To Be Argued By:
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Court of Appeals

STATE OF NEW YORK

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-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 City Department of Health and Mental Hygiene,

Defendants-Respondents-Appellants.

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Plaintiffs state the following:

1. The New York Statewide Coalition of Hispanic Chambers of Commerce is a not-for-profit organization under 26 U.S.C. § 501(c)(6), incorporated in the State of New York. It has no parents or subsidiaries.

2. The New York Korean-American Grocers Association is a not-for-profit organization under 26 U.S.C. § 501(c)(6), incorporated in the State of New York. It has no parents or subsidiaries.

3. The Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters is an unincorporated association recognized under New York's General Associations Law and is recognized as a labor organization pursuant to the National Labor Relations Act, 29 U.S.C. § 158. It has no parents or subsidiaries.

4. The National Restaurant Association is a not-for-profit organization under 26 U.S.C. § 501(c)(6), incorporated in the State of Illinois. Its subsidiaries are Alliance Business Solutions, LLC; ARN 2055, LLC; The National Restaurant Association Educational Foundation; National Restaurant Association Military Foundation; National Restaurant Association Services, LLC; and National Restaurant Association Solutions, LLC.

5. The National Association of Theatre Owners of New York State is a not-for-profit organization under 26 U.S.C. § 501(c)(6), incorporated in the State of New York. It has no parents or subsidiaries.

6. The American Beverage Association is a not-for-profit organization under 26 U.S.C. § 501(c)(6), incorporated in the District of Columbia. It has no parents or subsidiaries.

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PRELIMINARY STATEMENT

This case has never been about obesity or soft drinks. It is about whether the Mayor and his unelected Board of Health can usurp the authority of the City Council and decide for themselves what the law will be. It is about an ill-conceived product ban that would have inflicted substantial and irrational economic harm on thousands of small businesses by prohibiting them from selling legal beverages that competing businesses next door would be permitted to sell freely. It is about whether the unelected Board of Health has limitless power to impose on millions of New Yorkers its view of how they should live their lives.

The power to enact new policy into law is reserved to the legislative branch. The executive enforces the law, but it may not usurp the legislature's authority to create new law. These principles are fundamental to the separation of powers. When executive agencies have violated these core principles and exceeded their proper jurisdiction, this Court has not hesitated to strike down the offending agency action. *See, e.g., Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). The Supreme Court and the Appellate Division applied those precedents faithfully here and rightly rejected Defendants' claim of unchecked law-making authority over "all matters affecting health in the city of New York." R40-41; R1789-90. This Court should affirm.

In May 2012, former Mayor Michael Bloomberg directed the New York City Department of Health and Mental Hygiene ("DOH" or the "Department"), the New York City Board of Health ("Board" or "Board of Health"), and former Commissioner Farley (collectively, "Defendants") to adopt a rule telling New Yorkers what sizes of sugar-sweetened beverages they can buy. The Mayor's proposal was riddled with arbitrary exemptions and carve-outs having nothing to do with health. It excluded convenience stores such as 7-Eleven (home of the Big Gulp), along with milkshakes, fancy coffee drinks, and countless other products containing more calories than those the Mayor proposed to ban. It allowed people to buy multiple drinks and unlimited refills, while banning families from buying two-liter (67-ounce) resealable bottles, which it treated as though they were single-serving cups. In the name of feasibility it allowed drinks that come in standard 16-ounce bottles, while in the name of health it excluded drinks that come only in standard 500-ml (16.9-ounce) bottles.

This was not the Mayor's first attempt to create law targeting sugar-sweetened beverages. He first tried to do it the traditional way, supporting resolutions and bills in the City Council and State Legislature. But when those efforts failed, the Mayor took matters into his own hands, directing the unelected Board—all of whose members he had appointed—to make the law he wanted. City Council members immediately objected to the Mayor's blatant end-run

around the legislative process. The media criticized his proposal as a nanny state measure that reeked of elitism and executive overreach. The lead scientist on one of the studies on which the proposal purportedly relied declared that it would be an "epic failure." R440. Concerned parties protested the proposal's paternalism and arbitrariness, and emphasized the harm it would cause to countless small businesses. Nevertheless, the Board rubber-stamped the Mayor's proposal and codified it as a binding regulation ("the Ban")—enforceable through civil and criminal penalties—without a single substantive change.

Plaintiffs—a coalition of industry associations, labor groups, beverage producers and distributors, and small and minority-owned businesses, such as restaurants, delis, and movie theaters—filed an Article 78 and Declaratory Judgment action seeking injunctive and declaratory relief. R54-56. After briefing and oral argument, the Supreme Court granted Plaintiffs' petition, agreeing that that the Board violated the separation of powers by acting as though it were a legislature. The court explained that Defendants' position, "if upheld, would create an administrative Leviathan" that "would not only violate the separation of powers doctrine, it would eviscerate it." R42. The Supreme Court also found that the Ban's irrational patchwork of restrictions and exceptions was arbitrary and capricious.

The Appellate Division affirmed the Supreme Court's ruling that the Board's Ban was unlawful. It rejected the Board's claim to special legislative authority as resting on a "fundamental misunderstanding of the power of administrative agencies vis-à-vis the legislature." R1778-79. And it likewise determined that the Ban "was not the kind of interstitial rule making intended by the [City Council]," but instead an "usurpation" of the City Council's "legitimate legislative functions." R1783. Because it held that the measure violated separation of powers, the Appellate Division found it unnecessary to consider whether the Ban was also arbitrary and capricious. R1795.

On appeal to this Court, Defendants argue for the first time that separation of powers principles do not apply to localities. But this Court has expressly held that separation of powers principles *do* apply to New York City, and it has repeatedly set aside actions by the Mayor and his appointees that violate those principles.

Defendants next insist that the Board, unique among all State and City agencies, has both executive *and* legislative power and is not bound by constitutional limitations imposed by the separation of powers. They ignore the Constitution and Charter provisions that make the City Council the sole legislature authorized to enact local laws in New York City. They ignore statutes that subordinate the Board both to the City Council and the State Public Health Council ("PHC"). They ignore that the Board is appointed by the Mayor and enacts rules

(not laws) like every other city agency. And they ignore the breathtaking implications of their position: if validated, it would grant the Mayor and his unelected Board unchecked authority to make law on nearly every aspect of human activity in New York City, because almost everything we do can be said to have "public health" implications. The Supreme Court and Appellate Division rightly rejected Defendants' claim to such unprecedented legislative power.

Defendants next argue that, even if they do not have the extraordinary legislative power they claim, the Ban was nothing more than run-of-the-mill, interstitial rulemaking within the bounds of the Board's traditional delegated authority. But the Ban was not nearly so modest. It was an unprecedented gambit to coerce New Yorkers into living Defendants' vision of a healthier lifestyle by restricting their consumption of safe, lawful, and uncontaminated products. It was a dramatic departure from the Board's traditional regulatory authority over "food establishments," which they acknowledge is limited "to protect[ing] people *only from infectious agents and other contaminants.*"[1] Defendants proudly announced it as a "historic," "brand new," and "groundbreaking policy."[2]

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[1] Thomas Frieden, Thomas Farley et al., *Public Health in New York City, 2002–2007: Confronting Epidemics of the Modern Era*, Int. J. of Epidemiology, vol. 37, Issue 5 (2008) (emphasis added).

[2] *See* R1484, R1494 (Sept. 13, 2012 BOH Meeting); R1429 (Response to Comments); R732 (June 12, 2012 BOH Meeting); Press Release, Mayor Bloomberg Discusses City's Efforts to Combat Obesity and Sugar Beverage Regulation (Mar. 11, 2013), http://www.nyc.gov/

It is, however, for the legislative branch—not the executive—to weigh competing health, business, and consumer interests and decide whether to enact "brand new" policy. At some level, Defendants appear to recognize this. It is likely why they have claimed throughout this litigation that the Board has special legislative power. That claim is meritless, however, and their fallback attempt to defend their "groundbreaking" law as ordinary interstitial rulemaking fails as well.

Defendants finally protest that the Ban is not arbitrary. But the Supreme Court properly concluded that the Ban's crazy quilt of loopholes and classifications provides an independent basis to hold it unlawful. The irrational lines drawn by the Ban are either arbitrary on their face or founded on jurisdictional justifications that are contrary to law and to Board precedent.

Every judge who has heard this case has concluded that the Board lacked the authority to enact the Ban. And Defendants themselves insist that the Board's jurisdiction was too limited for it to apply the Ban to all similarly-situated businesses and products in an evenhanded way. Yet rather than work with the People's elected representatives to develop more rational, effective, and evenhanded legislation, they ask this Court to endorse their far-reaching claims of unprecedented authority in an effort to resurrect the deeply flawed product ban

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portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2013a%2Fpr090-13.html&cc=unused1978&rc=1194&ndi=1.

they created. This Court should deny that request. The order of the Appellate Division should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the Board possess special legislative power that immunizes it from scrutiny under *Boreali*? (The Appellate Division correctly answered "No.")

2. Is the Ban impermissibly legislative and thus beyond the Board's executive rulemaking power under *Boreali*? (The Appellate Division correctly answered "Yes.")

3. Is the Ban unlawfully arbitrary and capricious under Article 78? (The Supreme Court correctly answered "Yes," and the Appellate Division did not reach this question.)

COUNTERSTATEMENT OF FACTS

A. The Mayor Bypasses The City Council To Get His Ban Enacted

The City Council has taken numerous steps to address obesity, but it has never enacted legislation targeting sugar-sweetened beverages. It repeatedly declined to enact resolutions, supported by Mayor Bloomberg, calling for laws targeting sugar-sweetened beverages at the state and national level.[3] The Council's

[3] Those measures included a proposed state excise tax on sugar-sweetened beverages, proposed federal requirements for warnings on sugar-sweetened beverages, and a proposed United States Department of Agriculture order permitting the City to prohibit the use of food stamps to purchase sugar-sweetened beverages. *See* N.Y.C. Council Res. No. 1265-2012 (N.Y. Mar. 28, 2012), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102924&GUID=B0BB5DD1-

"rejection of such measures … reflect[ed] a lack of agreement that it is appropriate to target such drinks." City Council Members' App. Div. Amicus Br. at 9-10.

The State Legislature has also repeatedly rejected proposals to single out sugar-sweetened beverages as disfavored products. In 2011, the State Assembly declined to (1) prohibit the sale of sugar-sweetened beverages in food service establishments and vending machines located on government property;[4] (2) restrict the placement and sale of certain sugar-sweetened beverages in stores;[5] or (3) impose additional taxes on certain "sweets or snacks," including sugar-sweetened beverages.[6] In 2009, the Assembly declined to prohibit the purchase of sugar-sweetened beverages with food stamps.[7] The Assembly also rejected several proposals—supported by Mayor Bloomberg—to tax sugar-sweetened beverages. R466-67.

56C8-431C-A191-221D3A678B4E&Options=&Search=; N.Y.C. Council Res. No. 1264-2012 (N.Y. Mar. 28, 2012), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102925&GUID=5EAE5E93-0881-4D42-B76C-A47B70E7AAB4&Options=&Search=; N.Y.C. Council Res. No. 0768-2011 (N.Y. Apr. 6, 2011), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=862347&GUID=14B3F44A-502C-410F-96A2-8420D81DBB6C&Options=&Search=.

[4] *See* Assembl. Bill No. 10010 (N.Y. May 1, 2012), *available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A10010&term=2011.

[5] *See* Assembl. Bill No. 18812 (Prefiled) (N.Y. Jan. 4, 2012), *available at* http://assembly.state.ny.us/leg/? sh=printbill&bn=A08812&term=2011.

[6] *See* Assembl. Bill No. 843 (Prefiled) (N.Y. Jan. 5, 2011), *available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A00843&term=2011.

[7] *See* Assembl. Bill No. 10965 (N.Y. May 5, 2010), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A10965&term=2009&Summary=Y&Text=Y.

Having lost the "legislative fight," Mayor Bloomberg took matters into his own hands.[8] He directed his appointees on the Board of Health to prohibit New York City's Food Service Establishments ("FSEs") from selling sugar-sweetened beverages in any cup, bottle, or other container that could hold more than 16 ounces.[9] This product ban would apply to all of the City's restaurants, delis, fast-food franchises, movie theaters, stadiums, and street carts, but thousands of other FSEs would be excluded and free to sell all beverages of any size. The Mayor's proposal also exempted numerous categories of beverages that contain more calories than the ones it targeted. The next day, with apparently no appreciation for the irony, the Mayor publicly celebrated "National Donut Day" at an event in Madison Square Park where "lucky winners" received "the ultimate prize—free donuts for a year."[10]

The Mayor's proposed end-run around the City Council was decried by the New York Times as a blatant executive overreach and an unprecedented intrusion on personal liberty. R116. It was resoundingly criticized and ridiculed in

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[8] In their briefing to this Court, Defendants deny that the Portion Cap Rule was proposed by the Mayor's Office. That is disingenuous. Contemporaneous with announcing the Ban, New York City's own website praised "Mayor Bloomberg's proposed Ban on the sale of large [sugary] drinks." *See* Press Release, Mayor Bloomberg et al., Highlight Health Impacts of Obesity (June 5,2012), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012a%2Fpr200-12.html&cc=unused1978&rc=1194&ndi=1.

[9] *See id. See also* R761-68 (Notice of Public Hearing).

[10] R477-78.

editorials and on national television as the product of a nanny state run amok. *USA Today* described it as "short on logic and long on intrusion." R117. National Public Radio highlighted its carve-outs for alcohol-based drinks, wines, and high-calorie coffee beverages favored by more affluent consumers. R392. Jon Stewart observed that it "combines the draconian government overreach people love with the probable lack of results they expect."[11] A *New York Times* poll showed that 60 percent of New Yorkers, including majorities in every borough, opposed the Mayor's plan. R120.

Fourteen members of the City Council wrote to the Mayor, objecting to his arrogation of legislative authority:

> It is not the role of the government to tell us how to live our lives and the City should not attempt to do so, especially without the approval of the people's elected representatives in the Council. We ask that you rescind this proposal and allow people to continue making their own decisions about how much soda they will drink. If you persist in pursuing this proposal, we insist that you put it before the Council for a vote.[12]

But the Mayor ignored requests to submit the matter to the City Council. The Department published his proposed rule on June 19, 2012. R132-33.

More than 6,000 written comments were submitted in opposition—from City Council members and other elected officials, community leaders, local

[11] *The Daily Show* (Comedy Central broadcast May 31, 2012), http://www.thedailyshow.com/watch/thu-may-31-2012/drink-different.

[12] R203.

business owners, trade associations, scientific experts, individual consumers, and non-profit organizations, among others. *See generally* R143-425. And more than *90,000* New Yorkers signed a petition opposing the Mayor's unilateral imposition of the Ban. R175.

Despite this outpouring of opposition, the Board adopted the Ban—exactly as proposed by the Mayor. Under penalty of $200 fines, and potential criminal prosecution,[13] the Ban would prohibit FSEs within New York City from selling any so-called "sugary drink" in a container larger than 16 fluid ounces. R133 (proposed R.C.N.Y. tit. 24, § 81.53). It defined "sugary drink" as any "carbonated or non-carbonated beverage that: (A) is non-alcoholic; (B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener; (C) has greater than 25 calories per 8 fluid ounces of beverage; and (D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient." *Id.* "Milk substitute" was arbitrarily defined to include only "soy-based" substitutes, and exclude rice- and almond-milk. *Id.* The Ban would also prohibit FSEs from selling, offering, or providing "to any customer a self-service cup or container that is able to contain more than 16 fluid ounces" regardless of the type of beverage desired. *Id.* Yet the Ban would not limit in any way the sale of other drinks,

[13] Although Defendants limited to a $200 fine the civil penalty for violating the Ban, the Charter independently provides that "[a]ny violation of the health code shall be treated and punished as a misdemeanor." N.Y.C. Charter § 558(e).

including sugar-sweetened alcoholic beverages, milkshakes, and fancy lattes with many more calories than other drinks—like sweetened grapefruit and cranberry juices, and vitamin waters—whose sales the Mayor arbitrarily chose to limit.[14]

On its face, the Ban would apply to all FSEs, defined under the New York City Health Code as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle." R.C.N.Y. tit. 24, § 81.03(s). But the Board declared that thousands of those establishments—including convenience stores, corner markets, and bodegas—would be exempt because they are subject to inspection by the New York State Department of Agriculture and Markets ("Department of Agriculture").[15] As a consequence, street vendors and delis would be prohibited from selling beverages that 7-Elevens right next door could sell freely.

The Department summarily rejected all objections to the Ban in a 24-page document that largely reiterated Defendants' position at the outset of the rulemaking. R1418. Defendants did not dispute that there was no health-based reason to apply the Ban to some FSEs but not others, or to exempt alcohol-based

[14] *See* R261, R266, R310-11 (American Beverage Association Comments); R325, R333-34 (Report of Dr. Schorin).

[15] *See* R611 (establishments over which Department of Agriculture normally has inspection authority); R117 ("Bloomberg's edict wouldn't even kill off the granddaddy of supersized drinks, 7-Eleven's Big Gulp.").

drinks. Rather, they claimed the Board lacked jurisdiction to regulate the exempted businesses and alcoholic beverages, even though the Board had previously adopted other rules covering those very same businesses and beverages. Defendants also acknowledged that their choice of a 16-ounce cut-off was not based solely on health, but rather on their desire to balance health with economic and social concerns—including "impact to business," "impact to consumers," and customers' ability to "customiz[e]" products to their liking. R1425-28. (Later, during this litigation, when confronted with the fact that most manufacturers do not even make precisely 16.0-ounce cups, Defendants decided on the fly to permit 17-ounce cups.[16])

Defendants—medical doctors and others with public health backgrounds—defended the Ban based on their assumptions about behavioral economics, business, and consumer preferences. Defendants hypothesized that, despite conspicuous cup sizes and product-volume labeling, the consumer somehow does not make a "conscious and informed choice," but rather blindly and helplessly "accept[s] the portions chosen for him or her by restaurants and beverage companies." AOB 62-63. They insisted that larger portion sizes are not "driven by consumer demand," but instead "are more likely the result of industry marketing practices." R1424. Confident in their worldview, Defendants dismissed

[16] *See* Aff. of Daniel Kass in Opp. to Pet.'s Req. for a Prelim. Injunction (Feb. 12, 2013), ¶ 7.

as unfounded the concerns of local business leaders and declared that the compromise built into the Ban would minimize harm to their businesses. R1425-28.

Defendants failed meaningfully to respond to comments critiquing the studies and data on which its proposal purportedly relied.[17] They even continued to cite the expert who conducted the behavioral experiments they had earlier relied upon despite his insistence that Defendants completely misused and misrepresented his findings.[18] Despite these criticisms and the public outcry against the proposal, the Board codified the Ban exactly as Mayor Bloomberg had proposed it, *without a single substantive change*.[19]

B. The Supreme Court Declares The Ban Unlawful

On March 11, 2013, after full briefing and hearings on the merits, the Supreme Court declared the Ban unlawful and enjoined its enforcement. The court forcefully rejected Defendants' argument that the Board has true legislative power over all matters touching on health. "To accept [Defendants'] interpretation of the authority granted to the Board," the court held, "would leave [the Board's] authority to define, create, mandate and enforce limited only by its own

[17] *See, e.g.*, R263, R267-73, R284, R288-89, R365-77 (demonstrating flaws with DOH's characterization of and reliance on studies).

[18] R389-91 (Dr. Wansink criticizing misuse of his data); R389-91 (proposed rule relying on Dr. Wansink); R435-36 (final rule re-citing Dr. Wansink).

[19] R435-36 (final rule).

imagination," creating an "administrative Leviathan" that "would not only violate the separation of powers doctrine, it would eviscerate it." R41.

Next, applying this Court's guidance in *Boreali*, the Supreme Court held that the Board impermissibly acted in a legislative capacity when enacting the Ban. It found that the Board's regulation, "laden with exceptions based on economic and political concerns," reflected "a balancing being struck between safeguarding the public's health and economic considerations." R21. It concluded that the agency adopted its rule on a "clean slate," explaining that the provisions of the City Charter on which Defendants rely "do not grant the Health Department the sweeping and unbridled authority to define [and] create" a Ban like this one. R35. And it found that Defendants had trespassed on an area of "past and ongoing debate within the City and State Legislatures," where the People's representatives had provided the agency neither a mandate nor guidance. R37. Considering all of these interrelated factors, the court concluded that Defendants had impermissibly arrogated legislative power to themselves.

The Supreme Court also found the Ban unlawful for the additional and independent reason that it was "fraught with arbitrary and capricious consequences," leading to "uneven enforcement even within a particular City block, much less the City as a whole, and that its "loopholes … effectively defeat [its] stated purpose." R40.

C. The Appellate Division Unanimously Affirms

In July 2013, the Appellate Division affirmed in a unanimous decision. The court rejected Defendants' extraordinary contention that the Board is immune from the limitations imposed on all other agencies by separation of powers. The Appellate Division found, instead, that the Board is no different from the State PHC, the "analogous administrative body" whose actions were at issue in *Boreali*. R1780. It held that Defendants exercise only delegated authority and "cannot exercise sweeping power to create whatever rule they deem necessary." R1779.

The Appellate Division also affirmed the Supreme Court's holding that, under *Boreali* and other controlling precedents, the Board had exceeded its delegated authority and usurped the legislature's role by enacting the Ban. The court found the Board had gone far beyond the "specific duties imposed" and the "powers conferred by" the City Charter by seeking to regulate products that *not even the Board* considered "inherently unhealthy." R1785. Recognizing the Ban was different in kind than regulation "engaged in by the Board of Health in the past," the court concluded that the Board "did not fill a gap in an existing regulatory scheme but instead wrote on a clean slate." R1789. The court declined the Board's invitation to construe its grant of authority as an "unfettered delegation of legislative power" to restrict New Yorkers' lifestyle choices as it saw fit. R1790.

The Appellate Division likewise criticized the Board's attempt to impose the Mayor's vision of healthy lifestyle choices on the People despite their legislators' repeated refusals to pass laws targeting sugar-sweetened beverages. The court noted that the City Council and State Assembly had considered and rejected at least eight legislative proposals that would have targeted sweetened beverages in various ways. In this context, the court determined that the Board's "attempt to 'take it upon itself to fill the vacuum and impose a solution of its own' is improper." R1792 (quoting *Boreali*, 71 N.Y.2d at 8).

The Appellate Division also found that the Ban reflected the sort of "compromise" that is impermissible for the Board to make, balancing "health concerns," "commercial well-being," and other "political considerations" without any legislative guidance. R1788. It rejected Defendants' claim that the Board "acted *solely* with a view towards public health considerations when it adopted exemptions to the Portion Cap Rule," citing substantial evidence that "the DOMHM and the board members themselves indicated that they weighed the potential benefits against economic factors" when enacting the Ban. R1784 (emphasis added). The court concluded that where—as here—no one contends the products at issue are "inherently dangerous," the decision "to regulate a particular food is inherently a policy decision" and is "especially suited for legislative determination," not resolution by the Board of Health. R1786-87.

Finally, the Appellate Division found that Defendants exercised no "special expertise or technical competence in developing" the Ban. R1794-95. By adopting precisely what it was handed by the Mayor, the court found that the Board neither "br[ought] any scientific or health expertise to bear" in crafting the Ban, nor exercised any "technical competence … to flesh out details." *Id.* For all of these reasons, the court concluded that the Board had "overstepped the boundaries of its lawfully delegated authority" and violated separation of powers by acting to prohibit New Yorkers from consuming safe and lawful products.

ARGUMENT

I. THE BOARD IS AN EXECUTIVE AGENCY SUBJECT TO SEPARATION OF POWERS CONSTRAINTS

"'[N]o concept has been 'more universally received and cherished as a vital principle of freedom'" than the separation of powers. *N.Y. State Inspection, Sec. & Law Enforcement Emps. v. Cuomo*, 64 N.Y.2d 233, 239 (1984). Like the State Constitution, the New York City Charter treats the separation of powers as a fundamental precept and expressly "provide[s] for distinct legislative and executive branches." *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 356 (1985). "Respect for this structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch." *Subcontractors Trade Ass'n v. Koch*, 62 N.Y.2d 422, 427 (1984).

Defendants ignore those bedrock principles. They urge this Court to hold that the unelected Board possesses both legislative *and* executive power—and both State *and* local authority—to govern New Yorkers' lives with respect to "all matters affecting health." They assert that the Board, and the Board alone—among all local or state agencies in New York—possesses free-floating "broad," "special," "unique," "extraordinary" legislative power that is somehow exempt from separation of powers limitations that constrain other executive agencies.[20]

Defendants' sweeping claim of control over all matters affecting health in the City is foreclosed by the State Constitution, the New York City Charter, municipal home rule, and precedent. Defendants' boundless view of the Board's power would grant it virtually limitless authority over the way New Yorkers choose to live their lives. Nearly every choice we make—from what we eat, to how we work, to what we do in our spare time—"affect[s]" our "health." Defendants have not identified a single constitutional or statutory provision supporting their theory that the Board is an unelected super-legislature with "extraordinary" control over the lives of more than ten million New Yorkers. Nor have they identified any meaningful limits to their extraordinary claim of law-making authority.

[20] AOB 4, 20, 21, 24.

Every judge to consider Defendants' position has rejected it. This Court should reject it as well.

A. Separation Of Powers Principles Apply To New York City

It is settled law that separation of powers principles apply to New York City's government. *Subcontractors Trade Ass'n*, 62 N.Y.2d at 427. This Court has made clear that "the City Council is the body vested with legislative power," *id.*, and that the executive branch "may not unlawfully infringe upon the legislative powers reserved to the City Council." *Under 21*, 65 N.Y.2d at 356 (citing authorities). The Mayor and other executive branch officials are "empowered to implement and enforce legislative pronouncements emanating from the Council" but "'may not go beyond stated legislative policy and prescribe a remedial device not embraced by the policy.'" *Subcontractors Trade Ass'n*, 62 N.Y.2d at 427-28 (quoting *Broidrick v. Lindsay*, 39 N.Y.2d 641, 645-46 (1976)).

These principles are the product of a century's worth of constitutional and statutory developments that Defendants ask this Court to ignore. For most of the 19th century, New York's municipalities had no constitutional claim to law-making authority. All law-making authority emanated from the State Legislature, and the power to promulgate ordinances and regulations was parceled out to, and

often reallocated among,[21] various local officials—councils, boards, officers, trustees, and the like.[22] *In re Zborowski*, 68 N.Y. 88, 91-93 (1877). That changed with the enactment of home rule. In 1923, New York amended its Constitution and enacted legislation empowering municipalities to choose their own form of government, amend their charters by local law, and pass local laws "relating to the property, affairs or government of cities." *See* N.Y. Const. art. XII, §§ 2-3 (amended 1923).

These home rule powers were strengthened significantly in 1963. New York amended the Constitution to provide that "[e]very local government … shall have a legislative body elective by the people thereof." N.Y. Const. art. IX, § 1(a). The amended Constitution and the Municipal Home Rule Law subsequently enacted by the State Legislature provide that, aside from referenda, "[t]he legislative body of a local government" *alone* is empowered to enact "local laws" addressing the "safety, health, and well-being of persons" within their city. *Id.* § 2(c)(10); N.Y. Mun. Home Rule Law §§ 2(7), (9); 10(1)(ii)(a)(12). Local legislative bodies are also authorized to enact laws resulting in "the creation or *discontinuance of*

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[21] *See, e.g.*, Health Laws of New York ch. 31, § 1 (1805), ADD31-34 (authorizing Common Council to create and delegate authority to a board of health); Ch. 275, §§ 1-2, 1850 N.Y. Laws 117, ADD22 (abolishing board of health and transferring authority to Mayor and Common Council).

[22] The Board's ability then to promulgate ordinances deemed to constitute state law was not unique; all ordinances had the force of state law. *See Romano v. Bruck*, 25 Misc. 406, 407 (N.Y.C. City Ct. Gen. T. N.Y. County 1898).

departments of its government and *the prescription or modification of their powers*." N.Y. Mun. Home Rule Law §§ 2(7), (9); 10(1)(ii)(a)(1) (emphasis added); *see also* N.Y. Const. art. IX § 2(c)(1).

New York City's Charter effectuates these mandates. It specifies that "[t]here shall be a council which shall be the legislative body of the city," and that "the council shall be vested with the legislative power of the city." N.Y.C. Charter § 21. The Mayor, in contrast, is the head of the executive branch. The Mayor appoints the heads of the City's administrative bureaus, including the Board. *Id.* §§ 6, 551, 553. The Mayor and his appointees are not treated as "legislative bod[ies]" by the Charter. Instead, the City Administrative Procedure Act ("CAPA") within the Charter classifies them as "agencies" that can make "rules" to "carry out the powers and duties delegated to [them] by or pursuant to federal, state or local law." N.Y.C. Charter §§ 1042-43.

Defendants protest that separation of powers principles do not apply to *all* municipalities, pointing to three small localities that Defendants claim have adopted governmental structures where legislative and executive powers overlap. AOB 19 n.5. None of those municipalities has an unelected legislature, as the Board claims to be. Moreover, how those municipalities organize their governments is irrelevant. This case involves only *New York City*, and this Court has long recognized that "[t]he pattern of government established for New York

City by the City Charter … provide[s] for distinct legislative and executive branches." *Under 21*, 65 N.Y. 2d at 356 (emphasis added).[23] In New York City, this Court has made clear that the executive branch "may not unlawfully infringe upon the legislative powers reserved to the City Council." *Id.* (citing authorities); *id.* at 364 (Executive Order "an unlawful usurpation of the legislative power of the City Council"); *Subcontractors Trade Ass'n*, 62 N.Y.2d at 428-30 (Executive Order "an unlawful usurpation of the legislative function"); *see also, e.g., Casado v. Markus*, 16 N.Y.3d 329, 337-38 (2011) (explaining that *Boreali* analysis would govern question of whether a New York City agency had "trespassed on a sensitive policy area that is within the Legislature's special province"); *Am. Kennel Club v. City of N.Y.*, Index No. 13584/89 (Sup. Ct. N.Y. County Sept. 19, 1989) at 9-10 (applying *Boreali* and enjoining Defendant Board of Health from enforcing rule written "on a clean slate" purporting to ban pit bulls in New York City) (R629-51).

B. The Board Has No Special Legislative Power

Relying primarily on imprecise language from older cases, Defendants protest that the Board is not a "mere agency." AOB 20. They claim it is a "unique … body with special … legislative[] authority." AOB 21. But the City Charter, controlling precedent, the Board's own practices, and the Board's legal

[23] Incredibly, Defendants cite *Under 21* as authority for the proposition that a city need not follow the separation of powers when structuring its government, ignoring the case's core holding that separation of powers principles govern in New York City.

subservience to the City Council and the State PHC demolish that claim, and confirm that the Board is a local agency within an executive department of the City, exercising administrative, not legislative, authority.

1. The Board Is An Executive Agency, Not A Legislature

The City Charter establishes that the Board is an administrative agency of the City, not a competing legislature. The contrast between the City Council and Board is overwhelming. The Charter establishes the City Council as "*the* legislative body of the City." N.Y.C. Charter § 21 (emphasis added). The Charter houses the Board within the Department of Health and Mental Hygiene, an executive agency whose commissioner is appointed by the Mayor. *Id.* §§ 551, 553, 1041(2). The City Council includes individuals from all walks of life, elected by the people of New York. *Id.* §§ 22, 25. The Board consists of doctors or other health professionals appointed by the Mayor. *Id.* § 553. City Council members cannot be removed from office by any local or state executive officer.[24] Board members can be removed by the Mayor, after a hearing in front of the Mayor himself.[25] *Id.* § 554.

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[24] City Council members may only lose their office by operation of law, as triggered by a narrow set of circumstances such as conviction of a felony. N.Y. Pub. Officers Law § 30.

[25] In suggesting that the Board is "something more" than a "mere agency," Defendants emphasize that Board members serve fixed terms of office and are removable only for cause. But numerous other City agencies share those identical characteristics. *See, e.g.*, N.Y.C. Charter §§ 192, 193 (City Planning Commission); *id.* §§ 621, 626 (Board of Correction); *id.* §§ 659, 662

When passing legislation, the City Council must comply with the procedures for the enactment of local laws set forth in the Municipal Home Rule Law and City Charter. *See, e.g.*, N.Y.C. Charter §§ 28, 32, 34-38; N.Y. Const. art. IX. The Board does not follow those procedures. Instead, like all other agencies of the City of New York, the Board is required to and does comply with CAPA's procedural requirements. N.Y.C. Charter § 1043. The Board enacts "rules," a CAPA-defined term for an agency statement or communication that merely "implements or applies law or policy." *Id.* § 1041(5). The Charter Commission that drafted CAPA expressly described provisions of the Health Code adopted by the Board as "rules" subject to CAPA and promulgated by a "city agenc[y]."[26] And the Board modifies the Health Code using standard rule-making procedures applicable only to agencies.[27] Defendants recognize this. They concede that the Ban is a "rule" and admit it was promulgated pursuant to notice and comment. AOB 1, 11. By

(Board of Standards and Appeals). No one would suggest those agencies exercise legislative power as a result.

[26] New York City Charter Revision Commission, December 1986-November 1988, The Report: Volume One, at 32, ADD44; New York City Charter Revision Commission, December 1986-November 1988, The Report: Volume Two, at 100, ADD55.

[27] *See, e.g.*, R435 (The City Record, Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the New York City Health Code (Sept. 21, 2012), at 2062 ("This amendment to the Health Code is promulgated pursuant to §§ 556, 558 and 1043 of the Charter."). Section 1043 of the Charter governs agency rule-making.

contrast, the "Council is excepted [from CAPA] because its actions are legislative acts."[28]

The City Council's local laws are codified in the City's Administrative Code. The Board's rules are found in the Health Code, which is codified alongside—and has the same status as—the rules of every other administrative body in the "Rules of the City of New York." *See Juniper Park Civic Ass'n v. City of N.Y.*, 831 N.Y.S.2d 360, 360 (Sup. Ct. Queens County 2006) (Health Code and Rules of New York City Department of Parks and Recreation are subject to CAPA and neither is "superior," even on matters of health). Like all other administrative regulations, but unlike true legislation, the Board's rules are subject to arbitrary and capricious review under Article 78.[29]

This Court's decision in *People v. Blanchard* confirms what the Charter's plain language already makes clear: The Board has no true legislative power. *Blanchard* was an appeal from a criminal conviction for keeping unwholesome poultry in violation of the Health Code's predecessor, the Sanitary Code. 288 N.Y. at 145, 147 (N.Y. 1942). The defendant argued that the State Legislature had

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[28] New York City Charter Revision Commission, December 1986-November 1988, The Report: Volume Two, at 95, ADD52; *see also* N.Y.C. Charter § 1041(2) (excluding City Council from agencies subject to CAPA).

[29] R435 ("rule-making powers" governed by Charter § 1043); *Patgin Carriages Co. v. N.Y.C. Dep't of Health & Mental Hygiene*, 28 Misc. 3d 1229(A) (Sup. Ct. N.Y. County 2010) (applying CPLR § 7803(3) to the Board).

impermissibly delegated to the Board the legislative power to define criminal offenses. *Id.* This Court agreed with the defendant that the Board is only an "administrative" body and that "the substantive law-making power of the People is vested by the Constitution in the Legislature and cannot be delegated" to such an agency. *Id.* The Court also agreed with the defendant that "the definition of criminal offenses and the prescription of punishment therefor is part of that legislative power." *Id.* It nevertheless upheld the conviction, but only because it concluded that the Board had not purported to exercise legislative power. *Id.* at 148. The Court explained that "it is the city charter [] and the Penal Law [] that make any violation of the Sanitary Code a misdemeanor." *Id*. In other words, the conviction was valid because it was the Legislature—*not the Board*—that had exercised legislative power to make the violation of the Sanitary Code a crime.

Defendants' cursory attempt to distinguish *Blanchard* (in a footnote) falls flat. They protest that *Blanchard* addressed only whether the Board may "prescribe criminal penalties." AOB 27 n.7. That description misses the larger point. In deciding the question presented, *Blanchard* held that "the substantive law-making power of the People … cannot be delegated" to the Board. 288 N.Y. at 147-48. That holding forecloses Defendants' argument that the Board wields true legislative power.

2. Defendants' Hodgepodge Arguments For Sweeping Legislative Power Are Meritless

a. The City Charter Does Not Support Defendants' Claim Of Legislative Power

Defendants argue (at 8-9) that §§ 556 and 558 of the Charter grant the Board legislative power. But the Board's authority under § 558(b) to "add to and alter, amend or repeal any part of the health code" is no different from the PHC's authority under N.Y. Pub. Health Law § 225(4) to "establish, and from time to time, amend and repeal sanitary regulations, to be known as the sanitary code of the state of New York." In *Boreali*, this Court found the latter provision confers only ordinary administrative authority on the PHC. The same conclusion follows from the nearly identical provision here. The Board's authority under § 558(b) is only standard administrative rulemaking power. *See* R.C.N.Y. tit. 24, § 9.03 (establishing procedure to petition Board to "commence *rulemaking* pursuant to § 1043(f) of the Charter" to "add to, alter, amend or repeal a provision of the New York City Health Code" (emphasis added)).

Sections 558(c) and 556 also confer only administrative powers. Those provisions authorize the Board to "embrace in the heath code all matters and subjects" to which the Department's authority to "regulate all matters affecting the health in the city of New York" extends. But the Board cannot derive legislative power from the *Department's* authority, which Defendants concede (at 20-21) is

only administrative.[30] These provisions again mirror the PHC's nearly identical responsibility to "deal with any health matters … in the state of New York, and with any matters as to which the jurisdiction is conferred upon the public health council." N.Y. Pub. Health Law § 225(5)(a).

Defendants suggest that the Board's authority must exceed the PHC's, because—according to Defendants—the Board's power sometimes has been described loosely as legislative, while the PHC's has never been so characterized. AOB 22. But the PHC's power has been characterized in similar terms. *See, e.g.*, *Aerated Prods. Co. v. Godfrey*, 263 A.D. 685, 687 (3d Dep't 1942) ("The duties of the [PHC] are legislative…"), *rev'd on other grounds*, 290 N.Y. 92, 99 (1943). Despite occasionally imprecise language describing the PHC's substantive rulemaking power as "legislative," this Court in *Boreali* had no trouble concluding it was an ordinary executive agency. The same is true of the Board. *See also infra* Part I.B.2.d.

Defendants also note that, whereas the PHC's power to amend the Sanitary Code is subject to approval by the State Department of Health Commissioner, the Board's power to amend the Health Code does not turn on the approval of another

[30] Relatedly, the Department's executive power to "regulate" with respect to the "control of communicable and chronic diseases" and exercise oversight of the "food and drug supply of the city" cannot morph into legislative power when exercised via the Board's delegated rulemaking authority. *See also supra* Part II.A.

agency official. That is a distinction without a difference: The PHC's status as an agency does not turn on its inability to promulgate rules without the approval of a particular agency head, and the Board equally is not a legislature simply because—like most other agencies—it can promulgate rules on its own.

b. The Board's Origin In Ancient Charters Does Not Support Defendants' Claim Of Legislative Power

Defendants argue that the Board should be understood as a State Legislature nestled within a local Department of Health. AOB 22. That theory is wholly inconsistent with the City Charter, which establishes the Board, provides for the appointment of its members by the Mayor, and defines its authority. *See* N.Y.C. Charter §§ 553-69. Defendants' contrary theory rests on their observation that some long outdated New York City Charters—in 1904 and 1936—were either "enacted entirely by the State legislature" or were "proposed by a commission established pursuant to an act of the State legislature." AOB 21, 22. But that completely ignores the evolution of municipal home rule, described *supra* at 21-22. For decades, the Constitution and Municipal Home Rule Law have empowered localities to choose their own form of government, amend their charters, and modify the authority of city officers. Home rule likewise empowers a municipal legislative body to provide for "the creation or discontinuance of departments of its government and the prescription or modification of their powers." *See* N.Y. Const.

art. XII, §§ 2-3 (amended 1923); N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(1); (ii)(c)(1); N.Y.C. Charter § 40(1).

The City Council's resulting authority over the Board—like its authority over other City agencies—is not merely theoretical. In 1967, the Council amended the Charter to create the Health Services Administration, vest it with "jurisdiction to regulate all matters affecting health in the city," and place the Board within the new agency. 1967 N.Y.C. Local Law No. 127 §§ 1700, 1703(1)(a), ADD02-03 (Addendum). A decade later, the Council completely overhauled the City's health agencies, abolished the Health Services Administration, and placed health-related functions and authority (including the Board) in a new Department of Health. *See* 1977 N.Y.C. Local Law No. 25 §§ 1-2, ADD06-14. Two years later, the Council amended the Charter again to clarify the limited scope of the Board's powers, reflecting the prescient concern that "[*r*]*egulations* passed by the Board of Health may be overly broad and so invade the province of the City Council's legislative authority."[31] The City Council's plenary authority to legislate over, reorganize, or even abolish health agencies in New York City, including the Board, confirms that any direct ties between the Board and the State Legislature were broken long ago.

[31] Report of the Committee on Health in Favor of Approving and Adopting a Local Law to Amend the New York City Charter in Relation to Defining Powers of Board of Health (1979) ("1979 Council Committee on Health Charter Report"), ADD41 (emphasis added); *see also* 1979 N.Y.C. Local Law No. 5 § 1, ADD19-21 (amending N.Y.C. Charter § 558(c).

Defendants' suggestion that the Board remains a State agency today because it was originally established in a Charter enacted by the Legislature a century ago would also lead to absurd results. Accepting this position would vest the Board and the City Council with overlapping and competing legislative power over health in New York City, without any guidance as to the hierarchy or any provision for whose authority controls in the case of a conflict between the two. And that would be only the tip of the iceberg. If Defendants' theory were credited, many other local boards whose origins also can be traced to the Legislature would similarly revert to state entities.[32] But that is not the law. Contrary to Defendants' view, municipal home rule vested control of local agencies with the local legislatures in which the Constitution vests local lawmaking power.

c. New York City's Historical Exemption From Article 3 Of The Public Health Law Does Not Support Defendants' Claim Of Legislative Power

Defendants emphasize that New York City is exempt from Article 3 of the New York State Public Health Law. AOB 27. But that exemption cuts against Defendants' position, because it confirms that the Board is primarily a creature of the New York City government, subject to oversight by the City Council. Article 3

[32] *Compare, e.g.*, Ch. 628, § 1, 1904 N.Y. Laws 1489, ADD23-24 (state-created New York City Parks Board shall have the power "to establish and enforce rules and regulations for the government and protection of the public parks"), *with* N.Y.C. Charter § 533(a)(9) (affording Commissioner of the Department of Parks & Recreation the power "to establish and enforce rules and regulations for the use, government and protection of public parks").

establishes certain uniform rules for the organization and role of local boards of health and prevents municipalities subject to the Article from altering those baselines. By exempting New York City from Article 3, the State Legislature freed the City Council to exercise plenary authority over the Board of Health's organization, structure, and responsibilities. *See* 1979 Council Committee on Health Charter Report, ADD41 ("The City of New York is specifically exempted under the Public Health Law, Article 3. … Thus, we are not preempted by the state to legislate in this area."). Combined with the home rule provisions discussed above, this exemption confirms the Board's subservience to the City Council.

d. This Court's Precedents Do Not Support Defendants' Claims Of Legislative Power

Defendants rely on stray language in a handful of older cases that have referred to the Board's role as "legislative." That reliance is misplaced. Those cases were decided long before courts used terms like "quasi-legislative" to distinguish between true legislative power and administrative rulemaking authority. And not one of them suggests that the Board may enact policy initiatives divorced from legislative direction and guidance. Instead, each case involved the Board's exercise of routine, delegated *rulemaking* power within the

scope of its traditional authority over matters such as contamination; sanitation; food-borne illness; adulteration; and the like.[33]

Defendants' reliance on *Grossman* and *Blanchard* is particularly unavailing. *Grossman* described the Board rule at issue as an "*administrative regulation* which [was] legislative in nature" and emphasized that the Board's delegated authority was always confined by "'limits that are to be measured by tradition.'" *Grossman*, 17 N.Y.2d at 350-51 (emphasis added) (quoting *Blanchard*, 288 N.Y. at 147). And as discussed *supra* at 26-27, *Blanchard* explicitly rejected Defendants' position that the Board has true legislative power.

Nor does *Schulman*, support Defendants' claims. *Schulman* implicated a Board rule "designed to monitor the safety and effectiveness of New York City's pilot program in legal abortions." 38 N.Y.2d at 237-38. The rule required that physicians fill out pregnancy termination certificates with information regarding the procedure, including the name of the patient. The Court observed in a footnote that the physician-patient privilege did not render that requirement invalid because, *inter alia*, the privilege could be abrogated legislatively, and implied that the Board

[33] *E.g., Blanchard*, 288 N.Y. 145 ("unwholesome poultry"); *Grossman v. Baumgartner*, 17 N.Y.2d 345 (1966) (lay tattooing to prevent spread of hepatitis); *People v. Weil*, 286 A.D. 753 (1st Dep't 1955) (sewer, water, and gas pipe regulation); *Paduano v. City of New York*, 45 Misc. 2d 718 (Sup. Ct. Spec. T. N.Y. County 1965) (fluoridation of City water supply); *Metro. Bd. of Health v. Heister*, 37 N.Y. 661 (1868) ("infectious disease," "vessels from unhealthy ports," slaughter-houses," "cleaning and scouring streets, alleys, sinks," businesses "causing noxious effluvia or vapor," and cleaning "butcher's stall[s], sewer[s], priv[ies]"); *Schulman v. N.Y.C. Health & Hosps. Corp.*, 38 N.Y.2d 234 (1975) (reporting on termination of pregnancies).

had exercised delegated authority to abrogate the privilege in the case at hand. *Id.* at 236 n.1. This Court has recognized that other agencies, too, may possess implied authority to abrogate the physician-patient privilege in order to fulfill their delegated "responsibilities and powers." *N.Y.C. Health & Hosps. Corp. v. N.Y. State Comm'n of Correction*, 19 N.Y.3d 239, 244-45 (2012) (approving of abrogation by New York State Commission of Correction). *Schulman* went no farther. Its brief footnoted discussion did not purport to address, much less overrule, *Blanchard*'s holding that the Board lacks true legislative power.

Equally misplaced is Defendants' reliance on language from cases commenting 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." *E.g.*, *Grossman*, 17 N.Y.2d at 351 (emphasis added). That language reflected the City's historical exemption from the scope of the State's Sanitary Code, which meant that the Board had the authority to prescribe "health regulations" for the City, independent of any State regulatory oversight. But those health regulations were still rules, not local laws. *See supra* at 34. And in any event the State Legislature cancelled the City's exemption in 1971, making the Sanitary Code applicable to New York and subjecting the Board to oversight and preemption by the State Commissioner of Health, Department of Health, and PHC. Ch. 626, 1971 N.Y. Laws, ADD28-30. Mayor Lindsay vigorously opposed those

changes, claiming "'[t]he net effect of the proposed amendments is to strip the New York City Board and Department of Health of the Autonomy in matters of public health in New York City which they have enjoyed for more than one hundred years.'" *NYLS' Governor's Bill Jacket*, S. 1971-1972, Reg. Sess., ch. 626, at 20 (1971), ADD38. He was unsuccessful, however. The Board's modern subservience to the PHC—an agency that per *Boreali* has no true legislative authority—is another serious flaw in Defendants' position. Their suggestion that the Board possesses state legislative power lacked by the state agency that oversees it makes little sense.

Properly read, Defendants' cases merely acknowledge the Board's authority to create rules that are administrative in nature (or "quasi-legislative," as they are often described today). *See Weil*, 286 A.D. at 757 (describing Sanitary Code as "'body of administrative provisions'" (citation omitted)); *compare also Paduano*, 45 Misc. 2d at 724 ("legislative capacity"), *with Valentino v. Cnty. of Tompkins*, 45 A.D.3d 1235, 1236 (3d Dep't 2007) (fee setting is "quasi-legislative act of an administrative agency"); *People v. Cull*, 10 N.Y.2d 123, 127 (1961) ("[T]he order of the State Traffic Commission here involved falls in the legislative or quasi-legislative category…."). Not one of Defendants' cases supports their claim to true legislative power, as distinguished from ordinary agency rulemaking authority.

More recent cases using modern terminology confirm that the Board's Health Code provisions are ordinary regulations—not legislative enactments. *See, e.g.*, *N.Y.C. Coalition to End Lead Poisoning v. Giuliani*, 173 Misc. 2d 235, 239 (Sup. Ct. N.Y. County 1997) (Health Code provision on lead paint an "administrative agency's regulation" which "cannot conflict" with a local law on the same subject); *Carr v. Schmid*, 105 Misc. 2d 645, 647 (Sup. Ct. N.Y. County 1980) ("Health Code regulations are not the direct legislative enactment of any elected legislative body"; its "provisions [are] similar or akin to regulations of other agencies exercising delegated rule-making powers.").

e. History And Practice Do Not Support Defendants' Claim Of Legislative Power

Finally, Defendants cite certain of the Board's prior regulatory actions as purported evidence of its special legislative power. But these examples fall comfortably within specific statutory grants of authority or the traditional limits of the Board's public health jurisdiction—or, in the case of trans fats, actually confirm that the Board lacks the unilateral legislative power it now claims:

- The rule on lead paint banned the sale and use of a *poison*—a role the Board has historically exercised, *see People ex rel. Knoblauch v. Warden of Jail of the Fourth Dist. Magistrates' Court*, 216 N.Y. 154, 158-59 (1915) (power to "abate…or otherwise improve…any building… dangerous to life or health").

- The Board's trans-fat rule similarly reflected its conclusion that "[t]here is *no safe level* of artificial trans-fat consumption."[34] Even so, due to doubts about the Board's authority to enact that rule,[35] the City Council quickly enacted ratifying legislation "incorporat[ing] the Ban on artificial trans-fat into the Administrative Code," R627, to (in the sponsor's words) "put the trans-fat Ban on stronger legal footing."[36]

- Requiring dissemination of calorie information falls within the Board's traditional food-labeling authority, *see N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009).

- The "fluoridation program" applied only to the "'public water supply,'" *Paduano*, 45 Misc. 2d at 720 (citation omitted), which is completely controlled and provided by the City, and the program was promulgated under DOH's then-express responsibility, pursuant to Charter § 556(c),

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[34] DOH: Trans Fat in New York: Frequently Asked Questions, http://www.nyc.gov/html/doh/html/living/nyc-transfat-faq.shtml.

[35] Defendants claim (at 34-35) that the City Council "implicitly recognized the Board's legislative authority" by adopting a local law (R627) *on the exact same subject* as the Board's trans fat rule. In fact, as noted above, the legislative record indicates that the opposite was true—the City Council appreciated that the Board's rule was legally vulnerable absent legislative ratification. In any event, the rule was never challenged in court.

[36] John Toscano, *Vallone's Trans Fat ban Signed By Mayor*, The Queens Gazette, Apr. 4, 2007, *available at* http://www.qgazette.com/news/2007-04-04/features/019.html.

for the "purity and wholesomeness of the water supply and the sources thereof."

- The window guard rules were enacted pursuant to delegated authority from the City Council enabling the Board to issue and enforce orders for the "prevention of accidents by which life or health may be endangered," *see Sorbonne Apartments Co. v. Bd. of Health*, 88 Misc. 2d 970, 971 (Sup. Ct. Spec. T. N.Y. County 1976) (citing Administrative Code, § 556-10.0).
- The Board's creation of an immunization registry is a straightforward application of the Board's traditional and specifically delegated authority to "supervise the reporting and control of communicable … diseases," N.Y.C. Charter § 556(c)(2).
- Defendants' citation of the Board's day care regulations concerning "nutrition and physical activity" is also unavailing. AOB 46. The Board has long exercised broad authority to regulate hygiene, feeding, and other aspects of the City's day care facilities, a state of affairs long recognized by state law, *see, e.g.*, N.Y. Soc. Serv. Law § 390 (1942) (directing the State Department of Social Welfare to prescribe "regulations … for the protection and care, including the health, safety, treatment and training of children" at a "day nursery," but exempting New York City). No similar

tradition supports the Board's attempt to impose its views of appropriate portion control—or for that matter physical activity—on the public at large.

Outside the context of this litigation, the Board's former Chairman, Appellant Farley, freely acknowledged that the Board does not have the unchecked authority over matters of health that it claims here. When the idea of banning smoking in parks gained traction, he admitted that the proposal "would probably have to be approved by the City Council." R619-20. And rather than proceeding unilaterally, he presented the Board's recent tobacco-sales initiatives to the City Council for approval.[37] The Board typically appreciates that it cannot act on all matters touching health without legislative direction.

3. If Accepted, Defendants' Theory Would Grant The Board Virtually Unlimited Legislative Authority

Despite three full rounds of briefing, Defendants have yet to provide any limiting principle bounding their theory of the Board's "extraordinary" power. AOB 23-25. This time, Defendants chose to regulate only certain beverages. But if the Board can legislate about *anything* that affects the "security of life and health in the city," N.Y.C. Charter §§ 556, 558(b)-(c), then tomorrow it could limit any product's portion size: steaks to six ounces, pasta to one cup, hamburgers to a

[37] Rande Iaboni, *NYC Council Gets Tough on Tobacco, Approves Raising Purchase Age to 21*, CNN.com, Nov, 1, 2013, http://www.cnn.com/2013/10/30/us/new-york-city-tobacco-age/.

quarter-pound, pizza to one slice, and ice cream to one scoop. None of this is implausible. Weight gain correlates with consumption of *just about everything*, including skim milk,[38] and Board members have already indicated that their "next steps" could include targeting consumers' enjoyment of foods like popcorn and 100% fruit juice.[39]

Of course, the Board's legislative power over "health" would not be limited to dictating "caps" on particular foods. If it actually had the power to force New Yorkers to hew to its vision of a healthy lifestyle, the Board might decide to restrict the total caloric content, the percentage of calories from fats, or the number of grams of carbohydrates permitted to be consumed in certain establishments. Or it might completely outlaw the sale of sugar-sweetened beverages, snacks, and desserts, or require that all meat be 90% lean or all dairy fat-free. Or it might enact countless other laws not involving food—for instance, setting portion caps on television viewing or video games to discourage a sedentary existence.[40] Defendants' notion that the unelected members of the Board can dictate New

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[38] R273-74, R279, R284, R365.

[39] R733-35 (June 12, 2012 Board Meeting Transcript).

[40] In June 2013, Mayor Bloomberg announced various proposals to encourage stair-use, rather than elevators. Jennifer Peltz, *NYC Mayor's New Health Push: Take the Stairs*, Associated Press July 17, 2013, *available at* www.usatoday.com/story/news/nation//2013/17/nyc-mayor-stairs/2530269/. He explained that "New York City has been a leader when it comes to promoting healthier eating, and now we're leading when it comes to encouraging physical activity as well." *Id.* Under Defendants' view of their authority, they could go beyond mere encouragement and require New Yorkers to take the stairs.

Yorkers' lifestyle choices, without authorizing legislation, is a radical and dangerous proposition without support in the laws of this State.

Defendants ask this Court to ignore the consequences for the political process if their argument is accepted.[41] But those consequences are profoundly disturbing. In Defendants' world, the Mayor would be free to evade fundamental limits on executive authority by using the Board to create new laws whenever he or she becomes impatient with the legislative process. And if this Court credits Defendants' claim that the Board exercises *state* legislative authority, the Board's enactments would trump the duly enacted local laws of the City Council, despite the Council's express authority to enact local laws for the "health and well-being of persons." N.Y. Const. art. IX § 2(c)(10); N.Y. Mun. Home Rule Law § 10 (1)(ii)(a)(12).

Accepting Defendants' arguments also would have consequences outside New York City. At least *forty-five* other local boards throughout New York exercise authority with respect to any matters affecting public health, just like the Board. Approving Defendants' vision would create dozens of unelected super-legislatures with nearly limitless authority immune from local democratic

[41] *See* AOB 25 ("[T]he issue here is not whether the Board is vested with the sole legislative authority with respect to chronic diseases or food service establishments but rather whether it has the requisite legal authority to enact the Portion Cap Rule.").

control.[42] And every one of these local health boards would have the power to enact the very same indoor smoking ban that this Court struck down in *Boreali*, without any check or balance from an elected legislature.

Defendants' argument is breathtaking in its scope. If accepted, it would destroy the separation of powers in New York City and fundamentally alter the balance of powers between municipal executive and legislative branches throughout the State. It should be rejected.

II. THE BAN VIOLATES SEPARATION OF POWERS

The separation of powers is a foundational principle of a free society, preventing the concentration of too much power in any one branch. "It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men." *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282 (1898). To safeguard fundamental liberties,

[42] Under state law, local boards of health may also adopt rules "for the security of life and health" within their respective jurisdictions. *See* N.Y. Pub. Health Law § 347. Nine county charters expressly affirm this ostensibly-broad mandate, while boards of or within New York's thirty-six non-charter counties enjoy it by default. *See id.*; Dutchess Cnty. Charter § 7.03 (board may adopt rules "as may affect public health" and "consider any matters…relating to the preservation and improvement of public health"); Chemung Cnty. Charter § 603 (rules "for the security of life and health" and "take appropriate action to preserve and improve the health"); Tompkins Cnty. Charter § C-9.04 (same); Putnam Cnty. Charter § 10.06 (rules "as may affect public health"); Rensselaer Cnty. Charter § 8.02 (same); Suffolk Cnty. Charter § C9-4 (rules "affecting public health"); Westchester Cnty. Charter § 149.21 (same); Erie Cnty. Charter § 504 (rules "relating to health"); Nassau Cnty. Charter §§ 901-03 (rulemaking powers coextensive with state law grant, *i.e.*, "for the security of life and health").

this Court rigorously enforces the separation of powers. It has repeatedly foreclosed attempts by executive agencies to usurp power reserved to the legislature. *See, e.g.*, *Boreali*, 71 N.Y.2d 1, 11.

In *Boreali*, this Court struck down an indoor-smoking ban promulgated by the PHC, whose jurisdiction, like the Board's, extends to "any matters affecting…health or the preservation and improvement of public health." N.Y. Pub. Health Law § 225(5)(a). *Boreali* identified four reasons why that regulation transgressed the line between "administrative rule-making and legislative policy-making." 71 N.Y.2d at 11-14. The PHC's regulation: (1) was issued on a "clean slate" without legislative guidance; (2) intruded on an area of ongoing legislative debate; (3) reflected a balancing of social and economic concerns beyond the agency's authority; and (4) while "unquestionably" involving a "health issue," was not a product of "special expertise or technical competence" nor "necessary to flesh out details" of legislative policy. *Id.*

As the Appellate Division recognized, the factors identified in *Boreali* serve as guideposts for evaluating whether an agency has engaged in impermissible lawmaking. Defendants acknowledge that no single factor is dispositive, nor are all four necessary. *See* AOB 13; *Ellicott Grp., LLC v. N.Y. Exec. Dep't Office of Gen. Servs.*, 85 A.D.3d 48, 54 (4th Dep't 2011); *Nassau Bowling Proprietors Ass'n v. Cnty. of Nassau*, 965 F. Supp. 376, 379-81 (E.D.N.Y. 1997). The question

ultimately is whether, in light of the separation of powers, the agency has acted in a legislative capacity and thus exceeded its statutory mandate.

Despite Defendants' protestations, it is even clearer here than in *Boreali* that, in promulgating the Ban, the Board overstepped its executive limits and exercised "'the open-ended discretion to choose ends' which characterizes the elected Legislature's role." *Boreali*, 71 N.Y.2d at 11 (citation omitted). Defendants themselves have described the Ban in revolutionary terms. Rightly so. It is far afield from the Board's traditional role of protecting New Yorkers from unsanitary conditions or toxins like lead paint or second-hand smoke. And it is far more intrusive. In contrast to historic regulations that have protected the public from hidden or external dangers, the Ban aims to protect New Yorkers from themselves, by coercing them into making personal choices that the Board believes are more consistent with a healthy lifestyle. Neither the City Charter nor the City Council have authorized Defendants to exercise such pervasive control over New Yorkers' lives.

Mayor Bloomberg and his appointed Board nonetheless believe this intrusion is necessary. Impatient with what they describe as the "vagaries of the political process," AOB 4, they substituted their own judgment for that of the City Council. They are of course entitled to their view. But regardless of the merits of their beliefs, the power to fashion brand new public policy balancing competing

health, consumer, business, and other interests belongs to the legislative branch, not the executive. In its rush to enact the Mayor's preferences into law, the Board exceeded its rightful role.

A. The Board Enacted The Ban On A "Clean Slate"

An agency's enactment of policy on a clean slate is often the "most significant[]" evidence that it has impermissibly exercised legislative power. *Rent Stabilization Ass'n v. Higgins*, 83 N.Y.2d 156, 170 (1993). In *Boreali*, this Court found that the PHC wrote its smoking regulation on a "clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" because it "did not merely fill in the details of broad legislation describing the over-all policies to be implemented." 71 N.Y.2d at 13. That is even more plainly the case here.

When the Board promulgated the Ban, even Defendants themselves did not portray it as the sort of unexceptional, "'interstitial' rulemaking that typifies administrative regulatory activity." *Boreali*, 71 N.Y.2d at 13. To the contrary, they declared the Ban a "bold," "historic," "innovative," "brand new," and "groundbreaking policy."[43] They were correct: it was like nothing that the Board or any other board of health in New York has ever done before.[44] The Ban departed fundamentally from health boards' traditional role overseeing the safety

[43] *See supra* n.2.

[44] *See* R732 ("This is brand new and it's never been done.")

of the food supply. In contrast to rules that protect individuals from impurities, contamination, and similar hidden dangers that they cannot otherwise avoid, the Ban was designed to coerce individuals into making supposedly healthier lifestyle choices to protect them from their own free will. It is one thing for the Board to regulate food storage and preparation to protect people against salmonella in eggs, and quite another for the Board to dictate how many eggs people can eat. Defendants may believe that their "groundbreaking" rule is good policy. But they cannot make such policy on their own.

Defendants disagree with this. They insist the Board has extraordinarily broad policy-making powers. In particular, they claim the Charter vests the Board with nearly limitless authority to regulate all matters touching health, including every dietary choice in New York. AOB 8, 21, 42. But *Boreali* rejected the very same claim. *See* 71 N.Y.2d at 9, 13. And the grant of authority on which the PHC relied in *Boreali* is virtually identical to the grant of authority on which the Board relies here. *See supra* Part I.B.2.a.

Defendants point next to Charter § 556(c)(9), which charges the Board to "supervise and regulate the food and drug supply of the city." But Defendants themselves concede that their authority to "regulat[e] food establishments" has "traditionally" extended "to protect people *only* from infectious agents and other

contaminants."[45] *See, e.g.*, R.C.N.Y. tit. 24, § 81.07 (dealing with "sanitary preparation" and "protection against contamination"); *id.* § 81.09 (temperature control for safety); *id.* § 81.13 (hygienic practices for food workers). This responsibility to ensure the safety of food products has *never* been interpreted to encompass the power to dictate the portion sizes in which lawful, uncontaminated products are sold. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) ("'Perhaps the most telling indication of [a] severe constitutional problem…is the lack of historical precedent'" for the action) (citation omitted)).

The Memorandum of Understanding ("MOU") between the Department of Agriculture and the State Department of Health—on which Defendants heavily rely to define the supposed limits of their authority over FSEs—confirms this narrower understanding of the role envisioned by § 556(c)(9). It refers to the Board's responsibility to guard against "cases of food or water-borne illness," "contaminated foods," and "adulterated" food, and to respond to "food borne disease outbreaks" or an "FDA Class I, or similar recall of food or food products." R612-13. The Department of Health's *own website* regarding "Food Safety" reflects that same understanding—focusing on how to "prevent food illness" and

[45] See *supra* n.1 (emphasis added).

"food poisoning," "safe food handling," and the like.[46] Authority to ensure food supply safety and prevent adulteration is a far cry from authority to dictate individuals' dietary choices among safe and undamaged foods and beverages. There is no evidence that those who delegated the Board responsibility to "supervise and regulate the food and drug supply of the city" believed they gave the Board unchecked power to dictate New Yorkers' beverage choices, any more than the power to outlaw hot dogs, ice cream, soda, butter, cheesecake, chocolate, or other safe and lawful products that are not inherently dangerous.

Defendants similarly read far too much into § 556(c)(2), which authorizes the Board to "supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health." This authority also has never been understood to encompass general dietary regulation. Although the Board cited this provision when it prohibited trans fats in 2006, that regulation addressed an ingredient that the Board likened to a toxin, with "no safe level" of consumption.[47] And the Board's authority to act even in those circumstances was sufficiently unclear that the City Council enacted ratifying legislation to preempt a

[46] *See* N.Y.C. Department of Health and Mental Hygiene: Food and Water Safety, http://www.nyc.gov/html/doh/html/living/food-water-safety-homepage.shtml.

[47] *See supra* n.1.

legal challenge.[48] In contrast to their justification for the trans fat ban, Defendants do not contend that consumption of a sugar-sweetened beverage greater than 16 ounces *itself* causes obesity or amounts to an inherent danger or "a health hazard per se." R1792. Nor would such a position be reasonable. The Food and Drug Administration has established by regulation that "high fructose corn syrup" and "sucrose" are generally recognized as safe, and may be "used in food with no limitation other than current good manufacturing practice[s]." 21 C.F.R. §§ 184.1866, 184.1854, 184.1(b). New York's Commissioner of Agriculture and Markets has expressly adopted those findings. 1 N.Y.C.R.R. § 252.1(a)(3). Mayor Bloomberg himself conceded that, in contrast to smoking—where "it's not clear that one cigarette doesn't cause cancer"—*[i]n the case of full sugar drinks, in moderation it's fine*."[49]

Defendants' position here is that, when chronically consumed in excess and not balanced with exercise or other dietary choices, sugar-sweetened beverages become a "risk factor" for another "risk factor" (obesity) for certain chronic diseases like heart disease and diabetes. AOB 9, 42, 58 n.16. But the list of risk factors for risk factors for chronic diseases is endless. Countless lifestyle choices,

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[48] *See supra* n.36.

[49] Matt Lauer Interview with Mayor Michael Bloomberg, The TODAY Show (June 1, 2012), *available at* http://cityroom.blogs.nytimes.com/2012/06/01/on-today-bloomberg-defends-his-anti-soda-plan/?_php=true&_type=blogs&_r=0 (emphasis added).

from working late to watching television to driving to work, are known to enhance one's risk of obesity or chronic disease.[50] If it can regulate behavior that is only a risk factor for a risk factor for chronic disease, then the unelected Board could set "portion caps" on the amount of time each day New Yorkers can work, watch television, or drive their cars. The Supreme Court would be right that the Board's "authority to define, create, mandate and enforce [would be] limited only by its own imagination." R41. That would amount to an "unfettered delegation of legislative power." R1790. It is not, and cannot be, the law.

The more limited scope of the authority that the Board actually exercises under §§ 556(c)(2) and (c)(9) is confirmed contextually by § 556(c)'s surrounding subsections, which confer narrow and unremarkable supervisory powers concerning "the registration of births, fetal deaths and deaths," § 556(c)(1); aspects of care for the mentally disabled, §§ 556(c)(3), (c)(5), (c)(6), (c)(12); "clinical laboratories, blood banks, and related facilities," § 556(c)(4); "aspects of water supply and sewage disposal and water pollution," § 556(c)(7); "the public health aspects of the production, processing and distribution of milk, cream and milk products," § 556(c)(8); "removal, transportation and disposal of human remains,"

[50] *See* Frank B. Hu, *Sedentary Lifestyle and Risk of Obesity and Type 2 Diabetes*, Lipids, Feb. 2003 (38(2):103-8) (finding correlation between watching television and Type 2 Diabetes); Jo Willey, *Take Steps to Slash Diabetes Dangers by Walking to Work*, Express, Aug. 6, 2013 (reporting that driving to work creates an increased risk of diabetes); Sarah Klein, *Working Long Hours? You Might Be Harming Your Heart*, Health, May 11, 2010.

§ 556(c)(10); and "ionizing radiation," § 556(c)(11). Given the specificity with which the Charter identifies the Board's enumerated regulatory powers in § 556(c), subsections (c)(2) and (c)(9) cannot be interpreted as broadly as Defendants' contend.[51]

Defendants cite various cases in an attempt to justify their expansive claim of authority, but the contrast between those cases and this one only emphasizes further the gulf between permissible rulemaking and the Board's actions here. Each example highlights the kind of specific legislative grant of authority that must precede a valid Board regulation. *See N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991) ("unmistakable legislative direction" that PHC should consider nursing home's responsiveness to needs of Medicaid patients); *Motor Vehicle Mfrs. Ass'n v. Jorling*, 181 A.D.2d 83, 86 (3d Dep't 1992) (express grant of authority to regulate motor vehicle air pollution); *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 321-22 (2d Cir. 1999) (express grant of authority to regulate "'the maintenance of financial responsibility'" in the taxi industry) (citation omitted); *Pet Prof'ls of N.Y.C. v. City of N.Y.*, 215 A.D.2d

[51] If the Board's authority over the "food and drug supply" was as broad as they say, it would render superfluous §§ 556(c)(7) and (c)(8), concerning water and milk. *See Leader v. Maroney*, 97 N.Y.2d 95, 104 (2001) (statutory language should not be construed as superfluous).

742, 742-43 (2d Dep't 1995) (dog licensing regulations promulgated by the Board implemented the New York City Dog License Law).[52]

The Mayor's Ban, in contrast, advances no City Council policy. The national attention it garnered attested to the fact that it was unlike any regulation previously adopted. By enacting a Ban that "provides for a number of firsts," R637, the Board wrote on a clean slate, impermissibly appropriating for itself the policy-making role of a legislature.

B. The Ban Intrudes Upon An Area Of Legislative Debate

The *Boreali* Court explained that "the fact that the agency acted in an area in which the Legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" suggested that it acted without legislative guidance and exceeded the scope of its authority. 71 N.Y.2d at 13. So too here. The question of whether to target sugar-sweetened drinks has been a subject of "intense public debate," with the City Council "reject[ing] several resolutions targeting sugar sweetened beverages." R1793. The Mayor expressly acknowledged that he went to the Board in order to sidestep a legislative process that was not giving him the results he wanted. As he explained, "[t]he federal government, we asked them to do

[52] *See also supra* at 37-38 (describing legislative delegations or ratifications and traditional understandings pertaining to rules on lead paint, calorie information, fluoridation, and trans fat).

something they did nothing. We asked the President to ban the use of food stamps…they did nothing. We asked the State, they did nothing. The City tries to do something."[53] *Boreali* made clear though that "the repeated failures by the Legislature to arrive at such an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own. Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali*, 71 N.Y.2d at 13.

Defendants concede that "three unsuccessful City Council resolutions" and "five unsuccessful [S]tate Assembly bills" attempted to target sugar-sweetened beverages. AOB 49. They insist, however, that such "failed legislative action" is not evidence of legislative intent. *Id.* at 50. They miss the point. As *Boreali* explained, the Legislature's inaction in this context is not being relied upon "as some indirect proof of [the Legislature's] actual intentions" but as "evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem." 71 N.Y.2d at 13. When the legislature has "repeatedly tried—and failed—to reach agreement in the face of substantial public debate," it leaves an agency "without benefit of legislative guidance" to fulfill its typical role of "fill[ing] in the details of broad

[53] *CBS This Morning* (CBS television broadcast Mar. 13, 2013).

legislation describing the over-all policies to be implemented." *Id.* Attempting to circumvent an ongoing legislative debate, in concert with other indicia identified in *Boreali*, signals that an agency has crossed the line to impermissible legislative policymaking.

Defendants unpersuasively argue that this Court recently disapproved of reliance on this factor in *Expedia, Inc. v. City of N.Y. Dep't of Fin.*, 22 N.Y.3d 121 (2013). But that case did not even involve agency regulation. In *Expedia*, this Court simply explained that, in light of "[t]he plain language" of a prior enabling statute specifically authorizing New York City Council to impose "a tax . . . on persons occupying hotel rooms in [the] city," (*id.* at 126) the State Legislature's rejection years later of a single bill purporting to authorize the particular hotel tax at issue did not establish that the City Council lacked authority to enact its tax. *Id.* at 130-31. This case is far removed: no "plain language" authorized Defendants to enact their Ban; Defendants deliberately sought to circumvent an ongoing legislative debate that had at least *eight* times rejected proposals to target sugar-sweetened beverages; and other factors identified in *Boreali* likewise support the conclusion that the agency usurped the legislature's role.

Defendants finally protest that the resolutions that the City Council declined to enact would not have been binding, and that none specifically proposed "portion restrictions." AOB 49. But the City Council's unwillingness to adopt even

nonbinding resolutions targeting sugar-sweetened beverages shows just how far the Board went beyond the legislature's authorization. And it is irrelevant that none of the declined bills specifically concerned a "portion cap": *Boreali* admonished that, when an "agency act[s] *in an area* in which the Legislature had repeatedly tried—and failed—to reach agreement," it exceeds its authority. 71 N.Y.2d at 13 (emphasis added). Although the Ban employs different means of targeting the sale of certain beverages, it pursues the same end, and thus unquestionably addresses the same policy "area" as the proposals rejected by the City Council. *See* City Council Members' App. Div. Amicus Br. at 27-29.

C. Defendants Impermissibly Balanced Health With Social, Economic, And Political Considerations

In *Boreali*, this Court concluded that the PHC's anti-smoking law impermissibly reflected the agency's "own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector." 71 N.Y.2d at 12. Defendants contend that the Board here "did not balance any impermissible concerns with its duty to protect the public health." AOB 33. But the record shows clearly that Defendants balanced economic and social factors against asserted health considerations when enacting the Ban.

When it first presented the Mayor's proposal to the Board, the Department explained that the Ban represented "a balance of feasibility as well as health impact." R723. The Department then repeatedly emphasized that the Rule

balanced health concerns with economic and liberty interests. *See, e.g.*, R443 (Department defining "feasibility" to include "business impact" and "customer impact"); R739 ("We think beverage companies will still be able to make a profit from these beverages…. So we think [the Ban] is financially feasible."); R1461 ("[A]gain although there may be some cost [to businesses], it is also important to keep in mind the cost of obesity.").

The Board proceeded to balance economic and social costs against health considerations when evaluating and endorsing the Ban. *E.g.*, R729 (Dr. Phillips) ("Have you thought about the potential for economic impact?"… "[L]arge families, sharing drinks and that sort of thing."); R731 (Dr. Caro) (discussing "the economic impact on the pockets of the poor and low income class in New York City"); R738-39 (Dr. Caro) ("When a consumer buys 16 ounces, they pay 8.25 percent. If they buy a second one, they pay more taxes. And the small business has to pay those taxes. That's why my question before was, why are we targeting the low income small businesses instead of the big companies?"); R1479 (Dr. Richardson) ("[T]he benefits of this proposal far outweigh the burdens that might be imposed on the industry or the members of the public …. "); R1479-80 (Dr. Gowda) (noting need to balance "the issue of obesity … and the kind of impact it is having on our society" with "the real concerns that society has about what makes us American, what keeps our country what it is and that is this issue of choice").

In responding to public comments, Defendants again weighed the economic costs of obesity against potential job losses and harm to City businesses that might be caused by the Ban. Without any support, they found the expected economic costs of the Ban low, asserting it was "improbable" that consumers would seek out stores not covered by the Ban (even though often they are *right next door* to covered businesses). R1426. But like the PHC in *Boreali*, the Board "has not been authorized to structure its decision making in a 'cost-benefit' model and, in fact, has not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed." *Boreali*, 71 N.Y.2d at 12 (citation omitted). As in *Boreali*, such comments impermissibly "demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." *Id.*

Defendants do not deny that Board members weighed considerations other than health, but they dismiss that balancing as merely responding to comments "raised during the public comment period." AOB 33. That is inaccurate. DOH justified its Ban as a balance of health and feasibility, and many Board members explicitly weighed economic costs against purported benefits, before the public comment period opened. *See, e.g.*, *supra* at 57 (citing DOH and Board statements at R729, 731, 738-39 prior to opening of public comment period). Public comments (and the Board's responses thereto) understandably addressed the

economic and private interests implicated by the Ban because DOH and the Board made clear from the outset that they were considering those interests in shaping the Ban. This Court should reject Defendants' request that it ignore statements by the Department and the Board evidencing their balancing of health and other non-health considerations.

Defendants also contend that their health goals were "not compromised" by non-health considerations. That is simply not credible. Defendants insist that consuming one *12*-ounce soda each day would "lead to a 15-pound weight gain" *each year*. They are wrong about that,[54] but if they believed it to be true no health rationale alone would justify enacting a rule permitting even 12-ounce drinks. Defendants nonetheless opted for a 16-ounce limit and capped portions rather than total daily consumption in order to ensure that "[c]onsumer [f]reedom is [p]reserved," limit the rule's "commercial impact," and "maintain [economic] feasibility" for food service establishments. R1460-61; R1516. Those are profoundly important concerns, which rightly would be considered by a legislature. *See, e.g.*, City Council Members' App. Div. Amicus Br. at 9. But balancing those concerns is fundamentally beyond the Board's authority and expertise. As this

[54] Anemona Hartocollis, *E-Mails Reveal Dispute Over City's Ad Against Sodas*, N.Y. Times, Oct. 28, 2010, http://www.nytimes.com/2010/10/29/nyregion/29fat.html?pagewanted=all&_r=0 (Appellant Farley's own chief nutritionist characterized Farley's earlier claim of 10 pounds of weight gain per annum as "absurd" and warned that other scientists "will make mincemeat of us.).

Court has made clear, "[s]triking the proper balance among health concerns, cost and privacy interests … is a uniquely legislative function." *Boreali*, 71 N.Y.2d at 12. When an "agency has built a regulatory scheme on its own conclusions about the appropriate balance of tradeoffs between health and cost to particular industries in the private sector," it usurps the legislature's proper role and violates separation of powers. *Id.* By "'acting solely on [its] *own* ideas of sound public policy,'" the Board—like the PHC—was "operating outside of its proper sphere of authority." *Id.* (emphasis added) (citation omitted).

That conclusion is just as compelling here as it was in *Boreali*, particularly given the Board's similar "focus…on administratively created exemptions rather than on rules that promote the legislatively expressed goals." *Id.* As the Appellate Division correctly found, the Ban is riddled with exceptions that undermine rather than promote the asserted purpose of the Ban. The Ban prohibits the sale of portions greater than 16 ounces, but readily permits free refills and the sale or consumption by one person of two (or more) 16-ounce beverages with *identical (or more) calories* to forbidden 20-ounce or 32-ounce beverages. Defendants thus insist that their rule is "not a ban nor does it regulate anyone's choice of diet." AOB 41. But if sugar-sweetened beverage consumption is the health hazard they claim it is, the decision *not* to ban such beverages or more intrusively regulate individuals' diets can be explained only by Defendants' balancing of their health

concerns against economic and political cost, and individual freedoms. By enacting the "compromise measure" that it did—the Board's Ban "necessarily reflects a balance between health concerns, an individual consumer's choice of diet, and business financial interests." R1786.

Defendants concede that other gaping loopholes in the Ban are not even based on health considerations. They assert that the Ban's exceptions for convenience stores and alcohol are rooted in limitations on the Board's authority. That position does not withstand scrutiny. The Board's supposed lack of authority to regulate the exempted FSEs is belied by other city-wide Board regulations that apply to all FSEs without exception. *See infra* at 66-69. Moreover, even if Defendants were right that an MOU between the State Departments of Health and Agriculture limited their ability to regulate comprehensively, that memorandum expressly calls for "cooperative efforts" amongst the agencies to "assure comprehensive food protection"—something that indisputably did not happen here. *See infra* at 69. The Board's asserted lack of authority to regulate beverages that contain alcohol also rings hollow, as the law has always permitted the Board to apply generally applicable rules to alcohol and the establishments that serve it. *See infra* at 71-73. Whether actually motivated by these jurisdictional concerns, or instead adopted for economic or political reasons, Defendants' exemptions at

minimum "run counter to [their stated] goals and, consequently, cannot be justified as simple implementations of legislative values." *Boreali*, 71 N.Y.2d at 12.

For all of these reasons, the courts below correctly found that the Board engaged in impermissible (as well as arbitrary and irrational) balancing of economic, social, and privacy interests against asserted health considerations.

D. The Ban Is Not The Product Of Defendants' Special Technical Expertise

In *Boreali*, the PHC addressed scientific evidence pertaining to the health risks of environmental tobacco smoke in defending the action it was taking. 71 N.Y.2d at 6. The Court nonetheless found that the agency exceeded its authority because no special health expertise was involved in the "*development* of the … *regulations* challenged." *Id.* at 14 (emphases added). The same is true here.

Just like the PHC, which drafted a "simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups," the Board here promulgated a simple code that restricts sales based on the *volume* of beverages sold, without serious regard for a particular beverage's overall nutritional value. These wayward lines were drawn by the Mayor and then adopted wholesale by the Board as quickly as administrative

process would allow *with zero substantive changes*.[55] The Board's zeal to usher the Mayor's proposal through the rulemaking process without fixing even its most obvious flaws further confirms that the Ban was not the product of Defendants' independent scientific "expertise." Particularly given the absence of any direction from the City Council to target sugar-sweetened beverages, "it cannot be said that the Board of Health's technical competence was necessary to flesh out details of … legislative policies." R1795.

Defendants protest that the Board's members represent a "range of health and medical disciplines." AOB 7. But the Board justified the Ban based on all sorts of speculation having nothing to do with health—such as the supposed economic drivers of portion sizes, and the Ban's impacts on business and consumers.[56] By purporting to exercise expertise outside health, the Board was operating outside its sphere of authority. It does not matter for these purposes

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[55] *See* Sam Roberts, *With Rulings on Rubbish and Tattoos, Safeguarding the City for Centuries*, N.Y. Times Blogs, Sept. 11, 2012, http://cityroom.blogs.nytimes.com/2012/09/11/with-rulings-on-rubbish-and-tattoos-safeguarding-the-city-for-centuries/ ("Dr. Farley said that because members served fixed terms, the board was not in theory a rubber stamp for the mayor, though he could not recall the last time the board rejected a mayoral initiative.").

[56] *See, e.g.*, R1424 ("Rather than being driven by consumer demand, large portion sizes are more likely the result of industry marketing practices"); R1426 ("A shift in beverage sales from FSEs to non-regulated competitors such as pharmacies or bodegas is unlikely"); R. 1427 ("there is room for businesses to adopt to the proposal"). Of course, Defendants' unconvincing claim that New Yorkers do not "mak[e] conscious choices" to consume portions greater than 16 ounces, but instead have their "choices made for them by the beverage and restaurant industries," AOB 4, 41, cannot be squared with Defendants' admission that smaller 16-ounce drinks "are *already available* at many restaurants," R1428 (emphasis added).

whether "individual Board members evaluated … scientific and medical studies" when adopting the Ban. AOB 53-54. What matters is that the Board adopted the Ban based on conclusions about consumer behavior, economics, and business practices that are well beyond its expertise and authority.

In sum, the *Boreali* factors confirm that the Board stepped well beyond mere interstitial rulemaking and acted in an unlawful, legislative capacity.

III. THE BAN IS ARBITRARY AND CAPRICIOUS

The unfairness and arbitrariness of the Ban are stark. It outlaws large beverages at restaurants, bodegas, and hot dog stands, while permitting convenience stores and other competitors next door to sell those very same products. It allows unlimited consumption of milkshakes and fancy coffee drinks in the name of nutrition, but outlaws lower-calorie and high nutrition vitamin water and grapefruit juice in the name of nutrition. It treats both half-liter cups and three-liter re-sealable bottles as single-serving containers despite their vastly different sizes and purposes. And it threatens to cost jobs and impose harm on countless small businesses.[57]

Laws are not often struck down for irrationality, but the Ban's jumble of contradictory and self-defeating provisions crosses that line. It is arbitrary and

[57] See R662-671, R677-685, R1669-1712 (forecasting millions of dollars in compliance costs and lost sales, lost jobs and customer goodwill, and other irreparable harms).

capricious in at least three crucial respects: (1) *where* it applies (*i.e.*, only to select FSEs); (2) *what* it covers (*i.e.*, only select sugar-sweetened beverages); and (3) *how* it applies to those covered beverages and entities (*i.e.*, its multifarious loopholes and exemptions). The Supreme Court properly concluded that these loopholes and exemptions render the Ban hopelessly arbitrary.[58]

A. Application Of The Ban To Some Establishments But Not Others Is Arbitrary And Capricious

If upheld, the Ban would apply to restaurants, stadiums, and certain other FSEs, while exempting grocery stores, convenience stores, corner markets, bodegas, and gas stations. The so-called "Big Gulp Ban" *would not actually cover the Big Gulp*, but would prohibit the food truck parked in front of a 7-Eleven or the deli next door from selling the same beverages in a smaller size. It is undisputed that "the exemptions … have no foundation in considerations of public health." *Boreali*, 71 N.Y.2d at 12; R76; *see also* R1787-88. A beverage has the same number of calories regardless of where it is purchased or consumed.

The result is a crazy quilt "of uneven enforcement even within a particular City block," bearing no rational relationship to Defendants' purported goal to

[58] Having found that the Ban violates separation of powers, the Appellate Division did not reach the question of whether the Ban is also arbitrary and capricious. R1795. Ordinarily, this Court does not decide in the first instance a question not passed upon by the Appellate Division. *See, e.g.*, *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 97 N.Y.2d 456, 462 (2002). If this Court reaches this question, however, it should agree with the Supreme Court: the Ban is arbitrary, capricious, and contrary to law.

reduce obesity. R40. New York courts have repeatedly repudiated rules whose classifications bear no rational relationship to their stated purposes. *E.g.*, *Law Enforcement Officers Union Dist. Council 82 v. State*, 229 A.D.2d 286, 289-90 (3d Dep't 1997) (regulations arbitrarily and unjustifiably distinguished between types of inmate housing units); *Kelly v. Kaladjihan*, 155 Misc. 2d 652, 657-58 (Sup. Ct. N.Y. County 1992) (rule drew artificial distinctions between applicants that bore no rational relationship to agency's goal).

Despite their claims to "unique legislative authority" over all matters affecting health, Defendants argue that they lack power to pass a Ban that is *not* substantively arbitrary. AOB 57, 61. Pointing to an MOU between the State Department of Health and the State Department of Agriculture, Defendants claim that they are foreclosed from regulating exempted business. That excuse is inadequate.

The MOU addresses only a limited set of food supply safety issues—*e.g.*, FDA recalls, adulterated food, food-borne diseases outbreaks, or contaminated food. R612-13. It does not address, or in any way purport to limit, the Board's jurisdiction outside of that realm of food-supply safety. When the Board is acting pursuant to its *other* delegated responsibilities in §§ 556 and 558—concerning, for example, the abatement of nuisances, regulation of sewage disposal, or removal of

human remains—the Board remains free to regulate all businesses city-wide (including grocery stores, gas stations, and the like).

The Board knows this. It frequently has relied on other authority within §§ 556(c) and 558 to pass city-wide regulations applicable to supermarkets, convenience stores, and other businesses that sell food, but were nonetheless exempted from the Ban. *See, e.g.*, R.C.N.Y. tit. 24, § 181.07 (city-wide regulation of common eating and drinking utensils); *id.* § 71.05 (city-wide prohibition on the sale of "any food…which is adulterated or misbranded"); *id.* § 173.03 (city-wide prohibition specifying that "[n]o person shall … sell, give away or leave in *any place* a hazardous substance in a container which … bears a food, drug or cosmetic label or imprint" (emphasis added)); *id.* § 71.05(b) ("No person shall adulterate or misbrand a food, drug or cosmetic."). In some instances, the Board has even relied on the very same authority it relied on here—its responsibility to "supervise the reporting and control of communicable and chronic disease"—to regulate all FSEs city-wide. *See id.* § 11.01 *et seq.*, § 11.01(l) (requiring reporting of communicable diseases involving "a person who works in *any place* where food or drink is prepared, manufactured, handled, bottled, packed, stored, offered for sale, sold or

provided free of charge" (emphasis added)).[59] Defendants offer no persuasive explanation for why the Board has authority to promulgate city-wide health rules in other circumstances, but not this one.[60]

Defendants protest that Article 81 of the Health Code (where various regulations governing food preparation and food establishments are housed) is generally inapplicable to exempted businesses. *See* AOB 34, 37-38. But as explained, Defendants have issued city-wide regulations under *other* Articles governing food and businesses which store, prepare, or sell it. *See, e.g.*, Article 71—"Food and Drugs." *See c/o Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vill. of E. Hampton*, 98 A.D.3d 738, 739 (2d Dep't 2012) (where "a decision of an administrative agency" does not "adhere[] to its own prior precedent nor indicate[] its reasons for reaching a different result," it is "arbitrary and capricious and mandates reversal") (internal quotations marks and citations omitted). Where Defendants themselves choose to house a rule does not affect their power to promulgate it. Because nothing would have prevented them from codifying the Ban in a different Article, the provisions of which apply city-wide, Defendants'

[59] The Board has similarly enacted tobacco regulations that expressly pertain to "supermarkets" and other establishments over which they now claim to be powerless. *See* R.C.N.Y. tit. 24 §§ 181.17, 181.19.

[60] Defendants claim that some of the regulations that they have issued which apply to all FSEs merely "mirror" state or federal provisions. AOB 38. That misses the point—what matters is whether the City has the authority to regulate all FSEs city-wide, not whether similar state or federal regulations exist.

claim to be hamstrung is implausible. As the Appellate Division concluded, "[j]udged by its deeds rather than by its explanations, the Board of Health's jurisdictional rationale [for applying the Ban to only a subset of FSEs] evaporates," suggesting that the exclusion of certain favored businesses reflected "unstated but real worries about commercial well-being, as well as political considerations." R1788.

Even if the MOU governed Defendants' conduct, the Appellate Division correctly recognized that the MOU envisions "cooperative efforts between the two agencies" to "assure comprehensive food protection" and "to avoid gaps in food surveillance." R1787; R608. Defendants made no "prior attempt to coordinate with the Department of Agriculture" on the rule. *Id.* They now assert that their responsibility to coordinate with the Department of Agriculture extends only to resolving jurisdictional questions. AOB 39-40. But the MOU expressly mandates joint cooperation on issues including setting and implementing health standards, exchanging information, investigating suspected cases of food or water-borne illnesses, seizing and recalling adulterated foods, and overseeing public water supplies—all of which are plainly *substantive*, not just jurisdictional, in nature. *See* R612-13.

Defendants finally contend that it is permissible for a Rule to be "underinclusive" so long as it "address[es] a problem incrementally." AOB 63.

While agencies need not adopt "all or nothing" approaches to policy, and may *consciously* choose to target key problem areas, that is not what Defendants did here. Instead, they drafted a rule that arbitrarily and erroneously excluded certain businesses based on purported jurisdictional limitations—not reasons rationally related to health.[61]

B. Application Of The Ban To Some Beverages But Not Others Is Arbitrary And Capricious

The Ban also draws arbitrary distinctions between prohibited and non-prohibited beverages. *See* R40. It bans sugar-sweetened beverages loaded with nutritional value (such as vitamin-fortified beverages, cranberry and grapefruit juices, and almond milk), yet exempts comparable beverages (such as orange juice and soy milk) as well as other drinks with triple or more the sugar and calories than prohibited products, like *eight-hundred*-calorie milkshakes and coffee drinks.[62]

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[61] Defendants now suggest that the Board may also have had a *substantive* reason for applying the Ban to some FSEs but not others. They claim it serves "public health" to regulate FSEs selling foods "to be consumed immediately" rather than stores selling food for "home consumption." AOB 62. Because the Board never offered that justification during the rulemaking, it comes too late. *See Barry v. O'Connell*, 303 N.Y. 46, 50 (1951) ("[A] reviewing court, in dealing with a determination [by an agency], must judge the propriety of such action solely by the grounds invoked by the agency."). Because a beverage has the same nutritional content whether consumed in or outside the home, moreover, this *post hoc* rationale also makes little sense. This rationale also fails to track the terms of the Ban, which *does* prohibit a pizza parlor's delivery of two- and three-liter bottles for home consumption, but *does not* prohibit an in-store purchase of the Big Gulp for immediate consumption.

[62] *See* R381, 416 (whereas a 20-ounce sweetened soda contains 240 calories, a 20-ounce whole-milk latte contains 290, a 24-ounce Double Chocolaty Frappuccino contains 520, and a 20-ounce milkshake contains about 800).

Members of the Board themselves recognized the absurdity of these exclusions, yet did nothing to ameliorate them before finalizing the Rule. *E.g.*, R733 (Dr. Forman: "I also want to second the concerns about excluding juices, 100 percent juices, and milk-containing beverages, and certainly milk shakes and milk in coffee and beverages that have monstrous amounts of calories in them. I'm not so sure of what the rational[e] is not to include those, because their nutritional value to me does not outweigh the increased calorie contribution to obesity.").

Defendants claim that those dividing lines reflect a rationale premised on nutritional content. AOB 35-36. But the USDA Guidelines on which Defendants now rely to defend those classifications, *see* AOB 35, specifically call for the consumption of "fat free (skim) or low-fat (1%) milk," not milkshakes or the whole milk often found in fancy coffee drinks.[63] The USDA also recommends consumption of grapefruit juice as an "[i]mportant source[] of potassium, magnesium, and fiber," but Defendants treat it as a health hazard.[64]

The Ban also exempts all alcoholic beverages, and many of those have far more calories per ounce than covered beverages. There is no health-based reason to prohibit a restaurant from serving a 20-ounce cola, but allow the exact same

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[63] U.S. Department of Agriculture and Health and Human Services, *Dietary Guidelines for American*s 2010, at ix, 38 (7th ed. 2010), http://www.health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf.

[64] *Id.* at 84.

restaurant to serve the exact same drink with an added shot of rum (containing even more sugar and calories). Defendants again attempt to defend their political choice on a flimsy jurisdictional basis—arguing that the State Alcoholic Beverage Control Law preempts the Board from enacting regulations that "concern alcohol sales." AOB 36. But "establishments selling alcoholic beverages are *not* exempt from local laws of general application." *Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 763 (1989) (emphasis added). The Board is well aware of this. It has promulgated numerous rules of general application that affect alcohol sales, including most recently its rule requiring FSEs to "post calorie information for beverage items listed on a menu, menu board or item tag, including … *alcoholic beverages such as wine, beer, cocktails and other distilled spirits.*"[65] Many of the Board's other rules of general application also apply to the sale or service of alcoholic beverages. *See, e.g.*, R.C.N.Y. tit. 24, § 71.03 (defining food to include "any … beverages"); *id.* § 71.05(b) ("No person shall adulterate or misbrand a food, drug or cosmetic."); *id.* § 81.31(d) ("During food and beverage preparation, hot and cold holding, and food storage, food shall be protected at all times by covering with barriers."). The Board's jurisdictional excuse for

[65] New York City Health: The Requirement to Post Calorie Counts on Menus in New York Food Service Establishments, *http://www.nyc.gov/html/doh/downloads/pdf/cdp/calorie_compliance_guide.pdf* (emphasis added). *See also* R.C.N.Y. tit. 24, § 81.50 (declining to exempt alcoholic beverages).

exempting alcoholic beverages from this regulation is contrary to settled law and the Board's own precedent.

C. The Way The Ban Regulates Covered Beverages Is Arbitrary And Capricious

Covered beverages and establishments are regulated based on classifications lacking any scientific basis, rendering the Ban irrationally under- and over-inclusive. The Ban largely classifies based on volume or favored or disfavored ingredients—*not* nutritional benchmarks. Thus, the Ban renders illegal 20-ounce vitamin waters or sodas with 120 or 240 calories respectively, but leaves fully available 16-ounce energy drinks with 300 calories. And it treats a 20-ounce beverage identically to a three-liter bottle plainly not intended for consumption as a single serving.

Among other absurdities, the Ban also contains no restrictions on (1) free refills; (2) the number of beverages an individual can buy at one time; or (3) the amount of sugar an individual may add to his or her drink. Calories are calories, however, whether consumed in two 16-ounce containers or one 32-ounce container; and sugar is sugar, whether added to the drink by the manufacturer or the consumer. These exceptions cannot be grounded in science and again suggest weighing of economic, political, or social factors that are not valid bases for Board rule-making. *See N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 168 (1991). Moreover, the sheer ease with which consumers can evade the Ban strips

it of any realistic likelihood of reducing caloric consumption, "directly undermin[ing] and counteract[ing]" the Ban's objective. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking down law for that reason).

CONCLUSION

For the foregoing reasons, the order of the Appellate Division should be affirmed.

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New York, New York

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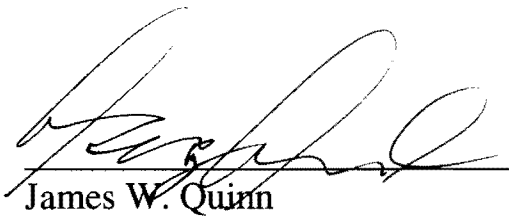

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