

IN THE SUPREME COURT OF PENNSYLVANIA
Supreme Court Eastern District
2 EAP 2018

Docket Nos. 2, 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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

***AMICUS CURIAE* BRIEF OF PHILADELPHIA OPPORTUNITIES
INDUSTRIALIZATION CENTER, INC. IN SUPPORT OF APPELLEES**

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

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Euna Han & Lisa M. Powell, Consumption Patterns of Sugar Sweetened Beverages in the United States, J. ACAD NUTR. DIET 43-53, Jan. 20136

Jennifer Harris et al., Rudd Center for Food Policy and Obesity, *Sugary Drink Marketing to Youth: Some Progress But Much Room to Improve*, Nov. 20144

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STATEMENT OF INTEREST OF AMICUS CURIAE

Philadelphia Opportunities Industrialization Center, Inc.—or OIC—is a nonprofit organization founded in 1964 by the late Reverend Dr. Leon H. Sullivan, who was an internationally-recognized advocate for civil and economic rights for all. The Reverend Sullivan—who marched with the likes of Dr. Martin Luther King Jr. and Reverend Jesse Jackson—believed that jobs were the key to economic development and true empowerment. The creation of OIC was his response to the lack of employment opportunities and job-training programs in the community.

The Philadelphia OIC is dedicated to the elimination of poverty, unemployment, and illiteracy, and works to open opportunities for all members of the community. Its mission is to assist the unemployed, the underemployed, the homeless, and disadvantaged youth and adults to achieve self-sufficiency and empowerment, primarily through education, training, and job placement, and through supportive human services, housing, and economic development.

Philadelphia OIC files this brief in support of the City of Philadelphia and Frank Breslin (“Appellees”), in accordance with Pennsylvania Rule of Appellate Procedure 531. Pursuant to Rule 531(b)(2), *Amicus* states that no person or entity other than Philadelphia OIC or its counsel (i) paid in whole or in part for the preparation of the *amicus curiae* brief or (ii) authored in whole or in part the *amicus curiae* brief.

SUMMARY OF ARGUMENT

In June 2016, the Philadelphia City Council enacted the Philadelphia Beverage Tax (“PBT”) to address severe local education, revenue, and health issues that profoundly affect all Philadelphians. Following lengthy, in-depth, and thoughtful deliberation, the Council appropriately determined that a tax on distributions of sweetened beverages was a necessary measure to generate funding for crucial services for the City’s citizens.

Amicus respectfully submits this brief in support of the City’s position that the *en banc* Commonwealth Court’s holding that the PBT is lawful should be affirmed, and to amplify two critical, policy-driven reasons why the tax should not be thwarted in the courts. First, the sweetened beverage industry has aggressively marketed its products to minorities, and, in light of the serious health risks that accompany sweetened beverages, the industry has contributed to disparities in the level of unhealthiness among certain communities, particularly among blacks and Latinos. Similarly, any criticism levied by the industry, which is comprised of some of the world’s largest companies, that the tax is “regressive” or otherwise unduly burdensome on the poor, must be taken with a heavy dose of skepticism. Second, the benefits of the tax are substantial. Expanding access to pre-kindergarten services, refurbishing recreation centers, and supporting the other

projects that will be funded by the PBT are vital projects for the City of Philadelphia.

ARGUMENT

I. FOR YEARS, THE SWEETENED BEVERAGE INDUSTRY HAS HEAVILY TARGETED MINORITY CHILDREN, ENRICHING ITSELF AND LEAVING OTHERS TO DEAL WITH THE NEGATIVE HEALTH EFFECTS

Longstanding, aggressive marketing schemes have promoted sweetened beverages in minority communities. In view of the deepening appreciation for the negative health disparities experienced by minorities arising from these marketing strategies, there is more than a small degree of irony in the efforts of Appellants—particularly the American Beverage Association (“ABA”), which is the sweetened beverage industry’s trade association and proxy—to emphasize opposition to the tax on the ground it may raise consumer costs and be felt disproportionately by the poor. (Appellants’ Br. at 7.)

Significant, empirically-based research shows that the marketing of sweetened drinks is targeted at minorities. In particular, research conducted by the Rudd Center for Food Policy & Obesity, culminating in a comprehensive report issued in 2011¹ and updated in 2014,² sets forth the following findings:

¹ See generally Glenn Blain, *Rage Ensues As Study Shows Soda Ads Target Minorities*, NY DAILY NEWS, Nov. 5, 2011 (“research released last week ... concluded black kids and teens watched 80% to 90% more soda ads than white children” with “Hispanic teens ... exposed to 99% more soda ads than their white counterparts” according to the Yale University Rudd Center

On English-language TV, black children and teens saw more than twice as many ads for sugary drinks and energy drinks compared with white children and teens in 2013. Further, this gap increased compared with 2010 as advertising to white youth declined at a greater rate than advertising to black youth. Although black children and teens also watch more television than their white peers, this difference does not explain the entire difference in number of ads viewed. *Black teens saw four times as many ads for Sprite and three times as many Coca-Cola regular soda ads, compared with white teens, indicating that these brands targeted their advertising to a black audience.*³

The study further highlights that Hispanic preschoolers and children saw 23% and 32% more Spanish-language TV ads for sugary drinks and energy shots in 2013 than in 2010.

There is also extensive literature studying the health risks associated with sweetened beverages. Included in that literature are articles co-authored by the Commissioner of the City Philadelphia Department of Public Health, Thomas Farley, published in leading peer-reviewed journals, including the New England Journal of Medicine. (R.R. 667a-668a, ¶ 7.) Among other things, scientific studies

for Food Policy & Obesity), available at <http://www.nydailynews.com/new-york/rage-ensues-study-shows-soda-ads-target-minorities-article-1.972855>.

² See Jennifer Harris et al., Rudd Center for Food Policy and Obesity, *Sugary Drink Marketing to Youth: Some Progress But Much Room to Improve*, Nov. 2014, available at http://www.sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf.

³ *Id.* at 11 (emphasis added). The report identifies a number of other brands targeting their products at black children and teens, including other brands with relatively high ratios of ads viewed by black compared with white youth such as Vitamin Water, 5-hour Energy, and Red Bull. *Id.*

have concluded that consumption of sugar increases weight gain and the risk of obesity. (R.R. 668a ¶ 12.) Notably, sweetened beverages represent the largest single source of sugar in the American diet. (*Id.*)

Addressing these health risks is especially important in the City of Philadelphia. “The epidemics of obesity and type 2 diabetes are two of the most serious health problems” facing the City, with approximately one-third of adult Philadelphians obese in 2014, and nearly one in six reporting that they have a diagnosis of diabetes—which is 66% above the national average and 40% greater than in 2004. (R.R. 668a, 669a nn. 1 & 2.)

Given the sweetened beverage industry’s advertising strategies aimed at minorities and the health risks associated with their products, it is unsurprising that the aggressive marketing of nutritionally-poor beverages to minorities has in all likelihood significantly contributed to health disparities. A Rudd Center report highlights this important public health issue:

In evaluating companies’ targeted marketing practices, it is important to recognize that food and beverage marketing designed to appeal directly to Hispanic and Black consumers is not problematic in and of itself. However, *this research demonstrates that racial-ethnic targeted food marketing likely contributes to health disparities.*⁴

⁴ Jennifer Harris et al., Rudd Center for Food Policy & Obesity, University of Connecticut, *Food Advertising Targeted to Hispanic and Black Youth: Contributing to Health Disparities* (Aug. 2015), available at http://www.uconnruddcenter.org/files/Pdfs/272-7%20%20Rudd_Targeted%20Marketing%20Report_Release_081115%5B1%5D.pdf.

As a leading researcher at the Rudd Center summarized, “[Black and Latino] populations suffer more from diabetes, obesity and other negative health consequences from the consumption of sugary beverages; it’s a huge problem in those communities.”⁵

In this context, the industry’s suggestion of a benevolent purpose—protecting the interests of vulnerable individuals from a new tax—rings hollow when one considers that the PBT cuts against the core business model of members of the ABA. Notably, the *first* “risk factor” to the value of Coca-Cola’s stock identified in the company’s 2015 annual report filed with United States Securities and Exchange Commission highlights what is in fact motivating the industry, namely the fear of reduced demand arising from taxation and public health concerns about consumption of sugary beverages that could significantly impact profitability:

Increasing public concern about obesity; *possible new or increased taxes on sugar-sweetened beverages by government entities to reduce consumption or to raise revenue*; additional governmental regulations concerning

⁵ Eliza Barclay, *Soda Companies Step Up Their Marketing to Black and Latino Kids*, NPR: THE SALT, Nov. 20, 2014, available at <http://www.npr.org/sections/thesalt/2014/11/20/365219686/soda-companies-step-up-their-marketing-to-black-and-latino-kids>. See also Euna Han and Lisa M. Powell, *Consumption Patterns of Sugar Sweetened Beverages in the United States*, J. ACAD NUTR. DIET 43-53, Jan. 2013 (“Racial minority, low-educated, and low-income individuals were more likely to consume total SSBs [sugar sweetened beverages].”), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3662243/>.

the marketing, labeling, packaging or sale of our sugar-sweetened beverages; and negative publicity resulting from actual or threatened legal actions against us or other companies in our industry relating to the marketing, labeling or sale of sugar-sweetened beverages *may reduce demand for or increase the cost of our sugar-sweetened beverages, which could adversely affect our profitability.*⁶

There is no question that the sale of sweetened beverages is big business. The value of PepsiCo, Inc. as traded on the New York Stock Exchange,⁷ to take just one example, exceeds the size of the gross domestic product for the majority of nations around the globe.⁸ Understandably, the ABA and its members, as profit-driven, shareholder-accountable business entities, have powerful economic incentives to oppose the PBT. Their efforts to oppose the PBT on the ground that they are protecting the interests of the poor—as opposed to protecting their companies’ bottom lines—should be considered with due suspicion by the Court.

⁶ Form 10-K, The Coca-Cola Company, For the Fiscal Year Ended Dec. 31, 2015, at 10, available at <http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/investors/2015-annual-report-on-form-10-k.pdf>.

⁷ See <https://www.bloomberg.com/quote/PEP:US> (last visited April 13, 2018) (market capitalization exceeding \$180 billion).

⁸ See <http://databank.worldbank.org/data/download/GDP.pdf> (2016 GDP data).

II. THE PBT'S BENEFITS, PARTICULARLY TO VULNERABLE YOUTH, FAR OUTWEIGH ANY POTENTIAL BURDENS ON BUSINESSES OR CONSUMERS

In addition to serving the laudable objectives of reducing consumption of unhealthy beverages in order to promote the public health, revenue generated by the PBT will improve the quality of life for Philadelphians.

A primary recipient of PBT-generated funding will be expanded pre-kindergarten programs. Funding such programs is especially important in the City of Philadelphia: currently only 41% of Philadelphia's third grade children read at grade level, and only 47% of adults have more than a high school education. (R.R. 670a ¶ 20.) The benefits of high-quality pre-kindergarten include increased educational attainment, and employment, and decreased likelihood of arrest. (*Id.*)⁹ In 2013, President Barack Obama observed, "every dollar we invest in high-quality early education can save more than \$7 later on."¹⁰ Through additional funding

⁹ See generally Lynn A. Karoly et al., *Proven Benefits of Early Childhood Interventions*, Rand Corp. 2005, available at http://www.rand.org/pubs/research_briefs/RB9145.html. The Karoly paper identifies nineteen early intervention programs that demonstrated "significant and often sizable benefits" in one or more of the following areas: cognition and academic achievement, behavioral and emotional competencies, educational progression and attainment, child maltreatment, health, delinquency and crime, social welfare program use, and labor market success. Further, for some programs, improved outcomes were demonstrated soon after the program ended; in other cases, the favorable results were observed through adolescence and in the transition to adulthood, and in the case of one study (the Perry Preschool Program, which has tracked participants through age 40) benefits have been measured decades after the intervention ended.

¹⁰ National Public Radio, Transcript, *All Things Considered*, Feb. 14, 2013, available at <http://www.npr.org/2013/02/14/172034480/study-pre-k-investment-pays-off-with-higher-incomes-reduced-crime>.

afforded by the PBT, expanded pre-k will especially benefit the many thousands of Philadelphia's children living below the poverty line, or, worse, in deep poverty, who are most in need of access to educational opportunities.

Other projects to be funded by the PBT are similarly worthy. Recreation centers, too many of which have not been refurbished since the 1970's, will be renovated, providing positive outlets for youth during after school hours—and such an investment is likely to result in a decrease in crime while promoting physical activity. Likewise, additional funding for libraries, given the strikingly low level of literacy in the City, is much needed.

Although situated between Washington DC, the world's political epicenter, and New York, the global financial capital, Philadelphia nevertheless lags behind those cities by many measures, and needs to take great strides to become a truly world-class city. The PBT represents a step forward in that direction, by attacking and addressing core education, revenue, and health problems inextricably intertwined with challenges of poverty and racial inequality that profoundly burden the City of Philadelphia and its citizens. The Court should uphold the lawfulness of the tax.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

In accordance with the Pennsylvania Rules of Appellate Procedure, undersigned counsel for the *Amicus Curiae* Philadelphia Opportunities Industrialization Center, Inc. certifies that this Brief complies with the type-volume and typeface requirements of the Rules of Appellate Procedure because this brief contains 2,066 words, excluding parts of the brief exempted by the Rules of Appellate Procedure. This brief has been prepared in a proportionally spaced typeface using the 2013 version of Microsoft Word in 14 point Times New Roman font with footnotes in 12 point Times New Roman font.

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

Undersigned counsel for the *Amicus Curiae* Philadelphia Opportunities Industrialization Center, Inc. certifies that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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