To be Argued by:
FAY NG

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New York Supreme Court

Appellate Division—First Department

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE, THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION, SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, THE NATIONAL RESTAURANT ASSOCIATION, THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE and THE AMERICAN BEVERAGE ASSOCIATION,

Petitioners-Respondents,

For a Judgment pursuant to Article 78 and 30 of the Civil Practice Law and Rules,

– against –

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THE NEW YORK CITY BOARD OF HEALTH and DR. THOMAS FARLEY, in his official capacity as Commissioner of the New York Department of Health and Mental Hygiene,

Respondents-Appellants.

BRIEF FOR RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

Respondents-Appellants, the New York City Department of Health and Mental Hygiene ("Department"), the New York City Board of Health ("Board") and Dr. Thomas Farley, Commissioner of the Department (collectively "appellants"), appeal from a Decision and Order (one paper) of the Supreme Court, New York County (Tingling, J.), entered March 11, 2013 (6-42).[1] The Court declared New York City Health Code § 81.53 ("Portion Cap Rule" or "Rule") invalid on the grounds that (1) the Board, in adopting the Portion Cap Rule, was impermissibly acting in a legislative capacity, and (2) the provision was arbitrary and capricious.

The Department regulates restaurants and food service establishments. The Portion Cap Rule regulates how these businesses serve a product whose overconsumption is driving an epidemic. It prohibits them from selling a sugary drink in a cup or container that can contain more than 16 fluid ounces. When presented with large portions, individuals will consume these portions without recognizing how large that portion is. The Rule does not prohibit consumers from purchasing sugary

[1] Unless otherwise indicated, numbers in parentheses refer to pages of the Record on Appeal.

beverages or from purchasing more than 16 ounces of them. Under this Rule, individuals who want to consume more than 16 ounces can do so, but they must make a conscious decision to have more. Thus, the Rule is a measured response to a health crisis and will provide consumers with information about appropriate portions of sugary drinks.

The Board adopted the Rule after extensive public review and comment and the submission of scientific evidence demonstrating that (1) more than 5,000 New Yorkers die every year from complications associated with being overweight or obese; (2) more than half of adult City residents (58 percent) are now overweight or obese, as are nearly 20 percent of the City's public school children (K-8); (3) sugary drinks have been repeatedly linked to obesity, type-2 diabetes, and heart disease in scientific studies; and (4) larger portion sizes of beverages lead to increased calorie intake.

Indeed, a 20-ounce sugary drink can contain added sugars equivalent to 16 sugar packets (1539). Some restaurants in the City offer sugary drinks in serving sizes as large as 64 ounces. A sugary drink of this size contains 780 calories and added sugars equivalent to 54 teaspoons of sugar (1539). The number of calories in these large size drinks is staggering, considering that, on average, consuming 140 calories each day from sugary drinks, would amount to more than 51,000 calories

over the course of the year. That amount of calories theoretically is enough to lead to a 15-pound weight gain in one year if other sources (i.e., exercise) are held constant (1556, ¶ 23).

The Court below erred in finding that the Board did not have the authority to address the above crisis by the adopting the Portion Cap Rule. Citing Boreali v. Axelrod, 71 N.Y.2d 1 (1987), it erroneously determined that the Board exceeded its statutory authority and acted in a legislative capacity.

A critical error in the lower Court's decision is the Court's treatment of the Board as a typical administrative agency that adopts regulations only to implement legislative enactments. In fact, the Board has legislative authority, and is empowered to issue substantive rules and standards in public health matters as recognized by decades of case law from the Court of Appeals and this Court.

Additionally, the Court below erred in reasoning that the intention of the legislature with respect to the Board was limited "to protect the citizens of the city by providing regulations that prevent and protect against communicable, infectious, and pestilent diseases" (33).

Such a limited view of the Board's jurisdiction ignores decades of case law and explicit text in the New York

City Charter. The Board has protected the health of New Yorkers from chronic and preventable diseases and conditions – including cardiovascular disease – through its authorized powers to fluoridate the water supply, restrict the use of lead paint, require the posting of calorie counts on menus, and limit the use of trans fats at food service establishments. Clearly, the adoption of the Portion Cap Rule, like these other initiatives, is well within the Board's authority.

Since the Board has broad legislative authority, and is empowered to issue substantive rules and standards in public health matters as set forth in the relevant Charter provisions and as recognized by this Court and the Court of Appeals, Boreali is not applicable in this case.

However, even under a Boreali analysis, the Board acted within its statutory authority. None of the four factors in Boreali are present in this case. First, the Portion Cap Rule rests wholly on health concerns and the application of nutrition and behavioral science; its reach in terms of establishments is limited by issues of jurisdiction, rather than by any impermissible economic or social considerations. Second, the New York State Legislature, through Charter §§ 556 and 558, authorized the Board to regulate all health-related matters, including chronic diseases, and thus provided sufficient legislative guidance for the Board to promulgate the Portion Cap

Rule. Third, neither the Legislature nor the New York City Council has ever considered proposed legislation on limiting portion sizes, and thus neither body has provided any indication that it would oppose the Portion Cap Rule. Finally, the Board's technical expertise was needed to assess and promulgate the Portion Cap Rule, including identifying obesity as an epidemic adversely impacting the health of New York City residents, identifying sugary drinks as a leading driver of the epidemic, and understanding the effect of portion sizes on the consumption of calories and obesity.

Thus, as discussed in detail below (Point I, supra), the Board did not exceed its statutory authority in adopting the Portion Cap Rule.

The Court below also erred in finding that the Rule was arbitrary and capricious, on the grounds that it did not apply to all sellers of sugary drinks (Point II, supra). The Portion Cap Rule applies to all food service establishments under the Department's enforcement jurisdiction, including all fast food establishments. Furthermore, the "all-or-nothing" approach taken by the lower court has been rejected by the Court of Appeals and other Courts. The Board, as well as government in general, is, and must be, permitted to attack problems on an incremental basis.

In sum, the Decision and Order (one paper) appealed from should be reversed and the petition dismissed.

QUESTIONS PRESENTED

1. Whether the Court below erred in finding that the Board exceeded its statutory authority?

2. Was the adoption of the Portion Cap Rule arbitrary or capricious?

STATEMENT OF FACTS

A. The New York City Board of Health

The Board consists of the Commissioner of the Department as well as ten additional members, five of whom must be doctors of medicine. If not physicians, the other five members must hold at least a masters degree in "environmental, biological, veterinary, physical or behavioral health or science, or rehabilitative science or in a related field." Charter § 553(a). All ten of the additional members must have at least ten years of pertinent experience. Id. Board members are appointed by the Mayor, with the advice and consent of the City Council, and serve a term of six years. The terms of service are staggered. Charter § 553(b). Board members can only be removed for cause. Charter § 554.

The current members of the Board represent a broad range of health and medical disciplines, including: a former chairperson of the Department of Community Health Sciences at

the Tulane University School of Public Health and Tropical Medicine; the president and CEO of Maimonides Medical Center in Brooklyn; an Associate Professor of Pediatrics and Community and Preventive Medicine at Mt. Sinai School of Medicine; a Professor and Chair at the Department of Epidemiology at Columbia University Mailman School of Public Health; a Professor and Director of the Urban Public Health Program at Hunter College; and a Senior Advisor at Nexera Consulting and former Administrator of the Health Care Financing Administration, the federal agency responsible for Medicare, Medicaid, and related programs.[2]

While the Board is part of the Department, it acts as a separate and distinct entity, one which is charged with enacting and amending the Health Code. In amending, repealing or adding to the Health Code, the Board "may embrace in the health code all matters and subjects to which the power and authority of the department extends." Charter §§ 558(b) & (c). In turn, the Department "shall have jurisdiction to regulate all

[2] New York City Council Resolution ("NYC Council Res.") No. 329 (2002); NYC Council Res. No. 331 (2002); NYC Council Res. No. 333 (2002); NYC Council Res. No. 428 (2002); NYC Council Res. No. 430 (2002); NYC Council Res. No. 748 (2004); NYC Council Res. No. 749 (2004); NYC Council Res. No. 520 (2006); NYC Council Res. No. 986 (2007); NYC Council Res. No. 443 (2010); NYC Council Res. No. 1058 (2011); NYC Council Res. No. 1059 (2011); NYC Council Res. No. 1085 (2011); NYC Council Res. No. 1086 (2011).

matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city." Charter § 556. This authority specifically extends to the "control of communicable and chronic diseases" and to supervising and regulating the "food and drug supply." Charter §§ 556(c)(2) & 556(c)(9). Chronic diseases include diseases where a leading risk factor is obesity such as type-2 diabetes and cardiovascular disease (1546, ¶4).

B. The Adoption of The Portion Cap Rule

The rules for food service establishments regulated by the Department are contained in Article 81 of the Health Code. At the June 12, 2012 meeting of the Board, the Department presented to the Board a proposal that Article 81 be amended to add a new rule for food service establishments, capping the size of cups and containers that they use to offer, provide and sell sugary beverages. The Board voted to allow the Department to publish the proposal in the City Record, and thereby begin the opportunity for the public to comment on the proposal (712-741; 742-760).[3]

[3] Contrary to the lower Court's statement (37-38), appellants, in their answer, denied petitioners' contention that the Rule was drafted by the Office of the Mayor (49, ¶4; 687, ¶2).

On June 19, 2012, a Notice of Public Hearing was published in the City Record, advising the public that a hearing regarding the Portion Cap Rule would be held on July 24, 2012. The Notice of Public Hearing also instructed members of the public that they could submit written comments about the proposed amendment by mail or electronically on or before 5:00 P.M. on July 24, 2012 (761-768).

Prior to the public hearing, over 38,000 written comments regarding the proposed amendment were received. Of these, approximately 32,000 comments (84%) supported the proposal and approximately 6,000 (16%) opposed it. A wide range of organizations and individuals supported the proposed amendment, including national and local professional societies, advocacy groups, academic institutions, elected officials, hospitals, community and faith-based organizations, insurance providers, scientific experts, and private citizens. Among these are 1199 SEIU, the American Public Health Association, the Center for Science in the Public Interest, Citizens' Committee for Children, Community Service Society of New York, City University of New York, Harlem Children's Zone, EmblemHealth, Greater New York Hospital Association, Montefiore Medical Center, Mount Sinai Medical Center, National Association of City and County Health Officials, New York Academy of Medicine,

United Way, Yale University's Rudd Center for Food Policy and Obesity, and the YMCA of Greater New York (769-1417;1564-1567).[4]

On July 24, 2012, a public hearing was held on the Portion Cap Rule and oral comments were received both supporting and opposing the proposed amendment (1147-1417). Thereafter, the Department provided the Board with a memorandum, dated September 6, 2012, summarizing and responding to the testimony and written comments (1418-1441).

At its September 13, 2012 meeting, the Board voted 8-0, with one abstention, to adopt the Portion Cap Rule. The members of the Board discussed why they believed this was a critically important public health initiative. A "Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the Health Code" was published in the City Record on September 21, 2012. The Portion Cap Rule was to go into effect on March 12, 2013 (1442-1495; 1496-1537).

The Portion Cap Rule provides, in pertinent part, as follows (1542):

> § 81.53 Maximum Beverage Size
> (a) ***Definition of terms used in this section.***
> (1) ***Sugary drink*** means a carbonated or non-carbonated beverage that:

[4] A selection of comments received by the Board in support of the Portion Cap Rule was submitted by appellants to the Court below (769-1060). The full text of all of the public comments submitted in response to the Portion Cap Rule is available at http://www.nyc.gov/html/doh/html/comment/comment.shtml.

(A) is non-alcoholic;
(B) is sweetened by the manufacturer or establishment with sugar or another calorie sweetener;
(C) has greater than 25 calories per 8 fluid ounces of beverage;
(D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.
The volume of milk or milk substitute in a beverage will be presumed to be less than or equal to 50 percent unless proven otherwise by the food service establishment serving it.
(2) ***Milk substitute*** means any liquid that is soy-based and is intended by its manufacturer to be a substitute for milk.
(3) ***Self-service cup*** means a cup or container provided by a food service establishment that is filled with a beverage by the customer.
(b) ***Sugary drinks.*** A food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces.
(c) ***Self-service cups.*** A food service establishment may not sell, offer, or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces.

C. The Instant Hybrid Article 78/Declaratory Judgment Action.

On October 12, 2012, petitioners commenced this lawsuit, seeking to invalidate the Portion Cap Rule (46-681, 1583).

Appellants served a verified answer (686-1537) and an affidavit by Commissioner Farley in opposition to the relief requested (1544-1582).

Thereafter, petitioners moved by order to show cause for a preliminary injunction, enjoining the effective date of the Portion Cap Rule pending hearing and determination of the hybrid action (1656-1712).

Appellants submitted an affidavit by Daniel Kass, the Deputy Commissioner for the Division of Environmental Health, in opposition to the motion for a preliminary injunction (1716-1719).

DECISION BELOW

(1)

The Court below held that the Board, in adopting the Portion Cap Rule, was impermissibly acting in a legislative capacity. The Court rejected appellants' argument that the Board is a body uniquely charged with legislative authority to protect the public health in New York City. In rejecting the appellants' argument, the Court did not discuss any of the appellate authorities which have explicitly recognized the Board's legislative authority.

Rather, the Court below discussed the history of the City Charter and cited to American Kennel Club, Inc. v. City of New York, Index No. 13584/89, Slip Op. (Sup. Ct. N.Y. Co. Sept. 19, 1989) (DeGrasse, J.), where a lower court had previously rejected an argument for the Board's legislative authority.

The Court then reasoned that under Boreali, the Board had exceeded its regulatory authority. Based on four "coalescing circumstances" present in that case, the Court in Boreali found that the New York State Public Health Council ("PHC") overstepped its regulatory authority when it adopted smoking regulations, previously considered, but not adopted by the State Legislature. The four "coalescing circumstances" present in that case were: (1) the PHC carved out numerous exemptions based solely upon economic and social considerations; (2) the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance"; (3) the State Legislature previously adopted legislation relating to smoking in public places, and thereafter considered (but never adopted) 40 bills that addressed the same subject area; and (4) no special expertise in the field of health was necessary to develop the regulations. 71 N.Y.2d at 12-14.

In this case, the Court below concluded that the Portion Cap Rule violated the first Boreali factor because the regulation herein was "laden with exceptions based on economic and political concerns" (21). The Court below took the position that the Department's lack of coordination with the Department of Agriculture and Markets regarding the Portion Cap Rule was "a

demonstration of the respondents weighing its stated goal of health promotion against political considerations" (21).

The Court then considered whether the Portion Cap Rule was written on a "clean slate". Here, the Court below concluded that "in looking at the history of the Charter, the intention of the legislature with respect to the Board was clear": "to protect the citizens of the city by providing regulations that prevent and protect against communicable, infectious, and pestilent diseases" (33).

The Court below further concluded that (1) the Board had no "authority to limit or ban a legal item" under its authority to control chronic disease, and (2) the Board "may supervise and regulate the food supply of the City when it affects public health, . . . [only] when the City is facing eminent danger due to disease" (33-34).

With respect to the third Boreali factor, the Court below found that the City Council's and the State Legislature's failure to pass legislation with respect to sugary drinks was evidence that the Legislature has not been able to reach agreement on the goals and methods that should govern in resolving this health problem (35-36).

Finally, the Court found that the fourth factor found in Boreali was not present in this case. Here, the Court below found that "the Board's Public Hearing and the memorandum after

the Hearing evidence the exercise of the Board's expertise" (38).

Based on the foregoing, the Court held that the Board, in adopting the Portion Cap Rule, was acting in a legislative capacity.

(2)

The lower Court determined that the adoption of the Portion Cap Rule was supported by a reasonable basis, stating (40):

> [T]he Board's promulgation of the Rule, the stated premise of enacting the Portion Cap Rule is to address the rising obesity rate in New York City. Accepting the Board's claims it considered the material it allegedly examined in promulgating the Rule, the reasonableness for enacting the Rule meets the criteria under Article 78 standards.

Although the Court found that a reasonable basis supported the Rule, it determined that it was arbitrary and capricious, reasoning (40):

> the loopholes in this Rule effectively defeat the stated purpose of the Rule. It is arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes

inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule.

POINT I

THE BOARD DID NOT EXCEED ITS STATUTORY AUTHORITY IN ADOPTING THE PORTION CAP RULE.

A. The Board Is A Unique Body Whose Extraordinary Authority Is Legislative In Nature And Emanates From State Law.

The Court below erroneously treated the Board as a typical administrative agency that adopts regulations only to implement specific legislative enactments. In fact, under the Charter and as recognized by the Court of Appeals and this Court, the Board has legislative authority, and is empowered to issue substantive rules and standards in public health.

The Charter vests the Board with the authority to "add to and alter, amend or repeal any part of the health code" as well as to "therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter . . . ." Charter § 558(b). It further charges the Board with "embrac[ing] in the health code all matters and subjects to which the power and authority of the department extends." Charter § 558(c). It similarly confers on the Department a broad grant of authority to "regulate all

matters affecting the health in the city of New York." Charter § 556.[5]

The Charter provisions described above all appeared in essentially their present form as part of the 1936 Charter revision, proposed by a commission pursuant to an act of the State Legislature and approved by the voters in that year. These Charter provisions have the force and effect of state law.[6] See New York City Charter Revision Commission, Proposed Charter for the City of New York, at 137 (1936); City of New York, New York City Charter, Adopted at the General Election Held November 3, 1936, at 51. The Charter Revision Commission noted that the "Board of Health exercises extraordinary police powers affecting the health of the city. By its power to adopt a sanitary code

[5] The State Legislature has recognized the uniqueness of New York City in its authority to enact its own public health requirements. For example, New York State Public Health Law specifically carves out New York City from the applicability of nearly the entire Article 3 of the Public Health Law governing local health officers and local boards of health.

[6] The 1936 Charter was drafted by a commission created pursuant to special laws enacted by the State Legislature (Chapter 867 of the Laws of 1934 and Chapter 292 of the Laws of 1935). As a result, this Charter is understood to have the force and effect of State Law. See Finegan v. Cohen, 275 N.Y. 432, 436 (1937) (upholding Charter provisions notwithstanding inconsistencies with Election Law and stating that "[b]y this method the Legislature amended or revised the charter of the city of New York."); see also Burke v. Kern, 287 N.Y. 203, 215-216 (1941) (treating §44[b] of the 1936 Charter, which is now Charter §40[2], as a special law surviving enactment of general legislation).

[now the Health Code] the Board has plenary powers of legislation." New York City Charter Revision Commission, Report of the New York City Charter Revision Commission at 38 (1936). The Commission further noted the Board's "important legislative and semijudicial powers." Id. It is critical to note that these powers generally do not originate in the 1936 revision, but rather may be found in an almost identical form in § 1172 of the former Greater New York Charter, as amended by Chapter 628 of the Laws of 1904. This section was enacted entirely by the State Legislature.

Thus, the Board's charge to act "for security of life and health in the city" and to "embrace in the health code all matters and subjects to which the power and authority of the department extends," carries State legislative authority.

In 1977, the City Council, without limiting the Department's broad authority over health, specified that the Department would have authority over "control of communicable and chronic diseases" (emphasis added) and the oversight of the "food and drug supply of the city." Charter §§ 556(c)(2) & (9), as amended by Local Law No. 25 of 1977. By doing so, the City Council similarly elaborated upon the scope of authority of the Board to act through the Health Code in light of the long-standing provision, derived from State law, that gives the Board the power to act on "all matters and subjects to which the power

and authority of the department extends." Thus, the Board has both general and specific authority, conferred both by the State Legislature and by the City Council, over the matters it addressed in the Portion Cap Rule.

Moreover, the legislative history of the Board set forth above, particularly its roots in State law, has long been construed by the appellate courts to support a uniquely broad mandate, essentially legislative in nature, to take all necessary steps, within constitutional limits, to protect the public health.

As this Court has recognized, the Board "is invested with the power, extraordinary as to administrative agencies, to formulate standards as well as to issue orders enforceable by penal sanctions. . . . The Sanitary Code [now the Health Code] may, therefore, 'be taken to be a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer of the authority of the Legislature.'" People v. Weil, 286 A.D. 753, 757 (1st Dep't 1955) (quoting People v. Blanchard, 288 N.Y. 145, 147 (1942)) (statutory citations omitted). That case involved the Sanitary Code provision requiring landlords to keep gas refrigerators in good order.

In Paduano v. City of New York, 45 Misc.2d 718, 721 (Sup. Ct. N.Y. Co.), aff'd on op. below, 24 A.D.2d 437 (1st

Dep't 1965), aff'd, 17 N.Y.2d 875 (1966), cert. denied, 385 U.S. 1026 (1967), the Court upheld the Board's power to enact the City's water fluoridation initiative, which provided that a fluoride component be added to the City's public water supply. The Court noted that the Board's authority to act in this area derived from Health Code §§ 555-558. Id. at 720. Further, the Court cited to the report of the 1936 New York City Charter Revision Commission, stating that the City's Charter "is intended to confer 'extraordinary' and 'plenary' powers of legislators for the protection of health upon the Board of Health," and that the "'Board of Health exercises extraordinary police powers affecting the health of the City. By its power to adopt a Sanitary Code the Board has plenary powers of legislation.'" Id. at 721. In Paduano, the Court found that "the Board of Health has the power to, and did, act in a legislative capacity under State legislative authority." Id. at 724. This Court affirmed the Supreme Court's decision on the opinion below and this Court's decision was affirmed by the Court of Appeals. 24 A.D.2d 437 (1st Dep't 1965), aff'd, 17 N.Y.2d 875 (1966).

As far back as 1915, the Court of Appeals recognized that "the board is a statutory body and its authority and powers are such only as are conferred by the statutes, but those powers are very broad -- well-nigh plenary . . . ." People ex rel.

Knoblauch v. Warden of Jail of Fourth Dist. Magistrate's Court, 216 N.Y. 154, 162 (1915).

The Board's legislative authority in the area of public health is so established that in certain areas such as the prevention of certain diseases, the Court of Appeals has recognized that the Board has sole legislative authority. For example, in Grossman v. Baumgartner, 17 N.Y. 2d 345, 351 (1966), the Court, in upholding a regulation banning tattooing except by a doctor to prevent the spread of hepatitis, the Court reasoned that "the Legislature intended the Board of Health to be the sole legislative authority within the City of New York in the field of health regulations as long as those regulations were not inconsistent with or contrary to State laws dealing with the same subject matter". See, also, Schulman v. New York City Health & Hospitals Corp., 38 N.Y.2d 234, 237 n.1 (1975) (citing Grossman, the Court noted that "the Board of Health has been recognized by the Legislature as the sole legislative authority in the field of health regulation in the City of New York").

At issue here is not whether the Board is vested with the sole regulatory authority in this area, but rather whether it has the requisite legal authority to enact the Portion Cap Rule. As set forth above, the express language of the Charter and the above-cited decisions make very clear the Board of

Health's authority to initiate rulemaking as it did in this area.

The fact that the State Public Health Council ("PHC") was found in Boreali not to have legislative authority does not mandate such a finding with respect to the Board herein. Although the PHC is entitled to deference in its decision-making, there is no extensive line of case law relevant to that entity that is at all similar to the long line of appellate authority recognizing the extraordinary legislative role of the City's Board of Health as an exception to the delegation doctrine. Presumably, the Boreali court did not consider any of the many appellate cases cited above for this reason. Accordingly, Boreali did not overrule, supersede or even address the cases discussed above.

Although in this case, the lower court engaged in a discussion of the legislative history of the relevant Charter provisions in finding that the Board did not have any legislative authority, it did not identify any Charter revisions which have limited the Board's historic powers (24-34). See, Perez v. City of New York, 41 A.D.3d 378 (1st Dep't 2007), lv. denied, 10 N.Y.3d 708 (2008) ("It is a cardinal principle of statutory interpretation that the intent to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation") (internal

quotation marks omitted). Further, the Court's discussion of the Charter's history was erroneous in significant respects, for example describing the 1989 Charter amendments as the "largest amendment" (31) when in fact there were virtually no amendments to the previous language in 1989. It appears that the Court at several points in its historical discussion mistook new editions or printings of existing Charter provisions for entirely new amendments or versions of those provisions.

Moreover, the Court completely disregarded the above-cited appellate authority. Instead, it relied on American Kennel Club, Inc. v. City of New York, Index No. 13584/89, Slip Op. (Sup. Ct. N.Y. Co. Sept. 19, 1989) (DeGrasse, J.) (18-19), a case where a lower Court previously rejected the argument that the Board has quasi-legislative powers. Appellants respectfully submit that the Court erred in this case, as well as in American Kennel Club.

Based on the relevant Charter provisions and controlling precedents, the Board has legislative authority and thus, Boreali, which concerns whether an administrative agency is acting in excess of its legislative delegation, has no applicability in this case.

B. Even Under A Boreali Analysis, The Board Did Not Exceed Its Statutory Authority.

In Boreali, the State PHC adopted a New York State Sanitary Code provision that prohibited smoking in certain, but

not all, public areas. The PHC was acting pursuant to a grant of rule-making authority, which the Court of Appeals found to be constitutional. Yet, while recognizing that the line between permissible administrative rule-making and impermissible legislative policy-making is "difficult-to-define," the Court of Appeals nevertheless ruled that based on the unique facts of that case, the PHC in that instance had exceeded this authority. 71 N.Y.2d at 11.

In making this finding, the Court identified four "coalescing circumstances" present in Boreali: (1) the PHC carved out numerous exemptions based solely upon economic and social considerations; (2) the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance"; (3) the State Legislature previously adopted legislation relating to smoking in public places, and thereafter considered (but never adopted) 40 bills that addressed the same subject area; and (4) no special expertise in the field of health was necessary to develop the regulations. Id. at 12-14.[7]

[7] Appellants respectfully submit that the Boreali Court did not set forth a rigid four-prong test in analyzing whether an agency has exceeded it authority. See, Matter of Consolidated Edison Company v. Department of Environmental Conservation, 71 N.Y.2d 186, 196-197 (1988) (Bellacosa, J., concurring) (concurring in the result of upholding a regulation, but noting that the Court's reasoning "sidestepped" Boreali).

Moreover, in explaining its ruling, the Court of Appeals noted that while "none of these circumstances, standing alone, is sufficient to warrant the conclusion that the PHC has usurped the Legislature's prerogative, all of these circumstances, when viewed in combination, paint a portrait of an agency that has improperly assumed for itself '[the] open-ended discretion to choose ends', which characterizes the elected Legislature's role in our system of government." Id. (emphasis added, citations omitted).

Indeed, numerous post-Boreali cases reiterate the requirement that a combination of factors must be present for there to be a violation of the separation of powers doctrine. See, e.g., Festa v. Leshen, 145 A.D.2d 49, 62 (1st Dep't 1989) (rejecting Boreali challenge and noting that the "combination of [coalescing] circumstances" was not present); Motor Vehicle Mfgs. Ass'n v. Jorling, 181 A.D.2d 83, 87-88 (3d Dep't 1992) (rejecting Boreali challenge and noting that the Boreali court "made clear that its conclusion rested on the coalescence of four circumstances . . . which are not all present here" [citations omitted]); Columbus 95th Street LLC v. NYS Div. of Housing & Comm. Renewal, 2009 N.Y. Slip Op 32791U, at **15, 2009 N.Y. Misc. Lexis 5310 (Sup. Ct. N.Y. Co. Nov. 25, 2009), aff'd, 81 A.D.3d 269 (1st Dep't 2010) (rejecting Boreali challenge and holding that the presence of "one factor is not enough").

In American Kennel Club, relied on by the Court below, the Supreme Court found the subject regulation invalid because all four Boreali factors were present: (1) the regulation contained exceptions unrelated to health concerns; (2) the regulation was drafted on a clean slate; (3) three prior legislative bills concerning breed-specific restrictions were considered and rejected by the New York City Council; and (4) the regulation did not require special expertise.

Here, as discussed below, the Court below erred in finding that, under Boreali, the Board acted beyond its legislatively delegated authority.

(1)

In Adopting The Portion Cap Rule, The Board Did Not Consider Impermissible Social Or Economic Factors.

The adoption of the Portion Cap Rule was based solely on health considerations, and not on any impermissible economic and social factors. In Boreali, the State PHC's declaration of findings for the public smoking ban "delicately balanced" the need to protect the public from secondhand smoke "against the goal of minimizing 'economic dislocations and governmental intrusions.'" 71 N.Y.2d at 14 (citations omitted). Specifically, the public smoking ban included provisions that had "no foundations in considerations of public health" and were based "solely upon economic and social concerns," such as exemptions for bars, convention centers and small restaurants as

well as the opportunity to obtain a waiver "based on financial hardship." 71 N.Y.2d at 11-12. The Court concluded that the PHC "built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector" and was thus "operating outside of its proper sphere of authority." 71 N.Y.2d at 12.

Here, in contrast, although the Portion Cap Rule does not apply to all beverages, the exclusions from coverage are based solely on permissible considerations. For instance, the Portion Cap Rule's definition of a sugary drink specifically excludes drinks that "contain more than 50 percent of milk or milk substitute by volume as an ingredient." Section 81.53(a)(1)(D).[8] As Commissioner Farley explained in his affidavit, "the nutritional profile of these beverages differs dramatically from that of sugary drinks. Sugary drinks generally contain no nutrients other than sugar, while milk and milk products contain calcium, vitamin D and potassium – 3 of the 4 'nutrients of concern' often found deficient in the diets of Americans" (1563, ¶35).

[8] Consistent with its health focused approach, the Portion Cap Rule specifically places the burden on the food service establishment serving such drinks: "The volume of milk … in a beverage will be presumed to be less than or equal to 50 percent unless proven otherwise by the food service establishment serving it" [emphasis added].

Pure fruit juice is similarly exempted based on its nutritional benefits. Fruit juice "is exempted as it has no added sugar and provides many of the same nutritional benefits as the fruit or vegetable from which it is derived" (1563, ¶ 34).

Inclusion of alcoholic beverages under the Portion Cap Rule would violate the New York State Alcoholic Beverage Control Law ("ABC Law"), which regulates the sale of alcohol, and preempts cities and towns from enacting laws and regulations that concern alcohol sales. See, People v. DeJesus, 54 N.Y.2d 465, 470 (1981) ("the Alcoholic Beverage Control Law is exclusive and Statewide in scope and thus, no local government may legislate in this field." (citations omitted)).

The Court below erroneously found that the Portion Cap Rule exempted certain establishments for impermissible "political considerations" (20-21). The Portion Cap Rule applies to all food service establishments regulated and permitted by the Department. It does not apply to businesses, such as 7-11 stores, that derive more than half of their revenue from sales of packaged food because these entities are not subject to the Department's authority. Instead, these establishments are subject to regulation by the State Department of Agriculture and Markets pursuant to a Memorandum of Understanding (MOU) between the New York State Department of

Agriculture and Markets and the New York State Department of Health ("State DOH") (607-615). The MOU establishes a scheme whereby enforcement of food safety regulations in supermarkets and groceries vests with the Department of Agriculture and Markets and enforcement of establishments primarily serving individual portions of ready-to-eat food, whether consumption occurs on or off premises, vests with the Department of Health. The New York City Health Department is without legal authority to regulate businesses which it does not have authority over in accordance with this MOU. The MOU states that staff of State DOH and Agriculture and Markets are to meet to resolve jurisdictional questions, that is questions that may arise as to under whose regulatory authority a particular business is subject to. This is different from questions as to whether a business regulated by the particular Department should also be subject to specific regulations of another Department.

Citing sections of the Health Code involving the sale of tobacco products, petitioners asserted below that the Board does regulate businesses subject to oversight of the state Agriculture and Markets Law (68, ¶56). Petitioners' argument is misplaced because the Department has enforcement powers with respect to tobacco products pursuant to sections 17-709 and 17-717 of the New York City Administrative Code. Further, because cigarette retailers must be licensed by the Department of

Consumers Affairs, there is no conflict with respect to enforcement jurisdiction by a state agency with respect to such products.

The fact that there are establishments regulated by a state agency that are not subject to the Portion Cap Rule cannot be considered exemptions based "solely upon economic and social concerns," which were found impermissible in Boreali. Such a reading of the first Boreali factor would require agencies to adopt regulations without regard to whether the body exercises any jurisdiction over the particular business.

In sum, unlike Boreali, the Portion Cap Rule was based solely on health considerations, regulating food service establishments which the Department is legally authorized to regulate.

(2)

The Portion Cap Rule Was Not Written On A Clean Slate.

The Boreali Court held that the New York State Legislature's lack of guidance in the grant of authority to the PHC indicated that the PHC had engaged in inherently legislative activities.

With respect to the Board, the Court should consider this factor with considerable sensitivity in light of the unique role of the Board supported by case law and legislative history as discussed above. In contrast to the language of the New York

Public Health Law at issue in Boreali, the Charter provisions that form the basis for the adoption of the Portion Cap Rule specifically provide the Department with an extraordinary grant of authority to "regulate all matters affecting the health in the city of New York," and to perform acts "as may be necessary and proper to carry out the provisions" of the chapter. Charter §§ 556 & 556(e)(4). Further, unlike the regulations invalidated in Boreali, the Charter goes on to identify specific areas that may be regulated by the Department, including the "control of communicable and chronic diseases"[9] and the oversight of the "food and drug supply of the city." Charter §§ 556(c)(2) & (9) (emphasis added). In turn, the Board may "embrace in the health code" any of the matters "to which the power and authority of the department extends." Charter § 558(c).

Such grants of authority have repeatedly been upheld by the Courts. See, e.g., Statharos v. New York City Taxi & Limousine Comm'n, 198 F.3d 317, 321-322 (2d Cir. 1999) (rejecting Boreali challenge, and holding that "language of the City Charter gives the Commission broad authority to issue rules that further its mandate to ensure financial responsibility on the part of the taxi industry" and that the financial disclosure

[9] A set forth in Commissioner Farley's affidavit, "Obesity is a risk factor for many debilitating and often fatal chronic diseases…." (1546, ¶ 4).

regulations at issue "aim to do just that"); Matter of New York City Comm. for Taxi Safety v. New York City Taxi & Limousine Comm'n, 256 A.D.2d 136 (1st Dep't 1998) (same).

Similarly, in Matter of Motor Vehicle Mfgs. Ass'n v. Jorling, 181 A.D.2d 83 (3d Dep't 1992), the petitioners challenged a regulation promulgated by the New York State Department of Environmental Conservation ("DEC") that related to automobile tailpipe emissions. The petitioners argued that the agency's adoption of the contested regulation "usurped the Legislature's prerogative to formulate State policy." Id. at 87. Relying on broad language that authorized DEC to "formulate, adopt and promulgate … regulations for preventing, controlling or prohibiting air pollution," the court held that DEC "did not engage in policy making by promulgating the [contested regulation] but, rather, proposed rules which implemented the goals and plans set forth by the legislature." Id. at 86-87. See also Pet Professionals v. City of New York, 215 A.D.2d 742, 743 (2d Dep't 1995) (health code provisions upheld since the Board "was merely filling in the details of broad legislation describing the over-all policy to be implemented").

Here, the Court below concluded that "in looking at the history of the Charter, the intention of the legislature with respect to the Board of Health is clear. It is to protect

the citizens of the city by providing regulations that prevent and protect against communicable, infectious, and pestilent diseases" (33).

It further erroneously concluded that (1) the Board has no "authority to limit or ban a legal item" under its authority to control chronic disease, and (2) the Board "may supervise and regulate the food supply of the City when it affects public health, . . . [only] when the City is facing eminent danger due to disease" (33-34).

Thus, the Court below took an erroneously and dangerously limited view as to the Board of Health's authority with regard to the protection of public health, seemingly limiting the Board's authority to communicable and infectious diseases. While it is true that the public health regulatory model is one based on controlling communicable diseases, this is in no way the extent of what is meant by public health. "Public health concerns . . . are not limited to communicable diseases and a different regulatory strategy may be needed for issues that do not fall within that approach." Goodman, Rothstein, Hoffman, Lopez, Mathews, Law In Public Health Practice, p. 40. "The range of public health responsibilities at the beginning of the twenty-first century is remarkably expansive. Id. at 26.

In limiting the Board's jurisdiction to "communicable, infectious, and pestilent diseases", the lower Court has

disregarded the specific language of the Charter and precedents of this Court, discussed earlier, upholding Board of Health regulations governing matters beyond those types of diseases. See, e.g., People v. Weil, 286 A.D. 753, 757 (1st Dep't 1955) (the Sanitary Code [now the Health Code] provision requiring landlords to keep gas refrigerators in good order); Paduano v. City of New York, 45 Misc.2d 718, 721 (Sup. Ct. N.Y. Co.),aff'd on op. below, 24 A.D.2d 437 (1st Dep't 1965), aff'd, 17 N.Y.2d 875 (1966), cert. denied, 385 U.S. 1026 (1967) (upheld the Board's power to enact the City's water fluoridation initiative, which provided that a fluoride component be added to the City's public water supply).

Further, the Board has previously restricted use of lead paint and artificial trans fats (1548, ¶¶ 9,10), and, in an analogous intervention designed to provide consumers with information to make more conscious choices about what they eat and drink, a requirement to post calories (1548, ¶ 10). The restriction on trans fats is particularly instructive because after the Board amended the Health Code, the City Council incorporated the restriction into the Administrative Code. In its statement of Legislative findings and intent, the City Council, implicitly recognized the Board's legislative authority, in stating that the Board of Health had previously

adopted the restriction "pursuant to the authority granted to it by § 558 of the New York City Charter" (627).

Finally, if the Board's authority set forth in sections 556, and 558 were as limited as the Court below found, the other sections in the Charter which deal with the Board's powers with respect to imminent epidemic conditions would be superfluous. For example, section 563 of the Charter provides that "in the presence of great and imminent peril to the public health, the board of health . . . shall take such measures and order the department" to take actions beyond those provided for the preservation for the public health including the power to take possession of and occupy any building as a hospital.

In sum, as set forth above, the adoption of the Portion Cap Rule was in accord with legislative policy and within the legislative delegation of authority.

(3)

Proposed City Council Resolutions And State Assembly Bills Did Not Preclude The Adoption Of The Portion Cap Rule.

The Court below found that the failure by the City Council and the State Legislature to pass legislation with respect to sugary dinks was evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving this health problem. The Court reasoned that the City Council had failed to pass three

resolutions targeting sugary sweetened drinks, including seeking a tax on such drinks, requiring warning labels and prohibiting the use of food stamps to purchase such drinks (35-36). In addition, the Court noted that the State Assembly had introduced bills prohibiting the sale of sugary dinks on government property and prohibiting stores with ten or more employees to display candy or sugary drinks at "the check counter or aisle" (35-36).

The Court below erred because neither the City Council nor the State Legislature has considered the issue of a portion cap. In any event, the Court of Appeals has explicitly rejected the argument that the failure to pass proposed legislature is evidence of legislative intent.

In Rent Stabilization Association of New York City v. Higgins, 83 N.Y.2d 156 (1993), cert. denied, 512 U.S. 1213 (1994), the Court upheld regulations adopted by the New York State Division of Housing and Community Renewal ("DHCR"), which enlarged the class of "family members" entitled to succeed to a rent regulated apartment upon the departure of the tenant of record. Notwithstanding the introduction of 27 bills in the State Legislature relating to succession rights, the Court rejected the argument that "the failed bills alone warrant the conclusion that the agency has exceeded its mandate". 81 N.Y.2d at 170.

In Bourquin v. Cuomo, 85 N.Y.2d 781, 787 (1995), the Court of Appeals stated "that proposed legislation similar to [the] the Executive Order . . . was not passed, does not indicate legislative disapproval of the programs contemplated by the [Executive] order. Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." 85 N.Y.2d at 787 (internal quotation marks omitted).

This Court in Festa v. Leshen, 145 A.D.2d 49 (1st Dep't 1989), reasoned that "the Court of Appeals, in ***Boreali*** (supra) could not have intended to invalidate a regulation merely because the Legislature had, at some point, considered the same subject matter. The court had in mind the type of extensive and repeated consideration which the Legislature had afforded to the issue of smoking in areas open to the public. Moreover, the PHC had only acted after substantial legislative debate on the issue".

Thus, the Court below erred in finding that the third Boreali factor was present in this case.

(4)

The Board Relied on its Specialized Expertise in Public Health in Determining that Sugary Drinks were a Significant Driver of the Obesity Epidemic, the Link between Portion Size and Consumption and in Establishing the Parameters of The Portion Cap Rule.

As the Court below properly found, "the Board's Public Hearing and the memorandum after the Hearing evidence the exercise of the Board's expertise" (38). Even though the parties may disagree with the Board's conclusions, it cannot be disputed that the specialized expertise of the Board was required to analyze the scientific arguments made by the Department and those opposing the proposal.

C. In Sum, Boreali Is Not Applicable In This Case Because The Board Has Legislative Authority. Even If Boreali Were Applicable, None Of The Boreali Factors Are Present In This Case. Thus, The Board Did Not Exceed Its Authority In Adopting The Portion Cap Rule.

As discussed above in Subpoint A, the Board's legislative authority over matters of public health is set forth in the Charter and has been recognized by the Court of Appeals and this Court. Thus, this Court need not consider whether the Board exceeded its delegation of authority under Boreali. However, even if Boreali does apply, petitioners have not established the existence of any of the factors in this case, let alone all four.

Accordingly, the Court below erred in finding that the Board exceeded its statutory authority in adopting the Portion Cap Rule.

POINT II

THE BOARD'S ADOPTION OF THE PORTION CAP RULE WAS RATIONAL AND REASONABLE AND NEITHER ARBITRARY NOR CAPRICIOUS.

A. Standard of Review

"The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious." Matter of Consolation Nursing Homes, Inc. v. Comm'r New York State Dep't of Health, 85 N.Y.2d 326, 331 (1995).

An "administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise." Id. at 331. Consequently, a party that seeks to invalidate a regulation has "the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence." Id. at 331-32 (emphasis added, citations omitted).

Moreover, a reviewing court should defer to the responsible official's exercise of judgment regarding factors that may be difficult to weigh or quantify. Courts must allow a policy-maker to "'apply broader judgmental considerations based

upon the expertise and experience of the agency he heads.'" Id. at 332 (quoting Catholic Med. Ctr. v. Dep't of Health, 48 N.Y.2d 967, 968-69 (1979)); see also, Price v. New York City Board of Education, 16 Misc.3d 543, 557 (N.Y. Co. 2007), aff'd, 51 A.D.3d 277 (1st Dep't 2008). ("The courts may not review rule-making choices between alternates; the choices as to how to formulate a rule is the responsibility of the agency, and the court may only set such aside if there was no rational basis for the choice made by the agency. Notwithstanding that a court may feel that a different choice would have been better, it is not the province of a court to make such a judgment"); Matter of the Legislature of the County of Rockland v. New York State Public Service Commission, 49 A.D.2d 484 (3d Dep't 1975) (in upholding the Commission's approval of new rates, the Court stated "although the areas of inclusion or exclusion of certain items in the rate base seem fairly arguable, and petitioner may have made a reasonable showing that some should be taken out, this kind of judgment in a technical area of public utilities regulation is one that lies within the special competence of the administrative agency. These judgments of the commission may well be debatable, but they are not arbitrary").

Finally, here, in light of the Board's unique legislative authority as discussed in Point I, supra, the Board

is entitled to considerable deference that should go well beyond the deference afforded to an ordinary administrative agency.

B. The Rational Basis for the Portion Cap Rule

The Court below properly held that the Portion Cap Rule was reasonable (40). As explained in the affidavit of Commissioner Thomas Farley, scientific evidence indicates that more than half of adult City residents (57.5 percent) are now overweight or obese, as are nearly 40 percent of the City's public school children (K-8). Despite numerous public health initiatives, obesity rates in the City have climbed. In 2011, 23.7 percent of adult New Yorkers were obese compared to only 18 percent who were obese in 2002 (1550, ¶ 12).[10]

Obesity is a risk factor for many debilitating and often fatal chronic diseases,[11] including heart disease, cancer, stroke, osteoarthritis, hypertension, gall bladder disease and

[10] Overweight and obesity ranges are calculated using weight and height to determine body mass index ("BMI"), which provides a reliable indicator of body fatness for most people (http://www.cdc.gov/healthyweight/assessing/bmi/). For adults, obesity is defined as a BMI ≥30. For children, obesity is defined as a BMI above the 95th percentile for children of the same age and sex (1545, ¶ 3, fn 2).

[11] According to the World Health Organization, chronic diseases are diseases of long duration and generally slow progression. Chronic diseases, such as heart disease, stroke, cancer, chronic respiratory diseases and diabetes, are the leading cause of mortality globally, representing 63% of all deaths. Out of the 36 million people who died from chronic disease in 2008, nine million were under the age of 60. http://www.who.int/topics/chronic_diseases/en/.

type-2 diabetes. Adults who are obese are almost three times as likely to develop diabetes as those who are at a healthy weight (1546, ¶¶ 4, 5; 1539).

The consequences of childhood obesity are equally devastating. Nearly one in four American teenagers suffers from pre-diabetes or diabetes. Childhood obesity leads to serious health consequences, including cardiovascular disease and increased mortality. As a result of this epidemic, today's children may have a shorter life expectancy than their parents (1546, ¶¶ 4,5; 1539).

While many social, behavioral, environmental, economic and biological factors contribute to obesity, medical authors have concluded that sugary drinks are a leading driver of the obesity epidemic (1552, ¶15). As the Chair of the Department of Nutrition at Harvard University's School of Public Health stated at the July 24, 2012 public comment hearing: "soda is … the single most important contributor to weight gain … part of the problem is that the body does not recognize excess calories from sugar dissolved in water … and we tend to add those calories rather than displace other calories, and of course that contributes to obesity" (1420). Sugary drinks are the largest single source of added sugars in the diet, contain almost no nutritional value, and do not provide a feeling of fullness (1539).

Compared to 30 years ago, Americans consume an additional 200 to 300 calories per day, "with the largest proportion of the increase due to sugary drinks" (1539) (citations omitted). In addition, high consumption of sugary drinks is linked to an increased risk of heart disease and type-2 diabetes (1555, ¶¶ 21, 22; 1539).

Moreover, portion sizes have increased at the same time that rates of obesity have increased. Whereas the original Coca-Cola bottle was only 6.5 ounces, carbonated soft drinks are now routinely sold in cans and bottles that are much larger, and the sizes of fountain drink portions have similarly expanded; beverages available at McDonald's have increased 457 percent from 1955, when it offered only one size of 7 ounces, to today, when a diner can purchase a sugary beverage as large as 32 ounces (1557, ¶26; 1539).[12] While large drinks are now routinely offered at most establishments, smaller drinks are scarce: the smallest drink size available in many restaurants is 20 ounces, and in some movie theaters a consumer cannot purchase a fountain drink smaller than 32 ounces. Increases in portion size have changed how people perceive what constitutes a normal size.

[12] Remarkably, some New York City restaurants offer individual drinks in cups as big as 64 ounces; a sugary drink of this size contains 780 calories (39 percent of the 2,000 calories a day recommended for most adults) and the equivalent of 54 teaspoons of sugar, and no nutrients (1557, ¶ 26; 1539).

Sixty years ago, Coca-Cola advertised that 16 ounces was enough to serve three people (1559-1560, ¶¶ 27-28; 749).[13] Today, virtually every food service establishment serves individual portions of sugary beverages bigger than 16 ounces.

People are consuming these larger serving sizes. Numerous "studies -- conducted in a variety of settings with an array of food and beverages -- consistently demonstrate that people eat more when offered larger portion sizes" (1442) (citations omitted). The Director of Yale University's Rudd Center for Food Policy and Obesity stated: "People tend to consume food in units -- typically whatever is in a bag, a bottle or a box. As bags, bottles, and boxes get larger, people consume more" (1423) (citations omitted).

In low-income neighborhoods many residents "report drinking 4 or more sugary drinks daily" (1539).[14] Especially troubling is the fact that their increased consumption of sugary drinks is not offset by decreased consumption of calories elsewhere. People do "not compensate for their additional

[13] Eight ounces is the standard portion size used by the United States Food and Drug Administration ("FDA") for nutrition labeling, a quantity which is meant to "represent the amount of food customarily consumed at one eating occasion" (1559-1560, ¶¶ 27-28).

[14] And "areas with the highest rates of sugary drink consumption are consistently characterized by the highest rates of obesity" (1553, ¶ 19) (citations omitted).

beverage intake by consuming less food, indicating that consuming large, calorie dense sugary drinks with meals can and does lead to excess calorie intake" (1422).

By limiting the sizes of cups and containers that establishments regulated by the Department can use to serve sugary beverages, the Portion Cap Rule will reduce their consumption and help address the obesity epidemic that currently impacts millions of New Yorkers (1549, 11; 1422).

C. The Portion Cap Rule Was not Arbitrary or Capricious

Although the Court below found that a reasonable basis supported the Rule, it determined that it was arbitrary and capricious, reasoning (40):

> the loopholes in this Rule effectively defeat the stated purpose of the Rule. It is arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule.

Contrary to the Court's reasoning, the purpose of the Rule will not be defeated by the fact that not all soda sellers are subject to the rule. All food service establishments under the Department's jurisdiction, including fast food chains, are

subject to the Rule. This is not an insignificant number. Petitioners contend that the consumer will go to stores which are not covered by the Portion Cap Rule. The Department noted, however, that "the majority of refrigerated beverages sold in pharmacies and bodegas tend to be 20 ounces or smaller" and that it was "improbable that consumers would seek out an alternative retailer for four more ounces of a sugary beverage" (1426). In addition, patterns "of human behavior indicate that consumers overwhelmingly gravitate towards the default option" and that with the adoption of the Portion Cap Rule consumers "intent upon consuming more than 16 ounces would have to make conscious decisions to do so" (1423).

The fact that refills are permitted also does not render the Rule ineffective. As an Assistant Professor of Medicine and Health Policy at New York University of Medicine stated: "We know that convenience drives many food purchases, particularly fast food purchases. If it becomes harder to carry two or more cups, people will be less likely to do so" (1423).

Moreover, the Rule is designed to make consumption of large amounts of sugary drinks a conscious and informed choice by the consumer. Thus, although a consumer is free to consume more than 16 ounces by ordering a second drink, getting a refill, or going to another store, he or she will be making an informed choice.

Finally, the fact that the Rule is allegedly "underinclusive" is not a basis to invalidate it. It is well established that government is not required to address all facets of a problem at once and may address a problem incrementally. In New York State Health Facilities Ass'n v. Axelrod, 77 N.Y.2d 340, 350 (1991), the Court of Appeals upheld a regulation requiring newly established nursing homes to agree to maintain a certain percentage of Medicaid patients because such patients in the past often experienced more difficulty than others in obtaining health services. The Court stated "petitioner argues that the regulations are irrational because they apply to new applicant facilities and do not redress any discrimination by existing facilities. Merely because respondent has attempted to address part of a perceived concern, however, provides no basis for invalidating the regulations". See also, New York State Restaurant Association v. New York City Board of Health, 556 F.3d 114, 133, n.22 (2d Cir. 2009) ("we also reject NYSRA's suggestion that heightened review is appropriate because New York City has alternative means of achieving its goals or because Regulation 81.50 [calorie count posting requirements] impacts only ten percent of New York City restaurants").

Under the reasoning of the lower court in this case, the Board would have to undertake extraordinary efforts,

including getting a state agency to agree to defer to the authority of the Board, in order to satisfy the court's "all or nothing" approach. Yet, as shown above, neither case law nor common sense requires such an "all or nothing" approach. The Board has acted to apply the Portion Cap Rule to food establishments within its clear jurisdiction. The Portion Cap Rule is a measured response to a serious health crisis and is reasonable and rational in all respects.

For all the foregoing reasons, the Board did not exceed it statutory authority and the Portion Cap Rule was supported by a rational basis and was not arbitrary or capricious. Accordingly, the Decision and Order of the Supreme Court should be reversed, and the Petition dismissed.

CONCLUSION

THE DECISION AND ORDER (ONE PAPER) APPEALED FROM SHOULD BE REVERSED, AND THE PETITION DISMISSED, WITH COSTS.

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE; THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION; SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; THE NATIONAL RESTAURANT ASSOCIATION; THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE; and THE AMERICAN BEVERAGE ASSOCIATION,

Plaintiffs-Petitioners,

For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules,

- against -

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. THOMAS FARLEY, in his Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene,

Defendants-Respondents.

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PRE-ARGUMENT STATEMENT

Index No. 653584/2012

CIVIL PRE-ARGUMENT STATEMENT

1. The title of the action is provided above.

2. Full names of the parties are set forth above and have not been changed.

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4. This is an appeal from an order of Supreme Court, New York County.

5. This is an action brought pursuant to Articles 78 and 30 of the Civil Practice Law and Rules seeking to enjoin and permanently restrain the defendants/respondents from implementing or enforcing New York City Health Code section 81.53, and seeking a declaration that section 81.53 is invalid.

6. On March 11, 2013, the Supreme Court enjoined and permanently restrained the defendants/respondents from implementing or enforcing section 81.53, and declared section 81.53 invalid.

7. The Supreme Court's decision is contrary to law.

Dated: New York, New York
March 12, 2013

By: 

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