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Toledo City Council
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Dear City Council Members,

Advocates for Basic Legal Equality submits this letter in support of Women of Toledo's call for Toledo City Council to pass the Pay Equity Act.

A. Toledo's pay equity act follows a tradition of legislative action across the country to reduce pay inequities.

Prior salary history is a regularly relied upon factor by employers when facing claims of gender-based wage discrimination. In an effort to reduce the gender wage gap, multiple cities around the country have enacted legislation that prohibits employers from inquiring about applicants' prior salary histories. California, Massachusetts, Delaware, Oregon, and Vermont were among the first states to pass statewide legislation banning the use of salary history inquiries. In New York and New Jersey, the governors banned salary history inquiries via executive orders. Additionally, Connecticut's pay equity act went into effect in January of 2019.

Like similar laws passed by those states and several municipalities across the country, Toledo's Pay Equity Act is intended to prevent wage discrimination and eliminate the pay gap. The Act seeks to prohibit illegal reliance on wage history in employment decisions by regulating commercial speech. The Supreme Court has long held that the First Amendment does not protect commercial speech that is false, misleading, or related to illegal activity from the government's regulation, while the government's regulation of accurate commercial speech about legal activity receives intermediate scrutiny. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–64 (1980).

B. The United States Supreme Court is highly deferential to legislators.

The Supreme Court has been clear: under intermediate scrutiny, the legal standard applied to commercial speech such as the inquiry into salary history, "courts must accord substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.

622, 665 (1994). Courts may exercise "independent judgment"—in recognition of the important rights at stake—but they have no "license to reweigh the evidence de novo, or to replace [the legislature's] factual predictions with [their] own." *Id.* at 666.

C. Other anti-Discrimination statutes prohibit inquiries that further discriminatory purposes.

That other anti-discrimination statutes at all levels of government prohibit employer inquiries that could further a discriminatory purpose only confirms that prohibiting inquiries into compensation histories, as Toledo's Pay Equity Act seeks to do, is entirely reasonable. For example, before offering employment to job candidates, federal law prohibits an employer from asking those applicants whether they have a disability. 42 U.S.C. § 12112(d)(2). By borrowing a familiar principle used in similar contexts to further its interest in eradicating discriminatory pay, pay equity acts across the country simply conclude what lawmakers across the country have recognized: one of the most effective ways of preventing discrimination is to prohibit actors from being in the position to discriminate at all.

Of concern to some parties is a recent decision by a Philadelphia federal district court that concluded that the Inquiry Provision of Philadelphia's pay equity ordinance violates the First Amendment. The court in *Chamber of Commerce for Greater Phila. v. City of Philadelphia* determined that the city's prohibition against relying on wage history, however, does not implicate the First Amendment and the reliance provision remains intact. 2018 WL 2010596 (E.D. Pa. Apr. 30, 2018).

The *City of Philadelphia's* case was decided by one judge at the lowest federal level in Pennsylvania and is now on appeal in the Third Circuit. 2018 WL 2010596 (E.D. Pa. Apr. 30, 2018). The Philadelphia court erred in two. First, the court erred by choosing to apply intermediate scrutiny to the Inquiry Provision as a threshold matter, failing to recognize that the Provision regulates unprotected commercial speech related to the illegal activity of relying on salary history to set future wages. Second, the court erred when applying intermediate scrutiny by requiring too high an evidentiary burden on the City regarding the connection between the Inquiry Provision and the city's substantial interest in reducing discriminatory pay disparities.

D. Several courts have recognized that employers who rely on prior salary perpetuate sex discrimination in pay.

The Northern District Court of Ohio denied summary judgment to an employer where the court found that a reasonable jury could infer that the employer relied on plaintiff's prior salary to set her pay significantly lower than that of her male predecessor, her male successor, and other male employees in the same position. *Cole v. N. Am. Breweries*, No. 1:13-cl-236, 2015 U.S. Dist. LEXIS 6157, at *29-30 (S.D. Ohio Jan. 20, 2015). In *Rizo v. Yovino*, the Ninth Circuit held that

employer's use of a pay scale based on salary history was impermissible under the Equal Pay Act because it resulted in unequal pay for male and female employees and thus "perpetuate[d] rather than eliminate[d] the pervasive discrimination at which [the EPA] was aimed"). 887 F.3d 453, 460-61 (9th Cir. 2018). In *Glenn v. General Motors Corp*. the Eleventh Circuit held that employer's salary history defense to a pay differential between male and female employees and holding that prior salary alone can never justify a pay disparity. 841 F.2d 1567, 1571 (11th Cir. 1988).

E. Ordinances across Ohio and in Toledo create private causes of action.

Cincinnati recently passed a pay equity ordinance that prohibits employers from asking about past compensation levels and creates a private cause of action for persons harmed. *See* Cincinnati Municipal Code, Sec. 804-05.

Toledo's Municipal Code already includes several ordinances that create a private cause of action. *See e.g.* TMC 158.08; TMC 795.23; TMC 1765.08. Other Ohio cities similarly invoke private causes of action in local ordinances. *See e.g.* Cleveland Municipal Code, Sec. 375.08 and Sec. 240.06.

F. Ohio law is well established that local ordinances may create civil liability through negligence claims.

Of course, a violation of an ordinance may constitute negligence per se, thus creating civil liability, even where the ordinance does not explicitly create a private cause of action. Restatement Third, Torts: Liability for Physical and Emotional Harm § 14; 70 Oh Jur Negligence § 53. Undoubtedly, a city's capacity to enact a local ordinance carries with it the power to change civil laws and shape the landscape of civil liability.

G. For a brief time, the Ohio Supreme Court indicated that municipalities could not create private causes of action, but later overturned its own decision. Currently, there is no Court ruling that prohibits Toledo from enacting a private cause of action.

Until recently, the Ohio Supreme Court had never determined that municipalities could not, through their Home Rule Authority, create a private cause of action. In *State ex rel. Flak v. Betras*, 152 Ohio St. 3d 244, 2017-Ohio-8109, 95 N.E.3d 329, the Ohio Supreme Court briefly visited the question. The *Flak* Court reviewed whether a County Board of Elections could consider the legality of a municipal charter amendment proposed by a ballot initiative and remove the proposed law from the ballot if the Board determined that it was illegal.

The *Flak* Court assumed, without discussion, that Municipalities could not create a private cause of action. The Court concluded that "[j]ust as a municipality may not create a felony, a municipality is not authorized to create new causes of action." *Id* at ¶15. The Court then determined that the Board of Elections could remove the proposed law from the ballot because it contained a private cause of action. The dissent in *Flak* admonished the majority pointing out that the Court

had "not previously considered the issue of who can create a private cause of action" and "the majority decide[d] this issue in a conclusory manner without significant analysis." *Id* at ¶36.

Later, the *Flak* majority overturned its own decision saying that it was "not entitled to the protection of stare decisis." *State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, ¶ 13-14. The majority in *Maxcy* specifically held that Boards of Election could not review the substance or legality of a proposed municipal charter amendment. The Court in effect ruled that the Board of Election in *Flak* should not have determined whether the private cause of action it provided was illegal. The question of whether a municipal charter amendment may create a private cause of action is one that must be litigated in a later forum after the law is enacted. *See id* at ¶19. Thus, the legality of the private cause of action as reviewed in *Flak* remains undetermined.

Sincerely,

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