Received 4/23/2018 5:17:26 PM Supreme Court Eastern District

Filed 4/23/2018 5:17:00 PM Supreme Court Eastern District
2 EAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA

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.

REPLY BRIEF FOR APPELLANTS

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 in September Term 2016, No. 01452, entered December 19, 2016

Shanin Specter, ID No. 40928
Charles Becker, ID No. 81910
Kline & Specter, P.C.
1525 Locust Street
Philadelphia, PA 19102
(215) 772-1000

Marc J. Sonnenfeld, ID No. 17210
John P. Lavelle, Jr., ID No. 54279
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000

Michael E. Kenneally (admitted *pro hac vice*)
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

A. The City Misunderstands the Scope of the Sterling Act. 3

B. The City's Tax Cannot Be Construed as a Tax on "Non-Retail Distribution Transactions." 8

C. The Court Should Reaffirm *United Tavern Owners*, Which Is Squarely On Point. 15

1. *United Tavern Owners* Is Correct. 16

2. *United Tavern Owners* Is Not Distinguishable. 18

D. The City's Political Arguments Get This Case Backwards. 22

III. CONCLUSION 25

CERTIFICATE OF WORD COUNT COMPLIANCE 26

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE 27

CERTIFICATE OF SERVICE 28

TABLE OF CITATIONS

Page(s)

Cases

Blair Candy Co. v. Altoona Area Sch. Dist.,
613 A.2d 159 (Pa. Cmwlth. 1992) 7

Appeal of Borough of Aliquippa,
175 A.2d 856 (Pa. 1961) 6

Appeal of Certain Taxpayers of Dunkard Twp.,
60 A.2d 39 (Pa. 1948) 6

City of Pittsburgh v. Allegheny Valley Bank,
412 A.2d 1366 (1980) 20

Commonwealth v. Donahue,
98 A.3d 1223 (Pa. 2014) 23

Commonwealth v. Lafferty,
233 A.2d 256 (Pa. 1967) 3, 17, 24

Commonwealth v. Nat'l Biscuit Co.,
136 A.2d 821 (Pa. 1957) 4, 12

Commonwealth v. Wanamaker,
296 A.2d 618 (Pa. 1972) 16

Commonwealth v. Wetzel,
257 A.2d 538 (Pa. 1969) 3, 17, 24

Commonwealth v. Wilsbach Distribs., Inc.,
519 A.2d 397 (Pa. 1986) 20, 21, 22

Fish v. Twp. of Lower Merion,
128 A.3d 764 (Pa. 2015) 1, 9, 11

Gurley v. Rhoden,
421 U.S. 200 (1975) 10, 14, 15

Hoffman Min. Co. v. Zoning Hearing Bd.,
32 A.3d 587 (Pa. 2011) 19

TABLE OF CITATIONS
(con't)

Page(s)

Holt's Cigar Co. v. City of Philadelphia,
10 A.3d 902 (Pa. 2011) 19

Honorbilt Prods. v. City of Philadelphia,
112 A.2d 108 (Pa. 1955) 7

John Wanamaker, Phila. v. Sch. Dist.,
274 A.2d 524 (Pa. 1971) 5

In re Lawrence Twp. Sch. Dist. 1947 Taxes,
67 A.2d 372 (Pa. 1949) 7

Lynnebrook & Woodbrook Assocs., L.P. ex rel. Lynnebrook Manor, Inc. v. Borough of Millersville,
963 A.2d 1261 (Pa. 2008) 1, 18

Man, Levy & Nogi, Inc. v. Sch. Dist.,
375 A.2d 832 (Pa. Cmwlth. 1977) 7

Mandl v. Commonwealth,
637 A.2d 703 (Pa. Cmwlth. 1994) 6

Marson v. City of Philadelphia,
21 A.2d 228 (Pa. 1941) 18

Murray v. City of Philadelphia,
71 A.2d 280 (Pa. 1950) 1, 7, 13, 24

Nutter v. Dougherty,
938 A.2d 401 (Pa. 2007) 20

Paul L. Smith Inc. v. S. York Cty. Sch. Dist.,
403 A.2d 1034 (Pa. Cmwlth. 1979) 7

People's Nat. Gas Co. v. City of Pittsburgh,
175 A. 691 (Pa. 1934) 7

Plymouth Lanes, Inc. v. Sch. Dist.,
202 A.2d 811 (Pa. 1964) 6

TABLE OF CITATIONS
(con't)

Page(s)

Pocono Downs, Inc. v. Catasauqua Area Sch. Dist.,
669 A.2d 500 (Pa. Cmwlth. 1996) 13

United States v. New Mexico,
455 U.S. 720 (1982) 15

United Tavern Owners of Phila. v. Sch. Dist.,
272 A.2d 868 (Pa. 1971) ..... *passim*

Verizon Pa., Inc. v. Commonwealth,
127 A.3d 745 (Pa. 2015) 16

Statutes

Act of April 12, 1951, P.L. 90 19

Act of August 5, 1932, P.L. 45, *as amended*, 53 P.S. § 15971 ..... *passim*

Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7201(k)(8) 17

Act of May 30, 1984, P.L. 345, § 11, 53 P.S. § 16191 5

Other Authorities

BLACK'S LAW DICTIONARY (10th ed. 2014) 10

CITY OF PHILA., THE MAYOR'S OPERATING BUDGET IN BRIEF FOR FISCAL YEAR 2019 (Mar. 1, 2018), https://beta.phila.gov/media/20180301094657/FY19-Budget-in-Brief.pdf 23

PHILA. CODE § 19-2603 5

PHILA. CODE § 19-4101(2) 10

PHILA. CODE § 19-4102(1) 12

PHILA. CODE § 19-4103(1) 2, 9, 12

PHILA. CODE § 19-4103(2)(b) 9, 11

TABLE OF CITATIONS
(con't)

Page(s)

Press Release, Office of the Controller, City of Phila., *Controller's Office Releases Data on Philadelphia Beverage Tax Revenue and Expenditures*, Mar. 13, 2018, http://www.philadelphiacontroller.org/media/press-releases/controllers-office-releases-data-on-philadelphia-beverage-tax-revenue-and-expenditures 23

WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) 10

I. INTRODUCTION

Emphasizing the social programs that the Tax might fund, the City and its amici urge this Court to defer to the political process. But the political process here did not get its start in 2016, when City legislators first proposed the Tax, and does not exclusively involve the voters of Philadelphia. It began in 1932, when the General Assembly passed the Sterling Act on behalf of the Commonwealth as a whole. *See* Act of August 5, 1932, P.L. 45, *as amended*, 53 P.S. § 15971. That statute imposed significant limits on the City's newly granted taxing authority: the City could only tax within its borders and "could not tax subjects taxed by the state." *Murray v. City of Philadelphia*, 71 A.2d 280, 284 (Pa. 1950). These meaningful limits reflected that "[t]he right of the state was paramount" over the City's objectives, notwithstanding the new local powers. *Id.*

In cases like this, it is this Court's responsibility not to assess the policy wisdom of the local tax but to preserve the Commonwealth's paramount position in Pennsylvania taxation by barring duplicative local taxes. This Court has consistently exercised that responsibility by setting aside local taxes that exceed localities' delegated taxing authority, and has further emphasized that the General Assembly intends local taxing authority to be construed *narrowly*, not broadly. *E.g.*, *Lynnebrook & Woodbrook Assocs., L.P. ex rel. Lynnebrook Manor, Inc. v. Borough of Millersville*, 963 A.2d 1261, 1265 (Pa. 2008); *Fish v. Twp. of Lower Merion*, 128 A.3d 764, 770 (Pa. 2015).

The Sterling Act prohibits the Tax in this case. Contrary to the City's claims, the Tax cannot be justified as a tax on so-called "non-retail distribution transactions"—as

if that were an established variety of tax—because the City's power to tax transactions is confined to "transactions . . . within the limits of such city," 53 P.S. § 15971(a), and the Tax purports to apply to distributor-to-retailer transactions wherever they occur. If there is any necessary connection between Tax liability and "transactions [or] subjects . . . within the limits of" Philadelphia, that link is with retailers' "holding out [soft drinks] for *retail sale* within the City." *Id.*; PHILA. CODE § 19-4103(1) (emphasis added). Such acts are part of the retail stage of commerce, and thus the City's Tax on those "transactions" or "subjects" impermissibly duplicates the state sales tax in violation of the Sterling Act.

But even if the City's Tax could be plausibly construed as a tax on "non-retail distribution transactions," the City offers *no case law* that supports the conclusion that such transactions are separately taxable, on top of existing taxes during retail sales of the same commercial products. Instead, the City trots out many cherry-picked cases that address very different questions—such as whether particular taxes are unconstitutional property taxes in violation of the Pennsylvania Constitution and whether an excise tax on gasoline falls on "producers" under the definitions of the federal Internal Revenue Code.

The only truly on-point cases cut against the City. One such case unequivocally rejects the City's argument (then and now) that a distributor-to-retailer tax and a retailer-to-consumer tax are "imposed on . . . different transaction[s]" and thus escape the Sterling Act's prohibition on duplicative local taxes. *United Tavern Owners of Phila. v. Sch.*

Dist., 272 A.2d 868, 873 (Pa. 1971) (plurality op.). Two others explain that the General Assembly designed its state sales tax with a deliberate purpose of preventing duplicative taxation on a commercial product at different stages in the chain of commerce. *Commonwealth v. Wetzel*, 257 A.2d 538, 539 (Pa. 1969); *Commonwealth v. Lafferty*, 233 A.2d 256, 259-60 (Pa. 1967). The City's efforts to separate "non-retail distribution transactions" from commerce already subject to the state sales tax runs counter to all of these cases.

The law is not on the City's side, whatever use the City may make of the Tax revenues. For good reason: under the City's "actual sameness" standard, localities could easily duplicate state taxes in virtually any stream of commerce by enacting taxes with only superficial differences, like the ones at issue here. This Court should hold that the Tax violates the Sterling Act and reverse the order below.

II. ARGUMENT

A. The City Misunderstands the Scope of the Sterling Act.

Although the City discusses a number of cases, those cases do not supply an answer to the question here: Has the City, through its Tax, impermissibly sought to tax a "transaction [or] subject . . . which is . . . subject to a State tax"? 53 P.S. § 15971(a). Few of the City's cases deal with transaction taxes of any sort. Fewer still do so in the context of interpreting non-duplication language like that in the Sterling Act as opposed to addressing constitutional challenges or different statutory language. *Not a single one*

addresses when a local tax at one level in the chain of commerce falls on a sufficiently different transaction than a state tax at another level. The City's cited cases therefore must be read with caution, because as this Court has stressed:

> It should be readily apparent that the considerations before a court when confronted by an attack upon a local tax as violative of the Sterling Act or [similarly worded enabling statutes], and the considerations when an attack is made . . . upon the constitutionality and validity of a State tax, are *wholly different*. And equally apparent it must be that the words as used in either case have judicial meaning only within the context of the problem to which they are applied.

Commonwealth v. Nat'l Biscuit Co., 136 A.2d 821, 828 (Pa. 1957) (emphasis added).

Read with the proper care, the City's cited cases do not justify the conclusion that the City seeks to draw from them: that Sterling Act "duplication is shown through actual sameness—not mere relatedness." City Br. 15. That hyper-narrow construction would make the Sterling Act's prohibition a nullity. No local legislature passes a local tax that is *actually* the same as a state tax. And if the City were right, it could effortlessly evade the Sterling Act's strictures—not to mention the state-imposed 2% cap on its retail sales taxes—by enacting taxes with the most trivial of differences. For instance, it could duplicate the state sales tax yet again by levying a "storage and handling" beverage tax on Philadelphia retailers measured by the ounces of beverages held out for

retail sale. The Sterling Act was not meant to be such a dead letter, and neither its text[1] nor the case law suggests that it is.

Take, for example, the City's leading case, *John Wanamaker, Phila. v. Sch. Dist.*, 274 A.2d 524 (Pa. 1971). It does not involve the Sterling Act, or a transaction tax, at all. The "sole question" it faced was whether Philadelphia's tax "on the use or occupancy of real estate for commercial or industrial activity" was "an unequal tax on real estate and thus violate[d] the Uniformity Clause of the Pennsylvania Constitution." *Id.* at 524. The challengers argued that the tax was an unconstitutionally non-uniform property tax because it fell on real estate used for commercial or industrial activity but not real estate put to other uses. The majority, however, after stressing that constitutional challenges to taxation face "a very heavy burden," rejected that argument because the tax was not a real estate tax but a "privilege" tax. *Id.* at 526-27. That holding has no implications for this case. The City has never claimed that its Tax is a property tax or a privilege tax, and the Uniformity Clause challenge to the Tax is not before this Court.[2]

---

[1] Rather than quote the main operative language of the Sterling Act, the City prefers to quote a later sentence expressly stating "the intention of th[e] section." 53 P.S. § 15971(a). But that sentence does not vary the main grant of taxing authority earlier in the subsection—on the contrary, it is expressly "subject . . . to the foregoing provisions," *id.*—and it is not the sentence on which this Court has focused in Sterling Act cases.

[2] The City's entire defense against Plaintiffs' Uniformity Clause challenge was that the Tax was *not* a property tax. *See, e.g.*, City Answer to Pet. for Allowance of Appeal 14-15. And a separate statute bars the City from imposing additional business privilege taxes beyond its existing Business Income and Receipts Tax. *Compare* Act of May 30, 1984, P.L. 345, § 11, 53 P.S. § 16191, *with* PHILA. CODE § 19-2603.

Uniformity was also the issue in the two cases that the City misleadingly invokes to suggest that distribution transactions are "a subject of taxation distinct from retail transactions." City Br. 20. That question was not remotely at issue in either cited case. One of these Uniformity cases addressed whether the distinction between wholesalers and retailers "provides a nonarbitrary, reasonable and just basis to grant a processing exclusion for sales and use tax to wholesale and not retail bakers." *Mandl v. Commonwealth*, 637 A.2d 703, 705 (Pa. Cmwlth. 1994). The other was even further afield. *See Appeal of Borough of Aliquippa*, 175 A.2d 856, 862-63 (Pa. 1961) (rejecting Uniformity Clause challenge to state statute that excluded "machinery, tools, appliances, and other equipment" from definition of taxable real estate).

The City's other citations are similarly inapposite. For instance, one cited case rejected an argument that a local "tax on the privilege or occupation of strip mining coal" unconstitutionally duplicated the *local* "property tax" on "real estate in the township." *Appeal of Certain Taxpayers of Dunkard Twp.*, 60 A.2d 39, 40-41 (Pa. 1948). The second involved an argument that a local tax "on the privilege of engaging in the amusement" of bowling violated a distinct statutory prohibition of local taxes "on the privilege of employing . . . tangible property . . . subject to a State tax," and the Court merely concluded that the local tax could not "be considered as a tax on the privilege of using bowling equipment." *Plymouth Lanes, Inc. v. Sch. Dist.*, 202 A.2d 811, 812-13

(Pa. 1964). Neither case, then, involved a transaction tax or the type of analysis required by the Sterling Act here.[3]

And for every case that the City cites, one can readily find a different case that finds impermissible duplication despite certain differences between the state and local taxes. *See, e.g.*, *Murray*, 71 A.2d at 284-86 (holding that City's tax on corporate shareholders' receipt of dividend income from their stock violated the Sterling Act by duplicating state capital stock and net income taxes on corporate property); *People's Nat. Gas Co. v. City of Pittsburgh*, 175 A. 691, 692-93 (Pa. 1934) (holding that Pittsburgh's tax on ownership or use of gas meters violated the Sterling Act by duplicating state capital stock tax on corporate property); *Honorbilt Prods. v. City of Philadelphia*, 112 A.2d 108, 109-10 (Pa. 1955) (holding that City's business privilege tax violated the Sterling Act, as applied to mattress manufacturer, by duplicating state license fee for selling mattresses); *In re Lawrence Twp. Sch. Dist. 1947 Taxes*, 67 A.2d 372, 373-74 (Pa. 1949) (holding that

---

[3] *See also Blair Candy Co. v. Altoona Area Sch. Dist.*, 613 A.2d 159, 160 (Pa. Cmwlth. 1992) (construing distinct prohibition in the Local Tax Enabling Act—on a local "mercantile or business privilege tax on gross receipts or part thereof which are . . . Pennsylvania sales tax"—as it related to Commonwealth's cigarette stamp tax (emphasis omitted)); *Paul L. Smith Inc. v. S. York Cty. Sch. Dist.*, 403 A.2d 1034, 1037 (Pa. Cmwlth. 1979) (rejecting a Uniformity Clause challenge premised on the contention that local "tax on an owner's privilege of using his realty as a location for his residence" was in substance a "property tax"); *Man, Levy & Nogi, Inc. v. Sch. Dist.*, 375 A.2d 832, 833-34 (Pa. Cmwlth. 1977) (rejecting argument that local business privilege tax duplicated a state property tax, because "[t]he business privilege has always been held to be a taxable subject separate and distinct from the property of the businessman").

local tax on "coal mined" was not a privilege tax but instead a property tax that violated Local Tax Enabling Act by duplicating state capital stock and corporate income taxes).

The real lesson to be learned from all these cases is not that the Court requires perfect overlap between the local and state taxes in order for a Sterling Act challenge to succeed. The lesson, rather, is that the Court carefully compares the substance of the local tax with that of the state tax to determine whether there is unlawful duplication. As demonstrated next, that comparison in this case leads to the conclusion that the City's Tax does fall on the same "transaction [or] subject" as the state sales tax and therefore violates the Sterling Act. 53 P.S. § 15971(a).

B. The City's Tax Cannot Be Construed as a Tax on "Non-Retail Distribution Transactions."

Plaintiffs' opening brief recounted numerous reasons why the City's Tax, contrary to its lawyers' official position, cannot accurately be described as a tax on "non-retail distribution transactions" under the Sterling Act. Plaintiffs began with a very simple reason for that conclusion: the only transaction taxes authorized by the Sterling Act's plain language are taxes on "transactions . . . within the limits of [the] [C]ity," and the Tax here is not targeted at distribution-level transactions within the limits of the City. Pls.' Br. 17-20.

The City response to this argument, late in its brief, is unconvincing. City Br. 34-40. Contrary to the City's portrayal, Plaintiffs raise the point not to challenge particular applications of the Tax, *see* City Br. 34-35 & n.14, but in order to identify what

the Tax as written actually taxes.[4] The Tax is not, in substance, a true distribution transaction tax. If the City had wanted, it could have written a much simpler tax targeting distribution transactions within the City. Instead, the City designed a Tax that targets distribution level transactions wherever they happen to occur, as long as they involve retailers whose purpose is "holding out [the covered soft drinks] for retail sale within the City." PHILA. CODE § 19-4103(1). For good measure, the City also targets unilateral activity by the Philadelphia retailer: "the transport of any [covered] beverage into the City by a dealer." *Id.* And then the City based the measure of the Tax not on the volume at the distributor level, but on the volume of final product *to be sold to the customer* once "prepared to the manufacturer's specifications." *Id.* § 19-4103(2)(b).

It is not hard to guess why the City wrote its Tax this way. The City did not want to tax wholesale soft drink commerce within the City; it wanted to tax *retail* commerce in the City and knew it had to get around the Sterling Act. *Cf.* R.R. 127a, 129a (The City's Mayor: "If I go into a WaWa or 7-11 and I'm mad at Jim Kenney because he raised the tax on sugary sweet beverages, I can choose not to buy that item.").

The City nevertheless tries to claim that a retailer's transportation of its own inventory, from one of its locations to another, is really "a segment of the distribution

---

[4] The City's extended discussion of particular realty transfer taxes is thus irrelevant. *See* City Br. 34-35 & n.15. The important point, which cannot seriously be disputed, is that a "transaction tax on . . . extraterritorial transactions [is] impermissible" under the Sterling Act and similar tax enabling act language. *Fish*, 128 A.3d at 770 (emphasis omitted).

transaction." City Br. 38. And in support of this counterintuitive claim, the City selectively quotes a recent dictionary definition, *id.* at 38-39, leaving out the "activity involving two or more persons" definition. BLACK'S LAW DICTIONARY 1726 (10th ed. 2014). In any case, the ordinary meaning of "transaction," including when the Sterling Act was enacted, is "[a] business deal" or "an act involving buying and selling." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2688 (2d ed. 1934). That is also the meaning relevant to the Tax here, as shown by the Tax's own definition of "[d]istributor": "[a]ny person who supplies sugar-sweetened beverage to a dealer." PHILA. CODE § 19-4101(2). Transporting one's own merchandise across the municipal border is neither "an act involving buying and selling" nor the "suppl[ying]" of that merchandise to a retailer. Besides, the City offers no reason beyond its own say-so to conclude that transporting products to their point of retail sale is part of the distribution transaction rather than the retail transaction.[5]

The City's next point fares no better. The City insists it makes more policy sense, from the City's perspective, to tax "out-of-City distributors doing business with Philadelphia dealers" in addition to "in-City distributors trying to distribute the same [drinks] to the same Philadelphia dealers." City Br. 39. No doubt the City would prefer to tax those who never act within its borders—taxing authorities often do—but the

[5] The City cites *Gurley v. Rhoden*, 421 U.S. 200, 201-02, 204-05 (1975), on this point, but it is unclear why. The case simply applied an unambiguous and specific federal statutory definition of the word "producer." *Id.* at 202 & nn.2, 3. There is no statutory definition of "distribution transaction" here.

Sterling Act does not permit extraterritorial taxation of this sort. *See, e.g.*, *Fish*, 128 A.3d at 770. And the City cannot even formulate this policy defense without limiting the claim to "Philadelphia dealers," betraying the Tax's focus on Philadelphia retail commerce. Distributors inside or outside the City owe no tax at all when they sell to out-of-City retailers. *See* Pls.' Br. 19. The City never says how, given all this over- and under-inclusiveness, the Tax can fairly be described as a tax on distribution-level "transactions . . . within the limits of such city." 53 P.S. § 15971(a).

The City's discussion of the measure of the Tax is equally unpersuasive. As Plaintiffs have underscored, the Tax's measure gives no indication whatever that the Tax is tied to the distribution-level (as opposed to retail-level) transaction. The Tax is not based on the volume distributed by the distributor to the retailer when that differs from the volume at which the product is supposed to be sold at retail—or anything else at the distribution stage. What governs is the volume that is supposed to be sold to the retail consumer. *See* PHILA. CODE § 19-4103(2)(b); Pls.' Br. 22. The City insists otherwise: "The [Tax] is paid upon and measured by the volume of syrup distributed to the dealer, at the rate of $0.015 per fluid ounce of beverage that the manufacturer's specifications states should be made from that distributed amount of syrup or concentrate." City Br. 40. But this claim is just a convoluted concession that the end-volume *does* furnish the Tax's measure.

For these reasons, the subject matter and measure of the Tax all point to the conclusion that the "transaction [or] subject" taxed by the Tax is retail-level, contrary

to the City's claims. That is enough reason to conclude that the Tax is impermissibly duplicative of the state sales tax. *See Nat'l Biscuit*, 136 A.2d at 825-26 (setting out the "subject matter" and "measure" test for duplication).[6] The City nonetheless insists on considering other factors, City Br. 21-34, but these arguments lack merit.

First, the City cannot disprove the Tax's retail focus by emphasizing that the Tax is collected in advance of the retail sale, even if the retailer does not succeed in selling a particular item. *See* City Br. 30-31, 33. The fact remains that unlike Philadelphia wholesale transactions, *virtually no Philadelphia retail sales* of the covered beverages *escape the Tax*—with the apparent exception of an unknown quantity of beverages manufactured by the retailer itself.[7] The City merely collects its Tax earlier and

---

[6] At times, the City seems to suggest that the measure of a local tax is relevant because variation matters for its own sake. *See, e.g.*, City Br. 21. Not true. As *National Biscuit* shows, the measure of the tax simply helps reveal its true incidence. *See* 136 A.2d at 826 (noting that tax measured by capital stock related to the exercise of the privilege of doing business in Pennsylvania helps to confirm that the tax falls on the privilege of doing business in Pennsylvania). As explained above, the measure of the City's Tax suggests it falls on retail soft drink commerce and does nothing to connect the Tax to the distribution-level transaction instead.

[7] The City's current position is that beverages sold at retail by their manufacturer are exempt from the Tax in light of one of the Tax's effective date provisions, which bars Philadelphia retailers from selling only beverages "acquired by the dealer on or after January 1, 2017." PHILA. CODE § 19-4102(1). The actual provision imposing the Tax, however, is not limited to beverages "acquired" by the Philadelphia retailer. *See id.* § 19-4103(1). Moreover, it is not clear how the City would apply this view in practice. Would parent-subsidiary transfers count as acquisitions? Nor is it clear that the City would adhere to this position after this litigation concludes. As the City's brief admits, it already made one opportunistic change to its interpretation of the Tax (and official regulations) after the Commonwealth Court's decision, in a transparent attempt to improve its litigating position. *See* City Br. 11 n.5.

somewhat more widely. There is no evidence here on how much more widely, and it is hard to believe that a large proportion of retailers' inventory ends up being discarded or otherwise permanently unsold. Such factual questions, moreover, may not be resolved in favor of the City in the posture of Plaintiffs' preliminary objections.

Second, the City is wrong to emphasize that the Tax is collected from distributors instead of retailers or consumers. City Br. 21-22. In many circumstances retailers actually do pay the Tax. Pls.' Br. 21. Regardless, imposing a tax on different taxpayers is not a loophole to the Sterling Act's bar on duplicative taxation. For example, the *Murray* Court held the City's tax on dividend income duplicative of the state taxes on corporations' capital stock and net income, even though the City tax was paid by individual shareholders and the capital stock and net income taxes were paid by the corporations themselves. 71 A.2d at 284-86. The differing taxpayer identities did not matter. *See also Pocono Downs, Inc. v. Catasauqua Area Sch. Dist.*, 669 A.2d 500, 502 (Pa. Cmwlth. 1996) (rejecting municipality's argument that "taxes are not duplicative if the stated burden of the taxes is on different taxpayers").

To further explain why it *should not* matter here whether the City Tax and state sales tax are paid by different taxpayers, Plaintiffs have noted that distributors and retailers pass along most of the costs to the consumer anyway, further diminishing the practical significance of this formal difference. Pls.' Br. 21-22. In response, the City acts as though Plaintiffs' "key" point is that this pass-through alone proves duplication. City Br. 23; *see also id.* 23-30. The City has consistently propped up this strawman to

fight, but it is not Plaintiffs' view, and never has been. *See, e.g.*, Pls.' Cmwlth. Ct. Br. 20-22; Pls.' Reply Br. 7. Plaintiffs' view is that the Court should not give any weight to the identity of the person formally designated the taxpayer. The relevant question in this type of duplication case is whether the state and local taxes fall on the same "transaction [or] subject," not whether they fall on the same taxpayer. 53 P.S. § 15971(a). The City identifies no authority to the contrary. *See* City Br. 21-22.

Instead, the City relies again on entirely inapposite authorities in which the legal issues did turn on the identity of the taxpayer. The federal *Gurley* decision, discussed at great length in the City's brief, rejected a gas station owner's argument that his state violated the U.S. Constitution by denying him a deduction from his obligation to pay the state's sales tax, on the ground that the retail price of the gas he sold reflected the passed-along costs of separate federal and state excise taxes on gasoline. 421 U.S. at 201-03. The premise of this argument was that liability for these two excise taxes fell not on him, but on the gasoline's retail purchasers. *Id.* at 203-04. The U.S. Supreme Court disagreed that the gas station owner's decision to "shift[] the economic burden of the taxes from himself to the purchaser-consumer" also shifted the legal obligation to pay the taxes. *Id.* at 204. The relevant provision of the federal Internal Revenue Code provided that the tax fell on the gas station owner rather than the consumer, *id.* at 205, and the state supreme court had conclusively determined that the same was true of the state excise tax, *id.* at 208. Plaintiffs here are not arguing that the Tax pass-through affects who bears the obligation of paying it. They instead highlight the pass-

through to rebut the City's erroneous fixation on the identity of the taxpayer. Thus, the *Gurley* Court's conclusion—on a question of federal constitutional law unrelated to whether two taxes fall on the same "transaction [or] subject"—has no bearing on this case.[8]

In short, the City's Tax is defined and measured by retail commerce within Philadelphia. It is not, despite the City's efforts to get around the Sterling Act, a tax on "non-retail distribution transactions." City Br. 1. Because the Tax falls on the same "transaction [or] subject" as the state sales tax, it is barred by the Sterling Act. 53 P.S. § 15971(a).

C. The Court Should Reaffirm *United Tavern Owners*, Which Is Squarely On Point.

Even if the Tax could reasonably be described as a tax on "non-retail distribution transactions," *United Tavern Owners* explains that it still would impermissibly duplicate the state sales tax and violate the Sterling Act. *See* 272 A.2d at 873. The City fails to discredit and distinguish *United Tavern Owners* on this point. The decision squarely applies to the facts of this case and should be reaffirmed, particularly since the General Assembly has never seen fit to alter the Sterling Act in response to the decision's

---

[8] *United States v. New Mexico*, 455 U.S. 720 (1982), is even less relevant. The question there was whether state taxes borne by a private company were unconstitutional attempts to impose taxes directly on the federal government itself merely because the private company contracted to do work for the federal government at higher prices because of the taxes. *Id.* at 733-38. Again, the identity of the taxpayer was crucial to the legal question.

interpretation of that statute. *Cf. Commonwealth v. Wanamaker*, 296 A.2d 618, 624 (Pa. 1972) ("It is well settled that the failure of the legislature, subsequent to a decision of this Court in construction of a statute, to change by legislative action the law as interpreted by this Court creates a presumption that our interpretation was in accord with legislative intendment." (citation omitted)); *Verizon Pa., Inc. v. Commonwealth*, 127 A.3d 745, 758 (Pa. 2015) (noting "the strong presumption that our interpretation of this statutory provision in [a previous case] has been in harmony with the General Assembly's intent due to the fact that body has chosen not to amend that language in response to that decision").

1. *United Tavern Owners* Is Correct.

The key conclusion in *United Tavern Owners* is that distributor-to-retailer transactions and retailer-to-consumer transactions are not separately taxable transactions under the Sterling Act. 272 A.2d at 873. These are not "different transaction[s]" for purposes of the Sterling Act's non-duplication provision: on the contrary, taxes at both levels are "classic sales taxes." *Id.* As Plaintiffs argued in their opening brief, there are at least three reasons to reaffirm this conclusion. Pls.' Br. 25-27. The City offers unpersuasive arguments in response.

First, the City essentially concedes that, under its reading of the Sterling Act, the statute's use of the word "subject"—in granting the City authority to tax "transactions [and] subjects" and barring the City from taxing any "transaction [or] subject" taxed by the Commonwealth, 53 P.S. § 15971(a)—would be meaningless. *See* City Br. 46-48.

But instead of reading the word "subject" out of the statute, in violation of well-settled principles of statutory interpretation, the Court should construe the terms together and conclude that different stages in the chain of commerce for the same physical commercial products are not separately taxable "transactions" because they nevertheless involve the same "subjects." Contrary to the City, this conclusion would not upend any existing doctrine, for *United Tavern Owners* is the only case to address the taxability of different transactions involving the same commercial product.

Second, the City cannot brush off this Court's previous discussion of the objectives of the state sales tax—and in particular, the tax's refusal to tax distribution-level sales "for the purpose of resale." Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7201(k)(8); *Wetzel*, 257 A.2d at 539; *Lafferty*, 233 A.2d at 259-60. Although those two cases do not interpret the Sterling Act, they nevertheless cast more light on the subject matter of the state sales tax than any other case besides *United Tavern Owners*. Both explain that "any requirement that the retailer or middleman should be obligated for an additional sales levy effects double taxation with respect to the same item of commerce," confirming that the subject of the state sales tax is the "item of commerce." *Wetzel*, 257 A.2d at 539. They also explain that the General Assembly had an affirmative intention "to prevent 'tax pyramiding'" or "tax on a tax situation" of this sort, to ensure "that the sales and use tax is paid only once in the sequence from creation of the commodity or service to the consumer." *Lafferty*, 233 A.2d at 259-60. These cases thus provide further evidence that the General Assembly opposed treating distribution-level

and retail-level sales as separately taxable events. And here again, the City offers no case law to support its own contrary position.

Finally, the City offers no real answer to *United Tavern Owners*'s concern about competition between state and local governments for tax revenues. *See* 272 A.2d at 873. The City may not be troubled by the Commonwealth's lost revenues, but this Court has recognized that tax enabling statutes include exceptions to the taxing power conferred precisely because excessive local taxation, in the General Assembly's eyes, is a "mischief to be remedied." *Lynnebrook*, 973 A.2d at 1267. Contrary to the City's topsy-turvy approach, *see* City Br. 51, the onus does not fall on the General Assembly to expressly disapprove unauthorized taxes through additional legislation. The onus falls on the City to show it "plainly and unmistakably" has the taxing power that it claims. *Lynnebrook*, 963 A.2d at 1265 (citation omitted). Nor does *Marson v. City of Philadelphia*, 21 A.2d 228, 229 (Pa. 1941), intimate otherwise. In that case, the Court simply rejected an effort to override the Sterling Act's plain grant of authority by an unwritten doctrine of governmental tax immunity. All Plaintiffs ask here is that the Court apply the Sterling Act as written and "resolve [any] doubts in favor of the taxpayer." *Lynnebrook*, 963 A.2d at 1268.

2. *United Tavern Owners* Is Not Distinguishable.

The City also tries hard to argue that *United Tavern Owners* has no bearing on this case because it supposedly applied a "field preemption" analysis and would not have struck down the City's liquor sales tax but for the state's regulation of the liquor industry

through the Liquor Code.[9] The City's efforts to distinguish *United Tavern Owners* are based on misreading and mischaracterization.

As this Court knows, "[t]here are three generally recognized types of preemption:"

> (1) **express or explicit preemption**, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) **conflict preemption**, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) **field preemption**, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments.

Hoffman Min. Co. v. Zoning Hearing Bd., 32 A.3d 587, 593-94 (Pa. 2011) (emphasis added).

Contrary to the City's claims, the only fair reading of *United Tavern Owners* is as an express preemption decision applying the Sterling Act's express language. The decision explicitly held that the City's liquor sales tax "violate[d] the preemption provision of the Sterling Act" and was "invalid under the Sterling Act." *United Tavern Owners*, 272 A.2d at 873-84. And although the decision (like the dissent below) does occasionally use the word "field," such terminology is common even in express preemption cases. *See, e.g.*, *Holt's Cigar Co. v. City of Philadelphia*, 10 A.3d 902, 907 (Pa. 2011) ("In express preemption, 'a statute specifically declares it has planted the flag of

[9] Act of April 12, 1951, P.L. 90.

preemption in a field.'" (citations omitted)); *Nutter v. Dougherty*, 938 A.2d 401, 404 (Pa. 2007) (similar).

In fact, as the City emphasizes, the Court did not recognize field preemption of local taxation at the time of *United Tavern Owners*. City Br. 43. That is partly *because* of *United Tavern Owners*, which rejected the challengers' field preemption argument based on the Commonwealth's regulation of the liquor industry in the Liquor Code, 272 A.2d at 869-71, before going on to endorse their Sterling Act argument, *id.* at 871-74. To be sure, as the City further emphasizes, this Court later changed course on the field preemption question, concluding that "the Liquor Code and regulations promulgated thereunder indicate the legislature's clear intent to regulate in plenary fashion every aspect of the alcoholic beverage industry." *Commonwealth v. Wilsbach Distribs., Inc.*, 519 A.2d 397, 400 (Pa. 1986) (plurality op.).[10] As a result, *Wilsbach* held that Harrisburg's business privilege tax could not lawfully be applied to Harrisburg liquor merchants. *Id.* at 402. But the *Wilsbach* plurality's disagreement with the first part of *United Tavern*

[10] Given that *Wilsbach* itself had a fractured lineup with no opinion commanding a majority of the Court, it is curious that the City relies so heavily on it in an attempt to discredit *United Tavern Owners* for having the same features. And the City overplays this hand. Contrary to the City's depiction, the *Wilsbach* plurality did not "criticize[] the Commonwealth Court for 'misplac[ing]' reliance on Justice O'Brien's opinion." City Br. 42. The *Wilsbach* plurality's statement on that subject was tentative: "Given the splintered voting pattern of *United Taverns*, Commonwealth Court's cautious reliance on *United Taverns* to dispose of Appellant's argument of pre-emption *may well have been misplaced*, and we feel it appropriate to re-examine the issue especially in light of our more recent decision in *City of Pittsburgh v. Allegheny Valley Bank*, 412 A.2d 1366 (1980)." *Wilsbach*, 519 A.2d at 400 (emphasis added).

Owners—the part *rejecting* the field preemption argument—is no reason to reject the second part of *United Tavern Owners*—the part *endorsing* the express preemption argument, which was not at issue in *Wilsbach* because Harrisburg's challenged tax fell not on transactions but on the privilege of doing business in the city. *See id.* at 398. As Plaintiffs noted earlier, Pls.' Br. 23, without contradiction by the City, *United Tavern Owners*'s agreement with the challengers' Sterling Act express preemption holding had never been called into question before this case.

And that express preemption holding applies with full force here. While the City claims that *United Tavern Owners* would not have held the City's liquor sales tax preempted without the Commonwealth's broader regulation of the liquor industry through the Liquor Code, the City's claim is based entirely on selective quotation. City Br. 44. The sentence immediately preceding the one quoted by the City explains that "the state Liquor Code alone is not a sufficient indication of the Commonwealth's intention to preempt the entire field of legislation affecting liquor." *United Tavern Owners*, 272 A.2d at 870. The point, then, was not that the Liquor Code was a necessary ingredient, but that it was insufficient. That is clear from subsequent passages from the opinion, which do not rely on the existence of the Liquor Code at all. *See, e.g.*, *id.* at 872 ("The *real question* presented by this case is whether, by the enactment of these two statutes [*i.e.*, the Commonwealth's 18% and 6% taxes on liquor sales], the legislature has intended to preempt the field of taxation specifically imposed on the sale of liquor." (emphasis added); *id.* at 873 ("*We hold today* that because the sales of liquor are already

subject to two state taxes, the state has preempted the specific field of liquor sales for taxation purposes." (emphasis added)); *id.* (rejecting City's contention "that the ordinance in question does not violate the preemption provision of the Sterling Act because it is imposed on a different transaction than that on which the two state taxes are imposed").

In fact, the idea that the state liquor taxes and Liquor Code have preemptive force in combination comes not from *United Tavern Owners*, but *Wilsbach*. In that later case, which the City portrays as a departure from *United Tavern Owners* in relevant part, the plurality concluded that it was the Commonwealth's "pervasive control over all phases of the liquor industry, *along with the extensive taxation and fees imposed*" that together "indicate[d] the legislature's intent to control this industry" to the exclusion of local taxation. *Wilsbach*, 519 A.2d at 402 (emphasis added).

United Tavern Owners unmistakably rejected the same argument the City again makes now: *i.e.*, that a sales tax on retail-level transactions and a sales tax on distribution-level transactions are not duplicative of each other for purposes of "the preemption provision of the Sterling Act because [each] is imposed on a different transaction" than the other. *United Tavern Owners*, 272 A.2d at 873. That argument lacked merit in *United Tavern Owners* and has not improved with the passage of time.

D. The City's Political Arguments Get This Case Backwards.

The City wants to have it both ways. Echoed by various amici—but, notably, zero members of the General Assembly—the City wants the Court to think about the

social programs that the City's Tax supposedly will enable the City to fund, City Br. 7, but not the consequences that a victory for the City would have on the balance of power over local taxation, *id.* at 54-57. The City's approach is backwards.

Whatever its usefulness as a public relations campaign, the City's pledge to spend Tax revenues on pre-K or infrastructure programs is legally irrelevant. Tax revenues can always be spent well, but that does not mean that the City has the taxing power it claims. Nor, for that matter, does the Tax actually require the City to spend Tax revenues on education or rebuilding. And it is an open question to what extent the City will deliver on those promises—much as it is an open question whether the City truly needs the Tax to do so.[11]

---

[11] Despite the preliminary-objections posture of this case, the City cites its own declaration and City council minutes as supposed evidence of how the Tax is being spent. City Br. 7. But the cited materials only contain *promises* to spend the Tax in particular ways, not evidence of actual spending. (R.R. 692a, 756-61a, 770-71a, 913a) Moreover, if the Court indulges the City's wish to go beyond the allegations of Plaintiffs' Complaint, it should also take judicial notice of three points. *See, e.g.*, *Commonwealth v. Donahue*, 98 A.3d 1223, 1230 n.5 (Pa. 2014).

First, the City Controller recently reported that 74% of the revenues from the Tax, approximately $63 million, have gone into the City's general fund rather than being spent on pre-K or community schools or the Rebuild community initiative. Press Release, Office of the Controller, City of Phila., *Controller's Office Releases Data on Philadelphia Beverage Tax Revenue and Expenditures*, Mar. 13, 2018, http://www.philadelphiacontroller.org/media/press-releases/controllers-office-releases-data-on-philadelphia-beverage-tax-revenue-and-expenditures.

Second, the City's budgets (which are themselves cited in the City's declaration, *see* R.R. 692a) show that the City projects over $4.6 *billion* in total revenues for 2019, leaving the Tax revenues a drop in the fiscal bucket. CITY OF PHILA., THE MAYOR'S OPERATING BUDGET IN BRIEF FOR FISCAL YEAR 2019, at 10 (Mar. 1, 2018), https://beta.phila.gov/media/20180301094657/FY19-Budget-in-Brief.pdf.

What does have relevance, contrary to the City's view, is whether the Tax is consistent with the purposes underlying the General Assembly's enactments. The Sterling Act's non-duplication provision (like the parallel Local Tax Enabling Act provision) seeks to ensure that the City does not compete with the Commonwealth over particular sources of tax revenue and that "[t]he right of the state [remains] paramount." *Murray*, 71 A.2d at 284. The state sales tax's anti-pyramiding provision seeks to preclude taxes on top of taxes in the chain of commerce. *Wetzel*, 257 A.2d at 539; *Lafferty*, 233 A.2d 259-60. The express statutory authorization for the City's 2% retail sales tax (like the parallel authorizations for other local sales taxes) sets an upper limit on the City's sales taxing power. *See* Pls.' Br. 31. If the Tax here succeeds, municipalities across the Commonwealth will be able to undermine the purposes behind these enactments through copycat taxes, on whatever commercial products and at whatever rates they please. It proves nothing that they have not done so already. Other governments are watching to see whether the City succeeds here. This Court should not let it. The Court should reject the City's novel Tax and attempt to expand its taxing authority.

Third, the City has the capabilities to prioritize different budgetary items, like pre-K or infrastructure programs, regardless of the outcome of this litigation. In fact, 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. This appeal does not ask the Court to choose between pre-K and no pre-K.

III. CONCLUSION

For the reasons given here and in Plaintiffs' opening brief, the Order of the Commonwealth Court should be reversed and the Tax declared unlawful.

Respectfully submitted,

/s/ Shanin Specter
Shanin Specter, ID No. 40928
shanin.specter@klinespecter.com
Charles Becker, ID No. 81910
charles.becker@klinespecter.com
Kline & Specter, P.C.
1525 Locust Street, 19th Floor
Philadelphia, PA 19102
(215) 772-1000

/s/ Marc J. Sonnenfeld
Marc J. Sonnenfeld, ID No. 17210
marc.sonnenfeld@morganlewis.com
John P. Lavelle, Jr., ID No. 54279
john.lavelle@morganlewis.com
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000

Michael E. Kenneally (admitted *pro hac vice*)
michael.kenneally@morganlewis.com
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000

Counsel for Plaintiffs-Appellants

Dated: April 23, 2018

CERTIFICATE OF WORD COUNT COMPLIANCE

I certify that this brief complies with PA.R.A.P. 2135(a)(1) because it includes 6,994 words according to the word count feature of Microsoft Word 2016, excluding the parts exempted by PA.R.A.P. 2135(b).

/s/ Marc J. Sonnenfeld
Marc J. Sonnenfeld, ID No. 17210

Dated: April 23, 2018

CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I certify 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.

/s/ Marc J. Sonnenfeld
Marc J. Sonnenfeld, ID No. 17210

Dated: April 23, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, a true and correct copy of the foregoing was served on the following via first class mail, which satisfies the requirements of PA.R.A.P. 121:

Mark A. Aronchick
John S. Stapleton
Claudia De Palma
Andrew M. Erdlen
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA

Kenneth I. Trujillo
Kevin S. Sweeney
Matthew Olesh
Chamberlain, Hrdlicka, White, Williams & Aughtry
300 Conshohocken State Road, Suite 570
West Conshohocken, PA 19428

Dimitrios Mavroudis
Marcel S. Pratt
Richard Feder
Frances R. Beckley
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

Counsel for Defendants-Appellees

Scott B. Cooper
Schmidt Kramer, P.C.
209 State Street
Harrisburg, PA 17101

Counsel for Amici Curiae State Senator Anthony Williams et al.

Thomas H. Kohn
Markowitz & Richman
123 South Broad Street, Suite 2020
Philadelphia, PA 19109

Counsel for Amicus Curiae Teamsters Local Union No. 830 and the Pennsylvania Conference of Teamsters

Kevin J. McKeon
Whitney E. Snyder
Hawke, McKeon & Sniscak, LLP
100 North Tenth Street
Harrisburg, PA 17101

Counsel for Amici Curiae The National Federation of Independent Business Small Business Legal Center et al.

Diane B. Sher
Lee Applebaum
Jacqueline D. DiRubbo
Fineman Krekstein & Harris, P.C.
1801 Market Street, Suite 1100
Philadelphia, PA 19103

Counsel for Amicus Curiae The Sustainable Business Network of Greater Philadelphia

Farimah F. Brown
Jessica E. Mar
Berkeley City Attorney's Office
2180 Milvia Street, 4th Floor
Berkeley, CA 94704

Michael J. Boni
Joshua D. Snyder
John E. Sindoni
Boni, Zack & Snyder LLC
15 Saint Asaphs Road
Bala Cynwyd, PA 19004

Counsel for Amicus Curiae City of Berkeley

Matthew Faranda-Diedrich
Jessica L. Itzkowitz
Royer Cooper Cohen Braunfeld LLC
Two Logan Square
100 North 18th Street, Suite 710
Philadelphia, PA 19103

Benjamin D. Winig
Deborah K. Barron
Sabrina S. Adler
ChangeLab Solutions
2201 Broadway, Suite 502
Oakland, CA 94612

Seth E. Mermin
Public Good Law Center
1950 University Avenue, Suite 200
Berkeley, CA 94704

Counsel for Amici Curiae ChangeLab Solutions et al.

Stephen G. Harvey
Rachel K. Gallegos
Steve Harvey Law LLC
1880 John F. Kennedy Boulevard, Suite 1715
Philadelphia, PA 19103

Michelle Payne
Public Citizens for Children & Youth
1709 Benjamin Franklin Parkway, 6th Floor
Philadelphia, PA 19103

Counsel for Amici Curiae Public Citizens for Children & Youth et al.

Michael J. Quirk
Berezofsky Law Group, LLC
40 West Evergreen Avenue, Suite 104
Philadelphia, PA 19118

Rachel S. Bloomekatz
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009

Counsel for Amici Curiae American Heart Association et al.

Wendy S. Smith
Morgan & Akins, PLLC
30 South 15th Street, Suite 701
Philadelphia, PA 19102

Counsel for Amicus Curiae The Philadelphia Parks Alliance

Joshua D. Snyder
Boni, Zack & Snyder LLC
15 Saint Asaphs Road
Bala Cynwyd, PA 19004

Counsel for Amicus Curiae Philadelphia Opportunities Industrialization Center, Inc.

Lowell L. Thomas
433 East Mount Pleasant Avenue
Philadelphia, PA 19119

Daniel Berger
Lawrence J. Lederer
Sarah R. Schalman-Bergen
Neil Makhija
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Counsel for Amicus Curiae African-American Chamber of Commerce for Pennsylvania, New Jersey & Delaware

William J. Leonard
Rigel C. Farr
Obermayer Rebmann Maxwell & Hippel LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102

Counsel for Amicus Curiae The International Municipal Lawyers Association

/s/ Marc J. Sonnenfeld

Marc J. Sonnenfeld, ID No. 17210
marc.sonnenfeld@morganlewis.com
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000

Dated: April 23, 2018