IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, on behalf of its members,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	**No. 17-1548**
CITY OF PHILADELPHIA and PHILADELPHIA COMMISSION ON HUMAN RELATIONS,	:	
Defendants.	:	

ORDER

AND NOW, this 30th day of May, 2017, upon consideration of "Plaintiff's Motion for a Preliminary Injunction" (Doc. No. 3), "Brief on Behalf of Defendant the City of Philadelphia Addressing Plaintiff's Lack of Standing" (Doc. No. 24), and "Plaintiff's Brief in Response to Defendants' Brief Addressing Standing" (Doc. No. 26), I find the following:

I. Background and Procedural History

1. Plaintiff, the Chamber of Commerce for Greater Philadelphia ("the Chamber"), on behalf of its member companies, filed a Complaint and motion for a preliminary injunction on April 6, 2017. The Chamber is a nonprofit organization "dedicated to promoting regional economic growth and advancing business-friendly public policies." It represents "thousands" of member companies across eleven counties in the three states of the Greater Philadelphia region. (Compl. ¶¶ 1, 12.)

2. The Chamber challenges an ordinance that adds a chapter addressing wage equity to the City of Philadelphia's "Fair Practices Ordinance: Protections Against Unlawful Discrimination." This ordinance is codified at Philadelphia Code §§ 9-1103, 9-1131 ("the Ordinance") and restricts the use of wage history in two ways: (1) the Ordinance makes it unlawful for employers, employment agencies, or employees or agents thereof "[t]o inquire about a prospective employee's wage history"; and (2) the Ordinance makes it unlawful for employers, employment agencies, or employees or agents thereof "[t]o rely on the wage history of a prospective employee . . . in determining the wages for such individual." Employers may rely on wage history of a prospective employee only if the applicant "knowingly and willingly disclosed" that information. Employers who violate the Ordinance are subject to civil and criminal penalties, including up to $2,000 per violation, and an additional $2,000 and 90 days in jail for a repeat offense. The Ordinance was signed into law on January 23, 2017 and was scheduled to take effect on May 23, 2017. (Id. ¶ 1.)

3. The Chamber contends that the Ordinance violates the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Commerce Clause of the United States Constitution. It brings this action against both the City of Philadelphia ("the City") and the Philadelphia Commission on Human Relations ("PCHR"), urging that the Ordinance is invalid and seeking an injunction against its enforcement. (Id. ¶¶ 7-10, 22-23.)

4. Before deciding the constitutional issues, I must first determine whether the Chamber has standing to bring this lawsuit.

5. Through the filing of a motion to dismiss, the City contends that the Chamber's Complaint should be dismissed because it has not identified a member company that has

been or will be injured by the Ordinance. Relying on Summers v. Earth Island Inst., 555 U.S. 488 (2009) and a series of United States Court of Appeals for the Third Circuit cases, see Am. Chiropractic Ass'n v. Am. Specialty Health, Inc., 625 F. App'x 169 (3d Cir. 2015); Nationwide Ins. Indep Contractors Ass'n, Inc. v. Nationwide Mut. Ins. Co., 518 F. App'x 58 (3d Cir. 2013); New Jersey Physicians, Inc. v. President of U.S., 653 F.3d 234 (3d Cir. 2011), the City asserts that without the identification of an injured member, the Chamber cannot demonstrate an injury in fact, and therefore cannot meet its burden of showing the Court that it has standing to maintain this lawsuit. (Mot., Doc. No. 24, at 1-5.)

6. The Chamber, pointing to Constitution Party of Pa. v. Aichele, 757 F.3d 347 (3d Cir. 2014) and United States v. One Palmetto State Armory PA-15 Machinegun, 115 F. Supp. 3d 544 (E.D.P.A. 2015), responds that it does not need to identify a member to establish standing because its members are the "object" of the Ordinance and thus it "obviously has standing." The Chamber further argues that Alabama Black Legislative Caucus v. Alabama, 135 S. Ct. 1257 (2015) instructs that an injured member does not need to be named and urges that the allegations in its Complaint and the Declaration of Robert C. Wonderling attached to the Motion for a Preliminary Injunction are sufficient to establish standing. (Pl.'s Resp., Doc. No. 26, at 1-5.)

II. Legal Standard

7. Federal Rule of Civil Procedure 12(b)(1) allows a party to move for dismissal of any claim for which the district court lacks subject matter jurisdiction. A Rule 12(b)(1) motion may challenge jurisdiction based on the face of the complaint or its existence in fact. See Mortensen v. First Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir).

Where, as here, the challenge is facial, the court must accept as true all well-pleaded allegations in the complaint and draw reasonable inferences in favor of the plaintiff. Id. Regardless of whether the challenge is facial or factual, the plaintiff bears the burden of persuasion. Id.

III. Discussion

8. The Chamber avers that it has standing to sue on behalf of its member companies because "its members conduct business and hire employees in Philadelphia, and are prohibited by the Ordinance from inquiring into a job applicant's wage history or relying on that history." It alleges that the Ordinance "chills the free speech rights of the Chamber's members" and "forces members to incur compliance costs, such as by retraining staff and developing new policies regarding salary determinations and hiring." (Compl. ¶¶ 3, 5, 87.)

9. Article III limits federal judicial jurisdiction to cases and controversies. U.S. Const. art. III, § 2; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Requiring that a plaintiff has standing ensures that they "allege such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." Summers, 555 U.S. at 493 (emphasis in original). To satisfy this burden, a plaintiff must show (1) "that he is under a threat of suffering an injury in fact that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) "a likelihood that a favorable judicial decision will prevent or redress the injury." ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 301 (3d Cir. 2012) (citing Summers, 555 U.S. at 493).

10. An association, such as the Chamber, has standing to sue on behalf of its members when "[1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Nationwide, 518 F. App'x at 63 (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342 (1977)). "In order to establish associational standing, however, an organization must 'make specific allegations establishing that at least one identified member ha[s] suffered or would suffer harm.'" New Jersey Physicians, 653 F.3d at 241 (quoting Summers, 555 U.S. at 498). Here, the City challenges only the first requirement of associational standing in its motion, contending that the Chamber has failed to identify a member that has suffered harm and therefore cannot establish that its members would have standing to sue in their own right. (Mot., Doc. No. 24, at 4-5.)

11. In Summers, the United States Supreme Court addressed whether an environmental organization had standing to enjoin the United States Forest Service from applying its regulations to exempt a salvage sale of timber on fire-damaged federal land from the notice, comment, and appeal process provided for in the Forest Service Decisionmaking and Appeals Reform Act. Summers, 555 U.S. at 491. The Court found that the organization was unable to show its members had standing where (1) two affidavits addressing injury to members were irrelevant following settlement of their portion of the lawsuit; (2) the remaining affidavit failed to establish that any member had concrete plans to visit a site where the regulations at issue would be applied; (3) additional affidavits were submitted after judgment; and (4) the organization could not establish procedural standing without demonstrating a concrete interest that was affected. Id. at 494-97. The

Court rejected a test for organizational standing where an organization's "self-description of the activities of its members [implies] a statistical probability that some of those members are threatened with concrete injury." Importantly, the Court observed that:

> While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation doesn't suffice. "Standing," we have said, "is not 'an ingenious academic exercise in the conceivable' . . . [but] requires . . . a factual showing of perceptible harm." In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm—surely not a difficult task here, when so many thousands are alleged to have been harmed.

Id. at 499.

12. The three Third Circuit cases relied upon by the City all cite Summers for the proposition that in order to meet the first prong of associational standing, an organization must identify a member who has suffered or will suffer a specified harm. See Am. Chiropractic Ass'n, 625 F. App'x at 176-77 (affirming the district court's finding that a national association for chiropractors bringing suit on behalf of its members lacked standing where the only member identified sought monetary damages, which an association cannot pursue on a member's behalf); Nationwide, 518 F. App'x at 63 (affirming the district court's finding that a voluntary membership association of insurance agents bringing suit on behalf of its members lacked standing to challenge changes to agent agreements because it had not identified a member who suffered specified harm); New Jersey Physicians, 653 F.3d at 241 (affirming the district court's finding that a nonprofit corporation bringing suit on behalf of its members did not have standing where the only member identified in the complaint did not suffer an injury in fact).

13. Additionally, in Chamber of Commerce of U.S. v. E.P.A., 642 F.3d 192 (D.C. Cir. 2011), a case not cited by either party, the United States Court of Appeals for the D.C. Circuit found that the Chamber of Commerce of the United States of America lacked standing to challenge an EPA decision where it had not "identified a single member who was or would be injured." Chamber of Commerce of U.S., 642 F.3d at 200 ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petition must specifically 'identify members who have suffered the requisite harm.'") (citing Summers, 555 U.S. at 497-98).

14. The Chamber avoids the clear directive set out in Summers, and instead argues that where a member is the "object" of a law, an association does not need to identify a member that has suffered harm. (Pl.'s Resp., Doc. No. 26, at 1-2.) But the cases cited by the Chamber do not pertain to suits brought on behalf of individual members nor do they address associational standing or discuss Summers. See Constitution Party of Pa., 757 F.3d at 347 (non-major political parties had standing to challenge provisions of Pennsylvania's election code governing access by non-major political parties); One Palmetto State, 115 F. Supp. 3d at 544 (individual plaintiff had standing to challenge a statute that banned the transfer or possession of machine guns). In Summers, the Supreme Court did not limit its identification requirement to cases where members of an association were not the object of a challenged law, but rather stated generally that its previous cases "have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm." Summers, 555 U.S. at 498. Similarly, the Third Circuit has not announced a different standard for cases where members of an association are not the object of a challenged

law. See Am. Chiropractic Ass'n, 652 F. App'x at 169; Nationwide, 518 F. App'x at 58; New Jersey Physicians, 653 F.3d at 234. I thus conclude that Summers and Third Circuit precedent require the identification of a member who has suffered or will suffer harm in cases brought by an association on behalf of its members. While the Chamber may believe that there is a "fundamental absurdity" to this conclusion, it has not provided a case holding otherwise.

15. The Chamber also relies upon Alabama Black Legislative Caucus v. Alabama, 135 S. Ct. 1257 (2015) to establish that it does not need to name injured members to demonstrate standing. There, the Alabama Democratic Conference challenged redistricting plans for Alabama's Senate and House of Representatives. Alabama Black Legislative Caucus, 135 S. Ct. at 1262-63. Alabama did not raise a standing objection nor did the district court request more detailed information about members of the Alabama Democratic Conference. Id. at 1269. The Supreme Court found that the district court erred in sua sponte dismissing the case for lack of subject matter jurisdiction because the evidence presented supported a "common sense inference" to lead the association plaintiff to believe that "in the absence of a state challenge or court request for more detailed information, it need not provide additional information such as specific membership list." Id. The Court remanded the case, not because identification was not required, but so that the district court could reconsider the Alabama Democratic Conference's standing by permitting it to file a list of members and having the state respond. Id. at 1270. Thus, the Chamber's reliance on Alabama Black Legislative Caucus is misplaced because the Supreme Court did not dispense with the requirement that associational plaintiffs identify a member, but rather remanded where Alabama had not challenged standing and the

district court had not given the Alabama Democratic Conference an opportunity to identify a member.[1]

16. A plain reading of Summers and Third Circuit precedent dictates that the Chamber must identify a member who will suffer specific harm as a result of the Ordinance. The Chamber's broad allegations about its members simply do not meet the requirements of Summers. Nor has the Chamber attached any affidavit to the Complaint detailing how any specific member would suffer harm in the Complaint.[2] Thus, the Chamber has failed to demonstrate "through specific facts . . . that one or more of [its] members [will] . . . be 'directly' affected" by the Ordinance, and I therefore cannot determine whether the

[1] The Chamber cites to other cases decided in this Circuit, as well as cases decided in the Second and Eleventh Circuits, however, those cases pre-date Summers. The only other relevant, post-Summers case that the Chamber cites to is Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032 (9th Cir. 2015). In explaining why the plaintiffs did not need to identify a member, the Ninth Circuit stated that "[w]here it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by defendant's action," and "where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury," there is "no purpose to be served by requiring an organization to identify by name the member or members injured." Cegavske, 800 F.3d at 1041.

Here, as presently pled, it is not clear that one of the Chamber's members will be adversely affected as the Chamber has failed to allege that any member actually inquires about or relies on wage history, and the City does need to know the identity of a member to respond to the Chamber's claim of injury.

I also note that the Ninth Circuit stated: "[E]ven if Summers and other cases are read to require that an organization always identify by name individual members who have been or will be injured in order to satisfy Article III, the district judge erred in dismissing the complaint without granting leave to amend." Id.

[2] The Chamber attaches the "Declaration of Robert C. Wonderling," the President and Chief Executive Officer at the Chamber, to its Motion for a Preliminary Injunction. (Mot., Doc. No. 4, Ex. C). Because the City has brought a facial attack on the Chamber's standing, I cannot consider documents beyond the pleadings. See Mortensen, 549 F.2d at 891. Even if I could consider Wonderling's declaration, I find that it, too, does not identify any member companies that will be harmed by the Ordinance. Rather, the declaration merely discusses "some members" who rely on wage history, and "some members" who require disclosure of wage history. (Mot., Doc. No. 4, Ex. C.) General statements about members do no enable me to determine whether any member would have standing to bring this suit on its own.

Chamber's members would have standing to bring this suit. See Summers 555 U.S. at 498 (quoting Lujan, 504 U.S. at 563).

17. Because the Chamber has not met its burden to show that at least one of its members would have standing to bring this suit, I will grant the City's motion and dismiss the Complaint without prejudice. I will also grant the Chamber leave to amend its Complaint pursuant to Federal Rule of Civil Procedure 15(a).

WHEREFORE, it is hereby **ORDERED** that the City's motion to dismiss is **GRANTED**. The Complaint is **DISMISSED** without prejudice. It is further **ORDERED** that the Chamber is **GRANTED** leave to amend within fourteen (14) days of this Order.

BY THE COURT:

/s/ Mitchell S. Goldberg

Mitchell S. Goldberg, J.