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Salary History Should Be Her Story: Upholding Regulations of Salary History Through a Commercial Speech Analysis

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SALARY HISTORY SHOULD BE HER STORY: UPHOLDING REGULATIONS OF SALARY HISTORY THROUGH A COMMERCIAL SPEECH ANALYSIS

TABLE OF CONTENTS

INTRODUCTION

"How much did you make at your previous place of employment?" It is one of the questions applicants and new employees dread the most.[1] Encountering this question is always a bit awkward because, without any indication of what the employer thinks is an appropriate salary range, you may worry that a prospective employer will perceive your previous salary as either too high or too low. However, this question is not just uncomfortable to answer; the question of salary history also serves as a persistent barrier to gender-based wage equality.[2]

Upon graduation from college, women make an average of $2.99 less per hour than recent male college graduates, despite women attaining a higher rate of bachelor's degrees.[3] When women already start out on a lower rung, or return to the workforce after taking time to raise a family, their salary history will continue to be less than their male colleagues who began with a higher salary.[4]

Take Aileen Rizo,[5] for example. After four years of serving as a math consultant for the Fresno County public schools, Rizo found out that she was making 20 percent less than a male colleague who was only recently hired, was less educated, and had less experience than she did.[6] She then learned from human resources that her

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1. *See* Renee Morad, *Job Interview: Will The Salary History Question Become Extinct?*, FORBES (July 31, 2017, 11:23 PM), https://www.forbes.com/sites/reneemorad/2017/07/31/job-interview-will-the-salary-history-question-become-extinct/#29a78b9127dd [https://perma.cc/G47U-42YD].

2. *See* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 163 (2011) (describing when "market excuses" such as prior salary are used to pay men and women differently).

3. TERESA KROEGER & ELISE GOULD, ECON. POL'Y INST., THE CLASS OF 2017, at 25 (2017), https://www.epi.org/files/pdf/124859.pdf [https://perma.cc/UDP6-6CZS].

4. Christina Cauterucci, *Equal Pay Legislation Banning Salary History Questions is Absolutely Based in Data*, SLATE: XXFACTOR (Apr. 14, 2017, 3:41 PM), http://www.slate.com/blogs/xx_factor/2017/04/14/equal_pay_legislation_banning_salary_history_questions_is_based_in_data.html [https://perma.cc/FH58-5CSE].

5. Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR (May 30, 2017, 11:09 AM), https://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history [https://perma.cc/P928-GLAL].

6. *Id.*

current salary was based on her previous salary and could not be changed.[7]

When hiring a new employee, Fresno County takes the new hire's most recent salary and increases it by about 5 percent to place them on a level within the County's salary classification bracket.[8] Although her prior salary was lower than even the lowest level, this newly hired male colleague started at a much higher salary level because of his higher previous salary.[9] More education and experience could not change her predicament if her previous salary did not also reflect that education and experience.[10] As long as her previous salary bound her, Rizo could not do anything to influence her current salary, regardless of what she could offer Fresno County.[11]

This experience is not exclusive to Rizo. Since 1980, Asian women continue to make only $0.87 per dollar earned by white men; white women make $0.79; black women make only $0.63; and Hispanic women make a mere $0.54 on the dollar in the United States when compared to white men.[12] Moreover, if a woman takes time off to start a family or is paid less at a previous job because of negotiation bias[13] or gender bias, then that salary will continue to follow her to new places of employment, regardless of skill or experience level, as long as her employer uses prior salary to determine starting wages.[14]

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7. *Id.*; *see also* Rizo v. Yovino, 887 F.3d 453, 458 (9th Cir. 2018) (en banc).

8. *Rizo*, 887 F.3d at 457.

9. *Id.* at 458.

10. Noguchi, *supra* note 5 ("I couldn't educate myself out of being paid less, I couldn't get more experience or be in the job market longer to break that cycle.... Because low wages will follow you wherever you go as long as someone keeps asking you how much you were paid.").

11. *Id.*

12. Courtney Connley, *Reminder: Today Isn't Equal Pay Day for Black, Latina, or Native American Women*, CNBC (Apr. 10, 2018, 2:19 PM), https://www.cnbc.com/2018/04/10/today-isnt-equal-pay-day-for-black-latina-or-native-american-women.html [https://perma.cc/M2YE-E2YK] (noting that this gap persists even when correcting for education and other demographics).

13. *See generally* Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation is Not a 'Factor Other Than Sex' Under the Equal Pay Act*, 10 GEO. J. GENDER & L. 1 (2009) (discussing negotiation bias against women and the perception that women who aggressively negotiate are not likable and are too entitled).

14. Cauterucci, *supra* note 4.

"Anchoring bias"—the tendency for people to focus on and overemphasize the first piece of information they receive, such as salary history—accentuates this discrepancy.[15] A low salary history can also prevent future job opportunities because employers may assume a candidate is not as qualified as others if her previous salary is lower than anticipated.[16] Katie Donovan, coauthor of the Massachusetts statute restricting salary history questions, says recruiters often use prior salary to eliminate applicants in a large job pool.[17] Employers view salary history as "too high, we can't afford you; too low, you must be bad at your job, or you're not a high enough level."[18] These factors allow the wage gap cycle to continue unbroken far into a woman's career.[19]

For this reason, states and cities across the country have passed or proposed a ban on employers asking a new employee or applicant about previous salary.[20] Massachusetts was the first state in the country to pass a ban on salary history.[21] California,[22] Delaware,[23] Oregon,[24] the City of San Francisco,[25] New York City,[26] and the City of Philadelphia[27] have since taken similar votes and passed legislation which take effect in 2018. New York State[28] has proposed a similar bill. However, the City of Philadelphia now faces legal challenges to its ordinance.[29]

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15. *Id.*
16. *See id.*
17. *Id.*
18. *Id.*
19. *See id.*
20. *See* Noguchi, *supra* note 5.
21. Chris Weller, *Cities are Finally Banning Employers from Asking Everyone's Least-Favorite Interview Question*, BUS. INSIDER (Apr. 13, 2017, 12:00 PM), http://www.businessinsider.com/cities-ban-salary-question-in-interviews-2017-4 [https://perma.cc/Q53D-GRTS].
22. CAL. LAB. CODE § 432.3(a)-(b) (West 2018).
23. DEL. CODE ANN. tit. 19, §§ 709B(6)(1)-(2) (2017).
24. OR. REV. STAT. ANN. § 652.220(1)(d) (West 2017).
25. *See* S.F., CAL., POLICE CODE art. 33J, § 3300J.4 (2017).
26. N.Y.C., N.Y., ADMIN. CODE § 8-107(25) (2017).
27. PHILA., PA., PHILA. CODE § 9-1131(2)(a) (2017).
28. Assemb. B. 2040C, 2017 Leg., Reg. Sess. (N.Y. 2017).
29. Fabiola Cineas, *Chamber Says CHOP, Drexel Would Suffer Under Philadelphia's Wage Equity Law*, PHILA. MAG. (June 15, 2017, 9:07 AM), https://www.phillymag.com/business/2017/06/15/philadelphia-wage-equity-law-chamber-of-commerce-chop-drexel/ [https://perma.cc/4GXD-ENA3]. The district court recently applied the *Central Hudson* test to determine whether the law passed intermediate scrutiny and found that salary history questions are commercial speech. Chamber of Commerce for Greater Phila. v. City of Phila., No. 17-1548, 2018 WL

The Philadelphia City Council unanimously passed an ordinance banning salary history without any challenges during the proposal and debate stages.[30] However, the Chamber of Commerce and thirteen local businesses have since filed suit against the city, alleging that the ban infringes their First Amendment rights to free speech.[31] This litigation and free speech claim on behalf of businesses in Philadelphia provides an informative case study to evaluate the merit of employer free speech claims and understand how salary history regulations are not only lawful, but crucial.

The businesses' free speech claim is contingent on courts' views of a corporation's free speech rights.[32] Although courts have upheld corporations' free speech rights in varying degrees over the past century,[33] not all speech is created equal.[34] Some speech, such as commercial speech, is less protected from regulation than other forms of speech based on the substantial government interest involved.[35] In order for courts to uphold a regulation of commercial speech without violating the First Amendment, the regulation must directly advance the government's interest and be narrowly regulated to serve that interest.[36] This standard is a lower bar than the

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2010596, slip op. at *5 (E.D. Pa. Apr. 30, 2018). However, the court found that the City failed to offer enough evidence that the ban on wage history inquiries would reduce the gender pay disparity. *See id.* at *11. The court also found that businesses may not rely on wage history during the employment process or drafting of contract. *Id.* at *23. As discussed later in this Note, the Supreme Court has not required empirical evidence to find that a regulation directly advances the government's interest, and has even relied on "commonsense judgment." *See* United States v. Edge Broad. Co., 509 U.S. 418, 428 (1993); *see also* discussion *infra* Part IV.B.1.

30. Cineas, *supra* note 29.

31. *Id.*

32. Vikram David Amar & Alan E. Brownstein, *Philadelphia's Ban on Employers Asking Job Applicants for Salary History Raises Interesting First Amendment Questions*, VERDICT (Jan. 27, 2017), https://verdict.justia.com/2017/01/27/philadelphias-ban-employers-asking-job-applicants-salary-history-raises-interesting-first-amendment-questions [https://perma.cc/5MSH-D6ZF].

33. *See* Citizens United v. FEC, 558 U.S. 310, 342 (2010) (listing many of the cases where the Court found corporations to have free speech rights).

34. *See infra* text accompanying notes 80-81.

35. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563-64 (1980).

36. *Id.* at 564.

strict scrutiny analysis applied to other speech, such as political speech.[37]

Hence, whether courts in Philadelphia or in cities and states across the country classify salary history questions as commercial speech, warranting a lower standard of constitutional protections,[38] is a question of great importance to working women in the United States. This classification as commercial speech is critical, as it will allow the government to regulate certain areas of strong public interest, such as factors contributing to the gender wage gap, without being struck down by the courts in favor of broader corporate protection.[39]

This Note argues that questions of salary history—whether asked in a job interview or of a new hire—are commercial speech and should be regulated as such without being subject to strict scrutiny. Part I explores definitions of commercial speech and explains why salary history should be classified as such. Part II reviews the Supreme Court's test for commercial speech regulations and then explains why this level of scrutiny remains indispensable to the commercial speech analysis. Part III outlines the substantial government interest in narrowing and eventually eliminating the gender wage gap through means such as salary history bans. This Part also explains why the current framework is insufficient to obtain wage equality and thus why these new laws are necessary. Part IV argues that these salary history laws are sufficiently narrow in directly advancing the government interest and restrict commercial speech in a reasonably confined way. Regardless of the outcome of the litigation in Philadelphia, this Note is important for understanding the regulations that are sweeping the country with regards to employer questions about salary history as commercial speech and why the regulation of these questions is critical for eliminating factors that contribute to the wage gap.

37. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) (finding that commercial speech warrants less protection than other types of speech).

38. *See id.*

39. *See* discussion *infra* Part I.B.

I. DEFINING COMMERCIAL SPEECH

Commercial speech is an important classification because it is protected and regulated differently than other types of speech, such as political speech.[40] This Part first examines the commercial speech doctrine and what courts have classified as commercial speech. Then it examines how the job process, in particular interviews, relates to other forms of commercial speech to understand how salary history fits into this classification.

A. Understanding Commercial Speech

In order to establish employer questions about salary history as commercial speech, it is important to understand what commercial speech is. However, the definition of commercial speech in legal scholarship lacks a degree of certainty and clarity.[41] Despite all of the Supreme Court's discussion on commercial speech, nowhere does the Court lay out a "bright line [rule] for distinguishing a protected employer right from a prohibited employer action."[42] The Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* described commercial speech as "expression related solely to the economic interests of the speaker and its audience."[43] However, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court seemingly defined commercial speech as "a communication which does no more than propose a commercial transaction."[44] Thus, the Court lacks a

40. *See Bolger*, 463 U.S. at 64 (noting that the Court only upholds non-commercial restrictions in limited circumstances).

41. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154 (2012); *see also* TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 21-22 (2012) (writing that the Court tends to care more about whether the government may regulate the speech than if the speech is actually commercial speech).

42. Paul Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 TEX. L. REV. 421, 453 (1981).

43. 447 U.S. 557, 561 (1980).

44. 425 U.S. 748, 776 (1976) (Stewart, J., concurring); *see also* PIETY, *supra* note 41, at 21; Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, MICH. ST. L. REV. 39, 55-56 (2013).

comprehensive approach to determine what types of speech are commercial.[45]

In *Virginia State Board*, the Supreme Court classified drug prescription information as commercial speech when it determined that this information was a matter of public interest.[46] The Court based this finding on the indispensable nature of "the free flow of commercial information" to keep the public "intelligent and well informed."[47] The Court's focus in *Virginia State Board* on protecting drug advertisements as commercial speech for their value to the public suggests that it defines commercial speech relative to the value for the listener, or society.[48] This has led scholars to note that protection of commercial speech is limited to a listener-based approach, where commercial speech is protected for its value to the listeners, and not to protect the speaker.[49] Thus, the Court focuses on the interests of the audience to protect commercial speech by allowing listeners to receive information that companies have previously withheld (for example, compelled disclosures) or compensating listeners for a power and information differential between the speaker and the listener.[50]

In an employment context, there is a power differential in communications between employers and employees "in which workers are comparatively disadvantaged in terms of information and power."[51] For instance, employers are aware of how integral an employee's work is to an operation or how much income a particular employee's work generates for the business; in contrast, the

45. *See* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 35 (2016).

46. 425 U.S. at 764-65.

47. *Id.*

48. *See* PIETY, *supra* note 41, at 11 (calling this aspect of commercial speech "distinctive"); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 401 (2012) (noting that only the speaker in this situation can "verify [the information's] accuracy").

49. Bernstein & Lee, *supra* note 44, at 71-72; *see also* Norton, *supra* note 45, at 46 (discussing how commercial speech is protected for its informational value to listeners); Pomeranz, *supra* note 48, at 401 (explaining that the Court found protection for commercial speech primarily important to "support intelligent and well-informed consumer decisions").

50. *See* Brudney, *supra* note 41, at 1165 (noting "a large asymmetry between the speaker and" listener with regards to information of the transaction).

51. Norton, *supra* note 45, at 37.

employee lacks this information.[52] Therefore, commercial speech protection offers a way to protect the listener—such as an employee in a corporate context,[53] or a person looking for drug prescriptions,[54] and ensures that the listener has full access to necessary information in a particular situation.[55]

B. Classifying Salary History as Commercial Speech

The Supreme Court has not explicitly said whether questions during an interview, such as those related to salary history, constitute commercial speech.[56] Commercial speech cases have typically involved pamphlets,[57] advertisements,[58] drug prescription information,[59] and other items that are part of commercial transactions between parties who are usually buying and selling.[60] A narrow view of commercial speech would limit the doctrine solely to speech that is an offer or acceptance of a sale of goods.[61]

However, there is precedent to find that interviews as part of the job recruitment process also represent commercial speech. The Supreme Court held in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* that a newspaper discriminated based on sex when it reported different job openings in male and female-designated columns.[62] The Court not only found that this was an illegal activity because the newspaper discriminated in employment on the basis of sex, but the Court also concluded that the postings discussed commercial activity and therefore were commercial speech.[63]

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52. *See id.* at 37-38.

53. *Id.* at 37.

54. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976).

55. *See supra* text accompanying notes 46-47.

56. *See* Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 745 (2003).

57. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983).

58. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

59. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557-58 (2011); *Va. State Bd.*, 425 U.S. at 750.

60. *See* PIETY, *supra* note 41, at 22.

61. *See* Brudney, *supra* note 41, at 1155-56.

62. 413 U.S. 376, 379-81 (1973).

63. *Id.* at 388.

Thus, the Court found that "proposals of potential employment ... constituted core commercial expression."[64] Lower courts have followed this holding to include the job recruitment process in the definition of commercial speech for speech such as "job advertisements, interviews, and other job-related negotiations (which ... generally include information about the terms and conditions of employment)."[65]

In addition, circuit courts have classified solicitations for employment as commercial speech, as seen in *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*.[66] In that 2017 case, the Second Circuit determined that questions related to employment qualify as commercial speech.[67] In fact, the court explicitly stated that "[i]t is well settled that speech that is no more than a proposal of possible employment is a 'classic example' of commercial speech."[68] In *Valle del Sol Inc. v. Whiting*, the Ninth Circuit also found that solicitations for work were related to a commercial transaction and therefore were commercial speech.[69] Hence, viewing commercial speech as only applicable to information and offers to buy or sell goods is overly restrictive; the lower courts have extended *Pittsburgh Press* to include "communications involving recruitment efforts, advertising, *interviews*, and other negotiations" as commercial speech due to the "close relationship to job ... transactions."[70]

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64. Norton, *supra* note 56, at 745. Commercial speech includes questions as well as assertions. Tung Yin, *How the Americans with Disabilities Act's Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment*, 17 LAB. LAW. 107, 114 (2001).

65. Norton, *supra* note 45, at 48; *see also* Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104 (2d Cir. 2017) (pertaining to job solicitations); Valle del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013) (relating to offers of employment).

66. 868 F.3d at 112.

67. *See id.* (finding that the ordinance restricting employment solicitations targets commercial speech).

68. *Id.* (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

69. 709 F.3d at 818 (finding that the speech relates to hire and transport, so "all affected speech is either speech soliciting a commercial transaction or speech necessary to the consummation of a commercial transaction").

70. Norton, *supra* note 56, at 745 (emphasis added).

These cases demonstrate that commercial speech extends to speech during the employment process.[71] Salary history questions are part of the job recruitment and employment process.[72] Moreover, they propose a commercial transaction between two parties[73] in that one seeks to offer employment and the other to accept. Questions about salary history also relate to the "economic interests of the speaker and its audience" because they concern the economic relationship between an employer and a potential or new employee.[74]

In addition, as discussed above,[75] the Court did not recognize protections for commercial speech in order to protect the speaker, in this instance corporations.[76] Instead, the Court defined commercial speech with respect to its value to listeners and the public.[77] The listeners in the context of the employment process are prospective or new employees who are at an informational disadvantage compared to employers.[78] A prospective employee does not have access to the employer's preference for certain hiring factors, how much a company can afford to pay in compensation compared to the minimum salary offered, other employees' salaries, how the company uses salary history information, or other information an employer possesses during the hiring process. Hence, when an employer, as the speaker, asks about salary history, the prospective employee, as the listener, responds at an informational disadvantage.

Therefore, protecting a corporation's right to ask questions without restriction in the employment process mistakenly protects the

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71. *Town of Oyster Bay*, 868 F.3d at 107; *Whiting*, 709 F.3d at 814.

72. *See* Amar & Brownstein, *supra* note 32 (noting that the salary history ban is not a general one, but rather one "in the context of a hiring process" and therefore "might be viewed as a regulation of expression that is incident to the conduct of hiring employees").

73. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (holding that commercial propositions do not lack all protection).

74. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980); *see also* Yin, *supra* note 64, at 115-16 (noting that questions in an interview are commercial speech because there is a proposal of a commercial transaction between employer and potential employee).

75. *See supra* text accompanying notes 46-50.

76. *See* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 143 ("The commercial speech doctrine was forged as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers.").

77. *See id.* at 147.

78. *Cf.* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 401 (1995).

speaker's and not the listener's interests, which is contrary to the primary purpose of the commercial speech doctrine.[79] Any protection of salary history questions as commercial speech should be only justified with respect to the interests of the employees as the listeners and not to protect the corporations as the speakers.[80] Moreover, lower courts demonstrate that speech as part of the employment process is commercial speech following the Supreme Court's holding in *Pittsburgh Press*.[81] Therefore, questions about salary history should be considered commercial speech because of the role these questions play in the job recruitment process and the economic transaction they represent between an employer and a prospective or new employee.

II. REGULATING COMMERCIAL SPEECH

In addition to defining commercial speech, it is also critical to understand how the government may regulate this speech. The Court's decision in *Virginia State Board* was the first to recognize constitutional protection from government regulations for commercial speech.[82] *Central Hudson* followed, and distinguished permissible restrictions of speech from overly burdensome regulations.[83] A law may regulate commercial speech if it passes the analysis that the Supreme Court established in *Central Hudson*.[84] This Part examines the protection the Court grants to commercial speech in *Virginia State Board* and the test it established for regulating such speech in *Central Hudson*.

79. *See* PIETY, *supra* note 41, at 11 (writing that to do so "would turn the doctrine on its head").

80. Norton, *supra* note 45, at 37.

81. *See supra* notes 65-70 and accompanying text.

82. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749-50 (1976); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 241 (2015).

83. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

84. *See id.* at 564.

A. Virginia State Board *and Protection for Commercial Speech*

The Supreme Court first articulated protection for commercial speech in the 1976 landmark case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[85] The plaintiffs claimed that the law prohibiting drug discount advertisements violated their First Amendment right of free speech because customers had the right to receive this information.[86] For the first time, the Court expressly held that the fact that speech is "commercial speech" does not preclude protection.[87] The Court recognized protection for the speech at issue because of its content and the strong societal "interest in the free flow of commercial information."[88]

However, in holding that commercial speech is entitled to First Amendment protection, the Court did *not* hold that the government may *never* regulate commercial speech.[89] To the contrary, the Court even went so far as to declare that it has "often approved restrictions" if these restrictions "serve a significant governmental interest" and allow for other means of communication.[90] This language paved the way for the Court's understanding of permissible regulations of commercial speech in *Central Hudson*.

B. The Central Hudson *Test and Intermediate Scrutiny*

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court laid out a test for determining when regulations of commercial speech are permissible.[91] This test is imperative in understanding why intermediate scrutiny, rather than strict scrutiny, is the standard for analyzing

85. 425 U.S. at 749-50 (considering a prohibition on pharmacists from advertising drug discounts for prescription drugs).

86. *Id.* at 754.

87. *Id.* at 761.

88. *Id.* at 763-65.

89. *Id.* at 770 ("In concluding that commercial speech ... is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.").

90. *Id.* at 771.

91. 447 U.S. 557, 564 (1980).

commercial speech.[92] A modern trend toward favoring the corporate use of the First Amendment to counteract government regulations has challenged the level of scrutiny applied to commercial speech.[93] However, recent court decisions that continue to apply the *Central Hudson* test and intermediate-level scrutiny,[94] along with the commercial speech doctrine's purpose of protecting public interest,[95] emphasize that *Central Hudson* remains controlling precedent when assessing commercial speech regulations.

1. What Makes a Regulation Permissible

Four years after *Virginia State Board*, the Court established a test for determining when the government may regulate commercial speech.[96] In that case, *Central Hudson*, the Public Service Commission had banned electrical utility companies from promoting electricity during the national energy crisis, and the plaintiffs argued this ban violated their free speech rights.[97] The Court declared that commercial speech is afforded less protection than other forms of speech under the First Amendment.[98] Protection of commercial speech "turns on the nature both of the expression and of the governmental interests served by its regulation."[99] The Court set forth a four-part analysis for evaluating commercial speech restrictions.[100]

First, the Court determined whether speech is misleading or false, which precludes the speech from First Amendment protection altogether.[101] Second, the Court asked "whether the asserted governmental interest is substantial."[102] Third, if the interest is substantial, then the regulation must "directly advance[ ] the governmental

92. *See* Pomeranz, *supra* note 48, at 402, 413.

93. John C. Coates IV & Ron Fein, *Corporations are Perverting the Notion of Free Speech*, NEWSWEEK (Aug. 4, 2015, 4:42 PM), http://www.newsweek.com/corporations-are-perverting-notion-free-speech-359785 [https://perma.cc/TJ86-Z5RD].

94. *See* cases cited *infra* note 133.

95. *See infra* text accompanying note 137.

96. *See Cent. Hudson*, 447 U.S. at 564.

97. *Id.* at 558.

98. *Id.* at 563.

99. *Id.*

100. *Id.* at 566.

101. *Id.*

102. *Id.*

interest asserted."[103] Finally, the Court determined whether the regulation "is not more extensive than is necessary to serve that interest."[104]

Hence, commercial speech is not free from all regulation.[105] The First Amendment only protects commercial speech when the government does not have a substantial interest to regulate and has not done so in a narrowly tailored way.[106]

2. Intermediate Scrutiny for Regulations

Even when speech is protected, not all speech is protected to the same extent.[107] In instances when commercial speech is regulated, the *Central Hudson* test's analysis calls for intermediate scrutiny in order to balance protection for speech with the government's interests for the public.[108] The Court held in *Bolger v. Youngs Drug Products Corp.* that the Constitution provides a different level of protection for commercial speech than other forms of speech.[109] Justice Breyer underscored this point in his dissent in *Garcetti v. Ceballos* when he stated the Court's common understanding that "virtually all human interaction takes place through speech," and thus "the First Amendment cannot offer all speech the same degree of protection."[110] Hence, different categories for speech are necessary and require judges to apply different levels of scrutiny.[111]

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103. *Id.*

104. *Id.*

105. *See id.*; *see also* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770-71 (1976).

106. *See Cent. Hudson*, 447 U.S. at 566.

107. *Id.*; *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983).

108. *See* Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 113 (2d Cir. 2017) (calling for intermediate scrutiny for commercial speech); ROBERT L. KERR, THE CORPORATE FREE-SPEECH MOVEMENT 218 (2008); Norton, *supra* note 45, at 83; Pomeranz, *supra* note 48, at 414.

109. 463 U.S. 60, 64-65 (1983).

110. 547 U.S. 410, 444 (2006) (Breyer, J., dissenting); *see also Town of Oyster Bay*, 868 F.3d at 112 ("[C]ommercial speech ... is afforded less protection than other constitutionally safeguarded forms of expression"); Am. Beverage Ass'n v. City & Cty. of S.F., 871 F.3d 884, 891 (9th Cir. 2017) (determining that commercial speech regulations warrant a lesser standard of review than "content-based regulations of noncommercial speech").

111. *Garcetti*, 547 U.S. at 444 (Breyer, J., dissenting).

However, later cases suggest that perhaps courts consider a higher standard of scrutiny for commercial speech.[112] In the landmark corporate speech case, *Citizens United v. Federal Election Commission*, the Court held that corporations have First Amendment rights for *political* speech, just as those of natural persons.[113] This calls into question the distinct levels of protection for political and commercial speech; the Court elevated First Amendment rights of corporations with respect to political speech to the same standard as human speakers, and could do the same for commercial speech.[114]

In addition, the Court later held in *Sorrell v. IMS Health Inc.* that the First Amendment necessitates heightened scrutiny for government regulations of speech that the government disagrees with; this includes commercial speech.[115] These cases may show that the Court has moved away from *Central Hudson* to apply a strict scrutiny test.[116] This view of the Court's decisions makes the speaker, rather than the interests of society, the focal point for commercial speech restrictions.[117] However, this is too broad of a reading of *Citizens United* and *Sorrell*, as discussed later in this Part.

3. Deregulation Through the First Amendment

In addition to calls for a heightened level of scrutiny for commercial speech, there has been a recent trend of affording corporations greater free speech protection in the face of regulations.[118] Instead of protecting the listeners and focusing on the audience's access to information, the commercial speech doctrine has continually been

112. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011); Citizens United v. FEC, 558 U.S. 310, 349-50 (2010); PIETY, *supra* note 41, at 4.

113. 558 U.S. at 349-50; *see also* PIETY, *supra* note 41, at 29.

114. PIETY, *supra* note 41, at 4 (noting that to do so could "imperil existing consumer protection legislation and strangle ... any efforts to assert greater regulatory supervision over critical industries").

115. 564 U.S. at 566 (holding that the consumer's need for doctor prescription practices made the regulation overly burdensome).

116. *Id.* at 565-66; *see also* Pomeranz, *supra* note 48, at 392-93 (noting that plaintiffs protesting commercial speech restrictions have long challenged the Court to reject the *Central Hudson* test and apply strict scrutiny).

117. Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 4-5 (2012) (arguing that the Court likely did not intend to "eviscerate[]" its reasoning in *Virginia State Board* by focusing on commercial speakers instead of listeners).

118. *See* Coates & Fein, *supra* note 93.

used by corporations as a deregulation tool to rid themselves of what they view as unnecessary regulations, such as compelled disclosures or privacy protection laws.[119]

The business movement for broader speech protections emerged in the 1970s and has been strengthened by the current Court's approach to corporate speech in cases such as *Citizens United* and *Sorrell*.[120] Businesses have increasingly used the First Amendment as a first line of defense, because almost any regulation relates in some part to speech and expression.[121] One scholar calls this use of the First Amendment as a deregulatory tool "the new *Lochner*," except that free speech is an even stronger deregulation tool because it "has the capacity to undo the state and transfer control of market regulation from the political branches to the judiciary, if not ultimately to the hands of free speech claimants."[122]

John Coates, Professor of Law and Economics at Harvard Law School, attributes this to what he calls the "corporate takeover of the First Amendment."[123] Rather than simply allowing limited regulation in only instances when society's interests are at stake, corporations now constantly bring free speech claims to rid themselves of any government regulation whatsoever.[124] In the decades leading up to the Court's decision in *Virginia State Board*, business cases made up approximately 20 percent of the Court's docket on free speech.[125] That number has since doubled, and businesses' speech arguments are now successful at the same rate as individuals'.[126] Thus, corporations have increasingly used the First Amendment

119. PIETY, *supra* note 41, at 1 (noting that businesses have strategically used litigation to fight regulations of commercial speech and "have successfully changed judicial and public attitudes" towards these regulations); Coates & Fein, *supra* note 93.

120. *See* Coates, *supra* note 82, at 241-42; Shanor, *supra* note 76, at 154-55 (citing Justice Powell's 1971 memorandum as the initial influence in framing business's First Amendment rights).

121. Shanor, *supra* note 76, at 177.

122. *Id.* at 199.

123. *See* Coates, *supra* note 82, at 246.

124. *Id.* at 265 (noting that this perpetuates a power imbalance between individuals and businesses or employers).

125. Coates & Fein, *supra* note 93.

126. *Id.*; Joe Pinsker, *How Corporations Took Over the First Amendment*, ATLANTIC (Apr. 1, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporations-took-over-the-first-amendment/389249/ [https://perma.cc/UA69-J8JC].

and the commercial speech doctrine effectively to evade government regulation.[127]

4. Counteracting the Deregulation Movement and Heightened Scrutiny

The Court in *Citizens United*, however, said nothing of commercial speech or how the majority opinion affects other areas of protected speech.[128] Furthermore, the Court has made clear in the past that commercial speech is distinct from political speech.[129] *Central Hudson* still remains controlling precedent for analyzing commercial speech.[130] Although not explicitly stated, the Court in *Sorrell* applied the analysis from *Central Hudson* to determine the substantial government interest in regulating the speech at issue, and whether this regulation was narrowly tailored.[131] The Court also determined that content-based restrictions for commercial speech are permissible and commercial speech may be regulated more than noncommercial speech.[132]

In addition, circuit and district courts continue to apply the *Central Hudson* test and intermediate scrutiny for commercial speech.[133] For instance, the Eastern District of Pennsylvania, where the businesses are challenging the Philadelphia ordinance, has previously made very clear that *Sorrell* did not change the standard of review for commercial speech as set forth in *Central Hudson*.[134] The

127. Pinsker, *supra* note 126.

128. PIETY, *supra* note 41, at 29.

129. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) ("[W]e have held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression."); KERR, *supra* note 108, at 217.

130. *See* Norton, *supra* note 56, at 744 n.67; Piety, *supra* note 117, at 35.

131. Sorrell v. IMS Health Inc., 564 U.S. 552, 571-72 (2011).

132. *Id.* at 579.

133. *See* Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 847 (9th Cir. 2017) (determining that *Sorrell* did not change the *Central Hudson* standard because the context for the Court's reference to "heightened scrutiny" is whether the statute regulates speech or commerce, and thus any reference to heightened scrutiny for commercial speech was compared to the rational basis review standard for merely commercial activity); Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 113 (2d Cir. 2017); 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014) (noting that *Sorrell* allows for the same analysis as the *Central Hudson* test).

134. *See* King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 308 (E.D. Pa. 2012).

court determined that the Supreme Court did not analyze the state statute in *Sorrell* under either intermediate or strict scrutiny because the outcome would be the same either way.[135] Consequentially, the Supreme Court "stopped far short of overhauling nearly three decades of precedent" and relied on commercial speech precedent, including *Central Hudson*, to analyze the statute.[136]

This intermediate level of scrutiny is critical in protecting the balance of power between the speaker and listener and ensuring that the free speech rights of the speaker do not unduly burden the audience.[137] In addition, the Court adopted commercial speech to protect the rights of the listener—and not the speaker—so the government should still sufficiently regulate commercial speech to protect the public interest in a way that passes intermediate scrutiny.[138] If courts apply strict scrutiny to commercial speech regulations, they effectively allow corporations to negotiate and conduct commercial transactions virtually unhindered because of the high standard a strict scrutiny analysis requires.[139]

The *Central Hudson* intermediate scrutiny test already offers protection to commercial actors from unwarranted government interference.[140] This test and level of scrutiny allows a company to speak freely in matters that do not implicate substantial government interests, and protects these same companies from regulations that do not directly and narrowly advance those government interests.[141] Thus, applying an intermediate level of scrutiny

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135. *Id.*

136. *Id.* ("If the Court wished to disrupt the long-established commercial speech doctrine as applying intermediate scrutiny, it would have expressly done so. Absent express affirmation, this Court will refrain from taking such a leap.").

137. *See* Pomeranz, *supra* note 48, at 402 ("Since commercial speech is 'the offspring of economic self-interest,' only by maintaining intermediate protection for commercial speech can we ensure that the bargaining process is fair and consumers are protected." (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980))).

138. Shanor, *supra* note 76, at 146.

139. *See* PIETY, *supra* note 41, at 4 (discussing how elevating commercial speech to strict scrutiny endangers constitutional regulations); *see also* Piety, *supra* note 117, at 5 (finding it unlikely that the Court meant to "eviscerate[] the rationale" underpinning *Virginia State Board* and its protections for listeners in favor of strict scrutiny).

140. *See* Pomeranz, *supra* note 48, at 402.

141. *See id.* at 413 (writing that intermediate scrutiny reflects both government interest in regulating commercial speech, and the "values inherent" in protecting that speech).

to regulations of commercial speech will not strip corporations of their First Amendment rights.[142]

In addition, despite the corporate movement to cast all regulations of corporate speech—including commercial speech—as wrong and overly burdensome, not all of these regulations are as negative or onerous as many corporations would have one believe.[143] In the wake of major financial scandals of the twenty-first century, such as Enron and AIG, regulation in certain areas has been increasingly embraced.[144] This supports Justice Breyer's view that the decision to regulate in order to protect the safety and well-being of the public should properly reside with the legislature instead of "a constitutional decision prohibiting the legislature from enacting necessary protections."[145]

Moreover, commercial speech is a massive component of commercial activity in this country. Marketing alone, the most common form of commercial speech, generates six trillion dollars in economic activity every year.[146] The government cannot effectively exercise its ability to regulate such a substantial part of commercial activity if it is only permitted to do so after being subject to strict scrutiny.[147] Furthermore, using commercial speech protections to fight any and all business regulations defeats the primary purpose of the commercial speech doctrine, which was to "secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers."[148]

Thus, courts should not permit the corporate use of the First Amendment against regulations to erode the analysis of permissible government regulation by submitting government regulation to strict scrutiny. The *Central Hudson* test has endured for thirty years,[149] and there is still "no need ... to break new ground."[150] This

142. *See id.* at 402.

143. *See* PIETY, *supra* note 41, at 1-2.

144. *See id.* at 2.

145. Thompson v. W. States Med. Ctr., 535 U.S. 357, 389 (2002) (Breyer, J., dissenting) (calling for "lenient application" of protections for commercial speech in order to protect the public).

146. *See* PIETY, *supra* note 41, at 2.

147. *See id.*

148. Shanor, *supra* note 76, at 143.

149. Lora E. Barnhart Driscoll, Comment, Citizens United v. Central Hudson*: A Rationale for Simplifying and Clarifying the First Amendment's Protections for Nonpolitical*

test permits regulation if the regulation directly advances a substantial government interest and is not more restrictive than is necessary.[151] Therefore, courts should use the *Central Hudson* analysis and intermediate scrutiny to determine whether salary history legislation is permissible regulation.

III. THE GOVERNMENT AND THE GAP

In order for salary history bans to pass the *Central Hudson* test for commercial speech regulation, the government must show that it has a substantial interest in regulating the speech at issue.[152] The substantial government interest inherent in salary history bans can be found in the text of some of the ordinances themselves.[153] For instance, in the Philadelphia ordinance, the City published its findings regarding the wage gap that continues to persist in Pennsylvania and the United States.[154] It enumerated that the purpose of the ordinance is to follow the legacy of the Equal Pay Act (EPA) and eliminate factors that perpetuate the wage gap, in this case by prohibiting inquiries into salary history.[155] The EPA and subsequent court cases demonstrate that the government has a substantial interest in narrowing the wage gap.[156] However, they also show deficiencies in the current legal regime[157] and why further legislation such as salary history bans are needed to further the government interest of narrowing the gender wage gap.

Advertisements, 19 GEO. MASON L. REV. 213, 213 (2011).

150. *Thompson*, 535 U.S. at 368 (reaffirming the Court's commitment to the *Central Hudson* test for commercial speech).

151. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

152. *See id.*

153. *See* PHILA., PA., PHILA. CODE § 9-1101(b), (e) (2017); S.F., CAL., POLICE CODE art. 33J, § 3300J.4 (2017).

154. PHILA., PA., PHILA. CODE § 9-1131(1)(a) (2017) (finding that women on average are paid seventy-nine cents on the dollar as compared to men in Pennsylvania; when broken down by race, many women of color are paid even less, with African-American women making sixty-eight cents on the dollar and Latinas fifty-six cents on the dollar).

155. *See id.* § 9-1131(1)(b).

156. *See* 29 U.S.C. § 206(d)(1) (2012); Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (determining that different pay for men and women violated the EPA); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988) (finding that using market forces to pay men and women differently violated the EPA).

157. *See, e.g.*, Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982).

A. Substantial Government Interest in Wage Equality

In 1963, Congress passed the EPA,[158] which provided in part that "[n]o employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work."[159] The EPA represents the interest of the government, and society as a whole, in ensuring that "equal pay for equal work" is a statutory right.[160] When the bill was debated in 1963, legislators noted during the proposal and discussion of the EPA that it was meant to eliminate a practice which is against "our national ideals concerning equal rights and equal opportunities for women"[161] and "our basic traditions of freedom and fair play."[162] The existing legislation in the states at the time was "ineffective, inconsistently enforced, and limited in coverage."[163] Thus, Congress enacted the EPA to be an essential tool in combatting wage discrimination.[164] That same government and public interest that led to the EPA persists to this day, and will, as long as the gender wage gap persists.

Subsequent court decisions emphasize this substantial governmental and societal interest in wage equality through findings that the use of prior salary in determining pay is contrary to the intent of the EPA.[165] For instance, in *Corning Glass Works v. Brennan*, only male employees worked the night shift due to state laws which prohibited night work for women.[166] The all-male night shift staff earned a higher rate of pay than the all-female day shift.[167] Once the state eliminated the laws regarding shift distinctions, women and

158. *See* Porter & Vartanian, *supra* note 2, at 167.

159. § 206(d)(1).

160. *See* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 29 (2010) (noting that "equal pay for equal work" was first enshrined in U.S. federal law in the EPA).

161. Porter & Vartanian, *supra* note 2, at 167 (quoting 109 CONG. REC. 8915 (1963) (statement of Rep. Randolph)).

162. *Id.* (quoting 109 CONG. REC. 9195 (1963) (statement of Rep. Powell)).

163. *Id.*

164. *See id.*

165. *See* Carole Supowitz Katz, *Wage Discrimination Claims: Employee's Prior Salary Fails the "Factor Other Than Sex" Test*, 15 COLUM. HUM. RTS. L. REV. 207, 217 (1984).

166. *See* 417 U.S. 188, 191 (1974).

167. *Id.*

men still earned different wages because wages were based on the previous discrepancy in shift pay.[168] The Supreme Court found that Corning's reliance on prior wages in this instance violated the EPA because it reflected a job market that valued men over women, which was an unsuitable differential.[169] It was the employer's duty to equalize base wages once the state eliminated shift distinctions and to pay female inspectors the same rate as the male inspectors.[170]

The Court elaborated on this point in highlighting that equalizing pay for women and men was the whole purpose of the EPA, so the employers must equalize pay for reasons of justice and to eliminate an "unfair method of competition" from the marketplace.[171] Therefore, the Court emphasized that sustaining pay based on prior salary violated the EPA because the discrepancy between the male and female workers' pay existed specifically because of the workforce's gender.[172]

Similarly, in *Glenn v. General Motors Corp.*, the Eleventh Circuit determined that an employer violates the EPA when it can only account for wage discrepancy because of market forces that value a male employee's worth higher than a female employee's worth.[173] In that case, General Motors paid a higher salary to the male employees arguing that the higher wages were necessary to hire the male employees off the market and pay them consistently with their previous wages.[174] The court found that this argument was exactly the type of disparity that Congress passed the EPA to combat.[175] Hence, these cases show the emphasis that the Supreme Court and lower courts have placed on overcoming market biases in order to further the government and societal interest of eliminating pay disparity in the wake of the EPA.

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168. *Id.* at 192.

169. *See id.* at 205, 209-10 (finding that Congress made the pay differential illegal when it "enacted into law the principle equal pay for equal work").

170. *See id.* at 206.

171. *Id.* at 207. Thus, any continued pay differential was merely Corning "taking advantage" of the fact that women could work for less than men. *Id.* at 208.

172. *See id.*

173. *See generally* 841 F.2d 1567 (11th Cir. 1988) (finding for the three female plaintiffs who sued because they earned less than their male counterparts in the same positions).

174. *Id.* at 1570.

175. *See id.*

B. Shortcomings of the Wage Equality Legal Framework

Unfortunately, the current version of the EPA does not always correct these market biases, so additional regulation is needed to further the substantial government interest of equal pay. Employers can still invoke an affirmative defense to justify paying men and women differently.[176] In the EPA, there are four affirmative defenses for wage discrepancy when wages are based on "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[177]

Congress included the "factor other than sex" defense to allow for a business's own distinctions for job classifications.[178] In theory, this allows employers to exercise discretion while still seeking the goal of eliminating gender-based wage disparity.[179] However, the "factor other than sex" defense is particularly pernicious in the way that it allows employers and courts to ignore information to the contrary in determining that prior salary is a factor not based on gender.[180]

For instance, in *Kouba v. Allstate Insurance Co.*, Lola Kouba, on behalf of a class of female employees, alleged that the defendant's use of prior salary to determine pay for new hires was unlawful discrimination.[181] The Ninth Circuit decided that the EPA "concerns business practices," so a company cannot pay men and women differently "absent an acceptable business reason."[182] But the court then concluded that despite valid fears that employers may "manipulate its use of prior salary to underpay female employees," the EPA does not strictly prohibit using prior salary to determine compensation.[183]

Thus, the Ninth Circuit acknowledged that prior salary can in fact perpetuate gender-based wage discrimination, but it still held

176. *See* 29 U.S.C. § 206(d)(1) (2012).
177. *Id.*
178. Katz, *supra* note 165, at 211.
179. *Id.* at 212.
180. *See* Porter & Vartanian, *supra* note 2, at 177 (remarking that employers often win even though "[c]ourts tend to scrutinize employer's reliance on prior salary more closely than competing offers and salary negotiation").
181. 691 F.2d 873, 874-75 (9th Cir. 1982).
182. *Id.* at 876.
183. *Id.* at 878.

that the "factor other than sex" affirmative defense allows businesses to explain away its use of salary history as an acceptable hiring practice.[184] But, as seen in the matter of Aileen Rizo, a company can implement a practice it believes is a sound business reason—such as using salary history to classify income brackets—and still perpetuate the wage gap in using this salary history.[185]

Even when courts are skeptical of an employer's dependence on salary history, because of the "factor other than sex" affirmative defense in the EPA, employers may still triumph if they can attest that their dependence is an acceptable business reason.[186] Thus, the current statutory framework fails to address factors such as prior salary that perpetuate the wage gap and inhibit the substantial government interest of "equal pay for equal work."[187]

C. Ineffectiveness of Salary History as a "Factor Other Than Sex"

In contrast to prior salary, courts have long considered market forces an insufficient "factor other than sex," and thus not an adequate affirmative defense.[188] As the Equal Employment Opportunity Commission Compliance Manual states, an employer may not assert as an acceptable defense that the market value of a male employee's work is higher than a female employee's work.[189] "[P]ayment of lower wages to women based on an assumption that women are available for employment at lower compensation rates does not qualify as a factor other than sex that would justify unequal compensation for substantially equal work."[190] Therefore, the use of market forces to justify lower wages is not acceptable as a defense under the EPA.[191]

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184. *See id.*

185. *See supra* notes 5-11 and accompanying text.

186. *See Kouba*, 691 F.2d at 878.

187. *See* Eisenberg, *supra* note 160, at 29-30.

188. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (finding wage differential based on job market illegal under the EPA); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988) (holding that the Court has "long rejected the market force theory as a 'factor other than sex'"); Elzer, *supra* note 13, at 25.

189. EEOC COMPL. MAN. 10-IV(F)(2)(g).

190. *Id.*

191. *Id.*

And yet, prior salary really is not that distinguishable from market forces.[192] An employer's excuse that a female employee is paid less because of her prior salary is just repackaging the argument that women are paid less as a reflection of the market value.[193] The market itself, including prior salary, is biased because of differing perceptions of men and women that rate a male employee's achievements higher than a female employee's achievements.[194] In addition, although market forces are an impermissible reason to pay men and women differently,[195] prior salary incorporates past decisions of market value and passes these decisions on to new employers via salary history.[196] Therefore, courts should not consider prior salary as an adequate "factor other than sex," and should not accept prior salary as an affirmative defense while rejecting market forces.[197]

Furthermore, salary history is simply not that useful as a business practice because it is not indicative of anything necessary to successfully perform a given job, such as education, training, or experience.[198] Moreover, it is inconsistent with the other defenses enumerated by the EPA.[199] Prior salary does not reflect time considerations like a seniority system defense does.[200] Nor is prior salary useful for determining economic benefits of a prospective employee, like the quantity or quality of production defense, because prior salary does not necessarily indicate quantity or quality of work.[201] Finally, employers can examine other characteristics that

192. *See* Elzer, *supra* note 13, at 25 (calling prior salary and market forces "inextricably linked").

193. *See id.* ("Given the relationship between prior salary and bargaining power in many of the negotiation cases, it is inconsistent to treat prior salary as an acceptable factor other than sex, while treating market forces as an unacceptable one.").

194. *See* Porter & Vartanian, *supra* note 2, at 188-89.

195. Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974).

196. Elzer, *supra* note 13, at 23-25 (asserting that the market influences how much value women have, which is reflected in their salary).

197. *See id.*

198. *See* Porter & Vartanian, *supra* note 2, at 197-98 (finding that prior salary does not helpfully narrow an applicant pool because it "is not related to the skills and abilities of the job in question").

199. *See* Katz, *supra* note 165, at 222-24.

200. *See id.* at 223.

201. *See id.* at 222-23. Katz further notes that salary history cannot typically predict future economic benefits of an employee because it is based on previous factors that may not be part of consideration for the current position. *Id.*

many argue prior salary encapsulates, such as education and experience, independent of salary history.[202] In light of these considerations, the importance of salary history dwindles to merely representing the decisions of former employers based on factors that may or may not be applicable to the current position.[203]

Courts are therefore too deferential to employers under the EPA's affirmative defenses in allowing them to justify the use of prior salary as a "factor other than sex." An employer's need for flexibility and autonomy, and the citizenry's need for the elimination of gender-based wage discrimination cannot always be simultaneously fulfilled.[204] Therefore, an employer's need for autonomy should not come at the expense of the public interest of equal pay.[205]

The EPA too easily permits employers to attest that the use of prior salary is a business practice, and not a factor based on gender.[206] And yet, prior salary carries with it the very type of bias that the EPA was meant to eliminate.[207] Due to the invidious nature of workplace discrimination based on gender, salary history should not be viewed as a "factor other than sex" and should instead be seen for what it is: a means of perpetuating prior bias towards employees based on their gender. As long as the EPA continues to allow an affirmative defense that enables the gender wage gap to persist, legislation that bans salary history questions is necessary to further the substantial government interest of wage equality first set forth in the EPA.

IV. ADVANCEMENT OF PUBLIC INTEREST THROUGH REGULATION

In order for the government to permissibly regulate salary history questions during the employment process, the regulation must be narrowly restrictive and further the substantial government

202. *See id.* at 224 (arguing that education and work experience should be examined on their own and not through prior salary because "[c]orrelation must not be confused with causation").

203. *See id.*

204. *See id.* at 212.

205. *See id.*

206. *See, e.g.*, Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982); *see also* Porter & Vartanian, *supra* note 2, at 177.

207. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988).

interest.[208] This final step in the *Central Hudson* test focuses on whether the regulation "directly advance[s] the state interest involved" and whether a more limited restriction would suffice.[209] This Part examines the narrowness of salary history bans and the ways in which these regulations reasonably fit the stated interest of narrowing the wage gap. Next, it responds to criticisms by demonstrating that the law is not overly restrictive and burdensome to employers.

A. Narrowness of Salary History Bans

Whether a regulation is appropriately restrictive is the most difficult prong of the analysis for a regulation on commercial speech to clear.[210] For example, in *Virginia State Board*, Virginia's restriction was improper because it "single[d] out speech of a particular content and [sought] to prevent its dissemination completely."[211] Later, in *Central Hudson*, the Court determined that the Public Service Commission's order directly advanced the state's interest in conserving energy, but the Commission was unable to show that a more limited restriction would not suffice.[212]

The Philadelphia ordinance—as well as any subsequently litigated salary history laws—however, should not meet this same end because it still allows the disclosure and use of salary history and does not prohibit all information relating to salary history.[213] Employers can still use salary history to determine wages if the prospective employee or recent hire "knowingly and willingly disclosed his or her wage history."[214] Thus, banning employer salary history

208. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

209. *See id.*

210. *See* Pomeranz, *supra* note 48, at 429 (noting that another option usually leads the Court to conclude that the government regulation is overly broad).

211. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

212. *Cent. Hudson*, 447 U.S. at 569-71.

213. *See* PHILA., PA., PHILA. CODE § 9-1131(2) (2017).

214. *Id.* This is the same for the Massachusetts law, MASS. GEN. LAWS ch. 149, § 105A (2017), California law, CAL. LAB. CODE § 432.3 (West 2018), Oregon law, OR. REV. STAT. § 652.220 (West 2017), New York City law, N.Y.C., N.Y., ADMIN. CODE § 8-107(25) (2017), San Francisco law, S.F., CAL., POLICE CODE art. 33J, § 3300J.4 (2017), a proposed New York State bill, Assemb. B. 2040C, 2017 Leg., Reg. Sess. (N.Y. 2017), and a proposed Delaware bill, DEL.

questions is not as restrictive as the law in *Virginia State Board* because it does not "seek[ ] to prevent [the information's] dissemination completely."[215] In addition, laws such as the Philadelphia ordinance should not meet the same end as the law in *Central Hudson* because, as compared to the other laws banning salary history, Philadelphia's ordinance is not more restrictive and reasonably fits the government's desire to narrow the gender pay gap.[216]

1. Comparison of Salary History Bans

The Philadelphia ordinance subjects businesses to possible civil or criminal penalties—including fines and a potential stint in jail for a repeated offense—if they willfully and maliciously fail to comply with the law.[217] Critics of the Philadelphia ordinance point out that this law is different than the Massachusetts law because it has an absolute prohibition on inquiring into salary history.[218]

The primary difference between the two laws is that Massachusetts allows an employer to assert an affirmative defense if they can show that they completed a good-faith self-evaluation in the past three years and that "reasonable progress has been made" with regards to the wage gap.[219] However, both laws make it unlawful to inquire into wage history, require disclosure of wage history, or retaliate if a prospective employee or new hire does not provide wage history.[220] Furthermore, both laws prohibit the employer from obtaining salary history from either the employee, or the employee's current or former employer, unless the employee voluntarily discloses salary history.[221]

CODE ANN. tit. 19, §§ 709B(6)(1)-(2) (2017).

215. *See Va. State Bd.*, 425 U.S. at 771.

216. *See Cent. Hudson*, 447 U.S. at 570.

217. Áine Cain, *An Employment Attorney Breaks Down the NYC Law that Just Eliminated Everyone's Least-Favorite Interview Question*, BUS. INSIDER (Apr. 11, 2017, 3:14 PM), http://www.businessinsider.com/how-new-york-city-ban-salary-interview-question-works-2017-4 [https://perma.cc/9LZS-QKPN]; Cineas, *supra* note 29.

218. Fabiola Cineas, *Comcast Has a Point on Pay Equity Bill*, PHILA. MAG. (Jan. 13, 2017, 5:53 PM), https://www.phillymag.com/business/2017/01/13/pay-equity-bill-comcast/ [https://perma.cc/5E4V-55JV]; *see also* MASS. GEN. LAWS ch. 149, § 105A (2017); PHILA., PA., PHILA. CODE § 9-1131(2) (2017).

219. § 105A(d).

220. *Compare* § 105A, *with* § 9-1131(2).

221. *Compare* § 105A, *with* § 9-1131(2).

Opponents to the Philadelphia ordinance point to the Massachusetts law's "good faith" defense to show that a less-restrictive regulation is available to Philadelphia and other places seeking to pass legislation like this.[222] Usually an alternative option that regulates less leads courts to conclude that a government regulation is overly broad.[223] But, as discussed above, allowing a company an affirmative defense for the use of salary history enables the company to invoke business reasons for the use of prior salary while still perpetuating the bias inherent to prior salary; thus, this does not directly advance the government interest.[224]

Moreover, the Massachusetts law is not the only benchmark against which to compare the Philadelphia ordinance. California signed a similar bill into law on October 12, 2017, which made a violation of the law a misdemeanor.[225] The California law also prohibits an employer from seeking salary history, but allows the employee to voluntarily disclose that information.[226] Like Philadelphia and Massachusetts, this law also prohibits the employer from relying on salary history information as a factor in determining the offer or salary for an applicant.[227]

Oregon placed a similar bill into effect on October 6, 2017.[228] That law prohibits employers from determining compensation based on current or past salary, and makes it unlawful to seek this information from either the employee or former employer.[229] Delaware's,[230] San Francisco's[231] and New York City's[232] laws are essentially the

222. Cineas, *supra* note 218.

223. Pomeranz, *supra* note 48, at 430; *see also* Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 117 (2d Cir. 2017) (holding that the ordinance was not narrowly tailored because another regulation already accomplished the same task without restricting speech).

224. *See supra* Part III.B.

225. CAL. LAB. CODE § 432.3 (West 2018); Margot Roosevelt, *California Bosses Can No Longer Ask You About Your Previous Salary*, ORANGE COUNTY REG. (Oct. 12, 2017, 6:15 PM), https://www.ocregister.com/2017/10/12/in-bid-to-fight-gender-pay-gap-gov-jerry-brown-signs-salary-privacy-law/ [https://perma.cc/JZU4-EPHV].

226. § 432.3.

227. *Id.*

228. OR. REV. STAT. § 652.220 (2017).

229. *Id.*

230. DEL. CODE ANN. tit. 19, §§ 709B(6)(1)-(2) (2017).

231. S.F., CAL., POLICE CODE art. 33J, § 3300J.4 (2017).

232. N.Y.C., N.Y., ADMIN. CODE § 8-107(25) (2017).

same. New York State has not yet signed the bill into law, but it follows the same provisions as those enumerated above.[233] Thus, only Massachusetts has allowed an affirmative defense.[234] Other states and cities have not included this provision in their laws and still punish salary history questions.[235] Therefore, the Philadelphia ordinance is not an outlier, which is critical in finding that a less restrictive means would not suffice.[236]

2. Reasonable Fit of Regulation to Interest

Additionally, the Supreme Court made clear in *Lorillard Tobacco Co. v. Reilly* that the regulation does not have to be the "least restrictive means" in order to be permissible.[237] Instead it must merely be a "reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends.'"[238] The restriction need not be perfect, but rather it must be reasonable.[239] Hence, businesses challenging the regulation cannot simply show that a less-restrictive regulation is possible; rather they must show that the regulation does not reasonably fit the city or state's intended aim in minimizing the wage gap through the prohibition of salary history questions.

Justice Rehnquist cautioned the use of the "less restrictive means" analysis in his dissent in *Supreme Court of New Hampshire v. Piper*.[240] He considered this analysis to be "both ill-advised and potentially unmanageable" because it could be taken to the extreme and used to strike down every government regulation because there

233. Assemb. B. 2040C, 2017 Leg., Reg. Sess. (N.Y. 2017).

234. *See* MASS. GEN. LAWS ch. 149, § 105A (2017) (providing an affirmative defense for companies who have performed good faith assessments within the previous three years and have made "reasonable progress ... towards eliminating wage differentials based on gender").

235. *See* CAL. LAB. CODE § 432.3 (West 2018); N.Y.C., N.Y., ADMIN. CODE § 8-107 (2017); OR. REV. STAT. § 652.220 (2017); S.F., CAL., POLICE CODE art. 33J, § 3300J.4 (2017).

236. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 570 (1980).

237. 533 U.S. 525, 556 (2001) (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995)).

238. *Id.* (quoting *Went For It*, 515 U.S. at 632).

239. Bd. of Trs. of the State Univ. v. Fox, 492 U.S. 469, 480 (1989).

240. 470 U.S. 274, 294-95 (1985) (Rehnquist, J., dissenting); *see also Cent. Hudson*, 447 U.S. at 584-85 (Rehnquist, J., dissenting) (calling for greater deference to state regulations because the State has the public interest in mind when enacting such regulations).

can always be at least *one* less-restrictive way to write a law.[241] If courts interpret the *Central Hudson* analysis to indicate that only the least restrictive means of regulation are allowed, then courts will have gone to the extreme that Rehnquist cautioned against, and strike down every government regulation of corporations.[242]

However, as we have seen in *Lorillard Tobacco*, the "least restrictive means" is not the standard; rather, the standard is whether the regulation reasonably fits and is narrowly tailored to the legislative intent.[243] Salary history bans, including Philadelphia's ordinance, reasonably fit the public interest in that they enable the government to regulate speech for the purpose of narrowing the wage gap, and they are narrowly restrictive because they still allow employees to voluntarily divulge such information.[244]

B. Responding to Regulation Criticisms

Despite criticisms of salary history legislation, common sense, alternative means of determining pay, and corporate compliance with these laws demonstrate that this legislation is not overly restrictive or burdensome on employers.

1. Common Sense

Although Philadelphia's ordinance is precisely a regulation that is necessary and that reasonably fits the purpose of narrowing—and eventually eliminating—the wage gap, critics of the law assert that it is not based in empirical data proving that banning prior salary questions will actually narrow the wage gap.[245] Government regulation sometimes only passes the final prong of the *Central Hudson* test if the government can point to empirical data to support the restriction.[246]

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241. *Piper*, 470 U.S. at 294-95 (Rehnquist, J., dissenting). Rehnquist thought that this puts too much power in the hands of judges and allows them to second-guess legislators on legislative matters, which is an undesirable consequence. *Id.*

242. *See id.*

243. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001).

244. *See supra* notes 213-16 and accompanying text.

245. *See* Cineas, *supra* note 29.

246. Pomeranz, *supra* note 48, at 428.

However, empirical data is not a requirement of the *Central Hudson* test.[247] The Supreme Court further made this clear in *Lorillard Tobacco* when it held that studies and anecdotes about different jurisdictions suffice, and justifications "based solely on history, consensus, and 'simple common sense'" are permitted.[248]

As argued above, history demonstrates that salary history perpetuates the wage gap.[249] "[S]imple common sense," as Justice O'Connor used in *Lorillard Tobacco*,[250] also leads to the conclusion that when a female employee is paid less based on her gender at one workplace, then that lower salary will follow her for the rest of her career, as long as employers continue to consider salary history in determining pay.[251]

Critics point to the fact that laws banning salary history questions have not yet proven effective.[252] However, it takes three to five years to adequately study the efficacy of such laws.[253] This should not be a prohibitive barrier to the success of regulations such as these. As Victoria Budson, the Executive Director of the Women and Public Policy Program at Harvard points out, progress cannot be limited to only those things that have been tested.[254] The facts indicate "when women—and particularly women and men of color—get hired, people are more likely to underpay them. And when you peg your offer and salary based on what someone's made in their last employment, you then replicate whatever discrimination people have faced in prior jobs."[255]

One cannot fall prey to the argument that you can only pass laws once you have data on the law's efficacy. Rather, you can only truly study a law's efficacy once it is enacted. The Supreme Court has

247. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980); *see also Lorillard Tobacco*, 533 U.S. at 555.

248. 533 U.S. at 555 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (finding that even if the standard of review is strict scrutiny, these factors would pass such a review)).

249. *See supra* Part III.C.

250. 533 U.S. at 555 (internal citations omitted).

251. *See* Cauterucci, *supra* note 4.

252. *See* Editorial, *A Gag Rule Won't Help Women Advance*, BLOOMBERG (Apr. 11, 2017, 9:00 AM), https://www.bloomberg.com/view/articles/2017-04-11/a-gag-rule-won-t-help-women-advance [https://perma.cc/337Z-A3S2].

253. Cauterucci, *supra* note 4.

254. *Id.*

255. *Id.*

itself said that other factors, such as "history, consensus, and 'simple common sense'" are adequate factors for determining whether a regulation directly advances a government's stated interest.[256] Therefore, empirical data on the law's efficacy is not necessary in order to determine that the law directly advances the government interest.[257]

In fact, the Supreme Court relied on Congress's "commonsense judgment" in *United States v. Edge Broadcasting Co.*[258] In that case, "commonsense judgment" was adequate to show that the regulation directly advanced the state's interest and permissibly regulated commercial speech.[259]

All that is required in commercial speech cases is that there be a "fit between the restriction and the government interest that is not necessarily perfect, but reasonable."[260] Banning salary history reasonably fits the government's interest in narrowing the pay gap because of the effect that salary history has in perpetuating the wage gap.[261] In order for the Philadelphia ordinance and other similarly written laws to permissibly regulate an employer's commercial speech, they need not work perfectly in every single instance to eliminate pay disparity, but they must reasonably further the stated interest of narrowing the wage gap.[262]

2. Alternative Means of Determining Pay

Furthermore, the Philadelphia ordinance does not overly restrict salary history information because, as shown above, it does not prevent employers from accessing salary history information

256. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

257. *See id.*

258. *See* 509 U.S. 418, 428 (1993) (relying on common sense to determine that lottery advertisement broadcasts near the Virginia/North Carolina border would reach residents of North Carolina and violate the state's lottery laws).

259. *Id.* at 428-29 ("[T]he validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place, or manner restrictions.").

260. *Id.* at 429.

261. *See supra* Part III.C.

262. *See Edge Broad.*, 509 U.S. at 429.

altogether.[263] Instead, it only regulates the employer's ability to seek and require it.[264] The employee may still furnish that information on her own,[265] and employers can still ask about an employee's expectations regarding compensation during the hiring process.[266] Therefore, the ordinance is unlike the laws in cases such as *Virginia State Board*, because it does not prevent dissemination of the information completely, but only restricts it in certain instances.[267]

In addition, the law is not overly burdensome to employers. It may require more training for human resources personnel to understand what is permitted under the law, but that is not a prohibitive prospect.[268] The law does not drastically restrict the hiring process for employers because an employer may still negotiate salary, discuss expectations, and evaluate education and experience.[269] Employers can also still compare salary ranges to the market when establishing different positions and adequate compensation.[270] Thus, employers are not left without any benchmark against which to compare a new salary.[271]

3. Corporate Embrace of Salary History Bans

Moreover, in the wake of salary history legislation, major companies such as Amazon have proactively banned salary history questions in order to work toward eliminating the gender wage gap.[272] Other companies, such as Google and Facebook, have applied

263. *See supra* text accompanying notes 213-16.

264. *See* PHILA., PA., PHILA. CODE § 9-1131(2)(a), (c) (2017).

265. *See id.* § 9-1131(2)(a).

266. Cain, *supra* note 217.

267. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

268. *See* Cain, *supra* note 217.

269. *See* Cain, *supra* note 217; Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 882 (2016); Tricia L. Nadolny, *Chamber of Commerce to Sue Philly Over Wage Equity Law*, PHILA. INQUIRER (Apr. 6, 2017, 3:00 AM), http://www.philly.com/philly/news/politics/city/Chamber-of-Commerce-to-sue-city-over-wage-equity-law.html [https://perma.cc/AC35-FKXH].

270. Cineas, *supra* note 218.

271. *See id.*

272. Valentina Zarya, *Amazon Joins Growing List of Employers That Won't Ask About Your Salary History*, FORTUNE (Jan. 18, 2018), http://fortune.com/2018/01/18/amazon-salary-history-wage-gap/ [https://perma.cc/28GT-9BWD].

the salary history ban to their entire company, even though only their offices in California are legally obligated to comply.[273] This initiative from some of the country's most prominent multibillion dollar corporations demonstrates that, rather than being overly burdensome, these laws are actually embraced by major corporations.[274]

Laws regulating the use of, and questions related to, salary history directly advance the goal, first presented in the EPA and now furthered by states and cities across the country, of working to eliminate the gender wage gap. Philadelphia's ordinance in particular is directly tied and narrowly fits this goal of narrowing the wage gap.[275] Because of the availability of salary history through other means and the alternative information available to employers in the hiring process,[276] these laws are not overly restrictive. Therefore, salary history regulations should survive the final prong of the *Central Hudson* analysis for permissible restrictions of commercial speech.[277]

CONCLUSION

The use of salary history to determine starting pay is an injurious business practice for those who were underpaid or undervalued in their previous jobs because of their gender. For employees such as Aileen Rizo, salary history unfairly limits salary options regardless of education and experience, and makes it more likely that men and women will be paid differently in the workplace. That is why laws, such as the Philadelphia ordinance and those in other states, that ban employer questions about salary history are critical in directly

273. *Id.*

274. *See id.*; *see also* Jena McGregor, *Those Bans on Asking About Salary History? Most Employers Don't Think They'll Work*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/11/16/those-bans-on-asking-about-salary-history-most-employers-don't-think-theyll-work/?noredirect=on&utm_term=.c715485630f5 [https://perma.cc/QF9Y-XH3A] (finding that 46 percent of 108 companies surveyed would implement the legal requirement of one jurisdiction, such as Massachusetts, and apply to all of the company operations across the country).

275. *See supra* text accompanying note 244.

276. *See supra* Part IV.B.2.

277. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

advancing the government interest of "equal pay for equal work" set forth in the EPA.[278]

Regardless of the outcome of the litigation in Philadelphia, courts should classify questions related to salary history as commercial speech because of the economic transaction implicit in questions regarding a proposal and acceptance of an offer. Salary history questions are also directly related to the job recruitment process, just as solicitations for employment and job advertisements are.

As commercial speech, regulations of salary history questions should be analyzed using the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, which looks to the substantial government interest involved in regulating certain speech, and whether that regulation directly advances the purported interest.[279] Thus, courts should apply intermediate scrutiny when conducting this analysis because of the lesser protections accorded to commercial speech in an effort to balance First Amendment rights with strong public interests.[280]

The Philadelphia ordinance and other similar laws that cities and states across the country are increasingly passing explicitly carry on the legacy of the EPA in seeking to narrow—and eventually eliminate—the gender wage gap, a substantial government interest made clear in the EPA and in subsequent court cases.[281] Prohibiting salary history questions reasonably fits this stated goal without overly burdening employers because they have access to other useful information in the salary decision process, such as education and experience.[282] Courts must continue to evaluate commercial speech, and thus salary history questions, under the intermediate scrutiny standard. In doing so, these permissible government regulations of

278. *See* Eisenberg, *supra* note 160, at 29-30 (writing that "equal pay for equal work" first became federal law in the EPA).

279. 447 U.S. at 566.

280. *See supra* Part II.B.2.

281. *See supra* Part II.A.

282. *See supra* Part IV.B.2.

salary history questions will continue the critical work of narrowing the gender wage gap.

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