To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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

Plaintiffs-Petitioners-Respondents,

For a judgment pursuant to Articles 78 and 30
of the Civil Practice Law and Rules

—against—

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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PRELIMINARY STATEMENT

This case is not about obesity in New York City or soft drinks. It is about whether the Mayor and his Board of Health can usurp the authority of the City Council and decide for themselves what the law should be. It is about an ill-conceived and irrational product ban that represented an unprecedented intrusion on personal choice, and that would have caused economic harm to thousands of small businesses prohibited from selling legal beverages that competing businesses right next door would be permitted to sell freely.

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 it. These principles are fundamental to the separation of powers. When executive agencies have violated these core principles and exceeded their proper jurisdiction, New York courts have struck down the offending agency action. That is what the Supreme Court did here. This Court should affirm.

In May 2012, Mayor Michael Bloomberg directed the New York City Department of Health and Mental Hygiene ("DOH"), the New York City Board of Health ("Board" or "Board of Health"), and Commissioner Farley (collectively, "Agency Defendants") to adopt a rule telling New Yorkers what size sugar-sweetened beverages they may purchase in certain outlets. In addition to representing an unprecedented interference with personal choice, the Mayor's

proposal was completely arbitrary and irrational in its application. It excluded convenience stores such as 7-Eleven (home of the Big Gulp) and many beverages that contain far more calories than those the Mayor proposed to ban. It treated two- and three-liter bottles as though they were single-serving cups. And it banned standard 16.9-ounce (500-ml) bottles while permitting 16.0-ounce bottles.

The Mayor sent his proposal to his appointed Board, knowing that the City Council and State Legislature had repeatedly refused to pass legislation targeting the beverages the Mayor wanted to single out. City Council members immediately objected to this blatant end-run around the legislative process. The media criticized the proposal for its elitism and executive overreach. The lead scientist on one of the studies on which the proposal purportedly was based declared that it would be an "epic failure." R440. Concerned parties protested the proposal's paternalism and the harm it would cause to countless small businesses. Nevertheless, the Board adopted the Mayor's proposal ("the Ban") without a single substantive change.

Plaintiffs-Respondents—coalitions of small and minority-owned businesses, restaurants, delis, movie theaters, industry associations, labor groups, and beverage producers and distributors (R54-56)—filed an Article 78 and Declaratory Judgment action seeking injunctive and declaratory relief. Applying longstanding separation of powers principles, the Supreme Court held that the Board had

exceeded its rulemaking authority and violated the separation of powers by acting as though it were a legislature. It also held that the Ban was arbitrary and capricious, declared the Ban invalid, and enjoined its enforcement.

Agency Defendants protest on appeal that the Board, unique among all State and City agencies, is not bound by constitutional limitations imposed by the separation of powers. They ignore over a century of constitutional evolution that has made the *City Council* the font of legislative power in New York City. They ignore statutory developments that subordinated the Board both to the City Council and the State Public Health Council ("PHC"). They ignore that the Board operates just like every other administrative agency and has conceded in similar contexts that it lacks the authority it claims here. Most remarkably, they ignore the breathtaking implications of their position: if validated, it would grant the Mayor and his Board unchecked authority to make law on nearly every aspect of human activity because almost everything we do can be said to have "public health" implications. The Supreme Court rightly rejected Agency Defendants' claim to special legislative powers, just as it had twenty-four years earlier in *American Kennel Club v. City of New York*, Index No. 13584/89 (Sup.Ct. N.Y. County Sept. 19, 1989) (DeGrasse, J.) (R629).

Despite insisting they are a legislative body and heralding their Ban as "bold," "historic," "innovative," "brand new," and "groundbreaking policy,"

Agency Defendants nevertheless dispute that they acted legislatively here. But they obviously did when their actions are evaluated under the four-factor analysis of *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), the seminal case that struck down the State PHC's similarly unlawful attempt to bypass the State Legislature. Applying the *Boreali* factors to this case, Justice Tingling correctly held that Defendant Agencies crossed the line and engaged in *ultra vires* lawmaking.

Justice Tingling also correctly held the Ban arbitrary and capricious under Article 78. Agency Defendants offered no rational explanations (let alone health-based reasons) for the Ban's crazy quilt of loopholes and classifications. That the so-called "Big Gulp Ban" *would not actually cover the Big Gulp* (but would ban the street vendor parked in front of a 7-Eleven from selling a 500-ml lemonade), and would allow a pitcher of cola only if spiked with alcohol underscores just two of the Ban's numerous absurdities.

The Supreme Court held unequivocally that the Board lacked the authority to enact this Ban. Agency Defendants themselves insist that the Board's jurisdiction was too limited to enable it to apply the Ban to all similarly situated businesses in an evenhanded way. Yet they nonetheless insist on continuing to litigate over the Board's unilateral power to pass this deeply flawed rule rather than work with the people's elected representatives on more rational, more effective,

and fairer legislation addressing obesity. They of course have the right to appeal. But the appeal has no merit. The Supreme Court's judgment should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

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

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

3. Is the Ban unlawfully arbitrary and capricious under Article 78? (The Supreme Court correctly answered "Yes.")

COUNTERSTATEMENT OF FACTS

A. The Mayor Bypasses The City Council And The Board Adopts His Unprecedented Ban Without Substantive Change

Although the City Council has taken numerous steps to address obesity, it has repeatedly *rejected* proposals that would have singled out sugar-sweetened beverages, as Agency Defendants attempted to do here. It rejected resolutions (supported by Mayor Bloomberg) that would have called upon the New York

Legislature to impose an excise tax on sugar-sweetened beverages,[1] the United States Food and Drug Administration to require warning labels on sugar-sweetened beverages,[2] and the United States Department of Agriculture to permit New York City to prohibit the use of food stamps to purchase sugar-sweetened beverages.[3]

The New York Legislature similarly has repeatedly declined to adopt initiatives singling out sugar-sweetened beverages. In 2011 alone, the New York Assembly declined to prohibit the sale of sugar-sweetened beverages in food service establishments and vending machines located on government property,[4] restrict the placement and sale of certain sugar-sweetened beverages in stores,[5] or impose additional taxes on certain "sweets or snacks," including sugar-sweetened beverages.[6] In 2009, the Assembly declined to prohibit the purchase of sugar-

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[1] *See* N.Y.C. Council Res. No. 1265-2012 (N.Y. Mar. 28, 2012), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102924&GUID=B0BB5DD1-56C8-431C-A191-221D3A678B4E&Options=&Search=.

[2] *See* 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=.

[3] *See* 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), http://assembly.state.ny.us/leg/?sh=printbill&bn=A10010&term=2011.

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

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

sweetened beverages with food stamps.[7] And on multiple occasions, the Assembly rejected proposals supported by Mayor Bloomberg to tax sugar-sweetened beverages. R466-67.

In 2010, the *New York Times* reported that Mayor Bloomberg had "escalated his antisoda campaign" in the midst of a "legislative fight" over whether to tax sodas or "bar city residents from using food stamps to buy sodas and other sugar-sweetened beverages."[8] Appellant Farley, who leads the Board at the Mayor's pleasure, implemented a controversial campaign claiming that drinking one can of soda each day could make a person gain 10 pounds a year.[9] His chief nutritionist admonished in internal emails that this claim was "absurd" and that other scientists "will make mincemeat of us."[10]

Having lost the "legislative fight," Mayor Bloomberg decided to take matters into his own hands. On May 30, 2012, he announced a proposal to prohibit certain New York City Food Service Establishments ("FSEs")—its restaurants, delis, fast-food franchises, movie theaters, stadiums, and street carts—from selling certain sugar-sweetened beverages in any cup, bottle, or other container that could

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

[8] 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.

[9] *Id.*

[10] *Id.*

hold more than 16 ounces.[11] The proposal made no sense. Thousands of other FSEs—including grocery stores, 7-Elevens, markets, and gas stations—were excluded and remained free to sell all beverages in any size whatsoever. Numerous categories of beverages that contain many more calories than the targeted sugar-sweetened beverages were exempt. Nevertheless, the Mayor made clear his intent to "bypass the City Council and go to the Board of Health to get the ban passed."[12] The next day, he publicly celebrated "National Donut Day" at an event in Madison Square Park where "lucky winners" received "the ultimate prize—free donuts for a year."[13]

The Mayor's proposal was immediately criticized as an end-run around the City Council by an overreaching executive and an unprecedented intrusion on personal liberty. The *New York Times* condemned it as clear executive "overreach[]." R116. *USA Today* described it as "short on logic and long on intrusion." R117. National Public Radio highlighted its sheer arbitrariness—including its carve-outs for alcohol-based drinks, wines, and high-calorie coffee drinks favored by more affluent consumers, which typically contain far more

[11] Aside from a vague general denial in their Answer, *see* Appellants Opening Brief ("AOB") 8 n.3, Agency Defendants have *never* disputed that the Ban was the Mayor's proposal.

[12] Cristian Salazar, *The Soda Ban and the Power of the Board of Health*, Gotham Gazette, July 23, 2012, http://www.gothamgazette.com/index.php/topics/health-1418-power-board-health.

[13] R477-78.

calories than soda. R392. And Jon Stewart said it "combines the draconian government overreach people love with the probable lack of results they expect."[14] A *New York Times* poll showed that 60 percent of New Yorkers, including majorities in every borough, opposed the Mayor's plan. Only slightly more than 1/3 of New Yorkers thought it was a good idea. R120.

Fourteen members of the City Council wrote to the Mayor, objecting to his stark 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.[15]

But the Mayor and Board ignored requests to submit the matter to the City Council and published a 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 business owners, trade associations, scientific experts, individual consumers, and non-profit organizations, among others. Agency Defendants were also presented

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

[15] R203.

with a petition containing *more than 90,000 signatures* of New Yorkers opposed to the Ban (which Agency Defendants misleadingly characterize as a *single* comment). R175. More than two dozen opponents—including several City Council members, the Brooklyn Borough President, local businesses, consumer advocates, and concerned citizens—voiced their concerns at a public hearing. R485.

Commenters cited, among other points, Agency Defendants' lack of authority to engage in legislative policy-making; the proposal's elitist and paternalistic interference with consumer choice; its arbitrary exclusion of foods and beverages containing far more calories per serving; and the economic harm it would cause to covered businesses relative to neighboring businesses exempted from the ban. *See generally* R143-425.

Despite this outpouring of opposition, the Board adopted the Ban—exactly as proposed by the Mayor. Under penalty of $200 fines, 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 defined to include only "soy-based" substitutes. *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 alcoholic beverages, certain fruit juices, milkshakes, soy milk, and milk-based coffee drinks which contain more sugar and many more calories than the drinks the Mayor chose to limit.[16]

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 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").[17] As a consequence, covered FSEs (such as street vendors and delis) would be prohibited from selling beverages that competitors (such as 7-

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

[17] *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.").

Elevens and markets) right next door would be allowed to sell—a bizarre result illustrated by photographs Plaintiffs-Respondents submitted to the Court below.[18]

Agency Defendants summarily rejected all opposing comments in a 24-page document that largely regurgitated their position at the outset of the rulemaking. R1418. The Board failed to address even the Ban's most absurd elements, such as its prohibition of standard 500-ml (16.9-ounce) beverage bottles, or its treatment of two- and three-liter bottles as single servings (which, among other things, would prohibit pizzerias from delivering two-liter bottles with their pizzas).[19] Yet, later, when pressed before the Supreme Court on the fact that manufacturers do not make 16.0-ounce cups, Agency Defendants pronounced *in an affidavit* that 17-ounce cups would be permitted (but still refused to allow *smaller*, standard 16.9-ounce (500-ml) bottles). R1718. The Board 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 drinks. Instead, the Board claimed it lacked jurisdiction to regulate the exempted businesses and alcoholic beverages, even though the Board previously adopted regulations covering those businesses and beverages. *See infra* 58-59.

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[18] R1730; Jan. 23, 2013 Hearing Demonstrative at 15-19 (submitted to this Court by Agency Defendants with the Record on Appeal).

[19] *See* R286, R292, R308-11, R322-23 (ABA Comments); *see also* Comments by: Auntie Anne's, Inc. (R149-50); Jessica Levinson, Registered Dietitian and Nutrition Consultant (R183); National Restaurant Association, (R210); National Association of Theatre Owners of NYS (R230-36); and Seth Goldman, Co-Founder of Honest Tea (R241).

The Board also failed meaningfully to respond to comments critiquing the studies and data on which its proposal purportedly relied,[20] even continuing to cite an expert despite his insistence that Agency Defendants were misusing and misrepresenting his studies.[21] While not relevant to the legal issues before this Court, Agency Defendants and their amici continue even now to ignore these and other criticisms which highlight the errors and flaws in the data and analyses on which they rely.

The Ban was promulgated as the Mayor had proposed it, *without a single substantive change*.[22]

B. The Supreme Court Declares The Ban Unlawful

On March 11, 2013, after full briefing and hearings on the merits and a motion for preliminary injunction (demonstrating the severe, unnecessary, and irreparable harms the Ban would inflict on businesses[23]), the Supreme Court issued a 36-page opinion declaring the Ban unlawful and enjoining its enforcement. The Court forcefully rejected Agency Defendants' argument that the Board has

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

[21] 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).

[22] R435-36 (final rule).

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

legislative power over all matters touching on health. Justice Tingling held, "[t]o accept [Agency Defendants'] interpretation of the authority granted to the Board by the New York City Charter would leave its authority to define, create, mandate and enforce limited only by its own imagination," creating an "administrative Leviathan" that "would not only violate the separation of powers doctrine, it would eviscerate it." R41.

Applying *Boreali,* the Court next concluded that the Board exceeded its authority and impermissibly acted in a legislative capacity when enacting the Mayor's Ban. The Court found that Agency Defendants wrote on a "clean slate," without legislative guidance, in imposing the Ban. R22-35. It explained that "one thing not seen in any of the Board of Health's powers is the authority to limit or ban a legal item under the guise of 'controlling chronic disease,' as the Board attempts to do herein." R33. The Court found further that the Board trespassed on an area of "past and ongoing debate within the City and State legislatures," R37, noting that both legislatures had repeatedly rejected proposals to "discourag[e] [sugar-sweetened beverage] consumption…relative to other products." R36. The Court rejected Agency Defendants' argument that "the Portion Cap Rule is based solely on health considerations." R19-20; *see also* R20-21. Rather, the Ban "evidence[d] a balancing being struck between safeguarding the public's health and economic considerations." *Id.* Finally, the Court recognized that the Board

"made no changes whatsoever to the Mayor's proposal," R37-38, but did not find that the Board "fail[ed] to exercise its expertise or technical competence." R38-39. Taking all of the *Boreali* factors into account, the Court concluded that Agency Defendants impermissibly exercised legislative powers and exceeded their lawful authority.

The Court also concluded, independently, that the Ban is arbitrary and capricious "because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule." R40.

The Court entered judgment declaring the Ban invalid and enjoining Agency Defendants from implementing or enforcing it. R41-42. This appeal followed.

ARGUMENT

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

The New York Constitution requires the separation of legislative and executive powers and requires that every local government "shall have a legislative body elective by the people thereof." N.Y. Const. art. IX, § 1(a). The New York City Charter likewise "provide[s] for distinct legislative and executive branches." *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 356 (1985). In New York City, the

legislative body is the City Council. N.Y.C. Charter § 21 (the City Council "shall be the legislative body of the city" and "shall be vested with the legislative power of the city"); *Subcontractors Trade Ass'n v. Koch*, 62 N.Y.2d 422, 427 (1984) ("[T]he City Council is the body vested with legislative power.").

The City's executive branch "is empowered to implement and enforce legislative pronouncements emanating from the Council," but in doing so "'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 (citation omitted). Before the executive may devise a scheme for ameliorating perceived social ills, "the legislature must *specifically* delegate that power…and must provide adequate guidelines and standards for the implementation of that policy." *Id.* at 429. "Fundamentally, '[t]he constitutional principle of separation of powers…requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies.'" *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 293 A.D.2d 20, 23 (3d Dep't 2002) (citation omitted), *aff'd in part, modified in part*, 100 N.Y.2d 801, 821-22 (2003).

Agency Defendants claim (at 17-23) these fundamental principles do not apply to the Board. They insist the Board, alone among all executive agencies in New York, wields "extraordinary" and "plenary" legislative authority over all matters pertaining to public health. This exact argument was rejected by Justice

DeGrasse in *American Kennel. See Am. Kennel*, slip op. at 6 -7 (rejecting argument that "*Boreali* does not apply…because the Board of Health has been vested with the authority to act legislatively in any health related manner and therefore has much broader powers than the PHC"); R1617-27 (Agency Defendants' Mem. in *Am. Kennel* at 32-42). Justice Tingling recognized that Agency Defendants' argument, if accepted, would "eviscerate" the separation of powers, and rightly rejected it too. R41.

Historically, courts sometimes have described agency powers in legislative terms, although in context, they were merely describing agency rulemaking authority that today is characterized as quasi-legislative. As local legislatures were strengthened over the 20th century, and contemporary principles of administrative law took root, the "legislative" characterizations on which Agency Defendants rely diminished, becoming extinct altogether after 1975. Home Rule enactments and revisions to the City Charter establish unequivocally that today the City Council is *the* legislative body for New York City, and the Board is merely an executive administrative agency, subject both to the City Council and to the State PHC. This cascade of developments explains why the most recent case Agency Defendants cite interpreting the Board's authority is 37 years old, and why they cannot point to a single case holding *Boreali* inapplicable to the Board (or to any of the *forty-five* other local boards of health possessing nearly identical rulemaking powers). To

accept Agency Defendants' proposition would anoint the Board a super-legislature empowered to issue a nearly limitless range of sweeping laws from its perch in the Mayor's executive branch. This cannot be.

A. The City Council Is The Legislative Body With Jurisdiction Over Health In New York City And The Board Is An Administrative Agency Subject To Its Direction

Agency Defendants' principal theory (at 17-18) is that legislation in the early 20th Century established a relationship between the State Legislature and the Board and endowed the Board with unique and pervasive legislative powers over all matters affecting public health. As explained below (27-29), even during that period, courts never held that the Board had true legislative powers as claimed here. But, regardless, constitutional and statutory developments over the last century severed any direct link between the State Legislature and the Board and established unequivocally that, today, the City Council is the sole legislative body for New York City, and the Board is merely an executive agency.

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,[24] various local officials—councils, boards, officers, trustees, and the like.[25] *In re Zborowski*, 68 N.Y. 88, 91-93 (1877).

In 1923, this relationship changed. New York amended its Constitution and enacted legislation to afford Home Rule to municipalities, empowering them 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, when the State Constitution was amended to create a local government bill of rights providing explicitly that "[e]very local government…shall have a legislative body elective by the people thereof." N.Y. Const. art. IX, §1(a).

The 1963 Home Rule amendment also specifically authorized local governments to enact laws falling within certain enumerated categories, including the "health and well-being of persons" within the city and the "powers [and] duties…of its officers and employees," so long as they do not conflict with general

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

[25] The Board's ability 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).

laws, and are not otherwise prohibited by the State Legislature. *Id.* §§2(c)(10), (1); §3(c). The Municipal Home Rule Law, enacted contemporaneously, declares that a municipality's authority over the "powers [and] duties…of its officers and employees" extends to "the creation or *discontinuance of departments of its government* and *the prescription or modification of their powers*." N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(1) (emphases added).

Finally, in 1989, the Charter was amended to state explicitly that "[t]here shall be a council which shall be *the legislative body* of the city" and that "[a]ny enumeration of powers in this charter shall not be held to limit the legislative power of the council, except as specifically provided in this charter." Charter § 21 (1989) (emphasis added). The express purpose of these amendments—"the most dramatic revisions to [the] charter since 1901"—was to clarify that the City Council is *the only* legislative authority within New York City, following federal courts' declarations that the City's Board of Estimate had unconstitutionally exercised legislative power.[26]

These developments demolish Agency Defendants' theory that the Ban is an exercise of directly delegated State legislative power. As they ultimately concede, the Board's authority derives from the City Charter, which is subject to the City

[26] *Final Report of the New York City Charter Revision Commission, January 1989 - November 1989*, at 1 (Mar. 1990).

Council's supersession powers under Article IX §2(c)(ii)(10) of the Constitution and N.Y. Mun. Home Rule Law § 10(1)(ii)(c)(1).

This is not merely theoretical. The City Council has freely exercised its plenary power over the Board's structure, function, and mandate. 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). 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. Two years later, the Council amended the Charter again to clarify the limited scope of the Board's powers, *see* 1979 N.Y.C. Local Law No. 5 § 1 (amending Charter § 558(c)), because "[r]egulations passed by the Board of Health may be overly broad and so invade the providence of the City Council's legislative authority."[27] The City Council's plenary authority to legislate over, reorganize, or even abolish the health agencies in New York City confirms that any direct ties between the Board and the State Legislature were broken long ago.

[27] 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").

Additionally, shortly after the 1967 Home Rule revisions, the State Legislature further emphasized the Board's agency status by making it subject to the oversight and jurisdiction of the State Commissioner of Health, State Department of Health, State PHC, and the State Sanitary Code. Historically, the City's exemption from the State Sanitary Code led courts to comment 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." *Grossman v. Baumgartner*, 17 N.Y.2d 345, 351 (1966); *see People v. Blanchard*, 288 N.Y. 145, 147 (1942) (describing era when "of necessity…local boards or officers" were tasked with creating "a body of administrative provisions"). In 1971, however, the State Legislature removed New York City's Sanitary Code exemptions and subjected the Board (like all other local health agencies) to oversight by the State PHC, Commissioner, and Department of Health. Laws of N.Y. 1971 ch. 626.[28] This was done over vigorous opposition by Mayor Lindsay, who declared "'[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

[28] Agency Defendants' insinuation (at 17 n.5) that New York City's exemption from Article 3 of the Public Health Law supports their theory is wrong. This exemption—concerning organization and structure of local health agencies—*further confirms* that the City Council holds plenary authority over the Board. *See* 1979 Council Committee on Health Charter Report ("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.").

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).[29] Ever since, the PHC has had ultimate regulatory authority over matters of health in New York City, just like other local jurisdictions. The Board's subordination to the PHC—a body that, *Boreali* confirmed, has no true legislative power—renders obsolete the *Grossman* dictum on which Agency Defendants rely,[30] and is incompatible with any suggestion that the Board has special legislative powers that the PHC itself lacks.

B. The Board Operates Just Like Other Agencies

Agency Defendants' view of the Board's legislative power is also inconsistent with the fact that, in all respects, the Board *operates* as an ordinary administrative agency. The City Administrative Procedure Act ("CAPA") treats the Board the same as every City "agency." Charter § 1041(2). The Board accordingly follows standard CAPA rulemaking procedures, and its regulations are

[29] *See also id.* at 2 ("Do not destroy the powers and authority of the New York City Board of Health and make them subservient to the State Health Commissioner and State Sanitary Code"); *id.* at 5 ("S5876A would seriously dilute the effectiveness of the New York City Board of Health by weakening its authority….").

[30] *Schulman v. N.Y.C. Health & Hospitals Corp.*'s later quotation in a footnote of that *Grossman* dictum was likewise dictum, and is far too thin a reed to support Agency Defendants' "special powers" theory. 38 N.Y.2d 234, 237 n.1 (1975). At bottom, both cases spoke of *regulatory* power. The Court of Appeals obviously appreciates that the City Council can make law on health-related matters, but the power of an agency to promulgate rules is distinct from true legislative authority. N.Y. Const. art. IX, §§ 2(c)(10), 3(c) (vesting in local legislatures law-making authority over "safety, health and well-being of persons").

subject to arbitrary and capricious Article 78 review (*un*like true legislation).[31] Agency Defendants themselves repeatedly call the Ban a "rule," a CAPA-defined term for an agency statement or communication that merely "implements or applies law or policy" (*un*like the City Council's power to create law and policy). Charter § 1041(5). The Health Code 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" (*un*like the City Council's local laws, codified in the Administrative Code and Charter). *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).

Agency Defendants elsewhere conceded the Board's status as an ordinary executive agency. When the idea of banning smoking in parks gained traction, Appellant Farley acknowledged that the proposal "would probably have to be approved by the City Council." R619-20. In June 2012, he testified that he "look[ed] forward to working with the Council…on another important smoking-related proposal." R623. And his most recent tobacco sales initiatives will go

[31] 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).

before the City Council for approval.[32] If the Board had the authority it now claims to broadly "legislate" on health, it could address smoking unilaterally.

C. Agency Defendants Are Claiming Virtually Unlimited Legislative Authority

Agency Defendants concede (at 16 & 33) the powers they claim for the Board—if sustained—would be "unique" and "remarkably expansive." This is a serious understatement. The Supreme Court rightly found that Agency Defendants' position would give the Board the "authority to define, create, mandate and enforce limited only by its own imagination." R41. Agency Defendants refused below to provide any limiting principle, and they provide none here.

Agency Defendants chose here to regulate a narrow category of beverages. But if the Board can legislate about anything that affects the "security of life and health in the city," 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 quarter-pound, pizza to one slice, licorice to one stick, and ice cream to one scoop. None of this is implausible. Studies in the Administrative Record show correlations between weight gain and consumption of *just about everything*,

[32] Esmé E. Deprez, *Bloomberg Seeks to Ban Cigarette Displays in NYC's Stores*, Bloomberg.com (Mar. 18, 2013), http://www.bloomberg.com/news/2013-03-18/bloomberg-seeks-to-ban-cigarette-displays-in-new-york-s-stores.html ("Mayor Michael Bloomberg called for legislation to…require stores to conceal tobacco products….").

including skim milk,[33] and Board members have already indicated that their "next steps" could include targeting consumers' enjoyment of foods like popcorn and 100% fruit juice.[34]

Of course, the Board's legislative power over "health" would not be limited to dictating "caps" on particular foods. Instead, it might restrict the total caloric content, the percentage of calories from fats, or the number of carbohydrates permitted in any purchased meal. Or it might completely outlaw the sale of all sugar-sweetened beverages, snacks, and desserts, or require that all meat be lean or all dairy fat-free. Agency Defendants' notion that the unelected members of the Board can enforce by fiat their conception of healthy lifestyle choices, without authorizing legislation, is a radical and dangerous proposition without precedent in our laws.

Perhaps most troubling, Agency Defendants' claim of special powers would allow the Mayor to evade fundamental limits on executive authority by using the Board to create new laws governing any activity that affects public health—which includes virtually any human activity—whenever he or she becomes impatient with the legislative process. That is precisely what happened here. *See infra* at 42-44 (Mayor justified Ban as "tr[ying] to do something" after he failed to secure

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

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

legislative change). Validating this executive overreach would destroy the separation of powers in New York City. *See Subcontractors Trade Ass'n*, 62 N.Y.2d at 428-30 (holding Executive Order "an unlawful usurpation of the legislative function"); *Under 21*, 65 N.Y.2d at 364 (holding Executive Order "an unlawful usurpation of the legislative power of the City Council").

D. The Older Precedents On Which Agency Defendants Rely Do Not Support Their Claim That The Board Is Imbued With True Legislative Power

Agency Defendants point to language in older cases in which courts sometimes described the Board's authority in legislative terms. They insist (at 19-23) that those precedents establish that the Board is a singular exception to the constitutional separation of powers. That is not a fair reading of the law.

To be sure, this Court and others sometimes described the Board's powers in legislative terms. But the underlying cases did not concern policy initiatives divorced from legislative direction and guidance. They addressed the Board's exercise of delegated *rulemaking* power within the scope of its traditional authority over matters such as contamination; sanitation; food-borne illness, adulteration, and labeling; poisons; nuisances; medical and nursing facilities; and infectious

diseases.[35] Even Agency Defendants' own principal cases—*Grossman* and *Blanchard*—confirm that the scope of 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 (quoting *Blanchard*, 288 N.Y. at 147).

Courts of that era recognized the distinction between rulemaking common to administrative agencies and legislative law-making. *See, e.g.*, *Blanchard*, 288 N.Y. at 147) ("[T]he substantive law-making power of the People is vested by the Constitution in the Legislature and cannot be delegated."). Thus, Agency Defendants' cases acknowledge the Board as creating rules administrative in nature, or as exercising "quasi-legislative" power in the sense that agencies are often described to exercise 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)

[35] *E.g.*, *Blanchard*, 288 N.Y. 145 ("unwholesome poultry"); *Grossman*, 17 N.Y.2d 345 (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. N.Y. County Spec. T. 1965) (fluoridation of City water supply), *aff'd*, 24 A.D.2d 437 (1st Dep't 1965); *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*, 38 N.Y.2d 234 (reporting on termination of pregnancies).

("[T]he order of the State Traffic Commission here involved falls in the legislative or quasi-legislative category…."). As explained *supra* 22-23, the older descriptions of the Board as the "sole legislative authority" over health in the City merely recognized that, at that time, the State Sanitary Code did not yet apply in New York City.

Today, it is well established (and unremarkable) that the Board's authority is administrative in nature. In *N.Y.C. Coalition to End Lead Poisoning v. Giuliani*, 173 Misc.2d 235, 239 (Sup. Ct. N.Y. County 1997), for example, the court explained that a Health Code provision on lead paint was merely an "administrative agency's regulation" which "cannot conflict" with a local law on the same subject. *See also 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."); *People v. Strax*, 80 Misc.2d 679, 681, 683 (N.Y.C. Crim. Ct. N.Y. County 1975) (Health Code amendment exceeded Board's role as "[a]n administrative agency" and "infringed upon the legislative authority"); *Nitkin v. Adm'r of Health Servs. Admin.*, 91 Misc.2d 478, 479-80 (Sup. Ct. N.Y. County 1975) (same), *aff'd*, 43 N.Y.2d 673 (1977).

E. Charter Provisions Cited By Agency Defendants Do Not Give The Board Legislative Authority

Agency Defendants argue (at 15-18) that pursuant to grants of authority under §§ 556 and 558(b) and (c) the Board was provided true legislative powers, and claim (at 22-23) that the Supreme Court failed to identify a "clear manifestation" of legislative action "limit[ing] the Board's historical powers" under these provisions. They are wrong on both accounts. As shown above, the Board never had the legislative powers they claim and, in any event, it is crystal clear today that the Board's authority is that of a typical administrative agency. Moreover, the controlling interpretive canon here is that statutes "should be construed so as to avoid doubts concerning [their] constitutionality." *In re Lorie C.*, 49 N.Y.2d 161, 171 (1980); *People v. Correa*, 15 N.Y.3d 213, 232 (2010) (same); *see also Boreali*, 71 N.Y.2d at 9-11. Agency Defendants' interpretation—enshrining true legislative power in an unelected Board—would raise serious constitutional questions.[36] Accordingly, it is Agency Defendants who must demonstrate unequivocally that the Legislature intended to delegate vast legislative authority to an unelected executive board. They do not even come close.

[36] *See, e.g., Seignious v. Rice*, 273 N.Y. 44, 49 (1936) (striking unconstitutional legislative delegation to New York City Health Commissioner where "Legislature ha[d] not drawn any line of cleavage, nor indicated a standard or measure by which the Commissioner might draw such line"); *Redfield v. Melton*, 57 A.D.2d 491, 495 (3d Dep't 1977) (legislation granting DMV commissioner "unfettered discretion" to fix license fees without any "'rules and principles'" was "unconstitutional delegation of authority" (citation omitted)).

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." Similarly, the Board's jurisdiction under § 558(c) "embrac[ing] in the health code all matters and subjects to which the power and authority of the department extends," and authority under § 556 to "regulate all matters affecting the health in the city of New York" is essentially identical to the PHC's power under N.Y. Pub. Health Law § 225(5)(a) to "deal with any health matters affecting the security of life or health or the preservation and improvement of public health in the state of New York, and with any matters as to which the jurisdiction is conferred upon the public health council." And the Court of Appeals in *Boreali* held the PHC's authority to be non-legislative.[37]

Agency Defendants insist that the PHC is different because, unlike the Board, courts never loosely described the PHC's administrative rulemaking as "legislative." AOB 22. That too is incorrect. *See, e.g.*, *Village Nursing Home, Inc. v. Axelrod*, 146 A.D.2d 382, 389 (1st Dep't 1989) (describing PHC as "quasi-legislative body"); *Aerated Prods. Co. v. Godfrey*, 263 A.D. 685, 687 (3d Dep't

[37] Notably, New York City's Corporation Counsel argued—unsuccessfully—as *amicus* in *Boreali* that the PHC exercised broadly-delegated authority that courts described in expansive terms. *See* R1648-49.

1942) ("The duties of the [PHC] are legislative…"), *rev'd on other grounds*, 290 N.Y. 92, 99 (1943) (invalidating Sanitary Code amendment as unreasonable).

Agency Defendants also insist (at 4) that the Board's prior regulations concerning lead paint, posting calorie information, fluoridation, and banning the use of trans fats support their claimed special powers. But these examples fall comfortably within specific statutory grants of authority or the traditional contexts long recognized as core to 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").

— 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 was promulgated under DOH's then-express

responsibility, pursuant to Charter § 556(c), for the "purity and wholesomeness of the water supply and the sources thereof."

— The Board's unilateral rule banning trans fats was quickly followed by City Council ratifying legislation to "put the trans fat ban on stronger legal footing"[38] by "incorporat[ing] the ban on artificial trans fat into the Administrative Code," R627, thus providing the necessary legislative approval for Agency Defendants' actions.[39]

Unsurprisingly, every court that has directly addressed the Board's claim to legislative hegemony has rejected it. Like the Court below, the Court in *American Kennel* concluded that "[t]he PHC is the approximate State equivalent to the City Board of Health." *Am. Kennel*, slip op. at 6 n.2. And the Second Department similarly presumed that *Boreali*'s limits apply in upholding a contested Health Code provision under a *Boreali* analysis. *See Pet Prof'ls of N.Y.C. v. City of N.Y.*, 215 A.D.2d 742, 743 (2d Dep't 1995).

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

[39] Agency 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. That makes no sense. In fact, as noted above, the legislative record indicates that the opposite was true—that 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.

The broadly described public health authority of the Board is, moreover, shared by at least *forty-five* other local boards of health throughout New York.[40] And courts have consistently applied *Boreali* to strike down regulations issued by these local boards, despite enabling statutes affording them similar authority to that claimed here. *See Nassau Bowling Proprietors Ass'n v. County of Nassau*, 965 F. Supp. 376, 379-81 (E.D.N.Y. 1997) (striking local health regulation under *Boreali*); *Dutchess/Putnam Restaurant & Tavern Ass'n v. Putnam Cnty. Dep't of Health*, 178 F. Supp. 2d 396, 402-05 (S.D.N.Y. 2001) (same); *Leonard v. Dutchess Cnty. Dep't of Health*, 105 F. Supp. 2d 258, 263-68 (S.D.N.Y. 2000) (same); *Justiana v. Niagara Cnty. Dep't of Health*, 45 F. Supp. 2d 236, 243-45 (W.D.N.Y. 1999) (same). If Agency Defendants' position were adopted, these forty-five local boards of health, along with countless other municipal agencies, would all be converted overnight into executive legislatures (to the certain dismay of the real legislatures).

[40] Under state law, county and sub-county 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 §703 (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").

II. THE BAN IS *ULTRA VIRES* UNDER *BOREALI*

In *Boreali*, the Court of Appeals struck down as *ultra vires* an indoor-smoking ban promulgated by the PHC, whose jurisdiction, like the Agency Defendants, 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 the regulation transgressed the line between "administrative rule-making and legislative policy-making." 71 N.Y.2d at 11-14. The PHC's regulations: (1) were 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," were not a product of "special expertise or technical competence" nor "necessary to flesh out details" of legislative policy. *Id.*

As Agency Defendants acknowledge (at 24 n.7), *Boreali* "did not set forth a rigid four-prong test." In evaluating an agency's action, no single factor is dispositive, nor are all four necessary. *See Ellicott Group, LLC v. N.Y. Exec. Dep't Office of Gen. Servs.*, 85 A.D.3d 48, 54 (4th Dep't 2011); *Nassau Bowling*, 965 F. Supp. at 379-81. The question ultimately is whether, viewed in light of the separation of powers, the agency has acted in a legislative capacity and thus exceeded its statutory mandate.

Despite Agency Defendants' protestations, the record is clear that all four *Boreali* factors are present here, and even clearer that, in promulgating the Ban, the Board overstepped its executive limits by exercising "'the open-ended discretion to choose ends' which characterizes the elected Legislature's role." *Boreali*, 71 N.Y.2d at 11 (citation omitted). The Board has exercised such "open-ended discretion" in at least two respects by: (1) deciding to restrict the consumption of some safe and lawful beverages and not others with similar or greater sugar and caloric content; and (2) choosing to pursue this end through their Ban, rather than a tax, age restriction, educational program, or other means. Because the Ban exhibits the same problems as the PHC rule struck down in *Boreali*, the Supreme Court correctly found it should meet the same fate.

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

The *Boreali* 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. Agency Defendants urge (at 30) the Court to approach the question whether the Board did likewise with "considerable sensitivity" in light of their belief that the Board has extraordinary legislative powers. If anything, Agency Defendants' erroneous claim to unfettered legislative authority should lead to even closer

scrutiny of their fallback argument that the Board was not "legislating" in this particular instance. Regardless, whether viewed with sensitivity or skepticism, the Board impermissibly drew on a clean slate with no legislative guidance.[41]

Agency Defendants do not even bother to allege that their Ban is the kind of "'interstitial' rulemaking that typifies administrative regulatory activity." *Boreali*, 71 N.Y.2d at 13. Instead, they have declared that the Ban is a "bold," "historic," "innovative," "brand new,"[42] and "groundbreaking policy."[43] They are correct that the Ban was not presaged by legislative direction. It is also like nothing the Board or any other board of health in New York has ever done before. The Ban departs fundamentally from health boards' traditional role—protecting individuals from external or hidden dangers—to instead coercing supposedly healthier lifestyle choices to protect individuals from their free will. It is one thing for the Board to regulate food storage and preparation to prevent against salmonella in eggs, and quite another for the Board to tell people how many eggs they can eat, using

[41] Below, Agency Defendants appeared to realize that the Ban is even farther afield than the regulation struck in *Boreali*, and asked the Supreme Court to excuse the Ban even if it was promulgated on a clean slate. *See* Defs' MOL in Opp'n to Pet. at 31 n.31 (ECF No.71).

[42] *See* R1484, R1494 (Sept. 13, 2012 BOH Meeting); R1429 (Response to Comments); R732 (June 12, 2012 BOH Meeting).

[43] Press Release, Mayor Bloomberg Discusses City's Efforts to Combat Obesity and Sugar Beverage Regulation (Mar. 11, 2013), 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%2F2013a%2Fpr090-13.html&cc=unused1978&rc=1194&ndi=1.

regulation of business practices to coerce consumer behavior that even the Board knows it cannot regulate directly. Defendants insist that "'a different regulatory strategy'" is needed for new problems "'at the beginning of the twenty-first century.'" AOB 33 (citation omitted). If so, it is *the City Council's* role to establish the new policies for those new problems before Agency Defendants depart from their traditional roles.

Agency Defendants argue that the Charter vests them with nearly limitless authority to "regulate *all* matters affecting the health in the city of New York," and thus to regulate every dietary choice in New York and any activity or behavior that is a "risk factor" for any communicable or chronic disease. AOB 31 & n.9. But *Boreali* rejected the same claim. *See* 71 N.Y.2d at 9, 13. And the grants of authority on which the PHC relied in *Boreali* and the Board relies here are *virtually identical*. *See supra* Part I-E.

Agency Defendants point next to Charter § 556(c), which concerns the Board's "supervision of matters." Section 556(c)(9) charges the Board to "supervise and regulate the food and drug supply of the city and other businesses and activities affecting public health in the city, and ensure that such businesses and activities are conducted in a manner consistent with the public interest and by persons with good character, honesty and integrity." But this supervisory power has never been interpreted to encompass dictating portions of safe and lawful

products. *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 in question) (citation omitted)). Indeed, the Memorandum of Understanding ("MOU") between the Department of Agriculture and the State Department of Health (which exercises control over local health departments) on which Agency Defendants so heavily rely confirms that the scope of responsibility envisioned by § 556(c)(9) is far narrower: "cases of food or water-borne illness," responding to an "FDA Class I, or similar recall of food or food products," "food borne disease outbreaks," "contaminated foods," and "adulterated" food. R612-13. Authority to ensure food supply safety and prevent adulteration is a far cry from authority to dictate individuals' dietary choices among safe and unadulterated foods and beverages.

Similarly, Agency Defendants 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; exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health." To begin with, the Ban does not involve the "supervis[ion]" of "the reporting and control" of a communicable or chronic disease. Agency Defendants themselves purport to be prohibiting products that they allege could (if part of an

overall long-term diet and exercise regime that was unhealthy) become a "risk factor" for another "risk factor" (obesity) for certain chronic diseases like heart disease and diabetes. AOB 31 n.9, 41. Of course, the list of risk factors for risk factors for chronic diseases is endless, and interpreting § 556(c)(2) to afford the Board of Health unbounded authority to regulate them all would lead to absurd results—for instance, giving the Board power to regulate causes of stress or inactivity, also risk factors for diabetes and heart disease. Ascribing to the unelected Board such unbridled power over the infinite number of personal lifestyle choices New Yorkers make every day would relegate the City Council to a half-pence side show. As *Boreali* cautioned, "a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits." 71 N.Y.2d at 9.

The limited scope of § 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," § 556(c)(10); and "ionizing radiation," § 556(c)(11). If Agency Defendants' authority over the "food and drug supply" was as broad as they say, it would render irrelevant § 556(c)(7) and (c)(8), concerning water and milk. 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 to direct the promulgation of this Ban.

Agency Defendants criticize Justice Tingling for characterizing the Board's authority as limited to regulation of "communicable, infectious, and pestilent diseases" or to regulating food "only when the City is facing eminent danger due to disease." AOB 33 (quoting R39-40). That is a red herring. The question is whether the provisions on which they rely authorize the Board to ban the sale of safe and lawful products that are, even in Agency Defendants' view, only a risk factor for a risk factor for a chronic disease—and only when consumed as part of an unhealthy lifestyle dependent on myriad other choices.

Agency Defendants' cases are also irrelevant because none concern the Charter provisions on which they rely, and all involved express statutory grants of authority. *See 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*, 215 A.D.2d at 742-43 (dog licensing regulations promulgated by the Board implemented the New York City Dog License Law). These cases highlight the types of specific legislation that *should* precede a new Board regulation.[44]

Like the Board's rule found invalid in *American Kennel*, the Mayor's Ban advances no City Council policy and is unlike any regulation previously adopted in the long history of the Board. By enacting a Ban that "provides for a number of firsts," R637, the Board wrote on a clean slate, 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 exceeded the scope of its authority. 71 N.Y.2d at 13. So too here. The Supreme Court correctly found (R37) that "[a]ddressing the obesity issue as it relates to sugar-sweetened drinks, or sugary drinks, is the subject of past and ongoing debate within the City and State legislatures." *See supra* 6-7. The Mayor expressly acknowledged that, by going through the Board, he

[44] *See also supra* 32-33 (describing legislative delegations or ratifications and traditional understandings pertaining to rules on lead paint, calorie information, fluoridation, and trans fat).

sidestepped a legislative process that was not giving him the results he wanted. *CBS This Morning* (CBS television broadcast Mar. 13, 2013) (Mayor Bloomberg: "The federal government, we asked them to do 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.").[45] But as *Boreali* made clear, "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.

Agency Defendants concede that the "City Council…failed to pass three resolutions targeting sugary sweetened drinks," and that the State Legislature likewise declined to adopt numerous "bills prohibiting the sale of sugary d[r]inks" or curtailing their use. AOB 36. They insist, however, that the failure to pass proposed legislation is not evidence of legislative intent. *Id.* They miss the point. As *Boreali* explained, in this context the Legislature's inaction is not being relied upon "as some indirect proof of [the Legislature's] actual intentions" but

[45] http://www.cbsnews.com/video/watch/?id=50142734n.

appropriately "as evidence that the Legislature has so far been unable to reach agreement." 71 N.Y.2d at 13.

Agency Defendants also protest that none of the City Council's proposed resolutions would have been binding, and that none would have specifically implemented "a portion cap." AOB 36. But the unwillingness of the City Council to adopt even nonbinding resolutions targeting these beverages shows just how far afield this Ban is. And it is irrelevant that none of these proposals 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). Here, though 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.

C. Agency Defendants Impermissibly Balanced Health Considerations With Social, Economic, And Political Considerations That Have Nothing To Do With Health

Agency Defendants contend adoption of the Ban "was based solely on health considerations." AOB 26. But the record shows clearly that Agency Defendants balanced economic and social factors against asserted health considerations, even though, 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).

The Board's decision to proceed with the Mayor's ban proposal, with all its arbitrary exemptions and despite the economic injury it would cause, was based expressly on "DOHMH's position that the potential health benefits outweigh these costs." R1426. The DOH representative who presented the proposal to the Board, Dr. Kansagra, described the proposed Ban as "a balance of feasibility as well as health impact." R723. She made it clear that DOH explicitly balanced economic and health interests when urging adoption of the proposed Rule. *See, e.g.*, 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.").

As the Board moved forward with the proposal, Board members made explicit statements reflecting the same impermissible balancing of economic and social costs against health considerations. *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) ("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").

Finally, in its response to comments, the Board explicitly weighed the purported downstream economic costs faced by the City due to obesity against potential job losses and harm to City businesses that might be caused by the Ban. Without any support, the Board 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. This balancing of purported benefits against economic costs and multifarious social impacts is far beyond the Board's role and expertise, and precisely what *Boreali* forbids. As in *Boreali*, such comments "demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." 71 N.Y.2d at 12. "Striking the proper

balance among health concerns, cost and [other] interests … is a uniquely legislative function." *Id.* The Board was "'acting solely on [its] own ideas of sound public policy' and…outside of its proper sphere of authority." *Id.* (alteration in original; citation omitted).

That conclusion is "particularly compelling here" given the Board's "focus…on administratively created exemptions rather than on rules that promote the legislatively expressed goals." *Id.* As the Supreme Court correctly found, the Ban is riddled with exceptions that undermine rather than promote the asserted purpose of the Ban. Agency Defendants concede that the Ban's most glaring loopholes are not based on health considerations at all. Instead, they claim that the exemptions for convenience stores and alcohol are rooted in limitations on the Board's authority. They are wrong for the reasons explained *infra*, at 52-59. But even if Agency Defendants' jurisdictional arguments had merit, their failure to coordinate with agencies possessing adjacent jurisdiction (as required by law and common sense), ensured that the Ban's exceptions arbitrarily favored some businesses and products at the cost of others. It also hampered the Ban's purpose. Such failure can only be explained by the Board's consideration of impermissible political factors. R20-21 ("[R]espondents do not deny that the 'MOU' requires [them] to coordinate with the Department of Agriculture [but] offer no evidence of any prior attempts to coordinate…. This could be construed as evidencing political

considerations outside of the Statement of Basis and Purpose."); *see also infra* 52-55. Deciding to proceed with the Ban despite its arbitrary and uneven application, and despite the competitive disadvantage to which it would put covered businesses, inherently involved a balancing of economic, social, and health considerations that is uniquely for the City Council to make. Charter § 28(a).

At minimum, Agency Defendants' exemptions "run counter to [its 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 Supreme Court 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 unquestionably addressed scientific evidence pertaining to the dangers 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 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 prohibits some

disfavored drinks, but not others, and targets certain establishments, but not others. Whether the lines were drawn for regulatory, political, or economic reasons, it is undeniable that they were all drawn by the Mayor and then adopted wholesale by the Board as quickly as administrative process would allow *with zero substantive changes*. This clearly was not the product of any scientific expertise exercised by the Board.[46]

Were it otherwise, Agency Defendants would have responded to public comments by correcting at least the proposal's most blatant flaws. But the Board failed even to address the arbitrary treatment of two- and three-liter bottles as single servings, the absence of any objective measure of "nutritional value" to guide the distinction between exempt and banned "sugary drinks," the exemption of soy- but not rice- or almond-based dairy substitutes, or the completely irrational distinction between 16-ounce bottles (allowed) and 16.9-ounce/500-ml bottles (banned). During the proceedings below, the Board—without even hinting at health concerns—proclaimed that it would allow cups holding up to 17 ounces, rendering the retained prohibition on 16.9-ounce bottles even more arbitrary and capricious. R1718. This is not an exercise of any independent scientific

[46] *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.").

"expertise"—rather it verifies Agency Defendants were simply ushering through their "rulemaking process" a policy that was handed to them.

Agency Defendants argue that the "specialized expertise of the Board was required to analyze the scientific arguments made by the Department and those opposing the proposal." AOB 38. At best, this indicates the Board exercised its expertise only in defending the Ban, not in developing it. But there is reason to doubt this self-serving characterization of the administrative record given that the response to comments largely repeated what was said at the outset of the rulemaking. *See supra* 12-13.

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

III. THE BAN IS ARBITRARY AND CAPRICIOUS

An administrative regulation will be upheld "only if it has a rational basis and is not unreasonable, arbitrary or capricious." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). Agency action is arbitrary when it is "without sound basis in reason" or "taken without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). Judged under this standard, the Ban is unlawfully "arbitrary and capricious" because: (1) it applies arbitrarily only to select FSEs, allowing others to sell covered products in direct competition with covered facilities; (2) it irrationally excludes alcoholic and dairy beverages that

contain far more calories and are often served in larger portions than the covered beverages; (3) Agency Defendants failed to provide any scientific basis to support their 16-ounce size restriction; and (4) the Ban contains numerous other loopholes and classifications that render it irrationally under- and over-inclusive. The Supreme Court so held. R40. This Court should affirm.

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

Agency Defendants do not deny that the Ban's exclusion of grocery stores, convenience stores, corner markets, bodegas, and gas stations has *no relationship* to addressing obesity and *no rational basis* in health. A beverage has the same number of calories regardless of where it is purchased. Nonetheless, the Ban regulates on just that basis—prohibiting consumers from purchasing sugar-sweetened beverages greater than 16 ounces from a pushcart, food truck, deli, or restaurant, while permitting them to walk next door to 7-Eleven or the corner market and purchase a Big Gulp or any other beverage in any size desired. New York's courts have repeatedly condemned agency schemes premised on such nonsensical distinctions. *E.g.*, *Law Enforcement Officers Union Dist. Council 82 v. State*, 229 A.D.2d 286, 289-90 (3d Dep't 1997) (Department of Corrections 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).

Agency Defendants do not deny that the Ban would lead to unfair and arbitrary results. They just claim they could not do better because (notwithstanding its alleged "special powers") the Board lacks authority to pass a Ban on sugar-sweetened drinks that *is not* substantively arbitrary. That excuse is factually and legally inadequate. Agency Defendants assert that the MOU limits their ability to regulate grocery stores, convenience stores, bodegas, and markets. But, as explained *supra* 39, the MOU concerns a limited scope of food safety issues—food adulteration, food-borne diseases, and the like—and has nothing to do with policymaking. Agency Defendants point to nothing in the MOU suggesting it contemplates that the Department of Agriculture would exercise any authority over individuals' lifestyle choices to purchase and consume safe and lawful products, so the idea that the MOU divides authority between the agencies with respect to such regulation is fanciful.

Even if the MOU applied to this sort of regulation, moreover, it would not tie the Board's hands. Agency Defendants have previously used their regulatory authority to promulgate city-wide health rules that regulate all FSEs. *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"). Whatever the implications of the MOU for Agency Defendants' jurisdiction over the safety of the food supply, Agency Defendants claim to have enacted this rule on the basis of other alleged powers well beyond the scope of the MOU—such as their supervisory jurisdiction over "communicable and chronic diseases." Charter § 556(c)(2). The Board has never suggested that grocery stores are uniquely immune from the Board's regulations respecting *that*. That Agency Defendants chose not to promulgate a city-wide rule in this case evinces *their* choice (or really the Mayor's choice) to exclude supermarkets and convenience stores arbitrarily from the Ban. If they failed to recognize they had a choice, their action is even more clearly arbitrary and capricious. *See* CPLR § 7803 (review of "whether a determination…was affected by an error of law"); *Morse v. Schroeder*, 78 A.D.2d 725, 726 (3d Dep't 1980) (overturning action under Article 78 because grant of variance was premised on "legal[] erro[r]").

Agency Defendants' claim that they were merely regulating pursuant to the MOU is also incompatible with the text of the MOU, which envisions "cooperative efforts between the two agencies" to "assure comprehensive food protection" and "to avoid gaps in food surveillance." R608. Before the Supreme Court, "Petitioners argue[d] and respondents [did] not deny that the 'MOU' requires [Agency Defendants] to coordinate with the Department of Agriculture." R20. Yet "[Agency Defendants] offer[ed] no evidence of any prior attempts to

coordinate with the Department of Agriculture and Markets on the Portion Cap Rule." *Id.* at 14-15. On appeal, Agency Defendants claim—for the first time—that their responsibility to coordinate with the Department of Agriculture extends only to "resolv[ing] jurisdictional questions." AOB 29. But the MOU expressly envisions substantive, not just jurisdictional, coordination. *See* R612 ("Agriculture will employ standards of health and sanitation established by the State Commissioner of Health and incorporate these fully in its food inspection programs. In setting such standards, the State Commissioner of Health will solicit comments from Agriculture, particularly as related to the feasibility of implementation."); *id.* (Agriculture and Health shall "provide similar food protection standards in retail food operations"). Agency Defendants' failure to act consistently with the MOU not only casts doubt on their claimed reason for drawing arbitrary lines, but also is contrary to their obligation to cooperate and therefore arbitrary in its own right. This is particularly significant because, if any agency has the authority to regulate container sizes or food ingredients, it is the Department of Agriculture—not Agency Defendants. *See* N.Y. Agric. & Mkts. Law §18(5) (granting Commissioner of Agriculture power to "[e]stablish uniform tolerances or amounts of reasonable variation for containers of food"); *id.* at §§ 199-200 (food additives and ingredients); 1 N.Y.C.R.R. § 252.1(a)(3) (adopting federal standards, including 21 C.F.R. § 184.1854, providing that sugar-sweeteners

are safe and may be "used in food with no limitation other than current good manufacturing practice[s]").

Even if the Board's assertion as to its regulatory limits were accurate (it is not), that would provide no excuse for imposing an arbitrary rule. Otherwise, agencies could simply apportion their authority by agreement with other agencies—as Agency Defendants claim happened here—and then regulate in arbitrary ways that exempt favored businesses or politically powerful groups. *Cf. People v. Tibbitts*, 305 N.E.2d 152, 155 (Ill. 1973) ("The legislature cannot vest an administrative agency with the power in its absolute and unguided discretion to apply or withhold the application of the law or to say to whom a law shall or shall not be applicable."). The Supreme Court properly rejected that unacceptable and unlawful result.

It is also no answer to assert, as Agency Defendants do, that businesses need not worry because it is "improbable that consumers would seek out an alternative retailer" for the size or kinds of beverages they prefer. AOB 46. The Board is comprised of doctors and scientists, not economists or businesspersons. Their unsupported conjecture is no less arbitrary and irrational because it is quoted in a brief. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168 (rule resulting from political compromise rather than "documented, empirical" evidence lacked the "requisite rationality" for agency decision-making). By contrast, real businesses

reacted to the Ban with alarm, documenting the many ways in which its arbitrary and haphazard lines will unfairly strip away sales (of beverages and other products),[47] jobs,[48] customer goodwill,[49] and impose significant compliance costs.[50]

Agency Defendants' only other defense is to contend that it is permissible for a Rule to be "underinclusive" so long as it "address[es] a problem incrementally." AOB 47; *see amici* National Alliance for Hispanic Health Br. 19-20; National Association of Local Boards of Health Br. 11. It is true, of course, that agencies need not adopt "all or nothing" approaches to policy. AOB 48. But when they *do* draw lines, those lines cannot be arbitrary, irrational, or inconsistent with the purpose of the rule at issue.[51] Such a rule is "without sound basis in reason" and thus arbitrary. *Pell*, 34 N.Y.2d at 231.

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

The Supreme Court correctly held that other features of the Ban are similarly arbitrary. R40. The Ban would cover numerous sugar-sweetened beverages that

[47] R1684, R1700, R1703-04.

[48] R685, R1703-04, R1710.

[49] R1684-85, R1689-91, R1709-10.

[50] R1672-74, R1678-80, R1683-85, R1694-97.

[51] Agency Defendants' cases all involve line-drawing exercises that bore a directly rational basis to the purpose of the Rule, and are therefore inapposite. *E.g.*, *N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 347 (1991) (agency action requiring new applicant facilities to provide care to Medicare patients to "answer[] the concern that profit-making establishments… might neglect the needs of Medicaid patients," consistent with statutory purpose of "radical" legislation first permitting for-profit medical facilities in New York state).

have nutritional value (such as vitamin-fortified beverages, cranberry and grapefruit juices, and almond milk), yet exempt comparable beverages (such as orange juice and soy milk) as well as coffee drinks with nearly 300% of the calories of a 16-ounce soft drink and large milkshakes containing *eight-hundred* calories.[52] Although Agency Defendants claim that those dividing lines reflect a rationale premised on nutritional content, AOB 27, the Ban does not actually distinguish among beverages based on any nutritional benchmarks. To the contrary, it applies to beverages that have substantial nutritional value and exempts others that have little or none. Agency Defendants' reliance on a rationale that is not reflected in the Ban is itself arbitrary and capricious. *See, e.g.*, *Tripoli Rocketry Ass'n v. BATFE*, 437 F.3d 75, 77-82 (D.C.Cir. 2006) (agency method for "classifying materials" arbitrary and capricious where rationale lacked "coherence," definition "designate[d] no points of comparison," and "metric for classifying" was not provided in regulation or statute).

Further still, the "loopholes inherent in the Rule"—unlimited purchases, unlimited refills, exclusions of calorie-laden milkshakes and fancy coffee drinks—"defeat and…serve to gut the purpose of the Rule." R40; *see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking law that would "directly

[52] 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).

undermine and counteract" its purpose). It is arbitrary to promulgate a rule so unmoored from its asserted rationale, particularly where its classifications undermine or counteract that rationale and produce senseless and illogical consequences. *See Kelly*, 155 Misc.2d at 655 (rule must "bear some rational relationship to the goals sought to be achieved"). Indeed, members of the Board themselves recognized these absurdities. *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.").

Agency Defendants also exempt alcoholic beverages, many of which have far more calories per ounce than covered beverages. There is no health-based reason to prohibit a restaurant from serving a 20-ounce soft drink, but allow the exact same restaurant to serve the exact same drink with a shot of rum. Agency Defendants' assertion that they lack authority to regulate alcoholic beverages again rings hollow. The Board previously asserted jurisdiction to mandate health warnings concerning the dangers of consuming alcohol during pregnancy, R.C.N.Y. tit. 24, § 1-02, and promulgated other regulations that pertain to the consumption of alcohol, R.C.N.Y. tit. 24, § 4-06 (influence of alcohol while on a

horse), *id.* § 165.21(f) (similar); *id.* § 165.41(u)(2)(I) (similar); *id.* § 165.63(h) (similar). Further, because the Ban (if it were to cover alcoholic drinks) would broadly apply to all establishments and beverages, it would fit squarely within the permissible realm of general regulations not preempted by state alcohol laws. *E.g.*, *Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 74 N.Y.2d 761, 763 (1989) ("[E]stablishments selling alcoholic beverages are not exempt from local laws of general application.").

C. Other Provisions Of The Ban Are Also Arbitrary And Capricious

Agency Defendants failed to articulate any scientific basis justifying the 16-ounce line at which they cap portions, for applying the same size limit to bottles as well as single-serving cups, or for the Ban's many bizarre loopholes. Agency Defendants have claimed that the Ban is designed to target obesity. But they never articulated a scientific basis for prohibiting the purchase of soda at 16 ounces, rather than 12, or 16.9 (500 ml), or 20. They certainly cannot rely on the bromide that a line must be drawn somewhere, having declared in the midst of the Supreme Court litigation that they would allow 17-ounce cups (while failing to provide any reason why 16.9-ounce bottles would still be banned). Agency Defendants also have never explained why the Ban treats two-liter bottles with replaceable caps and pitchers of soda identically to single-serving cups, when the former are plainly for sharing.

The Ban's numerous loopholes are equally irrational. Agency Defendants' Rule contains no restrictions on (1) free refills; (2) the number of beverages an individual can buy at one time; or (3) the amount of sweetener an individual may add to his or her drink. Calories are calories, 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 rule-making. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168. Moreover, the sheer ease with which consumers can end-run the Ban strips it of any realistic likelihood of reducing caloric consumption, "directly undermin[ing] and counteract[ing]" the Ban's objective. *Rubin*, 514 U.S. at 489.

CONCLUSION

For the reasons stated above, the Supreme Court's decision should be affirmed.

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