. 42 U.S.C. § 2000e-2. The Pregnancy Discrimination Act prohibits employers from considering "pregnancy, childbirth, or related medical conditions" in making employment decisions, 42 U.S.C. § 2000e(k), and the Equal Pay Act prohibits employers from considering sex in pay decisions. 29 U.S.C. § 206(d). Most states, including Pennsylvania, similarly prohibit employers from relying

upon race, color, national origin, disability, sex, religion, and age when making employment decisions. *See, e.g.*, 43 Pa. Stat. § 955.

Antidiscrimination laws also often prohibit employers from relying on other characteristics, histories, or life experiences when the legislature determines that it is unjust or unwise to do so. *See, e.g.*, 38 U.S.C.S. § 4311 (2017) (prohibiting employers from discriminating against members of the uniformed services by relying on military status when making employment decisions); D. C. Code § 2-1402.11 (limiting employers' reliance on an applicant's credit history or credit report), 43 Pa. Stat. § 955 (forbidding employers from discriminating against those who have engaged in whistleblowing activity), Me. Rev. Stat. tit. 5, § 4572 (forbidding employers from discriminating against those who have filed a workers' compensation claim).

B. Legislatures Commonly Exercise The Power To Prohibit Inquiries Related To A Protected Characteristic To Make Their Reliance Bans Meaningfully Enforceable.

Once a legislature takes a certain protected characteristic off the table for employment decision-making purposes — that is, once it enacts a reliance ban — one of the most effective ways to make that legal protection meaningful is to prohibit employers from asking about that characteristic on the front end, since employers' inquiries about protected characteristics, histories, or experiences can

elicit the information that enables them to discriminate illegally on those bases. Those inquiries can also dissuade the applicants who receive them from pursuing opportunities they have a right to seek.[1]

Precisely for these reasons, the Pennsylvania Human Relations Act not only prohibits employers from relying on a variety of protected characteristics but also prohibits them from "elicit[ing] any information . . . . concerning the race, color, religious creed, ancestry, age, sex, national origin, past handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of any applicant." 43 Pa. Stat. § 955(b)(1). Like Philadelphia, Pennsylvania has enacted a reliance ban, along with an inquiry provision to make its reliance ban meaningfully enforceable.

Many other legislatures have done the same in a variety of settings. Like Pennsylvania's law, these jurisdictions' laws often prohibit employers from making inquiries or otherwise seeking to obtain information about applicants' or employees' protected characteristics through application forms or pre-application inquiries. *See*, *e.g.* Haw. Rev. Stat. § 378-2(C); N.J. Stat. § 10:5-12(c); Cal. Gov't Code § 12940(d); Mass. Gen. Laws ch. 151B, § 4(3).

[1] Helen Norton, *You Can't Ask (Or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech,* 11 Wm. & Mary Bill of Rts. J. 727, 753 (2003).

For example, the Genetic Information Nondiscrimination Act not only prohibits employers from relying on genetic history in employment decision-making, but also restricts employers' and employment agencies' ability to "request, require, or purchase genetic information" regarding applicants and employees or their family members. 42 U.S.C. § 2000ff. Similarly, the Americans with Disabilities Act (ADA) forbids employers' reliance on disability status in making employment decisions and then prohibits pre-employment inquiries as to an applicant's disability and also limits medical testing prior to an offer of employment in order to make its reliance ban meaningful. 42 U.S.C. § 12112(d). The list goes on and on.[2]

In short, Philadelphia's law is consistent with commonplace and longstanding federal, state, and local antidiscrimination laws that prohibit employers from relying on, as well as asking about, certain characteristics or experiences. Like other laws that prohibit discrimination based on race, sex, religion, national origin, disability, genetic history, sexual orientation, veterans' status, and more, Philadelphia's law makes wage history a protected characteristic as a matter of employment policy — and then prohibits employers from inquiring about that characteristic to prevent them from relying on it in making decisions.

[2] *See Amicus* Brief of Women's Law Project and 27 Organizations Committed to Gender Equity, filed Sept. 14, 2017 (Doc. 69), No. 17-1548, at 8-10.

II. THE TRIAL COURT'S CHOICE TO APPLY INTERMEDIATE SCRUTINY IS ERRONEOUS BECAUSE THE CITY'S INQUIRY PROVISION REGULATES UNPROTECTED COMMERCIAL SPEECH RELATED TO THE ILLEGAL ACTIVITY OF RELYING ON WAGE HISTORY IN MAKING EMPLOYMENT DECISIONS.

The Supreme Court has long held that the First Amendment does not protect commercial speech that is false, misleading, or related to illegal activity from the government's regulation, while the government's regulation of accurate commercial speech about legal activity receives intermediate scrutiny. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–64 (1980). In the employment context, the Supreme Court has held that "conversations relating to employment constitute commercial speech." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relation*s, 413 U.S. 376, 385 (1973). Lower courts have consistently applied this reasoning to conclude that employers' recruitment efforts, interviews, and other job-related negotiations about the terms and conditions of employment constitute commercial speech. *E.g., Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay* 868 F.3d 104, 112 (2nd Cir. 2017) (characterizing potential employers' solicitation of day laborers as commercial speech because it involves advertisements and negotiations for work); *Valle Del Sol, Inc. v. Whiting,* 709 F.3d 808, 818 (9th Cir. 2013) (same); *New Jersey Dep't of Labor and Workforce Dev. v. Crest Ultrasonics,* 82 A.3d 258, 268

(N.J. Super. Ct. 2014) (characterizing state law that regulated job advertisements as a regulation of commercial speech).

As the District Court correctly noted, Philadelphia's law prohibits employers from asking applicants about wage history during the hiring process, and thus regulates commercial speech. The District Court erred, however, in applying intermediate scrutiny to the Inquiry Provision because that provision regulates commercial speech related to the now-illegal activity of relying on wage history in making employment decisions.

The City Council prohibited reliance on wage history in making employment decisions because it determined that such reliance perpetuated unlawful pay disparities and did not accurately reflect applicants' value, and that such reliance was thus unjust and unwise. It also prohibited employers' inquiries into wage history to prevent them from acquiring information that would enable them to make what are now illegal employment decisions — just as Pennsylvania's Human Rights Act and many other laws prohibit both employers' reliance on certain protected characteristics as well as their inquiries about those characteristics. In other words, once the City prohibited reliance on wage history in making employment decisions, employer inquiries into wage history constitute commercial speech related to that illegal activity of reliance — and are thus entirely unprotected from the government's regulation. *Central Hudson*, 447 U.S.

557 at 564. This analysis is consistent with the Supreme Court's ruling in *Pittsburgh Press*, in which the Court rejected a First Amendment Challenge to a city's employment ordinance prohibiting newspapers from publishing sex-segregated job advertisements; the city had separately prohibited employers from relying on sex in making employment decisions. The Court upheld the city's ordinance, concluding that sex-segregated job advertisements were related to the illegal commercial activity of relying on sex in employment decision-making:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

*Id**Error! Bookmark not defined.***. at 389.

The District Court suggested that employer inquiries about wage history, unlike the sex-segregated job advertisements in *Pittsburgh Press**Error! Bookmark not defined.***, could be used for nondiscriminatory and thus legal, purposes: "gathering market information or identifying applicants whom employers can or cannot afford." JA 0020.[3] But wage history is a limited and potentially discriminatory way to aid employers in "identifying applicants whom [they] can or

[3] References to "JA" are to the corresponding page number within the Joint Appendix.

cannot afford," *id**Error! Bookmark not defined.**.*, because that history is the result of discriminatory market forces rather than an accurate assessment of an applicant's skills, knowledge, or experience. *See Part III(C), infra.* Instead of assuming they can or cannot afford an applicant based on past salary, employers should instead tell applicants what *they*, the employers, can afford to offer. And in determining the pay that they offer, employers should, as City Council noted in its findings, base their salary offers on "the job responsibilities of the positions sought and not based upon the prior wages earned by the applicant." Phila. Code. § 9-1131(1)(e).

Moreover, the inquiry itself may, in discriminatory ways, dissuade applicants from applying for jobs. As Jeni Wright's and Melissa Beatriz Skolnick's testimony before the Council shows, JA 0278-79, employer inquiries into applicants' wage history puts women and/or people of color (who are often paid less than white men for similar work) in a difficult position. *See infra*, Part III (A) & (B). Either they give the information and receive lower pay if and when the employer relies on that information in making employment decisions, or they refuse to provide the information only to be rejected for the job altogether. From Wright's and Skolnick's testimonies, it is reasonable to infer that inquiries related to wage history could deter women and people of color from applying for jobs, just like the illegal job advertisements in *Pittsburgh Press**Error! Bookmark not***

defined.. *See also Fredenburg v. Contra Costa County Dep't of Health*, 172 F.3d 1176, 1182 (9th Cir. 1999) (recognizing that the ADA's prohibition on non-job-related pre-employment medical inquiries or examinations "prevents employers from using HIV tests to deter HIV-positive applicants from applying.").

III. THE TRIAL COURT ALSO ERRED IN ITS APPLICATION OF INTERMEDIATE SCRUTINY TO THE INQUIRY PROVISION BECAUSE THE CITY'S ORDINANCE DIRECTLY ADVANCES ITS SUBSTANTIAL INTEREST IN REDUCING PAY DISCRIMINATION.

As a threshold matter, as explained above, the District Court erred by applying intermediate scrutiny to the City's regulation of speech that is unprotected by the First Amendment—that is, the City's regulation of commercial speech related to illegal reliance on wage history in employment decision-making. The District Court also erred in its application of intermediate scrutiny to the Ordinance. Even if intermediate scrutiny were to apply (and, as the preceding section makes clear, it should not), the Inquiry Provision withstands such scrutiny, because the Ordinance directly advances the government's substantial interest in reducing pay discrimination.

Under *Central Hudson*, the government may regulate commercial speech (so long as it is truthful, not misleading, and related to legal commercial activity) when: (1) the governmental interest supporting the regulation is substantial; (2) the regulation directly advances that asserted interest; and (3) the regulation is

narrowly drawn. *Central Hudson,* 447 U.S. 557 at 564-656. Even under intermediate scrutiny, a legislature's decision-making authority deserves deference for decisions "drawn [from] reasonable inferences based on substantial evidence." *Turner Broad. Sys. v. FCC,* 520 U.S. 180, 195 (1997) (upholding federal regulation of cable carriers); *see also United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) ("Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced … even where it is not wholly eradicated."). Courts have applied *Central Hudson's* intermediate scrutiny test to uphold a variety of governmental regulations, granting deference to reasonable legislative decisions. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986) (applying *Central Hudson* to uphold a governmental restriction on casino advertising because the legislature's belief that such advertising would increase the demand for casino gambling was "a reasonable one"*)*; *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509 (1981) (applying *Central Hudson* and granting deference to the legislature when its regulation is "*not manifestly unreasonable*.").

The trial court erred in concluding that the regulation does not directly advance the City's substantial interest in reducing discriminatory pay disparities.

First, it erred in failing to recognize that the City directly advances its substantial interest in addressing the pay gap when it targets the discrimination that contributes to the pay gap, even if other factors also contribute to the problem. Because the available evidence shows that employers' reliance on wage history to set pay perpetuates pay discrimination for women and people of color, the Council's decision to prohibit inquiries about that wage history directly advances the goal of reducing such discrimination. Second, the District Court inappropriately insisted on an unrealistic and unnecessary level of evidence that would require data that employers keep proprietary and that is not available from administrative, household, or other establishment survey data.

A. Substantial Evidence Establishes The Existence Of Gender-, Race-, And Ethnicity-Based Wage Gaps.

A large amount of research establishes the existence of wage gaps between white men and women, and especially between white men and people of color. These gaps persist despite more than half a century of laws prohibiting unjustified wage differentials between women and men. Congress passed the Equal Pay Act more than fifty years ago, recognizing that sex-based differences in pay "depress[] wages and living standards for employees necessary for their health and efficiency." Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963). Pennsylvania's Equal Pay Act, adopted in 1959, is even older than federal law. 43

Pa. Stat. Ann. § 336.1 (2016). Legislatures and lawmakers in every state have made clear that sex-based differences in pay are unlawful. Yet the gaps have not changed significantly in over a decade, prompting legislatures' interest in identifying additional means of addressing the problem.[4]

In 2017, the median annual earnings for American women who worked full-time all year was $41,977, while the median annual earnings for American men working full-time all year was $52,146.[5] This translates to a 19.5 percent pay gap, unchanged from the previous year.[6] Put another way, employers pay women on average roughly 80.5 cents for every dollar they pay to men. The national wage gap between white men and women of color is even wider, with employers paying African American women 60.3 cents, Latina women only 53 cents, and Southeast Asian women and Pacific Islander women even less for every dollar paid white men.[7]

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[4] Kayla R. Fontenot, et al, *Income and Poverty in the United States: 2017 Current Population Reports*, U.S. Census Bureau 10 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf; *See* Inst. for Women's Policy Research (IWPR), Projected Year the Gap Will Close by State 1 (2017).

[5] IWPR, The Gender Wage Gap: 2017, *available at* https://iwpr.org/publications/gender-wage-gap-2017/

[6] *Id.*

[7] *Id.*; National Asian Pacific American Women's Forum (NAPAWF), Achieving Pay Equity for Asian Americans and Pacific Islanders (Mar. 2017), https://www.napawf.org/uploads/1/1/4/9/114909119/epd_fact-sheet_final.pdf ("Asian American women on average earn 85 cents for every dollar a white man

Overall, women in Pennsylvania make 79 cents to every dollar employers pay to a man, with African American women in Pennsylvania paid only 68 cents and Latina women only 57 cents to that same dollar paid to a white man.[8] In Philadelphia, employers pay Latina women 58 cents, Black women 70 cents, and White women 89 cents for every dollar they pay to White men.[9] Without effective action to reduce the gap, Pennsylvania women will not achieve equal pay until 2068, while nationally, women will achieve equal pay by 2059.[10]

The gender wage gap begins the moment women enter the workforce, and then follows them throughout their careers. Even though women today are more likely than men to receive a higher education,[11] they receive less pay than men

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earns… [However,] Southeast Asian and Pacific Islander women have some of the highest wage gaps compared to other racial and ethnic groups."); NWLC, Equal Pay for Asian and Pacific Islander Women (Feb. 2018) ("Burmese, Samoan, and Hmong women make just over half—51 percent, 56 percent and 59 percent respectively—of what white, non-Hispanic men make.")

[8] National Partnership, Pennsylvania Women and the Wage Gap (April 2017), http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2017-pa-wage-gap.pdf (using 2015 data).

[9] *See* https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (the Women's Law Project analyzed the 2015 data to determine the pay disparity).

[10] IWPR, The Economic Status of Women in Pennsylvania (Mar. 2018), https://statusofwomendata.org/wp-content/themes/witsfull/factsheets/economics/factsheet-pennsylvania.pdf (using 2015 data).

[11] Kurt Bauman, *Shift Toward Greater Educational Attainment for Women Began 20 Years Ago,* U.S. Census Bureau (Mar. 29, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/03/shift-toward-greater-educational-attainment-for-women-began-20-years-ago.html.

beginning just one year out of college — even when researchers control for factors like college major, occupation, and hours worked.[12] Disparities persist for women with advanced degrees, both in initial earnings and throughout their careers. Female business school graduates, for example, make less money than their male counterparts at graduation, and the pay gap widens over time.[13] A 2016 survey revealed that the average earnings of male law partners were 44 percent higher than the average earnings for female law partners.[14] The median earnings for women are lower than men's in nearly all occupations, regardless of whether those occupations are predominantly performed by women, by men, or a mix of both.[15]

[12] Christianne Corbett & Catherine Hill, AAUW, Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation 2 (2012), http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf.

[13] Marianne Bertrand, et al, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 Amer. Econ. J.: Applied Econ. 228, 236 (2010).

[14] Jeffrey Lowe, Major, Lindsey & Africa LLC, *Partner Compensation Survey 2016* (2016), https://www.mlaglobal.com/publications/research/compensation-survey-2016.

[15] *See*, *e.g.*, Francine D. Blau & Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends, and Explanations, NBER Working Paper No. 2193, National Bureau for Economic Research (2016), http://www.nber.org/papers/w21913 (published in 55 J. of Economic Literature 789 (2017)); IWPR, The Gender Wage Gap by Occupation 2016 and By Race and Ethnicity 1 (2017), https://iwpr.org/wp-content/uploads/2017/04/C456.pdf

For women, particularly women of color, the wage gap results in lower lifetime pay, less income for their families, and higher poverty rates.[16] By the time a college-educated woman reaches her 59th birthday, she will have lost almost $800,000 because of the gender wage gap.[17] Overall, the wage gap costs Pennsylvania women and their families $34 billion every year.[18] Across the United States, it costs women and their families nearly $900 billion a year.[19] Eliminating the wage gap means more money to shelter, feed, and care for one's family; it would reduce the poverty rate for working women by half and provide valuable support for American households, including households with children under age 18, over forty percent of which include a mother who is the primary or sole breadwinner.[20]

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[16] IWPR, The Economic Impact of Equal Pay by State 1 (2017), https://iwpr.org/wp-content/uploads/2017/05/C457.pdf.
[17] IWPR, Status of Women, Employment & Earnings, https://statusofwomendata.org/explore-the-data/employment-and-earnings/employment-and-earnings/#CumulativeLossesfromtheGenderWageGap (last visited Sept. 7, 2018).
[18] National Partnership, *supra* note 8.
[19] National Partnership for Women & Families (National Partnership), America's Women and the Wage Gap (Sept. 2018) at 2, http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf.
[20] *See* Center for American Progress, Breadwinning Mothers Are Increasingly the Norm (2016), https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/.

B. Substantial Evidence Shows That Discrimination Against Women And People Of Color Contributes To The Wage Gap.

Legislatures often confront complex problems with multiple causes, which often means that they must address the problem in parts. The District Court dismissed the substantial evidence showing that discrimination against women and people of color is an important factor in the wage gap by handpicking quotes from studies and literature reviews that note that discrimination may not be the sole cause. For example, the Court dismissed Professors Blau and Kahn's evidence-based conclusion that discrimination is very likely a cause of the wage gap by focusing only on the Professors' acknowledgement that other factors are also potentially involved.[21] JA 0038. But even if non-discriminatory factors may also contribute to the pay gap, that fact does not strip Philadelphia of the ability to address the discrimination that contributes to the pay gap. In other words, legislatures are, and must be, free to address part of a causally complex problem.

[21] Francine D. Blau & Lawrence M. Kahn, Comments on Judge Mitchell S. Goldberg's April 30, 2018 Opinion on Civil Action No. 17-1548, United States District Court for the Eastern District of Pennsylvania, *The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Philadelphia Commission on Human Relations* (Sept. 11, 2018) ("We believe [the District's Court's reference to IZA Discussion Paper, No. 9656, 2016] is an incomplete summary of our paper… while it is true that we found that some potentially non-discriminatory factors account for some of the gender wage gap, we also concluded that discrimination is very likely to be part of the explanation as well."). Appendix B.

Extensive research into the causes of the wage gap concludes that a significant percentage of the pay gap between women and men is "unexplained" after controlling for all known non-discriminatory factors that could contribute to a gap, like region, unionization, education, work experience, occupation, and industry.[22] The same is true of the earnings differences between black and white women and black and white men.[23] While the unexplained gap of earnings differences between all women and men has fallen slightly since 1979, the unexplained gap of earnings between black and white women has substantially increased.[24] In other words, the pay gap persists when we control for nondiscriminatory explanations for the gap — which leaves discrimination as the most likely explanation for some of the remaining gap.

Indeed, many studies that control for factors other than gender provide compelling evidence that discrimination accounts for some portion of the

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[22] Blau & Kahn, *supra* note 15 at 8.

[23] Mary C. Daly, et al., *Disappointing Facts about the Black-White Wage Gap*, FRBSF Economic Letter 2017-26, Federal Reserve Bank of San Francisco (Sept. 5, 2017), http://www.frbsf.org/economic-research/publications/economic-letter/2017/september/disappointing-facts-about-black-white-wage-gap/?utm_source=frbsf-home-economic-letter-title&utm_medium=frbsf&utm_campaign=economic-letter (last visited Sept. 7, 2018).

[24] *Id.*; Blau & Kahn, *supra* note 15; Valerie Wilson & William M. Rogers III, Economic Policy Inst., Black-White Wage Gaps Expand with Rising Wage Inequality (2016), https://www.epi.org/publication/black-white-wage-gaps-expand-with-rising-wage-inequality/

unexplained wage gap.[25] These studies show how employers continue to base decisions about wages on stereotypical generalizations about women rather than on applicants' individual merits — for example, by perceiving women as less productive or less committed to the workplace based on their status as mothers relative to fathers and non-mothers.[26] Such discrimination may be explicit or the result of unconscious biases that devalue the work that women, mothers, and people of color perform.[27]

In one study, researchers presented science professors with resumes from undergraduate science students that were identical except that one "belonged" to someone with a traditionally female name and the other "belonged" to someone with a traditionally male name.[28] The professors offered the male applicant a higher starting salary for a laboratory manager position than they offered the female applicant even though the two were identically qualified in all respects.[29]

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[25] *See, e.g.*, Blau & Kahn, *supra* note 15; Judy Goldberg Dey and Catherine Hill, AAUW Educational Foundation, Behind the Pay Gap 33-34 (2013), https://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf.
[26] Blau & Kahn, *supra* note 15 at 24-26, 33-34.
[27] *Id*.
[28] Corinne A. Moss-Racusin, et al. *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PNAS 16474, 16475 (Oct. 2012), *available at* http://www.pnas.org/content/109/41/16474.full.pdf.
[29] *Id*.

When employers rely on past salary to set future salary, this discriminatory pay gap will follow the female candidate for the rest of her career.[30]

Another study asked evaluators to assess resumes of men and women who were portrayed with equal job qualifications but with different races and different parental statuses, only to find that the evaluators perceived the equally-qualified applicants who were mothers as less competent and committed, and thus recommended lower starting salaries for them.[31] Both African American women and white women applicants "experience[d] a motherhood penalty" despite their qualifications, with African American applicants receiving an even lower salary compared to those offered to white applicants.[32]

Yet another study analyzed personnel data from a large organization and found that:

> [O]bservationally equivalent employees with different demographic characteristics get different salary increases even after they receive the same performance evaluation score.[33]

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[30] *Id*. at 16477.
[31] Shelly J. Correll, et al, *Getting a Job: Is There a Motherhood Penalty,* 112 American J. of Sociology 1297, 1309, 1319-21 (Mar. 2007), *available at* https://sociology.stanford.edu/sites/default/files/publications/getting_a_job-_is_there_a_motherhood_penalty.pdf.
[32] *Id.* at 1323.
[33] Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers.* Am. J. of Soc. 1479, 1507 (2008).

In other words, women and African American employees received lower salary increases than their equally-qualified white male counterparts.[34] And when future employers rely on these salaries to set future salaries, these discriminatory pay gaps will follow women and people of color for the rest of their careers.

C. Employer Inquiries Into Prior Pay Enable Them To Rely (Illegally) On Wage History, Thus Perpetuating Discriminatory Pay Gaps.

When it adopted the ordinance after hearing testimony on the pay gap, the Council recognized:

> 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.

Phila. Code. § 9-1131(1)(d). Women who start with lower salaries will continue to earn less than their male counterparts if future employers set pay based on prior salaries, as women who have publicly spoken about their experiences, including by filing litigation, have indicated. *See, e.g.*, *Beck v. Boeing,* 2000 U.S. Dist. LEXIS 23623 (W.D. Wash. 2000) (class action lawsuit included in Terry L. Fromson's testimony before City Council, JA 0269, that alleges pay discrimination where employer practice to base new employee salaries on their prior job salary resulted

[34] *Id.*

in a pay disparity between women and men that was unrelated to their performance on the job, skill level, or other job-related reason). And when employers ask applicants about their prior pay at the hiring stage, they acquire information that functions as anchors for determining future pay.[35]

Indeed, the *amicus* brief of the African American Chamber and the Latino Coalition states that businesses "inquire about or survey applicants" regarding their prior salaries in order to set a "competitive salary," which makes clear that the point of the inquiry into salary history is to rely on it when setting wages. *Amicus* brief of African American Chamber of Commerce and the Latino Coalition, filed July 27, 2017, at 8. Without wage history information, the African American Chamber and Latino Coalition and the United States Chamber claim that employers must take a "shot in the dark" to set salaries. *Id*.; *Amicus* Brief of U.S. Chamber of Commerce, filed July 14, 2017, at 5. To the contrary, research suggests that when employers do not have salary history information during the hiring process, they simply acquire more information about candidates' experience

[35] "Anchoring bias" is a well-known cognitive bias that describes the common human tendency to rely too heavily on a single initial data point, or anchor, in decision-making. *See* Todd McElroy & Keith Dowd, *Susceptibility to Anchoring Effects: How Openness-to-Experience Influence Responses to Anchoring Cues*, 2 Judgment & Decision Making 48, 48 (2007).

and qualifications on which to base their hiring decisions by asking more substantive questions.[36]

The Chambers want to ask about salary history under the flawed belief that prior pay reflects a fair market rate. But, as the preceding section made clear, the market for women's work often reflects bias rather than fairness. Indeed, in *Corning Glass Works v. Brennan,* the U.S. Supreme Court recognized that that an employer's choice to pay women less than men "reflected a job market in which Corning could pay women less than men for the same work," and rejected the employer's market defense to an Equal Pay Act claim. 417 U.S. 188, 205 (1974). To pay a truly fair market rate to women, employers must pay women the same rate they pay to men based on skill, effort, responsibility, and working conditions, rather than based on prior pay that often reflects discrimination.

Many courts have recognized that employers who rely on prior salary perpetuate sex discrimination in pay. *E.g.*, *Rizo v. Yovino*, 887 F.3d 453, 460-61 (9th Cir. 2018) (holding that employer's use of a pay scale based on salary history was impermissible under the Equal Pay Act because it resulted in unequal pay for male and female employees and thus "perpetuate[d] rather than eliminate[d] the

[36] *See* Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence from a Field Experiment* (2017), http://john-joseph-horton.com/papers/WageHistory.pdf.

pervasive discrimination at which [the EPA] was aimed"); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (rejecting employer's salary history defense to a pay differential between male and female employees and holding that prior salary alone can never justify a pay disparity); *Duncan v. Texas HHS Comm'n*, No. AU-17-CA-00023-SS, 2018 U.S. Dist. LEXIS 64279, at *10-11 (W.D. Tex. April 17, 2018) (denying summary judgment to employer where plaintiff's prior salary was used to set her pay significantly lower than the starting salary of a comparable male employee in the same position); *Cole v. N. Am. Breweries*, No. 1:13-cl-236, 2015 U.S. Dist. LEXIS 6157, at *29-30 (S.D. Ohio Jan. 20, 2015) (denying summary judgment to employer where the court found a reasonable jury could infer that the employer relied on plaintiff's prior salary to set her pay significantly lower than that of her male predecessor, her male successor, and other male employees in the same position); *Husser v. New York City Dep't of Educ.*, 137 F. Supp. 3d 253, 270 (E.D.N.Y. 2015) (denying summary judgment to employer where employee salaries were set based on a formula that included prior salary, resulting in vastly different salaries for male and female employees); *EEOC v. Grinnell Corp.*, 881 F. Supp. 406, 412 (S.D. Ind. 1995) (finding that a jury could reasonably conclude that the employer's practice of relying on prior pay "rewarded male employees for their higher prior salaries while taking advantage of the lower salaries historically paid to women."); *Faust v. Hilton Hotels*, No. 88-

2640, 1990 U.S. Dist. LEXIS 10595, at *16 (E.D. La. August 13, 1990) (finding employer's reliance on prior salary to be "unjust," as it would "allow employer to pay one employee more than an employee of the opposite sex because that employer or a previous employer discriminated against the lower paid employee").

As research shows and as courts have accepted, employers contribute to the pay gap when they rely on past salaries to set future salaries. Philadelphia City Council passed the ordinance to address this discrimination against those who work in their city. It did so based on substantial evidence showing that (1) gender and race-based wage gaps exist, and (2) that discrimination plays an important role in their persistence even if it is not the only contributing factor. That non-discriminatory factors might also contribute does not strip Philadelphia of the ability to address the discrimination that contributes to the pay gap.

From these well-established facts, Philadelphia City Council drew the reasonable inferences, supported by solid and largely undisputed evidence, that: (1) current wages reflect this discrimination, which means that reliance on current salaries to set future salaries will perpetuate discrimination; and (2) inquiring about salary history enables employers to illegally rely on wage history and thus serves as an impediment to economic advancement for women and people of color. Prohibiting employer inquiries into wage history is an enforcement tool that directly advances the City's substantial interest in reducing discriminatory pay

gaps by making it less likely that employers will perpetuate discrimination by anchoring future pay on past pay.

In enacting both the Reliance Provision and the Inquiry Provision, the City relied on inferences based on solid evidence that the pay gap exists, that at least part of the pay gap is due to discrimination, that reliance on pay history thus perpetuates this pay discrimination, and that inquiries into pay history enable employers to rely on pay history and perpetuate pay discrimination. But the District Court instead required "comprehensive studies demonstrating the alleged harm — that the perpetuation of discriminatory salaries in subsequent salaries contributes to a discriminatory wage gap," JA 0040, and then concluded that there was no clear "connection between the speech (asking about wage history) and the harm (perpetuation of discriminatory salaries in subsequent salaries contributing to a wage gap)." *Id.* These statements and conclusion suggest that the Court imposed an unreasonably high level of direct evidence while disregarding the substantial evidence that already exists. It is not clear how one could construct a study that would have satisfied the Court unless employers voluntarily disclose the inquiries and wage data that they typically keep private (for researchers to assess whether asking salary history questions has a disparate impact on women and people of color when comparing employers who do not ask the question to employers who do) or unless a jurisdiction enacts a law like that preliminarily enjoined by the

District Court (in which case researchers could see whether it succeeded in reducing the pay gap).

CONCLUSION

The District Court erred by rejecting Philadelphia's reasonable inferences based on solid evidence that establish how the Inquiry Provision directly advances the City's substantial interest in addressing discriminatory pay gaps. Thus, *amici* respectfully request that this Court reverse the District Court's decision on the Inquiry Provision and affirm the decision on the Reliance Provision.

COMBINED CERTIFICATIONS OF COUNSEL

The undersigned counsel hereby certifies as follows:

1. The undersigned counsel is a member of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).

2. This Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because this Brief contains 6451 words, as counted by Microsoft Office Professional Plus 2013, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally space typeface using Microsoft Office Professional Plus 2013 in 14-point Times New Roman font.

4. A copy of this Brief was served on all counsel of record through the Court's Electronic Case Filing System.

5. The text of the electronic version of the Brief transmitted to the Court on this date is identical to the text of the paper copies to be delivered to the Clerk. L.A.R. 31.1(c).

6. A virus check was performed on the PDF version of this Brief using Norton Internet Security 2018 with daily updates prior to transmitting it to the Clerk electronically and no virus was found.

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APPENDIX A: STATEMENTS OF INTEREST OF *AMICI*

A BETTER BALANCE

A Better Balance: The Work and Family Legal Center is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance also advocates for policies that promote workplace equality and fair pay, including salary history legislation, fair scheduling laws, equal pay disclosure laws, and fair minimum wage laws.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

American Association of University Women ("AAUW") was founded in 1881 by like-minded women who had challenged society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education and equal employment opportunities. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW has 13,423 members and supporters located within the jurisdiction of the U.S. Court of Appeals for the Third Circuit. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to

advance gender equity. In adherence with its member-adopted Public Policy Priorities, AAUW advocates for equitable access and advancement in employment, pay equity and fairness in compensation and benefits, and vigorous enforcement of employment anti-discrimination statutes at the local, state and federal levels.

AMERICAN CIVIL LIBERTIES UNION
AMERICAN CIVIL LIBERTIES UNION – PA

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million activists and members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding in 1920, the ACLU has vigorously defended First Amendment rights. In addition, the ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace. The ACLU has appeared before the federal courts in numerous cases, both as direct counsel and as amicus curiae, including *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (holding that ordinance prohibiting gender-specific employment advertisements did not violate newspaper's First Amendment rights). The proper resolution of this case is a matter of substantial interest to the ACLU and its members.

ATLANTA WOMEN FOR EQUALITY

Atlanta Women for Equality is nonprofit organization dedicated to providing free legal advocacy for women and girls facing sex discrimination in the workplace or at school, protecting and expanding economic and educational opportunities for women and girls, and helping our community shape our workplaces and schools according to true standards of equal treatment. Ensuring pay equity is crucial to our mission.

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has been on the frontlines of the fight to secure women's economic empowerment in California, including working to end practices that contribute to the gender wage gap and women in poverty.

COALITION OF LABOR UNION WOMEN

The Coalition of Labor Union Women is a national membership organization based in Washington, DC with chapters throughout the country.

Founded in 1974 it is the national women's organization within the labor movement which is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. During our history, we have fought against discrimination in all its forms, particularly when it stands as a barrier to employment or is evidenced by unequal treatment in the workplace.

COMMUNITY LEGAL SERVICES, INC.

Community Legal Services Inc. (CLS) was founded by the Philadelphia Bar Association in 1966 as an independent 501(c)(3) organization to provide free legal services in civil matters to low-income Philadelphians. Since its founding, CLS has served more than one million clients who could not afford to pay for legal representation. CLS's representational model is to make systemic changes based upon the legal issues identified through individual representation, to the extent possible, so that its results reach the larger low-income community in Philadelphia and beyond. CLS achieves these systemic reforms through class action and other impact litigation, administrative and legislative advocacy, and communications work.

CLS has represented thousands of individuals in discrimination and wage cases over the last five decades, and we know from our clients' experiences how

race and gender discrimination contribute to poverty in Philadelphia. Philadelphia is 42.8% African American and 13.4% Hispanic or Latino. Philadelphia also has one of the highest rates of female-headed households of US cities, at 38.2%. Given its poverty rate of 25.8%, with 12.2% of its families in deep poverty (earning less than 50% of the federal poverty level), this urgent situation requires bold action. Because of Philadelphia's unique demographics and high poverty rate we believe it is necessary and appropriate for the City of Philadelphia to take reasonable steps to ensure workers' rights, including preventing discrimination, thereby insuring that its citizens are fairly paid and able to succeed.

EQUAL PAY TODAY!

Equal Pay Today, a project of Equal Rights Advocates, is an innovative collaboration of women's legal and workers' rights organizations working at the local, state and federal level to close the gender wage gap and engage new and diverse constituencies in the fight for equal pay. We have members in nearly every region of the country and six state projects in California, Illinois, Minnesota, New Mexico, Pennsylvania, and Washington State. Understanding that many factors contribute to the gender wage gap, we focus on combating pay discrimination, pay secrecy, occupational segregation, pregnancy and caregiver discrimination, sexual harassment, wage theft and an inadequate minimum wage. Learn more about us at www.equalpaytoday.org.

EQUAL RIGHTS ADVOCATES

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated class actions and other high-impact cases related to gender discrimination and civil rights, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977) and has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-discrimination laws, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). ERA cosponsored the California Fair Pay Act (Cal. Labor Code § 1197.5), which amended the California Equal Pay Act, which prohibits the use of prior salary as a justification for any gender pay differential. ERA, along with 15 other national organizations, appeared as *amicus curiae* in *Rizo v. Yovino*, 887 F.3d 453 (9th Cir.), involving reliance on prior salary under the federal Equal Pay Act.

FAMILY VALUES @ WORK

Family Values @ Work (FV@W) is a national network of 27 state and local coalitions helping spur the growing movement for family-friendly workplace policies such as paid sick days and family leave insurance. Several of our

coalitions, including our members in Pennsylvania, support wage equity laws in their jurisdictions.

GENDER JUSTICE

Gender Justice is a non-profit legal advocacy organization based in the Midwest that works to eliminate gender barriers through impact litigation, policy advocacy, and education. Gender Justice helps courts, employers, schools, and the public better understand the root causes of gender discrimination, such as implicit bias and stereotyping. The organization has an interest in protecting and enforcing women's legal rights in the workplace. Gender Justice serves as counsel to women denied equal pay in the workplace and participates as amicus curiae in state and federal cases that have an impact in the region.

HADASSAH

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a long history of advocating for equal rights and a just economic society in the United States, including strongly supporting gender pay equity.

INSTITUTE FOR WOMEN'S POLICY RESEARCH

The Institute for Women's Policy Research ("IWPR") is a leading economic and public policy think tank founded in 1987 that focuses on quantitative and qualitative analysis of issues particularly relevant to women and their families. IWPR's research addresses issues of race, ethnicity, and socioeconomic status, and is concerned with policies that can help women achieve social and economic equality. The gender wage gap is a major contributing factor to poverty and inequality. IWPR`s research finds that if women's hourly earnings rose to the level of similarly qualified men's, eliminating the gender wage gap, poverty rates among families with working women would be reduced by half, see The Economic Impact of Equal Pay by State https://statusofwomendata.org/featured/the-economic-impact-of-equal-pay-by-state.

KEYSTONE RESEARCH CENTER

The Keystone Research Center was founded in 1996 to broaden public discussion on strategies to achieve a more prosperous and equitable Pennsylvania economy. Since its creation, KRC has become a leading source of independent analysis of Pennsylvania's economy and public policy. The persistence of the gender wage gap in Pennsylvania remains one of the Commonwealths most persistent economic problems undermining the economic freedom of women. Our interest in this case stems from our judgement that public policy which prevents

the use of past salary/pay history in hiring has great potential to narrow the gender wage gap.

LEGAL AID AT WORK

Legal Aid at Work (formerly Legal Aid Society – Employment Law Center) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women and girls, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, see, e.g., National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); and California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity. See, e.g., U.S. v. Virginia, 518 U.S. 515 (1996); Harris v. Forklift Systems, 510 U.S. 17 (1993); International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). LAAW's interest in

preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

LEGAL MOMENTUM

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for nearly 50 years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to ensure that all employees are treated fairly in the workplace, regardless of their gender. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), and Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Legal Momentum has also worked to secure the rights of women under state constitutions and local laws, including the right to equal pay for equal work.

LEGAL VOICE

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and LGBTQ persons through litigation, legislation, and public education on legal rights. Since its

founding in 1978 as the Northwest Women's Law Center, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. In addition, Legal Voice has worked to advance women's economic security by supporting policies that help women in the workplace, including equal pay, paid leave for survivors of gender-based and intimate partner violence, pregnant workers' rights, and policies that support women workers in low wage industries such as hotel, farm work, and domestic work.

NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian American and Pacific Islander (AAPI) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for AAPI women and girls. NAPAWF approaches all of its work through a reproductive justice framework that seeks for all members of the AAPI community to have the economic, social, and political power to make their own decisions regarding their bodies, families, and communities. Our work includes fighting for economic justice for AAPI women and advocating for the adoption of policies and laws that protect the dignity, rights, and equitable treatment of AAPI women workers.

THE NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE

The National Center for Law and Economic Justice (NCLEJ), exists to protect the legal rights of people with limited financial means, including persons receiving public entitlements and low-wage workers. NCLEJ focuses on impact litigation that will establish important principles for the protection of such individuals, and is committed to ensuring that all workers are afforded dignity and fair treatment on the job. A particular focus is protecting the rights of women working low-wage jobs. NCLEJ has been involved, as counsel or *amicus curiae*, in many significant cases involving the rights of low-income individuals over the more than 50 years since it was founded in 1965.

NATIONAL COUNCIL OF JEWISH WOMEN – GREATER PHILADELPHIA

The National Council of Jewish Women (NCJW) is a 125-year-old grassroots organization, with more than 2,000 members throughout the Commonwealth. We support equal pay and other employment laws that protect employees. Our advocates have advanced these issues for decades, working to pass the 1963 Equal Pay Act, as well as the 2009 Lilly Ledbetter Fair Pay Act. Our leaders have stood with Presidents who signed these bills into law. With many of our members and their families living and working in Philadelphia, we support the City's efforts to ensure fairness for all employees. We are grateful that the City

of Philadelphia has taken one small step toward the elimination of gender and race based-discrimination in pay.

NATIONAL COUNCIL OF JEWISH WOMEN - PITTSBURGH

The National Council of Jewish Women (NCJW) is a grassroots organization of volunteers and advocates who turn progressive ideals into action, with more than 2,000 members around the Commonwealth. NCJW strives for social justice by improving the quality of life for women, children, and families. NCJW has long supported equal pay, from working to pass the 1963 Equal Pay Act, to advocating for the 2009 Lilly Ledbetter Fair Pay Act. We now join to support Philadelphia's current efforts to ensure that employers do not perpetuate gender and race based-discrimination in pay.

NATIONAL EMPLOYMENT LAW PROJECT

The National Employment Law Project ("NELP") is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers under our nation's employment and labor laws, with a special emphasis on wage and hour rights. NELP has litigated and participated as amicus in numerous cases addressing the rights of

workers under federal, state and local wage laws in most state courts, federal circuits and in the US Supreme Court.

NATIONAL ORGANIZATION FOR WOMEN FOUNDATION

The National Organization for Women (NOW) Foundation is a 501(c)(3) organization affiliated with the National Organization for Women, the largest feminist grassroots organization in the U.S., with hundreds of chapters in every state and the District of Columbia. NOW Foundation's mission is to advance equal rights for women through education and litigation. We believe that in attaining equal rights, access to education, employment, equal pay and worker protections are essential.

NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging

discriminatory employment practices in the courts. The National Partnership has fought for decades for equal pay and to combat sex discrimination.

NATIONAL WOMEN'S LAW CENTER

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and their families, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity in all aspects of society including numerous cases addressing sex discrimination in the workplace. NWLC seeks to ensure that all individuals enjoy the full protection against sex discrimination promised by federal law and has a strong interest in closing gender and race wage gaps and ending pay discrimination.

PENNSYLVANIA COALITION AGAINST RAPE

The Pennsylvania Coalition Against Rape (PCAR) works to eliminate all forms of sexual violence and advocate for the rights and needs of sexual assault

victims. Founded in 1975, PCAR works with a network of 50 sexual assault centers that bring help, hope, and healing to all of the Commonwealth's 67 counties. We operate the National Sexual Violence Resource Center, which provides the nation with sexual violence prevention training and technical assistance. Pay equity is critical to sexual assault victims' economic security, safety, and well-being. A recent study from the Centers for Disease Control and Prevention found that individual victims of sexual violence incur $122,461 over a lifetime in costs associated with lost wages, health, criminal justice, and property damage (Peterson et al., 2017). Additional research shows that sexual violence can derail a person's education and employment, resulting in a $241,600 income loss over a lifetime (MacMillan, 2000). Allowing employers to base wages on pay/salary history will perpetuate pay inequity, leaving sexual assault survivors and their families with fewer economic resources to heal and thrive in their lives.

PATHWAYS PA

PathWays PA serves as one of the Greater Philadelphia Region's foremost providers of residential and community-based services for women, children and families. We are committed to client self-sufficiency and economic independence, and we know that all families benefit from earning fair and equitable wages.

RESTAURANT OPPORTUNITIES CENTER (ROC) OF PENNSYLVANIA

Members of our organization working as sous chefs and in other restaurant positions have been impacted by having to provide prior salary histories which has led to women and minority workers being paid less than their white male counterparts with similar and sometimes less qualifications.

SOUTHWEST WOMEN'S LAW CENTER

The Southwest Women's Law Center is a non-profit policy and advocacy Law Center founded in 2005 with a focus on advancing economic opportunities for women and girls in the State of New Mexico. We work to ensure that women have equal access to programs and opportunities to help ensure they can adequately care for their families. Foremost in our work is gender pay equity and ensuring that women receive fair and equal pay in the workplace. The Southwest Women's Law Center has been a strong advocate for fair pay for women for thirteen years. Accordingly, the Law Center is uniquely qualified to comment on the case and the decision to be rendered in *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Philadelphia Comm'n on Human Relations*.

UNION OF REFORM JUDAISM
CENTRAL CONFERENCE OF AMERICAN RABBIS
MEN OF REFORM JUDAISM

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, and the Men of Reform Judaism come to this issue inspired by Judaism's insistence on the importance of paying fair wages. Our faith compels us to work for equal pay for all people, regardless of gender.

WOMEN AND GIRLS FOUNDATION OF SOUTHWESTERN PENNSYLVANIA

The mission of the Women and Girls Foundation is to achieve equality for women and girls now and for generations to come. In pursuit of this mission, WGF breaks down barriers so that every girls can rise and every woman can soar. The gender wage gap continues to be a consistent barrier for gender equity, especially for women of color who experience an even more drastic and significant wage gap than their white counterparts. Countless studies have proven beyond a reasonable doubt, and with quantifiable evidence, the existence of a gender pay gap in nearly every occupational field in this country. When a new employer inquires into salary history, and then bases a new employee's salary on past salary history, that new employer is perpetuating the gender wage gap. Past salary history should not be

relevant to what a new employer sets as the market rate for a job. A job should be paid based on the market rate for that work, period. Not based on what that employee was paid in her last job. If we continue to allow employers to inquire about salary history, during interviews and as part of a job submission process, and then allow employers to set wages based on salary history, then we are in essence giving permission to employers to discriminate. The Women and Girls Foundation is in strong support of the Wage Equity Ordinance and is proud to add our signature to this *amicus* brief.

WOMEN EMPLOYED

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that basing pay differentials between men and women on previous salaries should not be allowed as a "factor other than sex" as this is not gender neutral.

WOMEN OF REFORM JUDAISM

Women of Reform Judaism (WRJ) is the women's affiliate of the Reform Jewish Movement, the largest Jewish denomination in North America. WRJ engages tens of thousands of women through a global network of hundreds of women's groups. Together this network of engaged activist women advocate for progressive Jewish values and champion numerous critical social justice issues of concern to women. WRJ is a leader in efforts to assure pay equity for women, believing that equality for women in the workplace is not only a woman's issue, but also an issue of human rights and social justice.

WOMEN'S LAW PROJECT

The Women's Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of women throughout their lives. To meet these goals, the WLP engages in high impact litigation, policy advocacy, public education, and individual counseling. Founded in 1974, the WLP has a long and effective track record on a wide range of legal issues related to women's health, legal, and economic status. Economic justice and equality for women is a high priority for WLP. To that end, WLP has advocated for equal pay for women, a goal that is far from achieved despite the adopted of federal and state equal pay laws more than fifty years ago. We have

supported reform to strengthen federal and state equal pay laws and to enact local laws banning reliance on prior pay to set wages in Philadelphia and Pittsburgh. Such laws are necessary to end the insidious perpetuation of pay discrimination by employers who seek to justify pay discrimination on the basis of prior pay.

APPENDIX B

Comments on Judge Mitchell S. Goldberg's April 30, 2018 Opinion on:

Civil Action 17-1548, United States District Court for the Eastern District of Pennsylvania, The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Philadelphia Commission on Human Relations

by

Francine D. Blau, Frances Perkins Professor and Professor of Economics, Cornell University

and

Lawrence M. Kahn, Braunstein Family Professor and Professor of Economics, Cornell University

September 11, 2018

In his opinion of April 30, 2018, Judge Mitchell S. Goldberg refers to our study "The Gender Wage Gap: Extent, Trends, and Explanations" by saying:

> "While the study authored by Francine D. Blau and Lawrence M. Kahn finds that education and experience 'explain relatively little of the [] wage gap,' it does acknowledge that other factors such as work force interruptions and shorter hours had 'salience for understanding the gender wage gap'" (p. 32).[37]

We believe that this is an incomplete summary of our paper, which presents new empirical evidence on the gender wage gap and reviews the existing evidence on this subject. Specifically, while it is true that we found that some potentially non-discriminatory factors account for the some of the gender pay gap, we also concluded that discrimination is very likely to be part of the explanation as well. We base this conclusion about discrimination on two types of evidence.

First, in our analysis of recent nationally-representative data, we found that even controlling for education, actual labor market experience, race-ethnicity, and region, women earned only 82.1% of what men earned in 2010. When we additionally controlled for union status, industry and occupation (as well as education, experience, race-ethnicity, and region),

[37] Judge Goldberg refers to a working paper version of our paper (IZA Discussion Paper, No. 9656, 2016). The paper has since been published in the *Journal of Economic Literature* (Vol. 55, No. 3, September 2017, pp. 789-865), one of the peer review journals of the American Economic Association. The published version is very similar to the working paper version with some editorial changes made at the copyediting stage.

women earned 91.6% of what men earned; that is, there was still a female shortfall. Thus, there was an important component of the overall gender pay gap that could not be explained by these measured factors. Many other studies, including our own previous work published in peer review journals, come to a similar conclusion. Second, in our review of experimental studies, we found that they showed evidence of discrimination against women in hiring and in pay. These experimental studies, in our view, are persuasive because by experimental design, factors other than gender are controlled for. These two types of evidence—the persistence of an unexplained gender gap in statistical analyses controlling for many factors that influence wages and the experimental evidence showing direct evidence of discrimination—lead us to believe that discrimination does account for at least some of the gender pay gap.

The findings on discrimination in our paper have been cited by the United States Court of Appeals for the Ninth Circuit in Case No. 16-15372, D.C. no. 1:14-cv-00423-MJS (Aileen Rizo v Jim Yovino, Fresno County Superintendent of Schools), Opinion Filed April 9, 2018. The En Banc decision concluded:

> "Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reach the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors." (p. 29).

The En Banc ruling noted that

> "Although it [the gender wage gap] may have improved since the passage of the Equal Pay Act, the gap persists today: women continue to receive lower earnings than men 'across industries, occupations, and education levels.'" (p.29). [Footnote 19 on page 29 is attached to this sentence, and in the footnote, the ruling cites our paper as a source for the Amicus Brief of the Equal Rights Advocates from which the ruling quoted.]

Further, in his concurring opinion in the same case, Circuit Judge Watford noted:

> "Despite progress in closing the wage gap, gender pay disparities persist in virtually every sector of the American economy, with women earning on average only about 82% of what men make, even after controlling for education, work experience, and other factors. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. Econ. Literature 789, 797-800 (2017). It therefore remains highly likely that a woman's past pay will reflect, at least in part, some form of sex discrimination. As a result, an employer will rarely be able to justify a gender pay disparity by relying on the fact that a female employee made less than her male counterparts at her prior job" (pp. 51-52).