

IN THE SUPREME COURT OF PENNSYLVANIA

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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
THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
IN SUPPORT OF APPELLEES**

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

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Press Release, Office of the Controller, City of Philadelphia, Controller’s Office Releases Data on Philadelphia Beverage Tax Revenue and Expenditures (March 13, 2018) (<http://www.philadelphiacontroller.org/media/press-releases/controllers-office-releases-data-on-philadelphia-beverage-tax-revenue-and-expenditures>)12

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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association (“IMLA”) is a nonprofit, nonpartisan professional organization comprising local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state leagues, and individual attorneys. Established in 1935 and consisting of more than 2,500 members, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA’s mission is to advance responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country.

IMLA files this *Amicus Curiae* Brief in accordance with Pennsylvania Rule of Appellate Procedure 531. This *Amicus Curiae* Brief is filed in support of the City of Philadelphia and Frank Breslin, in his official capacity as Commissioner of the Philadelphia Department of Revenue (“Appellees”). Pursuant to Rule 531(b)(2), IMLA states that no person or entity other than IMLA, its members, 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.

INTRODUCTION

This challenge to the Philadelphia Beverage Tax (the “PBT”) presents nothing short of a breaking point in American society.

Over the course of the past 150 years, American cities have become the resting place of virtually every ill flowing from enduring societal travails: the coming and going of the Industrial Revolution, two World Wars, the Great Depression, and a racially divided culture. Persistently unequal education, deeply entrenched poverty, and frighteningly uncontrollable health risks are just a few of the chronic problems cities face, even as their increasingly mobile commercial citizens cast about for brighter, richer, and safer environs.

As urban problems have grown, states have shown minimal interest in helping. The most they have done—and Pennsylvania was in the vanguard during the Great Depression—was to delegate taxing powers, essentially saying to cities, “deal with *your* problems by taxing *your* own.” Pennsylvania’s Sterling Act, adopted in 1932, granted Philadelphia the authority to levy, assess, and collect local taxes on a variety of transactions within city limits so long as they were not “subject to a State tax or license fee.”

The fact that states delegated taxing authority to cities was not surprising. It was, in fact, entirely predictable. It reflected another enduring reality in America: state legislatures, like Pennsylvania’s, are controlled by *ex* urban representatives

who see no reason, and have no will, to tax *their* constituents to solve problems they neither created nor understand. Consequently, America's cities have been left alone to deal with legacy problems in a box built by their own state legislatures. The only tool in the box is the power to tax within their limits to address those problems.

For too long, cities have pleaded for additional state help. Little, if any, has come. Meanwhile, urban problems have grown and the resources to deal with them have diminished. Now, American cities are doing what they must: shining a light on the problems; crafting solutions in local legislative bodies; and, paying for those solutions by taxing transactions within their own jurisdictions. In other words, cities like Philadelphia are doing the only thing left for them to do.

It remains unclear whether America's cities can survive if left to shoulder vast societal problems on their own, but they will fail for sure if courageous solutions, enacted through indisputably sound local legislative action, can be invalidated by courts at the behest of special interest groups that had their say and failed to carry the day in those very same legislative processes.

ARGUMENT

I. The History of the Sterling Act Supports Philadelphia's Ability to Generate Local Revenue Through the PBT

The Sterling Act is a tax-enabling law that grants broad taxing powers to the City of Philadelphia. The Sterling Act was passed during a special session of the

General Assembly in 1932 and gives authority to City Council in Philadelphia, the only city of the first class in Pennsylvania, “for general revenue purposes, to levy, assess and collect . . . such taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such city of the first class, as it shall determine.” Act of August 5, 1932, P.L. 45, *as amended*, 53 P.S. § 15971.

The “statute vested in the council of the City of Philadelphia an enormously broad and sweeping power of taxation.” *Nat’l Biscuit Co. v. Philadelphia*, 98 A.2d 182, 185 (Pa. 1953). The only limitation placed on Philadelphia’s taxing power under the Sterling Act is that “council of the city shall not have authority to levy a tax on a privilege, transaction, subject or occupation ‘which is now or may hereafter become subject to a State tax or license fee.’” *Id.* at 187.

The Sterling Act was passed during the Great Depression, when Philadelphia and all other municipalities faced serious financial crises. Historically, Pennsylvania and its political subdivisions relied almost exclusively on real estate taxes, but the depression aggravated other developing problems from the Industrial Revolution and brought the need for increased revenue. To alleviate the persistent financial strain, “the 1930’s witnessed the beginning of attempts to broaden local taxing powers.” ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, A-14, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS ON LOCAL TAXING POWERS (October 1962), p. 74. At the time, expanded local taxing authority was

reserved for big cities with large populations: “During World War II material and manpower shortages held local spending to essentials. Efforts to obtain new tax sources were few, and these were limited to large cities.” *Id.* Large cities were granted broad authority to pass taxes that addressed the needs of their residents. “New York State, in recognition of the acute local unemployment relief problem, granted to New York City broad taxing authority in 1933, permitting it to impose for six months any tax the State could levy. The authority was extended indefinitely the following year.” *Id.*

The Sterling Act was introduced to the Pennsylvania General Assembly with the specific belief that “conferring the power to tax to Philadelphia and Pittsburgh¹ would allow the cities to alleviate many of the problems emanating from the depression.” *The Sterling Act: A Brief History*, Pennsylvania Economy League, p. 2 (<http://economyleague.org/uploads/files/783716581668902685-the-sterling-act-a-brief-history.pdf>). “Under the Sterling Act . . . the city has broad powers to levy taxes for revenue purposes.” *Blauner’s v. City of Philadelphia*, 198 A. 889, 891 (Pa. 1938). Pursuant to the authority granted by the Sterling Act, Philadelphia “enacted an amusement tax and other minor taxes in 1937 and a sales tax in 1938,

¹ The Sterling Act initially granted taxing authority to Philadelphia and Pittsburgh, but Pittsburgh’s taxing authority expired pursuant to an automatic sunset provision in 1935. *See* Act of August 5, 1932, P.L. 45, § 4.

which a year later was replaced by an earned income tax.” ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, at 74.

The financial struggles for local governments continued after World War II because of the “pent-up demand for government services and the large backlog of needed public facilities.” *Id.* More than fifty cities in California and Ohio “utilized home rule provisions or general licensing powers to levy broad-based taxes” and essentially followed Philadelphia’s lead in passing their own local taxes. *Id.*

In 1947, Pennsylvania’s legislature passed the “Tax Anything Act,” which granted additional political subdivisions in Pennsylvania substantial taxing authority. Act of June 25, 1947, P.L. 1145, *as amended*, Act of May 9, 1949, P.L. 898, 53 P.S. § 2015.1. Like the Sterling Act, the Tax Anything Act was “a delegation of the state’s unused taxing powers to the subdivisions, giving them the responsibility of raising their own revenue in the way they saw fit.” James A. Moore, *The “Home Rule” Tax Act—A Solution or a Challenge?*, 97 U. Pa. L. Rev. 811, 814 (1949). “The history of the Act shows that its purposes were threefold: (1) to shift the responsibility of taxation for local purposes from the State to the political subdivisions; (2) to shift the burden of taxation from real estate to other taxable subjects; and (3) to allow the political subdivisions to raise sufficient revenue to meet their local needs.” *Id.* at 837-38.

Numerous other states likewise expanded municipal power to tax in the middle part of the 20th century. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, at 74-75. In Pennsylvania and in state legislatures elsewhere, taxing authority was delegated to political subdivisions as states recognized local governments were in the best positions to solve their own unique financial problems.

The Sterling Act was intended to enable Philadelphia to raise additional revenue and to provide the City with the freedom to craft its own tax laws and its own tax policies. As the Pennsylvania Supreme Court wrote in 1970: “The Sterling Act is a permissive one; one that grants power to first class cities, and the reservation of power in the clause under consideration must be seen in the light of the legislative intent of providing sources of revenue for impoverished cities.” *Tax Review Bd. v. Smith, Kline & French Labs.*, 262 A.2d 135, 137 (Pa. 1970).

The PBT is a modern revenue-generating tax that fits squarely within the autonomous taxing power granted to Philadelphia through the Sterling Act. The permissive purpose of the Sterling Act would be defeated here if the Court reverses the Order of the Commonwealth Court and holds the PBT invalid.

II. The PBT is Expressly Authorized by the Sterling Act and is not Duplicative of the Commonwealth’s Retail Sales Tax

The Sterling Act *permits*, rather than preempts, the PBT. The Sterling Act authorizes Philadelphia to implement and impose taxes within its territorial limits

so long as the tax is not “subject to a State tax or license fee.” 53 P.S. § 15971.

The PBT is a tax on the distribution of sweetened beverages, is triggered upon distribution of the beverages, and is paid by distributors or dealers. Phila. Code § 19-4100, *et seq.*, Bill No. 160176 (approved June 20, 2016). Pennsylvania’s sales tax, by contrast, is imposed on items sold at retail at six percent (6%) on top of the purchase price and is collected by vendors and paid by consumers. P.L. 6, No. 2, art II, §§ 201-06, *as amended*, 72 P.S. § 7201-06; *see Blair Candy Co., Inc. v. Altoona Area Sch. Dist.*, 613 A.2d 159, 161 (Pa. Commw. 1992).

The PBT does not run afoul of the Sterling Act because it does not duplicate any tax or license fee imposed by the Commonwealth. The PBT’s taxation on the distribution of sweetened beverages is different than the Commonwealth’s sales tax on soda in both practical and legally significant ways. As the Commonwealth Court correctly held: “[T]he PBT taxes non-retail distribution transactions and not retail sales to a consumer. As a result, the PBT does not violate the duplicative-tax prohibition in the Sterling Act or encroach upon a field preempted by the Sales Tax because the taxes do not share the same incidence and merely have related subjects.” Commw. Opinion at 19; 53 P.S. §15971; *see Commonwealth v. Nat’l Biscuit Co.*, 136 A.2d 821, 828 (Pa. 1957).

United Tavern Owners of Philadelphia v. School District of Philadelphia, 272 A.2d 868 (Pa. 1971) does not compel a different conclusion. First, the case

has no precedential value. Second, it involved a finding of state preemption of local liquor taxation based on the state's pervasive regulation of liquor, not a conflict with the state's sales tax. Third, this case does not present pervasive state regulation of the distribution of sweetened beverages, as is true of liquor, and the Sterling Act itself does not prohibit local taxation upon the distribution of sweetened beverages.

This Court held in *City of Philadelphia v. Clement & Muller, Inc.*, 715 A.2d 397, 398 (Pa. 1998) that “[i]n providing for the general welfare of the Commonwealth’s citizens, the General Assembly may choose to leave a subject open to control by local governmental bodies, it may enact laws of statewide application that simultaneously allow for local regulation, or local ordinances may be prohibited entirely.” By passing the Sterling Act, the General Assembly chose to leave open certain authority to the City of Philadelphia to impose taxes. The Sterling Act empowered Philadelphia’s City Council “to levy, assess and collect . . . such taxes on . . . transactions, . . . privileges, subjects and personal property . . . as it shall determine except that [it] shall not have authority to levy, assess and collect . . . any tax on a privilege, transaction, subject . . . or on personal property, which is now or may hereafter become subject to a State tax” 53 P.S. § 15971; *see Commw. Opinion at 15.*

Conflicts between Commonwealth and municipal taxes should not be found where they do not exist. The Court should reject the suggestions of Appellant and its *Amici* that the PBT is operationally the same as a sales tax. *See, e.g.*, Appellant Brief, p. 1 (“It devised a tax to accomplish the City’s goal while looking like it does something else”); *Amici Curiae* Brief of NFIB Legal Center, et al., p. 17 (discussing price increases small businesses will be “forced” to pass to consumers). Simply put, the PBT is not a sales tax. Holding the PBT otherwise would be contrary to law, would disrupt the allocation of taxing authority between Philadelphia and the Commonwealth, and would undermine the ability of local governments to act as laboratories for democracy. Philadelphia must be permitted to generate the revenue on which its residents depend by crafting taxes pursuant to the authority provided by the Sterling Act and in a manner truly responsive to local policy issues. It is, after all, what the Pennsylvania legislature left it to do.

III. Philadelphia’s Evaluation of its Priorities and its Decision to Raise Revenue Through the PBT Should not be Disturbed

Effective local self-government requires the freedom to set priorities, implement tax policy, and deliver government services to provide for the health and welfare of the local population. Local governments require latitude to be creative in the development of fiscal measures to respond to local priorities. Local authorities have “special knowledge of the conditions of their own localities” and are, therefore, in the best position to pass legislation cognizant of local interests.

See generally Brazier v. Philadelphia, 64 A. 508, 511 (Pa. 1906) (holding that “[i]n the absence of any prohibition against local legislation, it would rather seem to us that the legislature intended that the local authorities having jurisdiction over such a class of subjects, and having special knowledge of the conditions of their own localities, might, by ordinance, determine what should be a reasonable rate of [automotive] speed”).

Philadelphia discharged its duty of self-governance by passing the PBT, and acted to promote the well-being of its residents. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) (discussing legitimate government interest of protecting citizens’ health and safety). Courts must take care when doing their duty that they do not chill the exercise of legislative prerogative of the City of Philadelphia.² *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments.”). This Court should affirm the Order of the Commonwealth Court and should not invalidate Philadelphia’s accomplishment in

² Appellants’ *Amici* essentially request that this Court curb Philadelphia’s policy choices. They suggest, for example, that affirming the Commonwealth Court will invite other municipalities to pass similar taxes. *See Amici Curiae* Brief of Senator Anthony Williams, et al., pp. 8-9. The decision of other municipalities to pass similar taxes, however, is exactly the type of policy consideration best left to individual localities within their legal and constitutional taxing authority. Judgments of such legislative acts are best left to voters, not courts.

this case—one serving as a model for local governments across our nation—by employing the unjustified and unnecessarily restrictive legal interpretations of special interest groups.

A. The PBT has Generated More Than \$84.7 Million

The PBT generated \$39.5 million in Fiscal Year 2017 and, through the end of February 2018, \$45.2 million in Fiscal Year 2018—a total of \$84.7 million.³ The revenue is being used to combat the most serious problems Philadelphians face: poverty, inadequate education, and deteriorating neighborhoods. Twenty-one million of the revenue already generated by the PBT has been spent to support the creation of 11 community schools and 2,700 pre-k seats.⁴ If upheld, the PBT will continue to fund ambitious new early education programs and community schools and will revitalize communities by investing in parks, recreation centers, playgrounds, and libraries. [*Id.*; see also R. 670a, Declaration of Philadelphia Health Commissioner Thomas Farley]. The City expects to “expand the number of pre-k seats each year, funding 3,000 seats starting in FY20 and increasing to 5,500 seats by FY23,” “expand the number of Community Schools each year, increasing

³ Press Release, Office of the Controller, City of Philadelphia, Controller’s Office Releases Data on Philadelphia Beverage Tax Revenue and Expenditures (March 13, 2018) (<http://www.philadelphiacontroller.org/media/press-releases/controllers-office-releases-data-on-philadelphia-beverage-tax-revenue-and-expenditures>).

⁴ Press Release, City of Philadelphia, Beverage Tax Projections Updated in FY19 Budget and Five Year Plan (March 1, 2018) (<https://beta.phila.gov/2018-03-01-beverage-tax-projections-updated-in-fy19-budget-and-five-year-plan/>).

to 20 Community Schools by FY23,” and “initiate the first of three borrowings [for the Rebuild program] in late FY19.”⁵

B. The PBT is Specifically Structured to Help Philadelphia’s Children and Communities

The PBT was enacted by Philadelphia’s City Council, which voted it down twice before, only after City agencies and City leaders presented compelling evidence of its necessity and efficacy. [*See, e.g., R. 670a, 667a-670a*]. City Council hearings provided a forum for legislators, residents, and special interest groups alike to debate the PBT and decide whether it was an appropriate means to address a chronically underfunded education system by investing in programs designed to help children learn before they reach school:

The largest investment funded by the sugary drinks tax is the expansion of quality pre-kindergarten to thousands of families across the City. **Currently, 46 percent of Philadelphia’s kindergartners show up to the first day of school unprepared to learn.** At that point, they are already behind their peers, and they often stay behind them for their entire academic careers. But studies show that children who complete pre-K are more likely to stay on track in the early grades, graduate high school, complete college, and become employed adults. **As a city continually seeking cost-effective ways to better support local schools, quality pre-K expansion is the solution**

[R. 737a, Jane Slusser, Mayor’s Chief of Staff (emphasis added)].

The Rebuild Community Infrastructure (“Rebuild”) program “will invest money to revitalize the City’s parks, recreation centers, libraries, and

⁵ See FN 3.

playgrounds.” [R. 692a]. Here again, Jane Slusser, the Mayor’s Chief of Staff, testified to the importance of community infrastructure:

The tax on sugary drinks would also enable the City to pay debt service on the cost of borrowing for rebuilding community infrastructure . . . We know that students who participate in extracurricular activities have a 15 percent higher school attendance rate than non-participating students, and our students, seniors, and all residents, for that matter, deserve quality spaces that they can enjoy.

[R. 737a]. Studies show that, parks and recreation centers play a valuable role in preventing childhood obesity and other chronic health ailments. *See, e.g., City Parks Forum*, American Planning Association, *The Role of Parks in Shaping Successful Cities*, <https://planning.org/cityparks/>.⁶ Researchers estimate that, over ten years, the PBT will “prevent some 14,340 residents of Philadelphia from becoming obese and save nearly \$76.8 million in healthcare costs from reduced rates of obesity and diabetes.” [R. 670a].

Structuring the PBT entailed tremendous policy judgment and a focused tax methodology.⁷ [See R. 664a]. Philadelphia’s lawmakers had to determine the type

⁶ *See also* Debra A. Cohen, Roland Sturm, Bing Han and Terry Marsh, *Quantifying the Contribution of Public Parks to Physical Activity and Health*, Rand Corporation 2014, www.nrpa.org/uploadedFiles/nrpa.org/Publications_and_Research/Research/Papers/SOPARC-Report.pdf (tracing health issues to inactivity).

⁷ Teamsters Local Union No. 830 and the Pennsylvania Conference of Teamsters, *amici curiae* for Appellants, criticize and seek to minimize Philadelphia’s policy decision to fund quality pre-k education. *See* Brief for *Amici Curiae*, n.3. The Teamsters suggest the Court should disregard the intended use of the tax revenue because 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.” *Id.* It is the *City’s prerogative*, however, to decide how to budget and spend its money. Here, the City determined that quality pre-k education, community

of tax, tax rate, breadth of the tax base, types of beverages included, potential impact on local communities, allocation of funds, health benefits, and much more. These are precisely the kinds of policy decisions local legislatures are best suited to make, as tax-enabling legislation has required them to do.

C. Philadelphia Leads an Innovative Group of Local Governments

The PBT placed Philadelphia at the forefront of a movement in which local governments are actively seeking to promote the health and welfare of their residents in the face of fierce, well-funded opposition from the beverage industry. [See R. 643a]. When the PBT was enacted in March 2016, Philadelphia became the second city in the country, and the first big city, to pass a tax on the distribution of sweetened beverages. Berkeley, California passed a one-cent per ounce excise tax on the distribution of sugar sweetened beverages in November 2014. Berkeley Municipal Code, § 7.72.010, *et seq.*; see Public Health Institute, *Berkeley Evaluation of Soda Tax (BEST) Study Preliminary Findings*, Nov. 3, 2015.

Following Berkeley's and Philadelphia's lead, several cities across the country have since considered and passed similar measures. In November 2016, Boulder, Colorado passed a two-cent per ounce tax on the distribution of sweetened beverages. [R. 643a-644a]. Seattle, Washington passed a \$.01 to

schools, parks, recreations centers, and libraries are its priorities and has committed to spend the revenue from the PBT on those programs.

\$.0175 per ounce sweetened beverage tax, collected on the final distribution of sweetened beverages by distributors, beginning January 1, 2018. *Sweetened Beverage Tax*, Seattle.gov, <https://www.seattle.gov/business-license-tax/other-seattle-taxes/sweetened-beverage-tax>. San Francisco, Oakland, and Albany, California passed similar measures. [See R. 643a, 645a].

In many of these cities, the beverage industry mounted aggressive challenges to the distribution tax.⁸ In Philadelphia alone in 2016, the beverage industry reportedly spent \$10.6 million in its attempt to defeat the passage of the PBT. [See R. 342a].⁹ This Court should now reject the beverage industry's last-ditch effort to elevate private industry profits over public good.

D. This Court Should not Disturb Philadelphia's Policy Choices

Philadelphia must be allowed discretion when exercising its statutorily granted lawmaking and taxing authority and the courts should take care not to limit

⁸ In fact, the beverage industry is already mounting aggressive campaigns across the country in an effort to change the law so that beverage taxes are prohibited. See Mary Bottari, *Bills to Ban Local Soda Taxes Are Moving In The States, Coke and Pepsi Borrow From The Tobacco Playbook*, The Center for Media and Democracy's PR Watch (April 3, 2018), <https://www.prwatch.org/news/2018/04/13331/bills-ban-local-soda-taxes-are-moving-states-coke-and-pepsi-borrow-tobacco>.

⁹ Margot Sanger-Katz, *Soda Taxes Sweep to Victories, Despite Facing Big Spending*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/upshot/soda-taxes-sweep-to-victories-despite-facing-big-spending.html>; Frances Dinkelspiel, *Beverage Industry Spends Big to Beat Berkeley Soda Tax*, KQED (Oct. 10, 2014), <https://www.kqed.org/news/2014/10/10/beverage-industry-spends-big-to-defeat-berkeley-measure-d/>; *Soda Industry Spent \$67 Million Opposing State, City Soda Taxes & Warning Labels*, Center for Science in the Public Interest (Sept. 21, 2016), <https://cspinet.org/news/soda-industry-spent-67-million-opposing-state-city-soda-taxes-warning-labels-20160921>.

the breadth of municipal taxing power. Philadelphia’s decision to impose the PBT was, after all, a policy choice the City made after significant deliberation over many points of view, including the views of the beverage industry. Disturbing such policy choices is not the duty of the judiciary. *Cf. Smith v. Robbins*, 528 U.S. 259, 272 (2000) (holding that the Supreme Court maintains an “established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy”); *see John Wanamaker, Phila. v. Sch. Dist. of Phila.*, 274 A.2d 524, 526 (Pa. 1971) (holding that “challengers of the constitutionality of state or local taxation bear a very heavy burden in their efforts to overturn such legislation”).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

This *Amicus Curiae* Brief complies with the word count limitations of Pa.R.A.P. 531 and Pa.R.A.P. 2135 because it contains 4,082 words. This Certificate is based on the word count of the word processing system used to prepare this Brief.

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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.

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PROOF OF SERVICE

I hereby certify that on April 13, 2018, I electronically filed the foregoing *Amicus Curiae* Brief with the Prothonotary and served true and correct copies upon the following parties via the Court's e-filing system and first class mail, which satisfies the requirements of Pa.R.A.P. 121:

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