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.

BRIEF OF *AMICI CURIAE* THE NEW YORK STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE HISPANIC FEDERATION, THE U.S. HISPANIC CHAMBER OF COMMERCE AND THE MEXICAN AMERICAN GROCERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-PETITIONERS-RESPONDENTS' BRIEF

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Amici Curiae The New York State Conference of the National Association for the Advancement of Colored People (the "New York State Conference of the NAACP"), the Hispanic Federation, the U.S. Hispanic Chamber of Commerce (the "USHCC"), and the Mexican American Grocers Association ("MAGA") (together, "*Amici*") respectfully submit this brief in support of Plaintiffs-Petitioners-Respondents, and request that this Court affirm the trial court's March 11, 2013 Order, which granted Plaintiffs-Petitioners-Respondents' Verified Article 78 and Declaratory Judgment Petition (the "Petition").

PRELIMINARY STATEMENT

Amici have fought long and hard to protect and enliven the voices of their community members in the political system. But the City Department of Health and Mental Hygiene ("DOH"), the City Board of Health, and unelected appointees, circumvented those voices, along with the voices of millions of New Yorkers, when the Board told New Yorkers that it would selectively and unfairly harm small and minority-owned businesses by discriminatorily preventing them from selling large "sugary beverages" while allowing their large competitors such as 7-11 and grocery stores to carry the banned sugary beverages. The passage of this rule enacted by the Board of Health stripped New Yorkers of their democratic rights. This Court should affirm the trial court's decision invalidating the Ban.

BACKGROUND

Just one day before celebrating Friday, June 1, 2012 as "New York City Doughnut Day," and at a time when cuts continue to be made to physical education programs in New York City schools, Mayor Bloomberg declared war on super-sized beverages. Purportedly to combat obesity, the Mayor proposed to prohibit New York City's "food service establishments"—a defined term that includes restaurants, bodegas, delis, fast-food franchises, and street carts, many of which are small, minority-owned businesses—from selling sugary beverages in any cup or container that can hold more than 16 ounces (the "Ban"). The Board of Health ultimately enacted the Mayor's proposal pursuant to its rule-making authority and without amendment after a perfunctory notice-and-comment period. *See* R.C.N.Y. tit. 24, § 81.53(a). New York establishments that disobey the prohibition are subject to a fine of up to $200 for every violation. *Id.* § 81.53(d).

The Ban is overbroad: it prohibits the covered businesses from offering customers a "self-service" cup or container that is able to contain more than 16 ounces, regardless of the type of beverage the consumer might fill it with—whether unsweetened tea, diet drinks, or even water. *Id.* § 81.53(b). The Ban is also dramatically under-inclusive: it exempts all alcoholic beverages of any size, as well as beverages (again, of any size) that contain more than 50% of milk or a milk substitute, which would include, for example, milkshakes and high-calorie

coffee and chocolate drinks that may contain many more calories than found in a typical sugar-sweetened beverage. *Id.* § 81.53(a). Additionally, certain other establishments, including large, chain grocery and convenience stores, are not required to comply with the Ban at all because they are not "food service establishments." *See* R.C.N.Y. tit. 24, § 81.03(s); *see also* Ex. U to Petition. New Yorkers thus remain free to purchase a 32-ounce Big Gulp filled to the brim with a high-calorie, sugar-sweetened beverage from a neighborhood 7-Eleven, but they are not free to purchase a 20-ounce soda from their local bodega. The Ban threatens to "yield an adverse economic impact for small businesses." *See, e.g.*, Letitia James & Melissa Mark-Viverito, *Why the Soda Ban Won't Work*, Huffington Post (July 5, 2012), *at* http://www.huffingtonpost.com/letitia-james/nyc-soda-ban_b_1652169.html; *see also* Testimony of City Councilmember Letitia James at the Public Hearing on Soda Ban, N.Y. City Dep't of Health and Mental Hygiene, July 24, 2012, at p. 37:13-25.

Consistent with wide-spread public critique of the proposed Ban, the Board of Health received more than 6,000 comments in opposition to the Ban before it was enacted, including letters from numerous members of the City's legislative branch, the City Council, and other elected officials, as well as community leaders, local businesses, and individual consumers. Some of those providing comments on the proposed Ban expressed deep concern over the Board's threatened usurpation

of legislative power and the apparent end-run around the legislative process; indeed, the City Council had previously thwarted the Mayor's *several* prior attempts to impose similar measures. *See, e.g.*, N.Y.C. Council Res. No. 1265-2012 (N.Y. Mar. 28, 2012); N.Y.C. Council Res. No. 1264-2012 (N.Y. Mar. 28, 2012); N.Y.C. Council Res. No. 0768-2012 (N.Y. Apr. 6, 2011). Others expressed outrage over the unprecedented governmental interference with personal choice and freedom, as well as its threatened disparate impact on minority-owned businesses. Nonetheless, the Rule passed by a vote of 8-0, with one abstention.

On October 11, 2012, Plaintiffs-Petitioners-Respondents commenced this action seeking to invalidate the Ban. Following extensive briefing and oral argument, on March 11, 2013, the trial court issued a detailed thirty-six page Order, which invalidated the Ban and enjoined Defendants-Respondents-Appellants from implementing or enforcing it. The trial court correctly found that the Board impermissibly acted in a legislative capacity in enacting the Ban, thereby violating the separation of powers between the legislative branch and executive branch, and correctly concluded that the Ban was arbitrary and capricious. On March 12, 2013, this appeal ensued.

INTEREST OF *AMICI*

Amici are organizations who believe that the Ban is misguided, under-inclusive, and carries with it many unintended consequences that could harm their

constituents. Obesity rates in both the African-American and Hispanic communities exceed the national average, and the New York State Conference of the NAACP, the Hispanic Federation, the USHCC, and MAGA are devoted to finding an effective, comprehensive solution to the public health crisis facing their communities. All of these organizations believe that instead of enacting this Ban through an executive rule-making process, the City should address the issue of obesity in a comprehensive way in the legislative arena. In particular, these organizations believe that any serious effort to address the crisis of obesity must feature increased funding for and improvements to health and physical education programs in schools; it must not threaten disproportionate harm to small businesses, many of which are minority-owned.

Founded in 1909, the NAACP is a non-profit membership corporation chartered by the State of New York. The NAACP is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social and economic equality of all persons, and to eliminate racial discrimination. The obesity epidemic is acute within the African-American community. To tackle this public health crisis, the NAACP has developed a holistic educational program called Project HELP (Healthy Eating, Lifestyles, and Physical Activity). The program is designed to improve the overall quality of life for African-Americans through health education, focusing on educating participants on the risk factors that

lead to chronic diseases, including obesity, diabetes, hypertension, stroke, and cardiovascular disease.

The New York State Conference of the NAACP represents all of the NAACP branches in New York State. The New York State Conference's long-time president, Dr. Hazel N. Dukes, decried the Ban as "neither prudent nor helpful" in an editorial reprinted in the Huffington Post. *See* Hazel N. Dukes, *Sugar-Sweetened Beverages Ban: Short-sighted and Misdirected,* Huffington Post (Aug. 23, 2012), at http://www.huffingtonpost.com/hazel-n-dukes/ny-soda-ban_b_1834816.html. Dr. Dukes also lamented the policy decision to impose a discriminatory Ban on beverage sales, as opposed to increasing funding for health education to combat obesity, and she highlighted that the Ban would undoubtedly have a disproportionate impact on small and minority business—"those who can least afford it." *Id.*

The Hispanic Federation is a network of nearly 100 Latino-serving organizations throughout the northeast United States. The organization's mission is to empower and advance the Hispanic community. The Hispanic Federation provides grants to a broad network of Latino non-profit agencies serving the most vulnerable members of the Hispanic community and advocates nationally with respect to the vital issues of education, health, immigration, economic empowerment, civic engagement, and the environment. Like the NAACP, the

Hispanic Federation is concerned about the obesity epidemic, and it promotes numerous health and wellness initiatives aimed at improving the health and well-being of its constituents.

The Hispanic Federation's president, Jose Calderon, has also been outspoken in opposing the Ban. *See* Jose Calderon, *Obesity Demands Our Attention*, Fox News Latino (July 3, 2012), at http://latino.foxnews.com/latino/health/2012/07/03/jose-calderon-education-to prevent-obesity/. Mr. Calderon believes that in addition to discriminating against mom and pop "bodegas" operated largely by Latino small business owners, the Ban is also arbitrary when it comes to which sugary drinks or products it targets. According to Mr. Calderon, the Ban is so flawed—riddled with giant loopholes and exceptions—that it will do little to tackle the real challenge our community faces. More importantly, Mr. Calderon urges that the Ban does nothing to promote action in areas that can make a real difference in addressing obesity in our city: health education and physical exercise in our schools, and serious and systemic nutrition education in our communities.

Founded in 1979, the USHCC's mission is to foster Hispanic economic development and create sustainable prosperity for the benefit of the American society. The USHCC actively promotes the economic growth and development of Hispanic entrepreneurs and represents the interests of over three million Hispanic-

owned businesses across the United States that contribute in excess of $465 billion to the American economy each year. It also serves as the umbrella organization for more than 200 local Hispanic chambers and business associations in the United States and Puerto Rico.

The leadership of the USHCC has publicly opposed the Ban, stating that "[a]uthorities should focus on programs that educate on the importance of exercise and healthy eating habits. Knee-jerk bans defeat the purpose of influencing healthier lifestyles in the long run." *See United States Hispanic Chamber of Commerce Commends New York's Strike Down of Sugary Drinks Ban*, Globe Newswire (April 5, 2013), at http://globenewswire.com/news-release/2013/04/05/536247/10027576/en/The-United-States-Hispanic-Chamber-of-Commerce-Commends-New-York-Court-s-Strike-Down-of-Sugary-Drinks-Ban.html.

Founded in 1977, MAGA is a national trade association that has fought for many years to protect and preserve the rights of Hispanic consumers and the businesses that provide them goods, services, and economic empowerment. Guided by its mission statement, which provides that "Our business activities must make good social sense and our social activities must make good business sense," MAGA opposes the Ban.

ARGUMENT

THE TRIAL COURT'S ORDER INVALIDATING THE BAN SHOULD BE AFFIRMED BECAUSE THE BAN'S ENACTMENT VIOLATED FUNDAMENTAL SEPARATION-OF-POWERS PRINCIPLES THAT RESERVE CRITICAL POLICY DECISIONS TO THE LEGISLATIVE BRANCH.

Under the State's Constitution, N.Y. Const. Art. IX, § 1, it is within the legislature's domain to "make the critical policy decisions" for the citizens of New York. *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 821-22 (2003). Core separation-of-powers principles dictate that "the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency." *Boreali v. Axelrod*, 71 N.Y.2d 1, 10 (1987). Nor may the executive branch, including its administrative agencies, act *ultra vires*—i.e., the executive may not usurp the role of the legislative branch for itself nor take unilateral action without a valid delegation of legislative power. *Id*. at 9. These obligations apply with equal force to municipalities like the City of New York, and their legislative and executive bodies. *See* N.Y.C. Charter ch.2, § 21; *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 356 (1985) (New York City Charter "provide[s] for distinct legislative and executive branches").

As the trial court correctly held, Defendants-Respondents-Appellants far exceeded their prescribed constitutional role when the Board of Health enacted the Ban. Few policy decisions are of greater import or are as critical as the one

Defendants-Respondents-Appellants attempted to tackle: what to do about the obesity epidemic. But that is precisely why this unprecedented legislation deserved the deliberation engendered by the legislative process. "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; *see also Univ. of Penn. v. E.E.O.C.*, 493 U.S. 182, 189 (1990) ("balancing of conflicting interests . . . is particularly a legislative function"). The legislative branch, and not the executive, is in the best position to "weigh[] the concerns of . . . affected businesses and the general public," including affected small and minority-owned businesses; an administrative agency may not, "without any legislative guidance, reach[] its own conclusions about the proper accommodation among those competing interests." *Boreali*, 71 N.Y.2d at 6. When the administrative body "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," it cannot act on its own. *Id.* at 12. It did so here, and therefore, the trial court correctly found that the Ban cannot stand.

Critical policy decisions like the ones the Ban purports to address are reserved to the legislature for good reason. The legislative branch is governed by "precise rules of representation, member qualifications . . . and voting procedure" that make it "most capable of responsive and deliberative lawmaking." *Loving v.*

United States, 517 U.S. 748, 757–58 (1996). Indeed, "[i]ll suited to that task" is the executive, "designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control." *Id.* at 758. Critically, "[t]he clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.*

On this matter of utmost importance, the legislative process worked as it should. A majority of New Yorkers generally oppose the ban on large, sugar-sweetened beverages. *See* Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. Times, Aug. 22, 2012, Ex. D to Petition. Reflecting popular opinion, similar attempts to enact measures targeting high-calorie sodas and foods have failed, time and again, to find the necessary votes to pass the New York City Council and the New York Legislature. *See* Petition ¶¶ 37-38.

Defendants-Respondents-Appellants, quite literally, attempted to take this personal and policy decision out of the hands of the people of New York and the legislators elected to represent them. The City's unelected administrative body enacted a Rule with the force of law without fully considering the Ban's pros and cons, and without taking into account the interests of all New Yorkers, including

those who own and operate the small businesses disproportionately affected by this Ban. The legislative process is one that ensures those voices are heard and ensures that elected City Council members can represent the interests of their constituents—including, for example, Councilwoman James, who opposed the Ban largely because of its threatened impact on the minority small business-owners she represents. *See* Testimony of City Councilmember Letitia James at the Public Hearing on Soda Ban, N.Y. City Dep't of Health and Mental Hygiene, July 24, 2012, at p. 37:13-25. Defendants-Respondents-Appellants deprived all New Yorkers of a thoughtful, comprehensive, and responsive solution to the obesity crisis that could have—and should have been—borne from legislative deliberation. *See Loving*, 517 U.S. at 757-58.

Defendants-Respondents-Appellants' failure to heed the City Council resulted in an overbroad, and under-inclusive proposal that, if reinstated by this Court, would impose an unprecedented interference with personal choice. The Ban oversimplifies a complex health problem by arbitrarily attempting to restrict the amount of soda that will be consumed at certain food establishments, but not others. And while the Ban prohibits covered businesses from providing a single container or cup with more than 16 ounces of a sweetened beverage, businesses would be free to sell a consumer an unlimited number of 16-ounce or smaller containers or provide unlimited refills. The Ban is, at best, a superficial and

ineffective attempt to address a multi-layered problem. As the trial court correctly reasoned,

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

See Order and Judgment ("Order"), *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, Index No. 653584/12, at p. 34 (Sup. Ct., N.Y. Cty. March 11, 2013). And at its worst, the Ban arbitrarily discriminates against citizens and small business owners in African-American and Hispanic communities.

Had the City Council had an opportunity to further its efforts to develop a reasoned response to this public health crisis—i.e., had Defendants-Respondents-Appellants not usurped its authority—the City Council may well have come up with a plan of attack that was responsive to community interests, protective of minority-owned and minority-operated small businesses, and sensitive to public concern—and one that has a real chance at meaningfully addressing this public health crisis. The City Council is compelled to listen to its constituents and is ultimately held accountable when it does not. Deprived of the opportunity to consider the wisdom of this new law (and, indeed, having already declared it

unwise), the Council also was deprived of the opportunity to elect among possible alternatives—including developing new educational programs that would empower consumers to make good health decisions for themselves and not dictate what those choices must or should be. While obesity is a serious health concern, especially in minority communities, our emphasis and efforts should be targeted at addressing the issue more comprehensively, including through education and community programs, like the NAACP's Project HELP and similar programs promoted by the Hispanic Federation and the USHCC, that encourage physical activity and a balanced diet.

This sweeping regulation would burden and disproportionally impact minority-owned businesses at a time when these businesses can least afford it. Under the Ban, bodegas, delis, fast-food restaurants, and street carts are prohibited from selling certain sugar-sweetened beverages in containers larger than 16 ounces, but grocery stores, convenience stores, and gas stations are not. Consequently, many small, minority-owned food service establishments would be at a competitive disadvantage, while 7-Elevens, grocery stores, and gas stations could promote their ability to sell beverages of any size to consumers without restriction. Perversely, establishments that may still sell large drinks could gain a competitive advantage that would ironically undermine Defendants-Respondents-

Appellants' attempt to combat obesity by curtailing the amount of soda consumption in the City.

* * *

The Ban sets a dangerous precedent for what other types of laws and regulations may be enacted in the future by executive or administrative fiat. As the trial court correctly concluded:

> To accept the respondents' 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 . . . The [Ban], if upheld, would create an administrative Leviathan and violate the separation of powers doctrine. The Rule would not only violate the separation of powers doctrine, it would eviscerate it. Such an evisceration has the potential to be more troubling than sugar sweetened beverages.

(Order, at p. 35.)

Amici have fought long and hard to protect their constituents from unchecked exercises of power by local government officials in the name of "public good." If the trial court's decision to strike the Ban is not affirmed, one can only imagine what other types of regulations and laws city mayors throughout this State could attempt to enact under the guise of public health. The Ban is a slippery slope towards government-mandated regulations that curtail consumer choice and unfairly threaten small businesses without full and open debate by the people's

various elected representatives. The trial court's decision setting aside the Ban should be affirmed.

CONCLUSION

For all of these reasons, as well as those set forth in Plaintiffs-Petitioners-Respondents' brief and the trial court's Order, *Amici* urge the Court to affirm the trial court's decision striking down the Ban.

Dated: April 25, 2013

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