

# Never Ask a Woman Her Wage: The Constitutionality of Salary-History Bans

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*For over a half-century, legislatures have struggled to close the pay gap between men and women. Although the gap has shrunk substantially since Congress passed the Equal Pay Act in 1963, in recent years, progress has slowed to a near standstill. Why has the residual gap remained so persistent? Some argue that employers—by asking applicants to reveal their wage histories and then relying on that information to set future wages—have forced women to carry wage discrimination from job to job. Reacting to this argument, some states and cities have provided a simple solution: ban salary-history inquiries.*

*This Comment addresses whether these salary-history bans are constitutional. Responding to recent claims that these bans unconstitutionally burden employers' right to free speech—namely, by restricting the questions that employers are allowed to ask applicants—I argue that these bans permissibly restrict only the commercial speech of employers. In making this argument, I seek to prove that—in any jurisdiction—salary-history bans should withstand the intermediate scrutiny afforded to commercial speech restrictions. By assessing the structure, function, and (critically) effectiveness of salary-history bans, this Comment finds that there is sufficient evidence to show that these bans directly and materially serve to shrink the gender-wage gap. Therefore, I conclude that such laws are safely within the constitutional authority of the governments that enact them.*

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## INTRODUCTION

Employers across the country consistently rely on applicants’ prior wages during the hiring process. The question “How much did you earn in your previous job?” has become so commonplace that approximately 30% to 50% of applicants are asked about their pay history during the employment process, and, according to one study, over 80% of these inquiries occurred before a job offer was extended.<sup>1</sup> At first blush, the question seems mundane. It is unsurprising that employers give weight to their applicants’ wage history and future wage expectations. Naturally, having to reveal personal financial information can be uncomfortable, but, for women, this question carries more than discomfort; it comes loaded with generations of wage discrimination.

In the United States, despite countless efforts, the pay inequality between men and women remains a persistent issue.<sup>2</sup> Researchers estimate that the difference in earnings attributable

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<sup>1</sup> See Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence from a Field Experiment*, 39 J. LAB. ECON. 193, 208–09 (2021).

<sup>2</sup> Although the existence of a gender-wage gap is generally accepted, its cause is a topic of controversy. There is little doubt that factors other than discrimination contribute to the wage gap. These factors may include gender differences in measures of human capital—such as experience, education, industry (particularly those with labor monopsony), and career interruptions—as well as decisions about work-life balance and child-rearing. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 797–804 (2017); CONSAD RSCH. CORP., AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN 35–36 (2009). However, no study can account for the entire gap, and debate remains about whether the residual, unexplained portion of the gap is caused by gender discrimination or by some other factor. See, e.g., ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS 70–71, 186 (2007); CONSAD RSCH. CORP., *supra*, at 36. This Comment does not—and need not—take a position on the correct explanation of the gap. Rather, it premises its discussion on the uncontroverted facts that (1) a gender-wage gap exists and (2) some legislatures—determining that the gap is a product of discrimination—have articulated an interest in closing it. Because this Comment concerns legislation passed with that interest in mind, it defers to the legislatures’ judgment about the gap’s cause.

to gender ranges from 17% to 33%.<sup>3</sup> Based on these estimates, perhaps the most commonly heard statistic is that women earn 77 cents for every dollar earned by men, though this figure varies.<sup>4</sup>

In light of this inequality, scholars have identified the salary-history inquiry as a practice that perpetuates wage disparity by anchoring women to discriminatory pay as they move from job to job.<sup>5</sup> In other words, prior discriminatory wages influence future wages through salary questioning, thereby creating a “sticky gap.”<sup>6</sup> In response, some advocates have sought to prohibit employers from asking job applicants about their prior pay.

Although salary-history information can create a discriminatory effect, it is not used exclusively for discriminatory purposes. This information can provide employers with a metric to approximate applicants’ productivity.<sup>7</sup> It might also help employers determine reservation wages (the lowest pay that an applicant would be willing to accept for the job).<sup>8</sup> Laws preventing salary-history inquiries (“salary-history bans”) could therefore impose potentially significant costs on even nondiscriminatory employers.

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<sup>3</sup> See Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 553 (2020); Sinha, *supra* note 1, at 2, 6; Torie Abbott Watkins, Note, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should Be Ousted as a Factor Other Than Sex*, 103 MINN. L. REV. 1041, 1048 (2018); Jeff Meli & James C. Spindler, *Salary History Bans and Gender Discrimination* 4 (Univ. Tex. L. & Econ. Rsch., Working Paper No. E587, 2019); Recent Legislation, *Equal Pay Legislation—Oregon Bans Employers from Asking Job Applicants About Prior Salary*, 131 HARV. L. REV. 1513, 1513 (2018) (noting a gender-pay gap in Oregon of 21% (citing *Table S2419: Class of Worker by Sex and Median Earnings in the Past 12 Months (in 2016 Inflation-Adjusted Dollars) for the Full-Time, Year-Round Civilian Employed Population 16 Years and Over*, U.S. CENSUS BUREAU, <https://perma.cc/55HV-3NKE> (select “S2419” as table name and “Oregon” as state))).

<sup>4</sup> Meli & Spindler, *supra* note 3, at 4. For women of color, this gap can be even wider. According to one overview of wage disparity statistics, “[s]ince 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.” Elizabeth Lester-Abdalla, Note, *Salary History Should Be Her Story: Upholding Regulations of Salary History Through a Commercial Speech Analysis*, 60 WM. & MARY L. REV. 701, 703 (2018).

<sup>5</sup> See Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California’s Salary History Ban* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27054, 2020) (citation omitted) (noting that proponents of salary-history bans “have concluded that whatever has caused discrimination in the past continues to be perpetuated by questions about current salaries that are commonplace for job applicants in today’s labor markets”).

<sup>6</sup> Lobel, *supra* note 3, at 553.

<sup>7</sup> See Barach & Horton, *supra* note 1, at 2.

<sup>8</sup> See James Bessen, Erich Denk & Chen Meng, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* 4, (B.U. Sch. of L., Pub. L. & Legal Theory Paper No. 20-19, 2020); Sarah Brown & Karl Taylor, *Reservation Wages, Expected Wages and Unemployment*, 119 ECON. LETTERS 276, 276–77 (2013).

In the last decade, this tension between employers and salary-history ban proponents has led to numerous legal conflicts. First, equal pay advocates turned to courts, arguing that the Equal Pay Act<sup>9</sup> (EPA) proscribes salary-history inquiries. This argument had mixed success, however, due to a circuit split over a provision in the EPA that provides an exception for pay disparities caused by “a factor other than sex.”<sup>10</sup> A second approach was to pursue legislative redress by pushing state and local governments to incorporate salary-history bans into existing equal pay legislation. This effort quickly gained traction. In just four years, over forty states and localities have adopted salary-history bans in some form.<sup>11</sup> But in response to this quickly swelling wave of salary-history bans, business groups have actively fought to maintain their ability to conduct salary-history inquiries.<sup>12</sup>

Recently, the debate between salary-history-ban proponents and employers culminated in a Third Circuit case that raised a new question of law: Do salary-history bans violate the First Amendment?

In some respects, this question is one arising out of simple legal strategy—for employers seeking to stem the growing tide of salary-history bans, asserting a constitutional right to solicit this information from applicants is a powerful vehicle for doing so. But this claim also tests the boundaries of the commercial speech doctrine, highlighting the tension between employer speech rights and the government interest in eradicating wage disparity. This Comment seeks to resolve this tension by navigating the often-ambiguous commercial speech doctrine. I endeavor, first, to explain why salary-history bans should be understood as a regulation of commercial speech and, second, to demonstrate how these bans would withstand the intermediate scrutiny to which they would be subjected. This analysis requires an in-depth look at how salary-history bans operate so as to prove that the bans are effective at directly advancing the government’s interest in closing the wage gap.

To approach this argument, this Comment will proceed in four parts. Part I describes the rise of state and local efforts to ban salary-history inquiries. With a growing number of salary-history

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<sup>9</sup> Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. §§ 201–219).

<sup>10</sup> See *infra* Part I.A (introducing the EPA circuit split and discussing its impact on the salary-history-ban movement).

<sup>11</sup> See *infra* Part I.A.

<sup>12</sup> See *infra* Part I.C.

bans, it is useful to detail how tensions rose and why the First Amendment is being used to push against the movement. Part II focuses on the test for understanding when a regulation impermissibly restricts commercial speech. This Part also explains how courts determine whether speech is commercial and, importantly, why salary-history bans are properly assessed under the commercial speech framework. Part III then provides an analysis of salary-history bans, paying particular attention to whether these laws directly advance the government interest in reducing the pay gap. In this Part, I argue in favor of the theoretical strengths of these laws, while also pointing out the deficiencies in the arguments that salary-history bans are yet another form of ban-the-box legislation that will backfire against women. I further highlight early data indicating that banning salary-history inquiries likely has a net positive effect for reducing wage disparity, lending strong support for the conclusion that these laws directly and materially advance the government interest. A final Part concludes that salary-history bans do not violate the First Amendment.

## I. SALARY-HISTORY BANS AND THEIR OPPOSITION

### A. The Movement to Prohibit Salary-History Inquiries

The gender-wage gap is not a new phenomenon. Legislative efforts to correct wage disparities emerged as early as 1945, when Congress considered the Women's Equal Pay Act.<sup>13</sup> Though the 1945 Act failed to pass, throughout the following decades, the issue of equal pay received consistent congressional attention.<sup>14</sup> Eventually, in 1963, Congress passed the EPA, which "prohibit[ed] discrimination on account of sex in the payment of wages."<sup>15</sup> In the years that followed, the gender-wage gap closed significantly. In 1962, shortly before the EPA was passed, median earnings for women were 40% less than those for men.<sup>16</sup> By 2007, that gap had been reduced to 19.8%.<sup>17</sup> Since then, however, the wage gap has

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<sup>13</sup> See S. Rep. No. 1576, at 1–2 (1946).

<sup>14</sup> See Janet A. Johnson, *The Equal Pay Act of 1963: A Practical Analysis*, 24 *DRAKE L. REV.* 570, 572 (1975).

<sup>15</sup> 77 Stat. at 56.

<sup>16</sup> U.S. CENSUS BUREAU, SER. P-60, NO. 41, *INCOME OF FAMILIES AND PERSONS IN THE UNITED STATES: 1962*, at 2 (1963).

<sup>17</sup> *CONSAD RSCH. CORP.*, *supra* note 2, at 4. Whether the EPA was responsible for this gap reduction is a subject for debate, but at least some research suggests that it had a favorable impact on women's earnings. See Blau & Kahn, *supra* note 2, at 847–49;

been largely stagnant, with current estimates of the overall wage gap showing that the average woman earns between 80 and 83 cents for each dollar earned by a man.<sup>18</sup>

Although the EPA generally bars employers from paying disparate wages for equal work—a practice that naturally contributes to the overall wage gap—the act creates an exception for distinctions “made pursuant to (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.”<sup>19</sup> But these apparently neutral bases for setting wages may nevertheless perpetuate the pay gap. This Comment discusses just one of these potentially pernicious practices: the salary-history inquiry.

In order to successfully prohibit salary-history inquiries under the EPA, ban proponents were tasked with demonstrating that pay history is not a “factor other than sex” to justify a pay discrepancy. In a series of lawsuits, opponents to salary-history inquiries argued that, because a woman’s salary history may reflect past wage discrimination, it is impermissible under the EPA to use that information to set future wages.<sup>20</sup> However, this effort quickly became entangled in a broader circuit split over the application of the EPA’s “factor other than sex” exception. On one side of this split, the Ninth Circuit says that this factor needs to be job-related—“experience, educational background, ability, or prior job performance,” for example.<sup>21</sup> On the other side, the Seventh and Eighth Circuits broadly interpret the exception to cover anything other than a purely gender-based differential.<sup>22</sup> And in the

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Suzanne M. Crampton, John W. Hodge & Jitendra M. Mishra, *The Equal Pay Act: The First 30 Years*, 26 PUB. PERS. MGMT. 335, 339–41 (1997).

<sup>18</sup> Lobel, *supra* note 3, at 553–54; see also Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016), <https://perma.cc/28T5-497N>.

<sup>19</sup> 29 U.S.C. § 206(d)(1).

<sup>20</sup> See, e.g., *Irby v. Bittick*, 830 F. Supp. 632, 636 (M.D. Ga. 1993), *aff'd*, 44 F.3d 949 (11th Cir. 1995); *Taylor v. White*, 321 F.3d 710, 717 (8th Cir. 2003) (“Taylor also argues that, as a matter of law, an employer should not be allowed to rely on prior salary or a salary retention policy as a defense under the EPA because reliance on such factors permits the perpetuation of unequal wage structures.”); Appellee’s Answering Brief at 32–33, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372) (“Use of prior salary alone . . . essentially continues illegal practices of other employers and perpetuates the historical pay gap.”).

<sup>21</sup> *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018) (en banc), *vacated on other grounds*, 139 S. Ct. 706 (2019).

<sup>22</sup> See *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (“The fourth affirmative defense . . . is a broad ‘catch-all’ exception and embraces an almost limitless number of

middle, the Eleventh Circuit holds that “the ‘factor other than sex’ exception applies when the disparity results from unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business.”<sup>23</sup>

Because of this split, courts disagree about whether salary history is an acceptable factor to justify a pay discrepancy. Thus, in the Ninth Circuit, opponents to salary-history inquiries successfully argued that, because salary history bears only an “attenuated” relationship to factors such as “work experience, ability, performance, or any other job-related quality,” the EPA does not permit prior wages to justify gender-wage discrepancies.<sup>24</sup> Conversely, the Seventh Circuit—maintaining that a “factor other than sex” need not be business-related—held that, because market wages encompass more than discrimination, salary-history information can be used to justify a pay discrepancy under the EPA.<sup>25</sup> Taking the middle approach, the Eleventh Circuit held that salary history can be relied on so long as it is used in combination with some other job-related factor.<sup>26</sup>

Perhaps recognizing that the EPA circuit split creates a barrier for a uniform, workable answer to the legality of salary-history inquiries, opponents to the practice have recently sought to directly regulate it. In 2016, Massachusetts became the first state to pass a law explicitly prohibiting employers from asking applicants about their past wages.<sup>27</sup> A wave of cities and states soon followed Massachusetts in banning salary-history inquiries.<sup>28</sup> Currently, twenty states and territories have imposed some form

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factors, so long as they do not involve sex.”); *Taylor*, 321 F.3d at 717–18 (“On its face, the EPA does not suggest any limitations to the broad catch-all ‘factor other than sex’ affirmative defense. . . . [W]e are reluctant to establish any per se limitations . . . by carving out specific, non-gender-based factors for exclusion from the exception.”).

<sup>23</sup> See *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

<sup>24</sup> *Rizo*, 887 F.3d at 467.

<sup>25</sup> See *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466, 469–70 (7th Cir. 2005).

<sup>26</sup> See *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (“[A]n Equal Pay Act defendant may successfully raise the affirmative defense of ‘any other factor other than sex’ if he proves that he relied on prior salary *and* experience in setting a ‘new’ employee’s salary.” (alteration in original)).

<sup>27</sup> Stacy Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, N.Y. TIMES (Aug. 2, 2016), <https://perma.cc/8HCD-LJ5M>.

<sup>28</sup> See Associated Press, *What’s Your Past Salary? Lawmakers Want to Ban the Question*, IDAHO BUS. REV. (May 17, 2017), <https://perma.cc/4G34-242X> (“Massachusetts, New York City and Philadelphia have passed laws that bar employers from asking applicants about their salary history. And several states, including Idaho, California, Mississippi and Pennsylvania, have proposed similar legislation this year.”).

of salary-history ban.<sup>29</sup> An additional twenty-one localities have done the same, including New York City,<sup>30</sup> Philadelphia,<sup>31</sup> Kansas City,<sup>32</sup> and San Francisco.<sup>33</sup>

## B. The Anatomy of a Salary-History Ban

Not all salary-history bans have the same scope, and so it is worth specifying which of these bans are the subject of this Comment. For instance, several bans were created by executive order and extend only to government employers.<sup>34</sup> This Comment does not address those self-imposed bans. Instead, it focuses only on salary-history-ban legislation that regulates private employers. In this context, salary-history bans are sufficiently similar to avoid the necessity of addressing the particularities of each individual state and local ban. Instead, a selective sampling of these laws will adequately illuminate the potentially relevant differences among salary-history bans more generally.

The biggest difference in the way that salary-history bans operate is the extent to which these laws permit employers to consider voluntarily disclosed salary-history information. For example, in Massachusetts—the first state to enact a salary-history ban—an employer may not request wage-history information from an applicant or the applicant’s current or former employer.<sup>35</sup> But an employer in Massachusetts may use voluntarily disclosed

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<sup>29</sup> See ALA. CODE § 25-1-30 (2019); CAL. LAB. CODE § 432.3 (West 2019); COLO. REV. STAT. § 8-5-102 (2021); CONN. GEN. STAT. § 31-40z (2019); DEL. CODE ANN. tit. 19, § 709B (West 2017); HAW. REV. STAT. § 378-2.4 (2019); 820 ILL. COMP. STAT. 112/10 (2019); ME. STAT. tit. 5, § 4577 (2019); MD. CODE ANN., LAB. & EMPL. § 3-304.2 (West 2020); MASS. GEN. LAWS ch. 149, § 105A (2018); MICH. EXEC. DIRECTIVE 2019-10; N.J. STAT. ANN. § 34:6B-20 (West 2020); N.Y. LAB. L. § 194-a (McKinney 2020); N.C. EXEC. ORDER No. 93 (Apr. 2, 2019); OR. REV. STAT. § 652.220 (2020); PA. EXEC. ORDER No. 2018-03; VT. STAT. ANN. tit. 21, § 495m (2018); Alena Yarmosky, *Governor Northam Announces Employment Equity Initiative for State Agencies*, OFF. VA. GOVERNOR, (June 20, 2019), <https://perma.cc/TAF8-BKU3>; WASH. REV. CODE § 49.58.100 (2019); P.R. LAWS ANN. tit. 29, § 254 (2020).

<sup>30</sup> N.Y.C., N.Y., CODE § 8-107(25) (2017).

<sup>31</sup> PHILA., PA., CODE § 9-1131(2) (2017).

<sup>32</sup> KAN. CITY, MO., CODE § 38-102 (2019).

<sup>33</sup> S.F., CAL., POLICE CODE art. 33J, §§ 3300J.1–3300J.8 (2018). For a full account of states and localities with laws concerning salary-history inquiries, see *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions*, HR DIVE (Aug. 7, 2020), <https://perma.cc/6J5A-QVFV>.

<sup>34</sup> See, e.g., PA. EXEC. ORDER No. 2018-03; Yarmosky, *supra* note 29; CITY OF NEW ORLEANS MAYOR’S OFF., MAYOR LANDRIEU ISSUES EXECUTIVE ORDER TO ADDRESS EQUAL PAY FOR WOMEN (Jan. 25, 2017); SALT LAKE CITY HUM. RES., POLICY 3.01.10: GENDER PAY EQUITY (Mar. 1, 2018).

<sup>35</sup> MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2018).

or publicly available information about an applicant's wage history to set future wages, so long as that employer did not induce the initial disclosure.<sup>36</sup> New Jersey similarly allows employers to consider pay history when determining an applicant's salary, but only if the applicant voluntarily disclosed his or her pay history.<sup>37</sup>

In a minority of states—like Illinois, for example—employers may not consider even voluntarily disclosed wage history.<sup>38</sup> Though slight, this difference is worth noting because, as will be discussed in Part III.D, it might limit applicants' strategic options. Specifically, by making voluntary disclosure ineffective, the Illinois approach creates a different wage-bargaining environment than that of Massachusetts and New Jersey by restricting applicants' ability to leverage their prior wages when advantageous.<sup>39</sup>

Notwithstanding this variation in the extent to which employers are permitted to rely upon voluntarily disclosed information, salary-history bans are remarkably similar. For example, no ban—even in states with more protective disclosure provisions—prevents an employer from asking prospective employees about their desired or expected wages, so long as this question is not posed in such a way as to intentionally elicit salary history.<sup>40</sup> And all salary-history bans ultimately serve the same functional goal: prohibiting employers from soliciting an applicant's wage history. This broad similarity in salary-history bans consequently gives rise to the possibility of a uniform solution to the salary-history inquiry debate without the need to resolve the deeper EPA circuit split. Recognizing this potential, employers seeking to preserve the salary-history inquiry are left with two options: either prevent salary-history bans from spreading further or find a solution to defeat them altogether. This Comment now turns its attention to the ways in which employers have sought to protect their ability to ask applicants about their past salaries.

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<sup>36</sup> See OFF. OF THE MASS. ATT'Y GEN., AN ACT TO ESTABLISH PAY EQUITY: OVERVIEW AND FREQUENTLY ASKED QUESTIONS 14 (2018) (noting that an employer may seek an applicant's wage information from a public source); MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2018) (allowing an employer to confirm an applicant's voluntarily disclosed salary-history information and to request such information after making an employment offer with compensation).

<sup>37</sup> N.J. STAT. ANN. § 34:6B-20(h) (West 2020).

<sup>38</sup> See 820 ILL. COMP. STAT. 112/10(b-20) (2019).

<sup>39</sup> See *infra* Part III.D. Although this distinction is worth noting, the difference is not dispositive given the other arguments in Part III.

<sup>40</sup> See OFF. OF THE MASS. ATT'Y GEN., *supra* note 36, at 13–14.

### C. Opposition to Salary-History Bans

As states and localities continued to pass salary-history bans, pushback mounted against these measures.<sup>41</sup> Employers emphasized that, from a practical standpoint, prohibiting salary inquiries creates a significant burden. These employers want to get the most productive labor at the lowest wage, and knowing in advance what an applicant is likely to accept will help an employer identify optimal candidates and offer employment at a competitive rate.<sup>42</sup> Moreover, companies with a multistate presence argued the patchwork of regulations creates high compliance costs that would negatively impact businesses.<sup>43</sup>

Salary-history-ban opponents also argued that the bans are an ineffective—and possibly counterproductive—way to promote wage equality. The thrust of this argument is that, given the complex and multifaceted nature of the gender-wage gap, prohibiting employers from accessing wage-history information is an oversimplified solution.<sup>44</sup> This simplicity created the concern that the bans could lead to unintended consequences that might harm the women that the laws were enacted to protect. As momentum built for the effort to eliminate the salary-history inquiry, Professor Jennifer Doleac was frequently in the news to voice her concern over the potential adverse impact of these laws.<sup>45</sup> She argued that without information about a candidate's prior wages, employers—who clearly value this information—will make assumptions that might harm women.<sup>46</sup> For employers hoping to maintain the ability to gather wage-history information, the takeaway was that, although wage equality is an important issue, salary-history

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<sup>41</sup> See Martha T. Moore, *'What's Your Current Salary?' 'None of Your Business!'*, PEW CHARITABLE TRS. (June 25, 2018), <https://perma.cc/E23Y-7P9L>.

<sup>42</sup> See Paul Davidson, *'What's Your Salary?' Becomes a No-No in Job Interviews*, USA TODAY (Apr. 27, 2017), <https://perma.cc/95DU-YNZG> (“[M]any companies use salary history to set pay and manage their costs. ‘It’s hard to figure out how to pay somebody a fair amount.’ . . . ‘You’re looking at getting the best employee you can but . . . [also] trying to save the company money.’”); Associated Press, *supra* note 28.

<sup>43</sup> Moore, *supra* note 41.

<sup>44</sup> See *id.* (“‘Right now, we can’t even agree what’s causing’ pay inequity.” (quoting Mike Aitken, Senior Vice President of Membership, Soc’y for Hum. Res. Mgmt.)).

<sup>45</sup> See, e.g., *id.*; see also Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. TIMES (Feb. 16, 2018), <https://perma.cc/3PG3-EEG9>; Oliver Staley, *Amazon Won’t Ask Your Old Salary, a Rule That May Actually Hurt Women*, QUARTZ (Jan. 18, 2018), <https://perma.cc/9Q8F-689D>.

<sup>46</sup> See Staley, *supra* note 45. This Comment will return to the merit of this argument later. See *infra* Part III.D.

bans' uncertain benefits do not justify imposing additional hiring costs.<sup>47</sup>

Having raised these concerns, employers and sympathetic governments endeavored to stop the proliferation of salary-history bans. This opposition has taken many forms. In some instances, the governor vetoed salary-history-ban legislation.<sup>48</sup> In other cases, state legislatures have moved to preempt localities from passing salary-history bans.<sup>49</sup> Recently, some business owners have turned to a third approach: challenging salary-history bans under the First Amendment. The next Section sketches the contours of this novel First Amendment claim.

#### D. The First Amendment Challenge

The first time that employers claimed a First Amendment right to ask employees about their prior wages was in a lawsuit seeking to invalidate Philadelphia's wage equity ordinance. Enacted in 2018, this ordinance positioned the city as one of the earliest adopters of the salary-history ban.<sup>50</sup> In all respects, the ordinance was a typical salary-history ban, similar to the later-enacted New Jersey law discussed in Part I.B.<sup>51</sup> Predictably, many members of the business community objected to the new regulation.<sup>52</sup> In light of those objections, the Philadelphia

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<sup>47</sup> See Moore, *supra* note 41 ("Prohibiting employers from asking about a previous salary 'doesn't get to the root of the problem and just causes more problems in the hiring process.'" (quoting Wendy Block, Vice President of Bus. Advoc. and Member Engagement, Mich. Chamber of Com.)).

<sup>48</sup> See H.B. 211, 166th Gen. Ct., Reg. Sess. (N.H. 2019) (failing to override the Governor's veto); Dan Petrella, *New Law Will Bar Illinois Employers from Asking Job Applicants for Pay History*, CHI. TRIB. (July 31, 2019), <https://perma.cc/D6ET-BP37> (noting that, before Governor J.B. Pritzker signed the Illinois salary-history ban, former Governor Bruce Rauner twice vetoed similar legislation).

<sup>49</sup> See MICH. COMP. LAWS § 123.1384 (2018); WIS. STAT. § 103.36(3)(a) (2018); see also Jeffrey Fritz, *Banning the Bans: Michigan and Wisconsin Buck the Salary History Ban Trend*, JD SUPRA (Apr. 5, 2018), <https://perma.cc/9W97-A5Z5>; Lobel, *supra* note 3, at 570–71 (noting that a handful of other states have attempted, but failed, to enact laws preempting local attempts to pass salary-history bans).

<sup>50</sup> See Lisa Nagele-Piazza, *Philadelphia Employers Can't Ask About Salary History*, SHRM (Feb. 9, 2017), <https://perma.cc/ZK9X-4SPP>.

<sup>51</sup> See PHILA., PA., CODE § 9-1131(1) (2017) (providing justification for the wage ordinance by citing the gender-wage gap, the slow progress in closing it, and the role that reliance on past wages has on perpetuating inequality).

<sup>52</sup> See Complaint at 2, Chamber of Com. for Greater Phila. v. City of Philadelphia (*Chamber I*), 319 F. Supp. 3d 773 (E.D. Pa. 2018) (No. 17-1548) ("[T]he Chamber—like the business community it represents—strongly supports the goal of eliminating gender-based wage discrimination. . . . The Ordinance, however, . . . will not advance gender wage

Chamber of Commerce (“Chamber”) set out to defeat the new law. Filing in federal court, the Chamber argued that, by prohibiting employers from asking for applicants’ wage-history information, the Philadelphia ordinance violated the free speech rights of the Chamber’s member businesses.<sup>53</sup>

In *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia (Chamber I)*,<sup>54</sup> the district court held that the wage ordinance violated the First Amendment. However, it declined to review the salary-history ban with the heightened scrutiny that would be applied to traditional speech regulations. Instead, it determined that the burdened speech—asking about salary history—is “commercial speech,” which is subject to only intermediate scrutiny. Nevertheless, even applying this lesser scrutiny, the court held that the regulation was improper, finding that the city had failed to offer sufficient proof that the bans would reduce gender-wage disparity.<sup>55</sup>

Last year, however, in *Greater Philadelphia Chamber of Commerce v. City of Philadelphia (Chamber II)*,<sup>56</sup> the Third Circuit reversed. Although the appellate court agreed that the Philadelphia ordinance implicated commercial speech (and thus was subject to intermediate scrutiny),<sup>57</sup> it disagreed with the district court’s conclusion that the government had not met its burden for justifying the restriction.<sup>58</sup> This decision delivered a significant win to salary-history ban advocates. Even so, neither *Chamber I* nor *Chamber II* sets out a definitive resolution for future First Amendment challenges to salary-history bans, offering reasoning largely limited to arguments about party- and case-specific facts. In the sections to follow, this Comment will seek to provide that resolution. In the process, it will return to the particularities of the *Chamber I* and *Chamber II* decisions. But first, it is important to understand what the commercial speech doctrine is and how it limits the speech protections for salary-history inquiries.

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equality, but instead will chill the protected speech of employers and immeasurably complicate their task of making informed hiring decisions.”).

<sup>53</sup> See *id.* at 13–17.

<sup>54</sup> 319 F. Supp. 3d 773 (E.D. Pa. 2018).

<sup>55</sup> See *id.* at 790.

<sup>56</sup> 949 F.3d 116 (3d Cir. 2020).

<sup>57</sup> See *id.* at 137–38.

<sup>58</sup> See *id.* at 142–43.

## II. CATEGORIZING COMMERCIAL SPEECH

As alluded to above, one of the points of agreement between the *Chamber I* and *Chamber II* decisions was the determination that the Philadelphia wage ordinance regulated only commercial speech. For the purposes of this Comment, this distinction is a significant one: commercial speech has a unique place in First Amendment jurisprudence in that it receives First Amendment protection but not as much as other forms of protected speech. Thus, in order to later understand the degree to which salary-history inquiries are protected by the First Amendment, this Part provides an overview of the doctrine of commercial speech. It begins by discussing the origin of the commercial speech distinction and the intermediate scrutiny test according to which commercial speech regulations are reviewed. It next reviews the body of commercial speech jurisprudence to highlight the often-ambiguous line between commercial and noncommercial speech before assessing whether salary-history inquiries are properly characterized as commercial speech. Once these concepts have been introduced, this Part returns to *Chamber I* and *Chamber II* to understand how courts have, in at least one instance, applied the commercial speech doctrine to salary-history bans. This discussion will set up Part III of this Comment, which evaluates whether salary-history bans, on the whole, can withstand First Amendment scrutiny.

### A. Emergence of the Commercial Speech Doctrine

The modern commercial speech doctrine developed out of the 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>59</sup> In that case, the Supreme Court struck down a Virginia law that prohibited pharmacists from advertising prescription drug prices.<sup>60</sup> In doing so, the Court held that even “speech which does ‘no more than propose a commercial transaction’” is protected by the First Amendment.<sup>61</sup> This holding was a marked change from the Court’s earlier jurisprudence, which had held—with little explanation—that “the Constitution imposes no [ ] restraint on government as respects purely

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<sup>59</sup> 425 U.S. 748 (1976); see also 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, 741 (2003).

<sup>60</sup> See *Va. State Bd. of Pharmacy*, 425 U.S. at 750–52, 770.

<sup>61</sup> *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 385 (1973)).

commercial advertising.”<sup>62</sup> Despite the Court’s decision that commercial speech is protected by the First Amendment, it continued to recognize a distinction between commercial speech and other forms of protected speech.<sup>63</sup> This holding put commercial speech in an awkward middle ground where the Court “afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”<sup>64</sup> Not long after *Virginia State Board of Pharmacy*, the Court would attempt to define the scope of commercial speech protections by balancing “the nature both of the expression and of the governmental interests served by its regulation.”<sup>65</sup>

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>66</sup> the Supreme Court developed a multi-part test to assess whether a law restricting commercial speech can be upheld. First, a court determines whether the speech is “misleading [or] related to unlawful activity.”<sup>67</sup> “The government may ban forms of communication more likely to deceive the public than to inform it . . . or commercial speech related to illegal activity.”<sup>68</sup> But if the speech is neither misleading nor unlawful, then “the government’s power is more circumscribed.”<sup>69</sup> At this point, the burden switches to the government to assert “a substantial interest to be achieved by restrictions on commercial speech.”<sup>70</sup> If the government can articulate a substantial interest, then the court evaluates the law’s impact. Specifically, the court asks (1) whether the regulation “directly advances the governmental

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<sup>62</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); see also Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627, 627–29 (1990) (“Without citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen’s contentions, the Court found it clear as day that commercial speech was not protected by the first amendment.”).

<sup>63</sup> See *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (“In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ . . . and other varieties.” (quoting *Pittsburgh Press Co.*, 413 U.S. at 385)).

<sup>64</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

<sup>65</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

<sup>66</sup> 447 U.S. 557 (1980).

<sup>67</sup> See *id.* at 564.

<sup>68</sup> *Id.* at 563–64.

<sup>69</sup> *Id.* at 564.

<sup>70</sup> *Id.*

interest asserted”<sup>71</sup> and (2) whether it is “not more extensive than [ ] necessary to serve that interest.”<sup>72</sup> But before a court can apply the *Central Hudson* test, it must first determine whether the speech interest at issue should be considered within the framework of commercial speech to begin with.

#### B. When Speech Is Commercial

Categorizing commercial speech is not always a simple task, and the Court has never drawn a clear line between commercial and noncommercial speech. The Court in *Virginia State Board of Pharmacy* noted that “speech which does ‘no more than propose a commercial transaction,’” clearly constitutes commercial speech.<sup>73</sup> Later, the *Central Hudson* Court advanced a broader approach. At issue in *Central Hudson* was a New York regulation that “completely ban[ned] promotional advertising by an electrical utility.”<sup>74</sup> The Court, in holding that the promotional advertising was a form of commercial speech, provided two ways to distinguish commercial speech from other protected forms. First, commercial speech is “expression related solely to the economic interests of the speaker and its audience.”<sup>75</sup> Second, borrowing language used in *Virginia State Board of Pharmacy*, the Court acknowledged “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”<sup>76</sup> In combination, the *Central Hudson* approach extended the reach of the commercial speech doctrine beyond that which proposed no more than a commercial transaction.

But not all commercial speech can be identified as easily as *Virginia State Board of Pharmacy* and *Central Hudson* seemed to suggest.<sup>77</sup> In the case of *Bolger v. Youngs Drug Products Corp.*,<sup>78</sup> the Court was tasked with determining whether the First Amendment proscribed a law that prohibited the direct mailing

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<sup>71</sup> *Central Hudson*, 447 U.S. at 566.

<sup>72</sup> *Id.*

<sup>73</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co.*, 413 U.S. at 385).

<sup>74</sup> *Central Hudson*, 447 U.S. at 558.

<sup>75</sup> *Id.* at 561.

<sup>76</sup> *Id.* at 562 (quoting *Ohralik*, 436 U.S. at 455–56).

<sup>77</sup> See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 637 (1985) (“More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech.”).

<sup>78</sup> 463 U.S. 60 (1983).

of unsolicited contraceptive advertising.<sup>79</sup> The plaintiff, a manufacturer and distributor of contraceptives, sought to mail to the general public three types of materials: “flyers promoting a large variety of products available at a drugstore, including prophylactics”; “flyers exclusively or substantially devoted to promoting prophylactics”; and “informational pamphlets discussing the desirability and availability of prophylactics.”<sup>80</sup> The Court noted that the advertising pamphlets at issue in the case fell within the “no more than propose a commercial transaction” language, but it found that this distinction was inadequate for the informational pamphlets.<sup>81</sup> Instead, the Court identified three characteristics of these pamphlets: that they (1) contained advertisements, (2) referenced a specific product, and (3) had an economic motivation. Though any of these factors individually might not be sufficient to render the materials to be commercial speech, the Court found that the presence of all three of these factors “provide[d] strong support for the . . . conclusion that the informational pamphlets [were] properly characterized as commercial speech.”<sup>82</sup>

Ten years after *Bolger*, in *City of Cincinnati v. Discovery Network, Inc.*,<sup>83</sup> the Court once again faced the “difficulty of drawing bright lines that [ ] clearly cabin commercial speech in a distinct category,” and it once again failed to draw those lines.<sup>84</sup> Rejecting the *Central Hudson* approach that would apply the commercial speech distinction to a “somewhat larger category of . . . ‘expression related solely to the economic interests of the speaker and its audience,’” the Court endorsed a notion that the “core” commercial speech is that which proposes no more than a commercial transaction.<sup>85</sup> But the Court offered little guidance for how to identify this speech in practice. In part, it appeared to adopt *Bolger*’s approach: that for “close[ ] question[s],” commercial speech should be identified by carefully examining the commercial nature of the particular speech interest.<sup>86</sup> But it also showed some inclination to adopt a narrow approach that would take into account only whether there was a proposal of a

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<sup>79</sup> See *id.* at 61.

<sup>80</sup> *Id.* at 62.

<sup>81</sup> *Id.* at 66 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762).

<sup>82</sup> *Id.* at 67.

<sup>83</sup> 507 U.S. 410 (1993).

<sup>84</sup> *Id.* at 419.

<sup>85</sup> *Id.* at 422–23 (quoting *Central Hudson*, 447 U.S. at 561).

<sup>86</sup> See *id.* (citing *Bolger*, 463 U.S. at 66–67).

commercial transaction.<sup>87</sup> Ultimately, however, the Court declined to definitively resolve the ambiguity in the commercial speech definition, emphasizing instead that “[t]here is no doubt a ‘commonsense’ basis for distinguishing between” what is and is not “core” commercial speech.<sup>88</sup> “[T]he difference,” it noted, “is a matter of degree.”<sup>89</sup>

As the foregoing demonstrates, the Court has left much to be desired in the search for a clear definition of commercial speech. As a baseline, the Court has identified that the “core” of commercial speech is that which “does ‘no more than propose a commercial transaction.’”<sup>90</sup> But the Supreme Court has, in large part, left it to the lower courts to identify commercial speech using their common sense.<sup>91</sup> And “[b]ecause of the difficulty of drawing clear lines between commercial and non-commercial speech,” courts will typically make the distinction either by taking a “fact-driven” approach—using the *Bolger* factors as a guideline—or by analogical reasoning.<sup>92</sup> As the next Section will discuss, salary-history inquiries are best understood as a form of commercial speech, regardless of whether a court takes a fact-driven approach or relies on analogous cases.

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<sup>87</sup> *Id.* at 423 (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–474 (1989)); see also *Zauderer*, 471 U.S. at 637 (“Our commercial speech doctrine rests heavily on ‘the “common-sense” distinction between speech proposing a commercial transaction . . . and other varieties of speech.’” (quoting *Ohralik*, 436 U.S. at 455–56)).

<sup>88</sup> *Discovery Network*, 507 U.S. at 423.

<sup>89</sup> *Id.*

<sup>90</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co.*, 413 U.S. at 385); see also Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 55–61 (describing the definitional challenges with the commercial speech doctrine).

<sup>91</sup> See *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (“Commercial speech is ‘usually defined as speech that does no more than propose a commercial transaction.’ . . . Courts view ‘this definition [as] just a starting point,’ however, and instead try to give effect to ‘a “common-sense distinction” between commercial speech and other varieties of speech.’”) (first quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); and then quoting *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014)).

<sup>92</sup> *Id.* at 1115–20 (quoting *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (applying the *Bolger* factors); see also, e.g., *N.Y. State Ass’n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 840–41 (2d Cir. 1994) (reasoning that a geographically limited nonsolicitation statute is “properly classified as commercial” because “[o]ther courts that have considered similar restrictions have concluded that the solicitation of homeowners by realtors seeking the right to list and sell residential real estate ‘is primarily aimed at proposing a commercial transaction’” (quoting *Curtis v. Thompson*, 840 F.2d 1291, 1297 (7th Cir. 1988) (collecting cases))).

### C. Casting Salary-History Inquiries as Commercial Speech

Even though the Supreme Court has yet to announce whether speech in the context of an employment interview is commercial speech,<sup>93</sup> it is highly likely that a court would review salary-history bans under the commercial speech framework. As a starting point, the transactional nature of an employment interview and wage negotiation should be sufficient to tip the scale in favor of scrutinizing these inquiries under the commercial speech standard. The purpose of a typical job interview is to negotiate the commercial exchange of labor. Although there may be some complexity added when these interactions are intertwined with other forms of protected speech—like political or religious expressions—when they are not, there is strong support for the conclusion that employment interviews, transactions, and other recruitment-related speech are properly characterized as commercial speech.<sup>94</sup>

Moreover, as *Chamber I* and *Chamber II* indicate, courts will likely maintain this understanding of commercial speech in the context of salary-history bans. Despite the Chamber's attempt to convince the court that salary-history inquiries are not commercial speech, both the district and appellate courts disagreed with this argument.<sup>95</sup> In accordance with the reasoning described above, the *Chamber I* court noted that “[The Philadelphia ordinance] prohibits Philadelphia-based employers from asking potential hires about their previous wage history. . . . in the context of a job application or job interview, both of which propose a commercial transaction.”<sup>96</sup> The *Chamber II* court agreed with this conclusion in full.<sup>97</sup> And, despite lacking a directly analogous case, neither court spent a considerable amount of time grappling with the question of whether the commercial speech doctrine applied, lending further support to the idea that a future court, when applying common sense, would come to the same conclusion.

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<sup>93</sup> See Lester-Abdalla, *supra* note 4, at 706.

<sup>94</sup> See Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 47–49 (2016); Norton, *supra* note 59, at 727; see also *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) (“The act of soliciting work as a day laborer may communicate a political message, but the primary purpose of the communication is to advertise a laborer’s availability for work and to negotiate the terms of such work.”).

<sup>95</sup> See *Chamber I*, 319 F. Supp. 3d at 782; *Chamber II*, 949 F.3d at 136–37.

<sup>96</sup> *Chamber I*, 319 F. Supp. 3d at 783.

<sup>97</sup> *Chamber II*, 949 F.3d at 137.

Thus, while the boundary between commercial and noncommercial speech is often ambiguous—arguably “a distinction [ ] with no basis in the Constitution, with no justification in the real world, and that must often be applied arbitrarily in any but the easiest cases”<sup>98</sup>—courts continue to make this distinction. For salary-history bans, it is clear that courts have understood—and likely will continue to understand—that salary-history inquiries are a transactionally motivated form of speech. Therefore, despite ambiguity in the doctrine, this Comment will continue on the sound assumption that salary-history bans are properly analyzed under the commercial speech framework.

### III. CAN SALARY-HISTORY BANS SURVIVE *CENTRAL HUDSON*?

Once speech has been categorized as commercial, it becomes subject to the intermediate scrutiny test articulated in *Central Hudson*. As noted in Part II.A, the *Central Hudson* test has four factors. First, a court must determine whether the speech is misleading or pertains to unlawful activity.<sup>99</sup> In the case of a salary-history inquiry, that is clearly not an issue. Outside the context of any regulated employment matters, there is surely nothing unlawful or misleading about asking a person for their prior pay.<sup>100</sup> Second, the court asks whether the government has asserted a substantial interest underlying the regulation.<sup>101</sup> Here, again, a state or locality would have no trouble demonstrating this factor—the government interest in reducing wage disparity is undoubtedly compelling enough to carry this burden.<sup>102</sup> Unfortunately, at this point, the easy questions have been answered. For commercial speech that is not misleading, coercive, or unlawful, once the government has demonstrated a compelling reason for a speech regulation, the court is tasked with evaluating, third, whether the government has “demonstrate[d] that the challenged

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<sup>98</sup> Kozinski & Banner, *supra* note 62, at 648.

<sup>99</sup> See *Central Hudson*, 447 U.S. at 563–64 (“The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity.” (citations omitted)).

<sup>100</sup> This presumes that the EPA does not prohibit such inquiries, but that question is not the subject of this Comment. See *infra* Part III.A.

<sup>101</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>102</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (ruling that Minnesota’s “compelling interest in eradicating [gender] discrimination” justified an infringement on the right to associate). This point is also acknowledged in *Chamber I*, in which “[t]he parties agree[d] that the City has a substantial interest in promoting wage equity and reducing discriminatory wage disparities.” 319 F. Supp. 3d at 787.

regulation ‘advances the Government’s interest in a direct and material way’<sup>103</sup> and, fourth, whether there is a “narrow tailoring of the challenged regulation to the asserted interest.”<sup>104</sup>

With the standard in mind, it is useful to return a final time to the *Chamber I* and *Chamber II* decisions. As an initial matter, neither case put the first two *Central Hudson* factors into serious contention.<sup>105</sup> Rather, the primary line of disagreement between the courts in *Chamber I* and *Chamber II* pertained to the third *Central Hudson* factor. Specifically, *Chamber I* concluded that that the government had failed to show that the salary-history ban would directly advance the city’s interest in reducing gender-wage inequality.<sup>106</sup> The lower court argued that the government had presented only “unsubstantiated conclusions.”<sup>107</sup> Although the court did not doubt the credentials of the witnesses who testified to the effect of the salary-history ban, it found that the experts’ conclusions were “mostly conjectural in nature” and that they had failed to provide “any study, data, statistics, report, or any other evidence to support the proposition that initially depressed wages reflect discrimination.”<sup>108</sup> The appellate court disagreed. The *Chamber II* court concluded that the city had presented sufficient data to prove its point<sup>109</sup> and that, even if it hadn’t, the city did not need to empirically demonstrate the efficacy of the ordinance;<sup>110</sup> it was sufficient that the city had “made a reasonable judgment that a wage-history ban would further the [ ] goal of closing the gap.”<sup>111</sup> Notice, however, that the conflict between the two courts was largely driven by an evidentiary disagreement. Thus, while these decisions do well to frame the arguments that future courts might need to consider, their reasoning is easily cabined to the facts of the case, leaving the broader constitutionality of these laws unsettled.

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<sup>103</sup> Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (internal quotation marks omitted)).

<sup>104</sup> Greater New Orleans Broad. Ass’n, Inc. v. United States, 527 U.S. 173, 188 (1999).

<sup>105</sup> See *Chamber I*, 319 F. Supp. 3d at 787. Although Philadelphia argued that the wage inquiries were unlawful under the second *Central Hudson* factor, both courts quickly dismissed that argument. See *Chamber II*, 949 F.3d at 142.

<sup>106</sup> *Chamber I*, 319 F. Supp. 3d at 800.

<sup>107</sup> *Id.* at 797.

<sup>108</sup> *Id.*

<sup>109</sup> See *Chamber II*, 949 F.3d at 149.

<sup>110</sup> See *id.*

<sup>111</sup> *Id.* at 143. Though dicta, this willingness to defer to the city’s judgment is consistent with an analysis of novel commercial speech regulations for which substantial evidence might not be available. See *infra* note 133 and accompanying text.

Accordingly, the main contribution that this Comment seeks to provide is a universal discussion about how future courts should apply the direct advancement prong when evaluating challenges to salary-history bans. That discussion will occur in Part III.B–D, but first, it is worth a short digression to review the fourth *Central Hudson* factor: whether salary-history bans, if they do directly advance the government interest, are narrowly tailored in doing so. Consistent with the discussion below, the *Chamber II* court found that the Philadelphia ordinance satisfied this factor because “[t]he Ordinance simply seeks to insulate any discriminatory impact of prior salary levels on subsequent wages,” without otherwise restricting employers’ ability to obtain information about applicants.<sup>112</sup>

#### A. The Narrowly Tailored Prong

The fourth prong of the *Central Hudson* test requires courts to determine whether a government regulation is narrowly tailored to serve a substantial government interest. This prong is not the primary focus of this Comment; however, as it is a necessary hurdle to demonstrate the constitutionality of a salary-history ban, it cannot be ignored. Indeed, opponents to salary-history bans might argue that these laws are not narrowly tailored because they sweep in potentially legitimate questions about salary history.<sup>113</sup>

As other authors have concluded, it is improbable that the government would fail to satisfy the narrowly tailored requirement.<sup>114</sup> First, as will be discussed in Part III.B, salary-history bans are not enacted to target discriminatory intent, but rather to eradicate the discriminatory effect of wage history. In this regard, all salary-history information falls within the scope of the government’s interest.<sup>115</sup> Second, in light of the goal of closing the

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<sup>112</sup> *Chamber II*, 949 F.3d at 154–55.

<sup>113</sup> See Reply Brief for Appellee at 22–25, *Chamber II*, 949 F.3d 116 (3d Cir. 2020) (No. 18-2175).

<sup>114</sup> See Lester-Abdalla, *supra* note 4, at 728–32.

<sup>115</sup> The *Chamber II* court considered, but ultimately disregarded, an argument that the Philadelphia salary-history ban is overbroad because it also applies to male applicants. See 949 F.3d at 155 (“Aside from the clear equal protection implications. . . a system that perpetuates higher salaries for men based on their higher salary histories is no better than one that perpetuates lower salaries for women and minorities based on their lower salary histories.”). Other courts would likely come to the same conclusion. See *Went For It*, 515 U.S. at 632–33 (rejecting an overbreadth argument against a Florida law—designed to protect especially vulnerable accident victims from legal solicitation—even though the law did not “distinguish between victims in terms of the severity of their injuries”).

wage gap, the bans prevent only one specific question in the employment process.<sup>116</sup> To that end, the bans have no impact on the accessibility of any information other than the wage history that legislatures have sought to neutralize. Even under this limitation, employers are still free to ask about salary preferences, and candidates are still largely able to voluntarily disclose their own wage histories.<sup>117</sup> Therefore, salary-history bans do not “seek[ ] to prevent [the information’s] dissemination completely.”<sup>118</sup> For these reasons, salary-history bans are narrowly designed to remove tainted salary-history information from the employment process without impeding an employer’s ability to obtain otherwise necessary information from applicants.

With this prong established, this Comment now shifts its focus to its primary argument that salary-history bans, as a whole, directly advance the government interest in closing the gender-wage gap. In the next three Sections, this Comment will first introduce and describe the standard for direct and material advancement. Next, it will revisit the EPA circuit split discussed in Part I.A. In doing so, it will seek to explain why—despite clear disagreement about the discriminatory nature of salary-history inquiries—courts should take a uniform, effects-based approach when analyzing the constitutionality of salary-history bans. Finally, it provides a comprehensive review of the direct advancement prong as it applies to salary-history bans, ultimately concluding that the bans should withstand First Amendment scrutiny under *Central Hudson*.

## B. The Standard for Direct and Material Advancement

Although *Central Hudson* laid the foundation for what would become the rigorous four-part test described above, the decision

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<sup>116</sup> See Lester-Abdalla, *supra* note 4, at 728–29.

<sup>117</sup> Here, it is worth noting again that some bans, like the one in Illinois, do not permit employers to rely on voluntarily disclosed salary-history information. See *supra* Part I.B. This feature is likely not detrimental to the constitutionality of such laws, but it may factor into a court’s analysis. See *Chamber II*, 949 F.3d at 154–56 (reasoning that voluntary disclosure supports a judgment that the Philadelphia salary-history ban is narrowly tailored, but focusing primarily on the fact that the ban “leav[es] employers free to ask a wide range of other questions” and “does not prohibit employers from obtaining market salary information from other sources”).

<sup>118</sup> Lester-Abdalla, *supra* note 4, at 729 (alterations in original) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 771). This makes salary-history bans even less restrictive than other—presumably constitutional—laws that “prohibit[ ] queries soliciting information about applicants’ disability status, sexual orientation, marital status, or other protected characteristics.” Norton, *supra* note 59, at 727.

only briefly addressed the requirement that a government regulation must directly advance the stated substantial interest. The Court cited only two cases to establish that it had previously “declined to uphold regulations that only indirectly advance the state interest involved.”<sup>119</sup> The *Central Hudson* Court also spent little time applying this criterion to the facts of the case, devoting fewer than two hundred words to the matter before finding that the ban on the promotion of electrical utilities directly advanced the government interest in energy conservation. Even though the Court thought that the ban’s impact was “highly speculative,” it was satisfied by the fact that “[t]here is an immediate connection between advertising and demand for electricity.”<sup>120</sup> Therefore, while this factor is clearly a critical component for evaluating a regulation affecting commercial speech, *Central Hudson* left a tremendous amount of ambiguity about what it takes for the government to satisfy its burden.

The next development in the commercial speech doctrine came in the 1993 *Edenfield v. Fane*<sup>121</sup> decision. This case centered on a Florida Board of Accountancy rule that “provide[d] that a CPA ‘shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication.’”<sup>122</sup> Here, unlike in *Central Hudson*, the Court spent a considerable amount of time grappling with whether the government had sufficiently justified the regulation. The Court recognized that the Board of Accountancy had asserted a substantial interest—“protecting consumers from fraud or overreaching by CPA’s. . . . [and] maintain[ing] both the fact and appearance of CPA independence in auditing a business and attesting to its financial statements.”<sup>123</sup> But the Court was unconvinced that the rule “advance[d] its asserted interests in any direct and material way.”<sup>124</sup>

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<sup>119</sup> See *Central Hudson*, 447 U.S. at 564 (“The Court noted in *Virginia State Board* that ‘[t]he advertising ban does not directly affect professional standards. . . .’ In *Bates*, the Court overturned an advertising prohibition that was designed to protect the ‘quality’ of a lawyer’s work. ‘Restrains on advertising . . . are an ineffective way of deterring shoddy work.’” (first quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 769; and then quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 378 (1977))).

<sup>120</sup> *Id.* at 569.

<sup>121</sup> 507 U.S. 761 (1993).

<sup>122</sup> *Id.* at 763–64 (second alteration in original) (quoting FLA. ADMIN. CODE r. 21A-24.002(2)(c) (1992)).

<sup>123</sup> *Id.* at 768.

<sup>124</sup> *Id.* at 771.

The Court did not state its intent behind adding the term “and material” to the test. However, its inclusion certainly seems to suggest a heightened burden on the government to demonstrate not only that its regulation is targeted to advance the specific interest it asserts<sup>125</sup> but also that it has a significant effect in achieving that objective.<sup>126</sup> To that end, the Court made a point to emphasize that the Board of Accountancy had “present[ed] no studies that suggest personal solicitation of prospective business clients by CPA’s creates [ ] dangers of fraud, overreaching, or compromised independence,” nor did it “disclose any anecdotal evidence, either from Florida or another State, that validates the Board’s suppositions.”<sup>127</sup> Clearly, under *Central Hudson* and *Edenfield*, direct and material advancement cannot be shown without at least some empirical or anecdotal evidence. This, however, leaves unanswered the question of what would be sufficient.

While the Court has never explicitly stated the government’s evidentiary burden, over the course of numerous opinions, it has dropped enough breadcrumbs to identify the standard. As a baseline, the government does not necessarily need to supply empirical data “accompanied by a surfeit of background information”;<sup>128</sup> it is possible to show direct advancement “based solely on history, consensus, and ‘simple common sense.’”<sup>129</sup> However, anecdotal evidence is not sufficient to save an irrational regulatory scheme.<sup>130</sup> For example, a regulation can easily fail if it is “so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.”<sup>131</sup> Additionally, as *Edenfield* makes clear, the government must present at least some evidence to support the conclusion that a regulation is directly and materially advancing the stated interest.<sup>132</sup> Finally, the more evidence that the

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<sup>125</sup> See *Central Hudson*, 447 U.S. at 569 (finding that “conditional and remote eventualities” cannot directly advance the government interest).

<sup>126</sup> See Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 80–81 (1995); see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (“[W]e cannot agree with the assertion that the price advertising ban will *significantly* advance the State’s interest in promoting temperance.” (emphasis added)).

<sup>127</sup> *Edenfield*, 507 U.S. at 771.

<sup>128</sup> *Went For It*, 515 U.S. at 628.

<sup>129</sup> *Id.* (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

<sup>130</sup> See *Rubin*, 514 U.S. at 488–90.

<sup>131</sup> *Greater New Orleans Broad. Ass’n*, 527 U.S. at 190; see also *Rubin*, 514 U.S. at 489 (noting that various provisions of the same act “directly undermine and counteract” the effect of the challenged regulation).

<sup>132</sup> See *Edenfield*, 507 U.S. at 770 (“[The] burden is not satisfied by mere speculation or conjecture.”); see also *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2006) (“*Central*

government can supply, the stronger its case will be that the regulation serves its interest.<sup>133</sup> However, the Court has also recognized that substantial evidence might not be available in all cases; thus, courts should give leeway for governments implementing novel solutions.<sup>134</sup> Accordingly, it is clear that, to survive the direct and material advancement requirement of *Central Hudson* and *Edenfield*, the government must provide enough evidence to show that there is a logical nexus, given the conceivably available information, between the regulation and the interest of concern.

### C. The EPA Circuit Split Signals the Rationality of Salary-History Bans

With the direct advancement standard in mind, this Comment will now consider whether salary-history bans directly and materially advance the government's interest in reducing wage disparity. In contemplating this issue, it is worth turning to the separate legal challenges created by the circuit split over the application of the EPA. Rather than attempt to resolve the split, this Comment

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*Hudson* requires more from the government than bald assertions that a particular speech restriction serves its articulated interests."); *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000) ("While empirical data supporting the existence of an identifiable harm is not a sine qua non for a finding of constitutionality, the Supreme Court has not accepted 'common sense' alone to prove the existence of a concrete, non-speculative harm.").

<sup>133</sup> See, e.g., *Chambers v. Stengel*, 256 F.3d 397, 404 (6th Cir. 2001):

Defendants submitted ample evidence establishing that the statutes directly and materially advance the state's interests, including (1) the 106-page Florida study from the *Went For It* case; (2) an affidavit from [the] Kentucky Representative . . . who sponsored the statutes and stated that after he was involved in a vehicular accident, he received at least fifteen solicitation letters . . .; (3) an affidavit from the Executive Director of the Kentucky Bar Association setting forth a summary of a Kentucky survey report, which revealed the public's displeasure with attorney solicitation following an accident; (4) articles and letters appearing in *The Courier-Journal* and the *Kentucky Bench and Bar*; and (5) statistics of the frequency of automobile accidents in Kentucky.

<sup>134</sup> See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439–40 (2002) ("[M]unicipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech. A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)) (quotation marks and citation omitted)); cf. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 378 (2000) (noting, in the context of commercial campaign finance restriction rather than commercial speech, that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

focuses on the promising alternative solution offered by legislative salary-history bans. Despite this focus, however, the EPA circuit split should not be ignored. From the split emerges a clear sense of the ideological disagreement central to the salary-history-ban debate. On one side of the split is the view that the EPA is concerned with discriminatory intent and the belief that relying on prior wages, even if they are disparate, is a nondiscriminatory basis for setting future pay. On the other side is the argument that relying on disparate wages is inherently discriminatory under the EPA because those wages are influenced by prior wage discrimination. By highlighting the ideological divide driving the EPA circuit split—namely, whether courts should focus on discriminatory intent or discriminatory effects—this Section seeks to anticipate the fundamental objections to salary-history bans. This Section will show, however, that these objections fail to hinder the argument that salary-history bans directly advance the government's interest in closing the gender-wage gap. Specifically, because *Central Hudson* requires an effects-based approach, salary-history-ban proponents can find support from the side of the split that favors their position, whereas ban opponents lack the equivalent support.

Salary-history-ban proponents argue that, because salary-history information is inherently linked to the history of gender discrimination, it cannot be considered a “factor other than sex” for the purposes of the EPA. In a 2018 case, *Rizo v. Yovino*,<sup>135</sup> the Ninth Circuit adopted this view, finding that prior salary “may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience,” but it is a “second-rate surrogate” for these nondiscriminatory justifications.<sup>136</sup> Because “gender discrimination has been baked into our pay scales,”<sup>137</sup> the court held that “[a]llowing prior salary to justify a wage differential . . . entrench[es] in salary systems an obvious means of discrimination—the very discrimination that the [EPA] was designed to prohibit and rectify.”<sup>138</sup> In this regard, the Ninth Circuit advanced an effects-based view of the EPA consistent with the application of the direct advancement factor of *Central Hudson*. That is, because salary-history information is prone to gender effects,

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<sup>135</sup> 887 F.3d 453 (9th Cir. 2018).

<sup>136</sup> *Id.* at 467.

<sup>137</sup> *Id.* at 468–69 (McKeown, J., concurring).

<sup>138</sup> *Id.* at 468 (majority opinion).

reliance on this information tends to create further gender-wage disparity; therefore, such reliance is inherently discriminatory.

In contrast, the Seventh Circuit views salary history as a valid metric for employers to gauge human capital.<sup>139</sup> Although the court recognized the existence of a wage gap, it held that market wages likely reflect more than mere discriminatory intent meaning that salary history could be a “factor other than sex” under the EPA.<sup>140</sup> This holding, contrary to the Ninth Circuit’s, reflects an intent-based understanding of the EPA. This understanding follows from the difficult nature of isolating discrimination (which the government has an interest in eradicating) from neutral business practices (with which the government generally ought not interfere). Recognizing that tension, the majority argued that courts should be hesitant to read discriminatory intent into salary-history inquiries.<sup>141</sup>

The Seventh Circuit’s argument presents one of the core objections that one might have to salary-history bans.<sup>142</sup> But what is important to see is that, although this argument is relevant to the EPA’s proper application, it does not have any significant bearing on the outcome of applying the *Central Hudson* test to salary-history bans. As discussed earlier, the direct advancement prong of *Central Hudson* is satisfied when a policy is demonstrably effective in achieving its intended purpose.<sup>143</sup> Direct advancement is, therefore, an effects-based determination. If the government can adequately show that a salary-history ban actually serves to close the wage gap, then the law is likely to survive judicial scrutiny under *Central Hudson*, regardless of whether a court like the Seventh Circuit believes these laws to be unwise in principle. For this reason, the policy concerns highlighted by the Seventh Circuit are insufficient to foreclose the possibility that salary-history bans directly advance the goal of closing the wage gap. Conversely, the argument advanced by the Ninth Circuit—that salary-history inquiries have an inherently discriminatory effect impermissible under the EPA—demonstrates the clear viability of the argument that banning salary-history inquiries

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<sup>139</sup> See *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (“Wages rise with experience as well as with other aspects of human capital.”).

<sup>140</sup> *Id.*

<sup>141</sup> See *id.* (“Wage patterns in some lines of work could be discriminatory, but this is something to be proved rather than assumed.”).

<sup>142</sup> See *supra* note 2.

<sup>143</sup> See *supra* Part III.B.

advances the goal of ameliorating the effects of discrimination.<sup>144</sup> In other words, because *Central Hudson* would require courts to review salary-history bans using an effects-based framework, the Ninth Circuit's arguments in the context of the EPA can also be used to support the constitutionality of salary-history bans, whereas the Seventh Circuit's intent-based approach would provide no such support to employers seeking to challenge the bans.

Consequently, when evaluating First Amendment challenges to salary-history bans, courts ought to be mindful that—regardless of the reasons for the wage gap and despite the objection that salary-history bans impede an otherwise nondiscriminatory employment practice—the direct advancement prong of *Central Hudson* depends only on the government's ability to show the efficacy of the laws. Thus, there is no reason to think that, because of the EPA circuit split, courts would be unable to find a uniform solution to the constitutionality of salary-history bans. In the Section to follow, this Comment will assess the effect of salary-history bans from a theoretical and empirical perspective, ultimately concluding that these laws do indeed directly and materially advance the government's interest in closing the gender-wage gap.

#### D. Salary-History Bans Directly and Materially Advance Wage Equity

Although the arguments presented in the context of the EPA can be applied to show that salary-history bans are facially rational in the effects-focused context of *Central Hudson*, the burden remains on the government to establish that salary-history bans directly and materially advance the stated goal of closing the wage gap. This Section discusses in detail both the theoretical and empirical justifications for salary-history bans. In particular, the first part of this discussion considers the most common arguments against salary-history bans, ultimately rejecting those arguments in favor of the conclusion that salary-history bans are uniquely positioned to achieve their primary objective. In the second part, the discussion turns to the initial body of empirical research on salary-history bans, which offers promising evidence that salary-history bans have thus far been effective where enacted. Taking these two pieces as a whole, the Section concludes that salary-history bans directly and materially advance the government's interest in closing the wage gap.

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<sup>144</sup> See *Chamber II*, 949 F.3d at 148 (citing *Rizo*, 887 F.3d at 460–61).

1. Commonsense criticisms: the ban-the-box comparison.

There is no doubt that “[b]anning questions on salary-history is a blunt instrument to a seemingly complex problem.”<sup>145</sup> Thus, while the Ninth Circuit’s application of the EPA can translate to a commonsense argument in support of salary-history bans, the simplicity of these laws leaves room for potential commonsense counterarguments as well. Among these counterarguments is the intuitive comparison to a similar initiative—the “ban the box” movement to prohibit inquiries into job applicants’ criminal history—that gained traction around the same time as salary-history bans were coming to the fore.<sup>146</sup> Using this analogy as a backdrop, it is easy to identify the arguments most likely to be brought against salary-history bans. But this comparison is inapt. And from the weaknesses of the ban-the-box analogy emerge the obvious strengths of salary-history bans.

The ban-the-box movement is an effort to improve the employment opportunities for previously incarcerated individuals.<sup>147</sup> The specific goal of the initiative is to eliminate the commonly used checkbox on application forms that asks whether an applicant has been convicted of a crime.<sup>148</sup> Because the United States has a particularly high incarceration rate—one which disproportionately impacts Black men—the “box” is seen by many as a significant obstacle to employment for previously incarcerated individuals, which may contribute to the nearly doubled unemployment rate for Black men relative to the national average.<sup>149</sup> By the end of 2015, thirty-four states and the District of Columbia had enacted laws that banned the box to some extent.<sup>150</sup>

However, the story of ban the box quickly turned into a cautionary tale of unintended consequences. In a study conducted by Professors Amanda Agan and Sonja Starr, fictitious online job applications were sent to employers in New York and New Jersey. Taking advantage of recently enacted ban-the-box laws, Agan and Starr measured the change in callback rate of their applicants

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<sup>145</sup> Hansen & McNichols, *supra* note 5, at 1.

<sup>146</sup> See, e.g., Meli & Spindler, *supra* note 3, at 20–21.

<sup>147</sup> See Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of “Ban the Box”: Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 321, 330 (2020).

<sup>148</sup> See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 192 (2018).

<sup>149</sup> *Id.* at 192.

<sup>150</sup> Doleac & Hansen, *supra* note 147, at 330.

under a pre- and post-ban regime.<sup>151</sup> They found that, although removing the box positively impacted callback rates for incarcerated individuals overall, those gains were not evenly distributed. Instead, Agan and Starr observed that the primary beneficiaries from ban the box were White applicants with criminal records.<sup>152</sup> Black applicants with—and White applicants without—criminal records saw some gains in callback rates as well.<sup>153</sup> But for Black applicants without criminal records, there was a striking drop in callback rates.<sup>154</sup> The effects were so pronounced that the authors observed a 600% increase in the racial divide for overall callback rates than had existed pre-ban.<sup>155</sup>

Professors Jennifer Doleac and Benjamin Hansen have seen a similar result. Using data from the monthly Current Population Survey, Doleac and Hansen studied the employment effect of ban the box for “young, low-skilled, black and Hispanic men.”<sup>156</sup> They found that ban the box had the effect of reducing the likelihood of employment for the observed groups, lending support to the idea that “[ban the box] has unintentionally done more harm than good when it comes to helping disadvantaged job seekers find jobs.”<sup>157</sup> In combination, these studies raise concern that when employers lack information about applicants, they instead rely on racially biased assumptions.<sup>158</sup>

Given the apparent similarity between criminal-history bans and salary-history bans, opponents to salary-history laws worry that the bans will similarly produce unintended consequences.<sup>159</sup> For example, Doleac argues that when employers are prevented from accessing salary-history information, they will instead rely on assumptions that could ultimately hurt women.<sup>160</sup> Meanwhile, Professors Jeff Meli and James C. Spindler have argued that

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<sup>151</sup> Agan & Starr, *supra* note 148, at 198–202.

<sup>152</sup> *See id.* at 222–23.

<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> Doleac & Hansen, *supra* note 147, at 324.

<sup>157</sup> *See id.* at 360–62.

<sup>158</sup> *See* Agan & Starr, *supra* note 148, at 208 (“[E]mployers who lack individualized information might be relying on race-based assumptions about criminal record status.”); Doleac & Hansen, *supra* note 147, at 360 (“BTB does not address employers’ concerns about hiring those with criminal records and so could increase discrimination against groups that are more likely to include recently incarcerated ex-offenders, particularly young, low-skilled black and Hispanic men.”).

<sup>159</sup> *See supra* Part I.

<sup>160</sup> *See* Moore, *supra* note 41 (“Without information on pay history, employers will still try to offer women lower salaries, Doleac said.”).

salary-history bans could unintentionally have a detrimental impact on high-earning women.<sup>161</sup> They posit that, under certain conditions, employers that lack salary information are less likely to offer competitively higher wages to women already earning above average, imposing switching costs and potentially trapping these women at their current—possibly discriminatory—employers.<sup>162</sup> If this effect is pronounced, it might ultimately serve to undermine the very goal of the salary-history ban by increasing the overall gender-pay gap.<sup>163</sup>

In addition to these general criticisms, two specific—and common—features of salary-history bans might be identified by critics as creating unintended consequences. First, a number of salary-history bans allow applicants to voluntarily disclose their own prior salaries, which could lead to an unraveling effect.<sup>164</sup> Because employers currently use wage history as a metric to measure both productivity and future pay preferences, applicants—theoretically aware that employers cannot ask for this information—might choose to use voluntary disclosure as a signaling device. Opponents to salary-history bans could argue that this incentive leads to an adverse selection problem when, by comparison, those who choose not to disclose may be looked upon less favorably.<sup>165</sup> For those in the middle, this pattern of behavior might create pressure to disclose, which, in turn, puts pressure on the remaining nondisclosing individuals to do the same.<sup>166</sup>

The second argument is that the ability for employers to ask applicants for their desired wage creates a loophole to the salary-history ban.<sup>167</sup> As repeatedly noted, employers value salary-history information, and when this information is hidden, employers might seek other ways to obtain it. By asking about desired salary, employers might be able to get a rough sense of the wage a potential applicant would be willing to accept. However, the problem with this practice is that, because prior salaries are affected

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<sup>161</sup> Meli & Spindler, *supra* note 3, at 11–14.

<sup>162</sup> *Id.* at 7–9.

<sup>163</sup> *Id.* at 44–48.

<sup>164</sup> See Amanda Agan, Bo Cowgill & Laura Katherine Gee, *Do Workers Comply with Salary History Bans? A Survey on Voluntary Disclosure, Adverse Selection, and Unraveling*, 110 AEA PAPERS & PROC. 215, 219 (2020).

<sup>165</sup> See *id.* at 218–19.

<sup>166</sup> See *id.* at 219; Hansen & McNichols, *supra* note 5, at 3 (“If a past salary is a strong signal of both productivity and their reservation wage, we might expect all workers to reveal their salary to avoid being lumped in with workers with lower prior earnings.” (citing Agan et al., *supra* note 164)).

<sup>167</sup> See Agan et al., *supra* note 164, at 215.

by wage disparity, desired future wages might also suffer from gender effects. If employers broadly adopt the practice of asking for desired salary, there is some risk that salary-history bans will be rendered ineffective.

## 2. The defense of salary-history bans.

When considering the arguments above, it is obvious why comparisons are drawn between the salary-history bans and ban-the-box initiatives. Upon closer inspection, however, key distinctions emerge. These distinctions not only demonstrate why the ban-the-box-style criticisms are misguided; they also highlight the clear benefits that a salary-history ban might bring.

First, the typical salary-history inquiry occurs at a later stage of hiring than the typical criminal-history inquiry.<sup>168</sup> The criminal-history box is often present on application forms. Therefore, an applicant's criminal status is likely to create a barrier before the interview stage. In contrast, salary-history inquiries often (though not always) occur after an applicant has been invited to interview.<sup>169</sup> This makes a big difference when the backfire effect in ban-the-box laws appears to have been driven by racially biased assumptions that cause employers to effectively filter Black men out of the employment process. Because the salary-history bans often affect applicants who have already passed an initial screening, there is less of a reason to think that implicit bias would cause women to be shut out of the employment process. Thus, whereas ban the box has a tendency to systematically disadvantage Black men, the potential adverse effect of salary-history bans is more likely to come into play on an individualized basis.

Second, even if the above were not the case—that is, if salary-history inquiries typically occurred during the initial application—the assumption of lower wages could be counteracted. Because some salary-history laws allow for voluntary disclosure,<sup>170</sup> a woman facing a situation in which she is offered a lower wage than deserved—either because it is lower than she presently earns or because it is lower than the market wage for an equally situated man—has the opportunity to negotiate in a way that is simply not as feasible under ban the box. A Black man who is denied an interview likely has no knowledge that the reason for

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<sup>168</sup> See Sinha, *supra* note 1, at 5.

<sup>169</sup> See Barach & Horton, *supra* note 1, at 40–42.

<sup>170</sup> See Sinha, *supra* note 1, at 5; Lester-Abdalla, *supra* note 4, at 729.

his rejection is a result of a racially biased assumption. Even if he has his suspicions, there is little opportunity to counteract that negative inference because this rejection typically comes before the interview stage. With salary-history bans, voluntary disclosure provisions allow women to negotiate around an artificially low salary offer.<sup>171</sup> That is, women could selectively disclose in situations when it will boost their salary options without being burdened by past discriminatory wages when it would be a detriment.

Of course, voluntary disclosure is also the root of the concern for a potential unraveling effect. And this concern might be justified if there were a significant portion of the population that regularly disclosed wages without prompting.<sup>172</sup> But there isn't. In fact, the only time that the majority of applicants disclose wage history is when they are prompted to do so by the employer.<sup>173</sup> Moreover, if an applicant is unaware—as many likely are—whether his or her interviewer is constrained by a salary-history ban, that applicant is unlikely to deviate from his or her normal disclosure tendencies.<sup>174</sup> Even if an applicant is aware that a ban has been enacted, it is uncertain whether he or she would be sufficiently attuned to the behavior of other applicants to feel pressure to voluntarily disclose. Thus, if voluntary disclosure behavior is generally unchanged following a salary-history ban, employers would have no reason to treat an instance of nondisclosure as a negative signal.

In contrast to the fact that salary-history inquiries typically precede an offer, voluntary disclosure allows women to control when, if ever, it is to their advantage to leverage their prior pay. As noted above, there is likely not going to be a significant population that voluntarily discloses during an interview. Thus, without a salary-history ban in place, salary-history information is typically disclosed pre-offer. But with a ban in place, it is likely more beneficial for the applicant to keep his or her wage history private until after receiving an offer. By waiting for an offer, applicants have the opportunity to voluntarily disclose prior salary information as a way to bargain upward. Presumably, applicants will only do so if the offered salary is not more than their current pay. In light of the foregoing, voluntary disclosure provisions are likely more of a benefit than a detriment to women who, under

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<sup>171</sup> See Sinha, *supra* note 1, at 5.

<sup>172</sup> In contrast to disclosing only to counter a low salary offer.

<sup>173</sup> See Agan et al., *supra* note 164, at online app. tbl.A8.

<sup>174</sup> See *id.*

this regime, have the ability to selectively withhold information until after employers have made the first move.

Third, the risk that desired-wage inquiries neutralize the effect of salary-history bans is minimal. In contrast to salary-history inquiries that tie an applicant to the past, desired-wage inquiries allow an applicant to have control over her future. Applicants are generally aware of the estimated salary range of the position to which they are applying. This is why, for instance, individuals are less likely to voluntarily disclose their prior wage if they know that it is higher or lower than the typical applicant's.<sup>175</sup> Moreover, an applicant's desired wage is almost certainly higher than her present wage. Therefore, it seems unlikely that a desired-wage inquiry would inhibit women's wages as greatly as salary-history information might. This is particularly true when women applicants can use desired salary as a way to position themselves equivalently to their male counterparts and offset some of the effect of prior wage discrimination. Wage history, on the other hand, does not allow women to assert wage preferences.

Salary-history bans also incentivize employers to use alternative methods for evaluating their applicants' wage preferences. For example, employers might choose to include the expected salary range within the original job post. Though it can be difficult for employers to precisely estimate the market wage for a new position, listing even a rough salary estimate serves to filter applicants with prohibitively high or unrealistically low wage preferences. This resolves the need to individually determine an applicant's wage preferences, and it avoids having to walk the line between a desired-wage inquiry and an impermissible salary-history inquiry.<sup>176</sup> Indeed, some states that have enacted salary-history bans have also required employers to disclose compensation rates within their job advertisements.<sup>177</sup>

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<sup>175</sup> See *id.* at 218, online app. tbl.A10.

<sup>176</sup> It is worth noting that, although Doleac is critical of salary-history bans, she has expressed support for publicly accessible salary posting. Jennifer Doleac (@jenniferdoleac), TWITTER (May 13, 2019), <https://twitter.com/jenniferdoleac/status/1127928712698257409> ("Some people think that banning employers from asking about prior salaries is the best way to close the gender wage gap. You know what's most valuable to me? Knowing what my colleagues make."); Jennifer Doleac (@jenniferdoleac), TWITTER (May 13, 2019), <https://twitter.com/jenniferdoleac/status/1127929166555488256> ("When I moved from UVA to TAMU I was able to look up how much \$ everyone makes . . . and that helped me negotiate my current salary.").

<sup>177</sup> See, e.g., COLO. REV. STAT. § 8-5-201 (2021).

Fourth, and finally, by removing the salary-history inquiry, it becomes much easier to identify discriminatory behavior. Employers who use salary-history information do so on the justification that the information provides useful data about the employee—their presumed wage preferences and their human capital. Without this information, employers might make assumptions. But if those assumptions are based on the fact that women are typically paid less, then the justifications for using salary history seem to fall away. Instead, it becomes clear that an employer is paying discriminatory wages. This might, in turn, make it easier to detect discriminatory employment practices. This is not the case, however, with ban the box. When an employer elects not to interview a candidate, it is exceedingly difficult to determine motive—and particularly easy, given the subjective nature of hiring, for the employer to find a nondiscriminatory justification.

### 3. Empirical support for the efficacy of salary-history bans.

Salary-history bans have only been around for a few years. Therefore, there is a reduced evidentiary burden for the government to empirically prove the direct and material effect of the law.<sup>178</sup> This standard is not, as one might argue, a way to evade the evidentiary burden imposed by *Central Hudson*, but rather a recognition by the Court that novel solutions to complex problems might not have an immediately obvious effect. This is a crucial observation for salary-history bans because the full effect of these regulations might not be understood for years.<sup>179</sup> Salary-history bans meet this reduced burden because they are logically designed to target and reduce the wage gap. For this reason alone, salary-history bans are likely to survive the direct advancement prong of the *Central Hudson* test. Nevertheless, although the government need not necessarily produce empirical evidence to support its claim, what limited research has been conducted on the effect of salary-history bans further supports the efficacy of these laws.

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<sup>178</sup> See *supra* Part III.B.

<sup>179</sup> See Lester-Abdalla, *supra* note 4, at 733 (citations omitted):

Critics point to the fact that laws banning salary history questions have not yet proven effective. However, it takes three to five years to adequately study the efficacy of such laws. This should not be a prohibitive barrier to the success of regulations such as these. . . . 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.

As to the government's primary interest, initial evidence supports the conclusion that salary-history bans are indeed effective at reducing the gender-wage gap. In a 2019 paper, Sourav Sinha conducted a study similar to those used to analyze the effect of ban the box.<sup>180</sup> Taking advantage of the staggered implementation of salary-history bans, Sinha measured the impact of these laws on employment outcomes.<sup>181</sup> For private employers, Sinha "estimates a reduction in pay gap by 4.2 [percentage] points in hourly wages, and by 4.5 [percentage] points in weekly earnings."<sup>182</sup> A separate study has concluded that, "[a]s a policy directed to reduce the gender-wage gap, salary-history bans appear to be effective for job changers and [the study's] limited evidence finds little reason to worry about negative effects on the quality of job matches or from adverse selection."<sup>183</sup> Yet another study has found that, "at least on net, [salary-history bans] appear to be having their intended impact, increasing the earnings for women, particularly at an age where they likely experienced an earnings penalty due to childbirth."<sup>184</sup>

Beyond the positive direct impact on the wage gap, salary-history bans appear to create promising secondary effects. In one of the earliest comprehensive studies of salary-history bans, Professors Moshe Barach and John Horton found that employers without salary history were more likely to consider a broader pool of applicants—and, for those applicants, employers were spending more time conducting substantive evaluations.<sup>185</sup> Moreover, they did not find that employers were merely shifting to other proxies to replace wage-history information.<sup>186</sup> Further research supports the theory that, without salary-history information to gauge potential applicant interest, employers have a greater tendency to use tactics that are less vulnerable to the effects of discriminatory practices. Of particular note, in locations with

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<sup>180</sup> See generally Sinha, *supra* note 1.

<sup>181</sup> *Id.* at 10.

<sup>182</sup> *Id.* at 13. For hourly wages, this reduction was driven exclusively by gains in women's pay, but for weekly wages, the effect was partially caused by a reduction in men's pay.

<sup>183</sup> Bessen et al., *supra* note 8, at 30.

<sup>184</sup> Hansen & McNichols, *supra* note 5, at 5. These findings are not inconsistent with the possibility that high-earning women fare worse in a salary-history-ban system. See Meli & Spindler, *supra* note 3, at 45 ("The detriment to high performing women is balanced somewhat by the benefits that accrue to poorly performing women, such that the aggregate effect on the gender pay gap may be positive or negative.").

<sup>185</sup> Barach & Horton, *supra* note 1, at 3, 21–23.

<sup>186</sup> *Id.* at 3, 23–26.

salary-history bans, there is an observed increase in the rate at which salary ranges are announced in job posts.<sup>187</sup>

The efficacy of these salary-history bans is certainly still in need of further study, but the early indications are that, on the whole, salary-history bans are effective at reducing pay disparity. This demonstrates two things. First, although opinions may differ as to whether salary-history bans are the best policy, it is clear that they are a rational strategy for targeting wage disparity. Second, while data remains limited, preliminary research supports that these laws have an observable effect in closing the wage gap. In light of these observations and the earlier discussion, it is reasonable to conclude that salary-history bans meet the direct advancement standard of *Central Hudson*.

#### CONCLUSION

Salary-history bans are a permissible regulation of commercial speech. Both applications and interviews for employment are easily identified as a commercial exchange of labor. Thus, there is little doubt that salary-history inquiries would be characterized as commercial speech, particularly given that analogous forms of speech have been recognized as such. There is also little doubt that the government has a substantial interest in gender-wage equality. Whether the government can regulate this speech with salary-history bans therefore likely turns on whether these bans are actually effective. Although, at first glance, these laws share characteristics with the oft-criticized ban-the-box movement, they differ on key grounds, including the time of inquiry and the ability for applicants to counteract the potentially negative effects of employer bias. Examining the structural framework of the bans, it is clear that legislatures can reasonably intuit that salary-history bans can help to close the wage gap. This intuition is also supported by the existing data, which show early positive results that these laws are effective in closing the wage gap. Though simple, salary-history bans therefore present an effective and targeted way to reduce the effect of wage inequality. Under the existing *Central Hudson* doctrine, salary-history bans should withstand any conceivable First Amendment challenge, so governments interested in implementing these laws should feel within their bounds to do so.

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<sup>187</sup> Bessen et al., *supra* note 8, at 29.