

**IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

Docket Nos. 2 and 3 EAP 2018

LORA JEAN WILLIAMS; GREGORY J. SMITH; CVP MANAGEMENT, INC.  
d/b/a or t/a CITY VIEW PIZZA; JOHN'S ROAST PORK, INC. f/k/a JOHN'S  
ROAST PORK; METRO BEVERAGE OF PHILADELPHIA, INC. d/b/a or t/a  
METRO BEVERAGE; DAY'S BEVERAGES, INC. d/b/a or t/a DAY'S  
BEVERAGES; AMERICAN BEVERAGE ASSOCIATION; PENNSYLVANIA  
BEVERAGE ASSOCIATION; PHILADELPHIA BEVERAGE ASSOCIATION;  
and PENNSYLVANIA FOOD MERCHANTS ASSOCIATION,

Appellants

v.

CITY OF PHILADELPHIA and FRANK BRESLIN, IN HIS OFFICIAL  
CAPACITY AS COMMISSIONER OF THE PHILADELPHIA DEPARTMENT  
OF REVENUE,

Appellees.

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**BRIEF FOR *AMICI CURIAE* TEAMSTERS LOCAL UNION NO. 830  
AND THE PENNSYLVANIA CONFERENCE OF TEAMSTERS**

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On petition from an Order of the Commonwealth Court of Pennsylvania in Nos. 2077,  
2078 C.D. 2016, entered June 14, 2017, 164 A.2d 576, affirming Orders of the Court of  
Common Pleas of Philadelphia County in September Term 2016, No. 01452, entered  
December 19, 2016

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## I. INTEREST OF *AMICI CURIAE*

For decades, Teamsters Local Union No. 830 (Brewery, Soft Drink, Beer Distributors, Laundry, Commissioned Drivers, Optical and Dental, Miscellaneous Workers, Warehousemen and Helpers, Philadelphia, Pennsylvania) (hereinafter “Local 830”) has been the bargaining representative for members employed in the soft drink and other beverage industries. Those members work both as drivers and in various production and sales capacities.

Prior to the passage by Philadelphia City Council of the Philadelphia Beverage Tax (hereinafter “PBT”) in June 2016 by amendment of the Philadelphia Code, Phila. Code § 19-4103, Ordinance No. 160176, Local 830’s beverage-industry membership numbered approximately 2400 individuals. As a direct consequence of the enactment and implementation of that tax, sales of sweetened beverages have fallen dramatically, resulting in the permanent layoff of 185 employees from such employers as Coca-Cola, Pepsi Cola and Canada Dry. In addition, upwards of 700 driver-salesmen have suffered a reduction in their net pay of as much as fifty percent (50%), and as many as 1300 hourly employees have seen their net pay reduced by as much as fifteen percent (15%).

The Pennsylvania Conference of Teamsters (hereinafter “Conference”) is a regional organization of 63 Teamster affiliates, including Local 830, with approximately 90,000 members. Local 830 is not the only Teamster union that is, or may be, impacted by the PBT. The employees of Penn Jersey Paper Products are represented by Philadelphia Teamsters Local 107. That company has experienced a significant

decrease in its sales of soft drinks due to the PBT.<sup>1</sup> Moreover, several of the Conference's affiliated local unions outside of Philadelphia represent members who are employed in businesses that would suffer similar economic losses if Philadelphia's tax were upheld and were to be implemented in their jurisdictions.<sup>2</sup>

Accordingly, the above organizations enter this action as *amici curiae* in support of the Appellants' opposition to the PBT in order to address their shared concern for the adverse economic impact of that tax and its erosion of their members' standards of living. The PBT has already caused severe economic hardship to hundreds of Teamster members and judicial approval of that tax will only worsen their plight.

No person or entity other than counsel for *amici curiae* authored this brief nor did any person or entity other than *amici curiae* pay in whole or in part for its preparation.

## II. QUESTION PRESENTED

DOES THE CITY'S TAX VIOLATE THE STERLING ACT, 53 P.S. § 15971, WHICH PROHIBITS PHILADELPHIA FROM IMPOSING A TAX ON A TRANSACTION OR SUBJECT THAT THE COMMONWEALTH ALREADY TAXES?

Suggested answer: Yes.

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<sup>1</sup> Although no Penn Jersey employee has currently suffered any economic consequences due to that company's lost soda sales, those lost sales will have an obvious negative impact upon the union's ability to negotiate a favorable collective bargaining agreement in the future.

<sup>2</sup> Philadelphia local unions that represent employees in affected business include, in addition to Locals 830 and 107, Locals 115, 463 and 929. Outside of Philadelphia, the following local unions represent such employees: 30, 110, 205, 229, 249, 261, 401, 491, 585 and 926. In addition, Local 326 in New Castle, Delaware, Local 331 in Atlantic City, New Jersey and Local 676 in Collingswood, New Jersey represent members in such businesses. According to a survey conducted by the Conference, the Pennsylvania local unions represent approximately 4500 members who work for concerns that might be impacted by the tax with an additional 287 members in the Delaware and New Jersey locals.

### III. SUMMARY OF ARGUMENT

The Sterling Act empowers the City of Philadelphia to impose a tax on certain “persons, transactions, occupations, privileges, subjects and personal property,” provided that they are not already “subject to a State tax or license fee.” 53 P.S. § 15971(a). The Commonwealth has taxed the sale of sugared beverages. Therefore, the attempt by Philadelphia to tax such beverages is in direct conflict with the Sterling Act’s limitation on the City’s right to tax the sale of those items and the lower courts erred in granting the City’s preliminary objections and dismissing the Appellants’ lawsuit in opposition to the enabling Ordinance.

### IV. ARGUMENT: The City’s Tax Violates the Sterling Act

This matter comes before the Court upon review of the trial court’s grant of preliminary objections and its dismissal of plaintiffs’ lawsuit challenging the power of the City of Philadelphia to tax the sale of certain beverages, specifically, with limitations not germane to this litigation, those to which sugar or its equivalent is a key ingredient. Commonwealth Court, with two judges dissenting, upheld that dismissal. *Williams, et al. v. City of Philadelphia and Frank Breslin, etc.*, 164 A.2d 576 (2017) (Covey, J. and Jubelirer, J. dissenting).

In doing so, the lower courts concluded that the PBT did not doubly tax the sales of sweetened beverages in violation of the Sterling Act, Act of August 5, 1932, P.L. 45, 53 P.S. § 15971 (“Act”). That Act enables Philadelphia to “levy, assess and collect” “any tax on a privilege, transaction, subject or occupation,” provided the

Commonwealth “does not now tax” the same subject. 53 P.S. § 15971(a). Where the Commonwealth has levied a tax on a particular subject or transaction, such levy has a preemptive effect and precludes local taxation on that same subject or transaction.

As Commonwealth Court has observed, “it is difficult to extract a comprehensive analysis to be used whenever preemption of local taxation is claimed.” *City of Philadelphia v. Tax Review Board*, 601 A.2d 875, 877 (Pa. Cmwlth. 1992). That difficulty is manifest in the lower courts’ analysis of the PBT. Most significantly, those courts failed to acknowledge that Philadelphia’s taxation of sweetened beverages is precisely a double tax on those drinks. Soft drinks, as defined in the Tax Reform Code of 1971, 72 P.S. § 7201(a), are unquestionably subject to Pennsylvania’s 6% sales tax. 72 P.S. § 7202. Any further taxation on such drinks by the City is, therefore, in violation of the Sterling Act.

The City has successfully argued that its tax is not on the retail sale of those beverages, but rather is on the upstream distribution of them. That attempted distinction, however, is precisely what this Court rejected in *United Tavern Owners of Philadelphia v. Philadelphia School District*, 272 A.2d 868 (Pa. 1971) (plurality opinion). There, the Court found that once the Commonwealth had taxed the sale of liquor by a state liquor store to the holder of a liquor license, the City’s attempt to tax the sale of that same liquor to an individual customer violated the Sterling Act because the City’s tax operated on the same subject. Similarly, in this instance, the City is collecting taxes on the sale of sweetened beverages, even though the Commonwealth has previously

taxed such sales. *See also Commonwealth v. Wilsbach Distributors, Inc.*, 519 A. 2d 397 (Pa. 1986).

As noted by this Court over 60 years ago in striking down Philadelphia's effort to tax stockholders' dividend income because it duplicated the state tax on the corporate capital stock, "the practical operation of the two taxes is controlling as against mere difference in terminology." *Murray v. City of Philadelphia*, 71 A.2d 280, 283 (Pa. 1950). The City's effort to brand its beverage tax as one on distribution does not insulate it from its true nature, a second tax on sweetened beverages which, as such, renders it invalid as violative of the Sterling Act.

Apart from the imperative of *United Tavern Owners of Philadelphia*, there are numerous other reasons why the City's taxation of sugary beverages is improper, all of which are dealt with in great detail in Appellants' submissions. The bottom line is that the legality of the PBT must be measured against the restraints imposed by the Sterling Act. It simply fails that analysis.

Moreover, as with any tax, there are significant consequences. In this instance, the total loss of livelihoods (185 permanent layoffs) and the severe impairment of earnings of almost every remaining employee represented by Local 830 in the affected industry, militate against the claimed goals of this legislation.<sup>3</sup>

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<sup>3</sup> The City has lauded the tax as enabling it to provide pre-K opportunities for thousands of children. Whether that is true or not, this is not a legal consideration, but a political one. It is also misleading. The City's annual revenues already exceed \$4 billion, and the \$92 million that the City hopes to generate annually from the tax may be allocated however the City chooses. While the



If this legislation is not overturned, not only will the Local 830 members who have already been harmed by it continue to suffer its unintended consequences, but thousands of other hard-working citizens of the Commonwealth may well suffer a similar diminution of their standards of living, given the probability of similar legislation being enacted elsewhere, as municipalities strive to find new and creative sources of revenue.

## V. CONCLUSION

For the foregoing reasons and those set forth in Appellants' submission, the lower courts' decisions should be reversed and the Philadelphia Beverage Tax should be held to be in violation of the Sterling Act.

Respectfully submitted,

/s/ Thomas H. Kohn

Dated: March 12, 2018

*Counsel for Amici Curiae Teamsters  
Local Union 830 and the  
Pennsylvania Conference of Teamsters*

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City may decide to implement a pre-K program, that decision reflects the City's priorities within the context of its budget; it does not depend on the outcome of this litigation. Moreover, the City has promised to continue funding pre-K, at least at some level, even if the tax is voided. See <https://www.youtube.com/watch?v=Wuh1zly6GVI>, at 15:15. Accordingly, this litigation does not task the Court with choosing between pre-K and no pre-K, which, clearly, is a legislative, not a judicial, determination. Rather, the Court is simply faced with deciding whether the tax is statutorily precluded by the Sterling Act, regardless of its intended utilization.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Pa. R.A.P. 2135(a)(1) in that it includes 1,751 words according to the word count feature of Microsoft Word 2010, excluding the parts exempted by Pa. R.A.P. 2135(b).

/s/ Thomas H. Kohn

Thomas H. Kohn, ID No. 35811

Dated: March 12, 2018

## CERTIFICATE OF SERVICE

I hereby certify that the within brief was served by first-class mail, postage prepaid on the below date upon:

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