EXHIBIT A

To Be Submitted By:
Clifford Y. Chen

New York County Clerk's Index No. 653584/12

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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

Petitioners-Respondents,

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

against

(Additional Caption On the Reverse)

BRIEF OF *AMICI CURIAE* NEW YORK CITY COUNCIL MEMBERS MARIA DEL CARMEN ARROYO, CHARLES BARRON, FERNANDO CABRERA, LEROY G. COMRIE, JR., JULISSA FERRERAS, HELEN D. FOSTER, DANIEL R. GARODNICK, VINCENT J. GENTILE, ROBERT JACKSON, LETITIA JAMES, PETER KOO, OLIVER KOPPELL, KAREN KOSLOWITZ, MELISSA MARK-VIVERITO, DARLENE MEALY, ROSIE MENDEZ, MICHAEL C. NELSON, ANNABEL PALMA, DIANA REYNA, DONAVAN RICHARDS, YDANIS RODRIGUEZ, DEBORAH ROSE, AND MARK WEPRIN

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

Respondents-Appellants.

TABLE OF CONTENTS

PAGE NUMBER

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

INTEREST OF *AMICI CURIAE* 3

ARGUMENT 4

I. The Board Does Not Possess Any Extraordinary, Legislative Powers To Restrict Access to Safe and Legal Foods 4

A. The Board's Claim of Extraordinary Legislative Powers Would Usurp the City Council's Role as New York City's Legislative Body 5

B. The Board Has No Legislative Powers To Enact the Ban 9

II. The Ban Establishes Legislative Public Policy That Only the State or City Legislature May Enact 14

A. The Ban Is Largely Based on Social, Economic, and Other Non-Health-Related Considerations 15

B. The Ban Creates a Novel Regulatory Regime Without Legislative Guidance or Approval 21

C. The Issue of Sugar-Sweetened Beverage Consumption Is an Area of Ongoing Legislative Debate 27

D. The Board's Expertise Was Not Necessary To Make the Fundamental Policy Decisions To Target a Safe and Legal Food, and To Limit Its Availability by Capping Portion Sizes 29

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Am. Kennel Club, Inc. v. City of New York,
Index No. 13584/89 (Sup. Ct. N.Y. Cty. Sept. 19, 1989) 12

Boreali v. Axelrod,
71 N.Y.2d 1 (1987) .... passim

Carr v. Schmid,
105 Misc. 2d 645 (Sup. Ct. N.Y. Cty. 1980) 12

Grossman v. Baumgartner,
17 N.Y.2d 345 (1966) 13

Health Ins. Ass'n v. Corcoran,
154 A.D.2d 61 (3d Dep't 1990) 6

Metzen v. United States,
19 F.3d 795 (2d Cir. 1994) 17

N.Y.C. Board of Estimate v. Morris,
489 U.S. 688 (1989) 14

Paduano v. City of New York,
45 Misc.2d 718 (Sup. Ct. N.Y. Cty. 1965) 13

People v. Weil,
286 A.D. 753 (1st Dep't 1955) 13

Rodriguez v. Popular Democratic Party,
457 U.S. 1 (1982) 8

Sailors v. Board of Education,
387 U.S. 105 (1967) 9

Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.,
191 N.Y. 123(1908) 10

STATUTES AND SESSION LAWS

1967 N.Y.C. Local Law No. 127 12

1977 N.Y.C. Local Law No. 25 12

1979 N.Y.C. Local Law No. 5 12

2008 N.Y.C. Local Law No. 9 8

2009 N.Y.C. Local Law No. 51 7

2011 N.Y.C. Local Law No. 11 8

2011 N.Y.C. Local law No. 74 7

LEGISLATIVE MATERIALS

N.Y.C. Council Res. No. 0768-2011 28

N.Y.C. Council Res. No. 1265-2012 27

Transcript, Minutes of the Committee on Health, New York City Council (Mar. 1, 2007) 23

REGULATIONS

R.C.N.Y. tit. 24, § 173.13 25

OTHER AUTHORITIES

Final Report of the New York City Charter Commission, January 1989 - November 1989 (Mar. 1990) 11

Introductory Notes to New York City Health Code, Title II 25

Kelly D. Brownell, *et al.*, Personal Responsibility And Obesity: A Constructive Approach To A Controversial Issue, 29 HEALTH AFFAIRS No. 3 (2010) 20

National Institutes of Health, Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report (1998)..... 7, 25

PRELIMINARY STATEMENT

Defendants make the extraordinary and troubling claim that they hold powers that the Constitution and City Charter confer only upon the elected legislature. Defendants' theory, if accepted, would fundamentally alter the relationship and interactions between New York City's executive and legislative branches – at the expense of the elected City Council. As current Council Members, *amici curiae* encourage this Court to reject Defendants' claims that the Board of Health (the "Board") – an appointed executive body – holds the power to establish laws and public policy for the City. Such power rests with the City Council.

Thus, this Court should affirm the trial court's order invalidating the Board's enactment of New York City Health Code § 81.53 (referred to by the parties as the "Ban," the "Rule," or the "Portion Cap Rule"). As the trial court correctly concluded, the Board does not hold any extraordinary legislative powers, and the Board's enactment of the Ban violated the separation of powers under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987).

Amici curiae Council Members are particularly concerned by the Board's asserted intrusion into the City Council's legislative authority. *Amici curiae* are familiar with the difficult, varied, and politically sensitive issues that must be resolved in order to impose new laws with far-reaching and novel implications on social, economic, and public health

concerns. The Ban is exactly this kind of law. The decision whether to enact the Ban was therefore a question for the City Council.

As an initial, but critically important, matter, the Board does not possess any legislative powers of its own. The plain text of the New York City Charter (the "Charter") identifies the City Council as the sole legislative body for New York City. Numerous judicial decisions confirm this view. The older case law relied upon by Defendants does not actually recognize that the Board holds any inherently legislative powers, and in any event, these cases do not apply to the modern governmental structure of the City. Thus, the Board's actions are subject to an ordinary separation-of-powers analysis under *Boreali*.

Such an analysis establishes that the Ban's enactment embodied impermissible legislative policy-making. The Board weighed public health interests with a variety of other social and economic concerns when it enacted the Ban. Similar to other anti-obesity legislation that the City Council has considered in the past, the Board necessarily balanced these interests when it decided to target certain sugar-sweetened drinks – food that is safe and legal to consume – and when it selected a specific regulatory mechanism over other potential policies in order to discourage consumption of these drinks. As *amici curiae* can attest, the City Council has itself considered various policy options with similar aims. The Council's rejection of such measures simply reflects a lack of agreement that it

is appropriate to target such drinks specifically in order to address obesity, in light of the myriad significant and competing interests surrounding laws like the Ban.

If upheld, the Ban would set a dangerous precedent. Defendants contend that the Board was delegated legislative authority over any matter affecting health. But this logic goes too far. Almost any policy decision affecting individual behavior or social and economic choices affects health in some way. This is particularly true for conditions like obesity that are strongly tied to individual behavior and culture. While some individual behavior might very well be worthy of governmental attention, it is critical that these decisions be made by the legislature in the first instance so that any public health concerns may be properly weighed against the social and economic costs of such regulation.

For these reasons, this Court should affirm the trial court's invalidation of the Ban.

INTEREST OF *AMICI CURIAE*

Amici curiae are twenty-three individual New York City Council Members. The New York City Council is the lawmaking body of New York City. Each of its fifty-one elected Council Members represents a Council District in one of the five New York City boroughs. *See* New York City Charter ("N.Y.C. Charter") §§ 21-22.

The *amici curiae* Council Members have a substantial interest in 1) preserving the separation of powers between the Council and executive agencies; and 2) protecting the

interests of businesses and residents in their districts. The Ban implicates both of these concerns. In particular, the *amici curiae* Council Members are deeply troubled by the vast assertion of combined legislative and executive authority that Defendants have claimed in their arguments before this Court. In this regard, these *amici curiae* can explain how this broad claim of authority improperly infringes the City Council's role as the legislative body of New York City, and that the Board's powers are no greater than other executive agencies. The *amici curiae* Council Members can also explain the City Council's own efforts to enact measures similar to the Ban, and how the Ban embodies intensely political decisions that are both fundamentally legislative and far beyond the scope of any grant of authority to Defendants.[1]

ARGUMENT

I. The Board Does Not Possess Any Extraordinary, Legislative Powers To Restrict Access to Safe and Legal Foods

To justify their claim of authority to enact the Ban, Defendants argue that the Board wields "extraordinary authority" that is "legislative in nature" and insist that – even if this Court concludes the Board is not immune from separation-of-powers requirements – this Court must consider certain factors under *Boreali* with "considerable sensitivity" in

[1] No party or counsel for a party to this action authored this Brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this Brief.

light of Defendants' broad authority. *See* Appellants' Br. at 16, 30-31. Defendants' reliance on such expansive views of their authority reflects the extraordinary nature of the Ban – it imposes a legislative public policy with no approval from a legislative body. Under well-established principles of New York law, which apply to the Board no differently than any other agency, the Board's well-defined, but limited, public health powers simply do not permit such unilateral action.

A. *The Board's Claim of Extraordinary Legislative Powers Would Usurp the City Council's Role as New York City's Legislative Body*

In order to circumvent these limits on the Board's authority, Defendants now urge this Court to recognize expanded legislative powers on the part of the Board. But under Defendants' view, the Board's authority would be startlingly broad – it would permit the Board to impose legislative enactments on any matter affecting health in any way. A Board with such powers could essentially supplant the Council's role as the City's legislative body on a wide array of issues. The prospect of such a combined legislative-executive body is deeply alarming to the *amici curiae* Council Members – a concern the trial court correctly shared. This Court should similarly recognize that the Board does not enjoy such broad legislative powers, and that its actions are subject to an ordinary separation-of-powers analysis under *Boreali*.

Defendants claim that the Board holds legislative authority – perhaps sole legislative authority – to impose any law "affecting the health in the city of New York."

Appellants' Br. at 16-17 (quoting N.Y.C. Charter §556). They also rely on specific Charter provisions directing the Board to "supervise the reporting and control of communicable and chronic diseases," and to "supervise and regulate the food and drug supply of the city." N.Y.C. Charter §556(c)(2) & (9); Appellants' Br. at 18. Defendants argue that based on these provisions, and on language from decades-old case law, the Board may properly enact legislative policies like the Ban – notwithstanding the requirements set forth by the Court of Appeals in *Boreali*.

This is not so.

Unlike the enactments examined in Defendants' cases, the Ban represents a new and novel attempt by the Board to leverage its general power to regulate "matters affecting health" into authority over any behavior that might be associated with chronic disease, or even with risk factors for conditions like obesity and obesity-related ailments. But the range of such behaviors is vast, for "hardly any aspect" of behavior "does not interrelate with public health policy" in some way. *See Health Ins. Ass'n v. Corcoran*, 154 A.D.2d 61, 72 (3d Dep't 1990). It is well-recognized, after all, that a range of behavioral, social, and cultural factors are all tied to conditions like obesity. *See* National Institutes of Health, Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report ("The Evidence Report"), at xi

(1998).[2] So while Defendants justify the Ban based on their belief that drinking sugary beverages contributes to dangerous chronic diseases, so too does eating fatty foods, exercising too infrequently, watching too much television, or smoking.

Importantly, Defendants do not articulate any principle that would limit their ability to regulate such behaviors directly and unilaterally, and with no input from the City Council. Thus, Defendants' expansive interpretation of the Board's powers would not prohibit policies even more intrusive than the Ban. Under their view, the Board could enact laws mandating servings of vegetables with restaurant meals or requiring exercise prior to food purchases. After all, these requirements affect health in similar ways as the sugar-sweetened beverage consumption that the Ban targets. But even if such activities are worthy of encouragement, they cannot be enforced as law without any involvement by elected legislative representatives.

Defendants' interpretation of the Charter is also troubling because under their view, a wide variety of the City Council's own past enactments would now fall under the Board's claim of legislative authority. For example, in 2009 and 2011, the City Council passed new laws requiring bicycle parking for parking garages over a certain size. *See* 2011 N.Y.C. Local Law No. 74; 2009 N.Y.C. Local Law No. 51. Although parking regulations might seem far afield of the Board's authority, efforts to encourage bicycling such as

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[2] *Available at* http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf.

bicycle parking mandates certainly affect the health of city residents. Indeed, the Department of Health specifically tracks bicycling by New Yorkers as part of its Community Health Survey.[3] But if Defendants' expansive claim of authority is valid, then there was no need for the Council to go through the difficult legislative process to craft a compromise over these bicycle parking rules. The Board could have issued the very same regulations on its own as a matter affecting health. For similar reasons, under Defendants' view, the Board alone could have enacted policies like the Council's "green carts" legislation in 2008, which sought to increase the accessibility of fruits and vegetables in neighborhoods with "few healthy food options close to home." 2008 N.Y.C. Local Law No. 9, Council Int. No. 665-A. And even the Council's efforts to develop smoking bans would fall under the Board's proposed unilateral authority under Defendants' new vision of the Board's powers, notwithstanding *Boreali*. *See, e.g.*, 2011 N.Y.C. Local Law No. 11, Council Int. No. 332-A (barring smoking from the City's public parks and plazas).

It would be untenable, of course, to vest an executive body – whose members are appointed by the Mayor – with such broad legislative powers.[4] On many legislative

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[3] *See, e.g.*, New York City Department of Health and Mental Hygiene, Community Health Survey 2011, *available at* https://a816-healthpsi.nyc.gov/SASStoredProcess/guest?_PROGRAM=%2FEpiQuery%2FCHS%2Fchsindex&year=2011.

[4] Such a legislative body, with appointed rather than elected members, might even run afoul of federal constitutional requirements. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 & n.9 (1982) (noting that it was an "open . . . question 'whether a State may constitute a local legislative body through the appointive rather than the elective process'" (emphasis omitted) (quoting *Sailors v. Board of*

matters, such a body would wield essentially unchecked powers, and could act unencumbered of the essential deliberative and political concerns that the City Council is designed to represent, to accommodate, and to balance. Thus, it is the view of the *amici curiae* Council Members that the Board does not possess any legislative powers to enact measures like the Ban, which aim to restrict the availability and consumption of perfectly safe and legal foods. Only the City Council has the authority and institutional competence to strike a proper balance between the many intensely political considerations – individual liberty and privacy interests, economic interests, and public health concerns, among others – that legislation like the Ban would impact. Importantly, while the state may interfere with such fundamental interests in some cases, the decision to do so is a matter of important public policy. Such decisions must be, and are, reserved to the elected legislature.

B. The Board Has No Legislative Powers To Enact the Ban

The text and history of the City Charter, and numerous judicial opinions, confirm that the Board has no legislative powers to enact the Ban. They establish that the City Council is the only body within New York City that may exercise such legislative authority.

Education, 387 U.S. 105, 109-10 (1967))). To the best of *amici curiae*'s knowledge, this question remains an open one.

The City Charter states unambiguously that the City Council is "the legislative body of the city." N.Y.C. Charter § 21. The Charter does not purport to grant legislative authority – let alone sole legislative authority – to any other city body. Specifically, the Charter does not ascribe any legislative powers to the Board. Instead, section 556 of the Charter permits the Board only to "regulate" matters affecting health. The Board's authority to amend the health code is subject to this limitation imposed by the Charter. *See* N.Y.C. Charter § 558(b)-(c).

It is true that the 1936 Charter Revision Commission and a few subsequent judicial decisions described the Board's powers in legislative terms, as Defendants note. *See* Appellants' Br. at 17-21. But this does not mean that the Board actually held any inherently legislative powers, for such powers would plainly violate the fundamental separation of powers established by the State's Constitution. As the Court of Appeals stated in the early 20th century, "[a] review of the . . . judicial authorities in this state . . . clearly shows that . . . powers inherently and exclusively legislative cannot be delegated . . . ." *Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N.Y. 123, 138 (1908). Thus, Defendants' cases are best understood only to address straightforward, permissible delegations of authority by the Legislature. The fact that older court decisions occasionally described such delegated powers as "legislative" is simply an artifact of an older nomenclature. In modern parlance, these were merely

administrative rulemaking powers, exercised pursuant to valid legislative delegations. Executive agencies like the Board do not hold, and could never have held, the inherently legislative policymaking powers that Defendants now claim.

Moreover, regardless of the powers the Board might have once held, the modern structure of the City's government establishes a far stronger City Council role, which was not present at the time of the earlier court decisions on which Defendants rely. All of these decisions pre-date the strengthening of the City Council in recent decades, and the consolidation of legislative authority in the Council. Prior to 1989, for instance, the Council had shared legislative authority with the Board of Estimate. But following federal court decisions finding that the voting structure of the Board of Estimate was unconstitutional in light of its legislative powers, New York City voters that year approved revisions to the Charter that the 1989 Charter Revision Commission described as "the most dramatic revisions to their charter since 1901." Among other changes, the revisions "shifted all of [the Board of Estimate's] legislative powers to an enlarged City Council." Final Report of the New York City Charter Commission, January 1989 - November 1989, at 1 (Mar. 1990).[5]

Thus, by the time the 1989 revisions took effect, if not before, it had become abundantly clear that only the City Council held legislative powers within New York City.

[5] *Available at* http://www.nyc.gov/html/charter/downloads/pdf/1989_final_post-election_report.pdf

Moreover, the powers and structure of the Board of Health itself had undergone significant revisions between 1967 and 1979. *See* 1967 N.Y.C. Local Law No. 127 § 1700 (altering structure of public health agencies); 1977 N.Y.C. Local Law No. 25 (similar); *see also* 1979 N.Y.C. Local Law No. 5 (clarifying scope of the Board's powers). The cumulative effect of these revisions was to vest the City Council unambiguously with the entirety of the City's legislative powers; thus, nothing could have remained of any vestigial legislative authority on the part of the Board – to the extent the Board held any such authority in the first place. It is unsurprising, then, that the more recent case law treats the Board as an ordinary executive agency. *See Am. Kennel Club, Inc. v. City of New York*, Index No. 13584/89, slip op. at 7 (Sup. Ct. N.Y. Cty. Sept. 19, 1989) (rejecting argument that the Board of Health was vested with authority to act legislatively in any health-related manner); *Carr v. Schmid*, 105 Misc. 2d 645, 647 (Sup. Ct. N.Y. Cty. 1980) ("Health Code regulations are not the direct legislative enactment of any elected legislative body.").

To the extent Defendants rely on the Board's historical powers as described by older case law, that authority is limited to the Board's traditional roles of directly treating disease and preventing contagions, eliminating inherently dangerous or unsanitary conditions, and excluding unsafe foods or drugs from the City. The Board cannot extend any delegated authority beyond these "limits . . . measured by tradition." *Grossman v.*

Baumgartner, 17 N.Y.2d 345, 350-51 (1966) (internal quotation marks omitted). Thus, there is little question that the Board may, for instance, regulate gas refrigerators to prevent dangerous accumulations of carbon monoxide – a poison. *See People v. Weil*, 286 A.D. 753, 757 (1st Dep't 1955). The Board may also undertake efforts to provide direct treatment for chronic conditions, even on a city-wide basis as with fluoridation of the City's public water supply. *See Paduano v. City of New York*, 45 Misc.2d 718, 721 (Sup. Ct. N.Y. Cty. 1965). Likewise, the Board's authority may even extend to regulating behavior in order to prevent the spread of infectious diseases, as with its regulation of tattoo methods aimed at preventing the spread of hepatitis. *See Grossman*, 17 N.Y.2d at 351. As discussed above, such regulatory efforts are more properly understood as valid exercises of administrative rulemaking authority – not legislative policymaking. But regardless of the nomenclature, these cases clearly illustrate the traditional boundaries of the Board's powers.

The Ban plainly exceeds these boundaries, however, by restricting consumption of perfectly safe, legal foods. Any authority the Board might once have held does not, and never has, included the power to enact such measures. To be sure, it may well be true, as Defendants and their supporting *amici* suggest, that public health efforts to address obesity require policy tools that go beyond the Board's traditional powers. *See* Appellants' Br. at 33. But this does not mean that the Board may unilaterally conjure up the authority

to create such novel policies from whole cloth. This is particularly true where, as here, such policies may impinge important liberty and privacy interests, along with economic and public health concerns. *Cf. N.Y.C. Board of Estimate v. Morris*, 489 U.S. 688, 703 n.10 (1989) ("exigencies of history or convenience" cannot justify "debas[ing] . . . constitutional right[s]").

The proper forum for developing policies appropriate to these new public health challenges is the elected legislature – the body with the greatest institutional competence for representing and balancing the City's myriad interests. No legislature has yet promulgated a policy framework under which the Board might develop rules like the Ban. Tellingly, Defendants do not even try to identify such a framework. And indeed, the City Council and State legislature have rejected a number of measures that, like the Ban, would specifically target certain foods like sugar-sweetened beverages for reduced consumption. *See* Section II.C, *infra*. Unless and until the legislature passes such a measure providing such a framework, the Board has no power to create one on its own.

II. The Ban Establishes Legislative Public Policy That Only the State or City Legislature May Enact

Because the Board had no independent legislative authority to enact the Ban, it only possessed the limited power of administrative rulemaking. The *Boreali* decision provides the proper framework for determining whether an agency improperly acts beyond this administrative rulemaking authority and intrudes into legislative

policymaking. As current Council Members, *amici curiae* can offer insight into the particular elements of the Ban that reflect a balancing of health concerns with other non-health interests, and that render the Ban a legislative enactment rather than an administrative rule. Under *Boreali*, a legislature must perform this balancing in the first instance, for the task of "striking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function." *Boreali*, 71 N.Y.2d at 12.

No legislature has done so here. Although Defendants seek to emphasize the more scientific aspects of the Ban, they fail to realize that independent of these technical considerations, the Ban presupposes a fundamentally legislative policy framework – namely, that the complex social, cultural, and behavioral factors underlying obesity should be addressed by targeting sugar-sweetened beverages, and by discouraging their consumption by limiting portion sizes. The Board acted outside of its authority, and in violation of the separation of powers, by implementing this legislative framework through the Ban without the Council's approval.

A. The Ban Is Largely Based on Social, Economic, and Other Non-Health-Related Considerations

Although the trial court correctly determined that the Ban created significant exceptions based on economic, political, and social considerations, the Ban embodies a host of other, similar non-health related considerations that demonstrate the Ban's legislative character under the first *Boreali* factor. In the experience of *amici curiae*

Council Members, efforts like the Ban to encourage or discourage consumption of specific foods necessarily impinge on a wide variety of non-health-related interests – for instance, consumers' liberty and privacy interests, and the economic interests of food vendors. These factors, among others, must be considered when singling out particular foods, and when selecting a means of encouraging or discouraging their consumption.

The Ban is no exception. It establishes a policy framework that embodies two critical, political policy determinations of the sort that have long been reserved to the Council in its anti-obesity or healthy-eating efforts. First, the Ban targets a specific food category – certain sugar-sweetened beverages – that the Board believes some New Yorkers overconsume. Second, the Ban prescribes a specific mechanism to discourage New Yorkers from eating that food – here, dictating a maximum single portion size in certain food service establishments. Under *Boreali*, both of these decisions are uniquely legislative because they require balancing health concerns with a variety of non-health concerns such as cost, individual privacy and liberty, and equal treatment, among others. *See Boreali*, 71 N.Y.2d at 12. Thus, in creating the Ban, the Board improperly exercised legislative policymaking powers, even if the Board separately exercised some technical expertise within the Ban's new policy framework.

By targeting only certain sugar-sweetened drinks with the Ban, the Board necessarily looked beyond health concerns. Indeed, since a basic premise of the Ban is

that New Yorkers consume excessive quantities of sugary drinks, the Board's decision to regulate only these drinks required that any health concerns be weighed against New Yorkers' strong preference (according to the Board) for consuming such drinks. That is, the Board necessarily concluded, as a threshold matter, that health concerns outweighed the costs of infringing individual liberty and privacy to purchase such drinks. But as the Council's own experience bears out, and as further evidenced by the intense public interest in the Ban, this threshold decision to regulate a particular food at all is profoundly political. Such decisions necessarily reflect a balance between health concerns, individuals' liberty to choose food for their diet, and businesses' financial interest in providing that food for purchase. An executive agency cannot perform this balancing on its own. *See Boreali*, 71 N.Y.2d at 12.

The Board's decision to target a specific food rather than traditional food hazards such as toxins or food-borne pathogens, and without targeting other high calorie foods or drinks, highlights the Ban's novelty and the need for legislative approval. Importantly, the Board has never stated that sugary drinks are inherently unsafe to consume. Their public health significance is simply that they add calories to one's diet, and that, in the Board's view, some New Yorkers enjoy them to an "excessive" degree, leading to obesity and obesity-related ailments. But "calories," per se, are not dangerous. Indeed, they are a necessity for life. *See, e.g., Metzen v. United States*, 19 F.3d 795, 802 (2d Cir. 1994) (noting

that if "calorie intake is too low, [a] person might not intake enough nutrients necessary to sustain life"). And if "calories" were dangerous in some sense, then essentially all food bears the same potential danger, even though most foods are unaffected by the Ban.

Thus, any public health risk from sugar-sweetened drinks does not arise from the drinks themselves, but from the *behavior* of some New Yorkers in consuming these drinks, in conjunction with other high-calorie foods in their diets and insufficient physical activity. As explained in more detail below, the decision to regulate these drinks on the basis of consumer preference is far removed from the Board's traditional role in regulating foods that carry some inherent danger when consumed. *See* Section II.B, *infra*. This decision therefore required a fresh legislative balancing of the relevant health concerns and social costs – a balancing that only the Council could perform.

The Board also engaged in such uniquely legislative balancing when it opted to regulate the maximum portion size of such drinks instead of adopting some other regulatory strategy. As *amici curiae* Council Members can attest, even if there is agreement as to a specific goal, there may be many potential strategies for achieving this goal – each presenting a different balance of costs and benefits to different parties. Absent any legislative guidance or delegated authority in this regard, the Board had no power to select a portion-size rule over other policy options on its own, as it did.

Indeed, the Council itself has examined – but has not enacted or recommended – a variety of potential strategies that would have targeted consumption of sugar-sweetened drinks. *See* Section II.C, *infra*. Assuming the Council agreed to target such drinks specifically in the first place, they might be taxed, excluded from food stamp benefits, or age-restricted. Other policy options might target the display of sugar-sweetened drinks in retail stores, or simply bar their sale in certain places. Incentives could also help reduce consumption. Alternative drink options might be made more widely available in certain neighborhoods – like the "green carts" effort with respect to fresh produce – or retailers might be granted tax or other monetary incentives to stock or to promote lower-calorie beverage alternatives.

Each of these policy options strikes a different balance between the Board's stated health concern – combatting obesity – and consumer preferences, individual liberty interests, and the business interests of drink makers and retailers. Excise taxes could discourage consumption more broadly and raise funds, but would also be regressive. Making available more lower-calorie alternatives would preserve consumer choice, but might be less effective in actually changing consumption patterns, and would require the government to expend funds. Flat bans may be quite effective at reducing consumption, but would infringe most severely on consumer choice.

The relative merits of these different policy options, compared with the Ban, is not directly relevant to this litigation, of course. The salient point is that these alternative options exist, and that the decision to adopt one over the others is intensely political. So for purposes of a *Boreali* analysis, it does not matter that the Ban targets the portion size of covered drinks, rather than their monetary cost (as in a tax) or total consumption (as with an outright ban or hard limitation). Like these other regulatory strategies, the Ban directly regulates the food choices available to New Yorkers – it makes it more difficult for New Yorkers to purchase larger beverage quantities, whether they intend to consume the quantity on their own or to share.

Thus, it is largely irrelevant under *Boreali* that the Ban does not make it *impossible* to drink larger quantities. Taxes likewise make it more difficult, but not impossible, to consume a targeted item. Indeed, it has been recognized that taxes on particular foods are merely one way of adjusting the "default" choices for consumers. *See* Kelly D. Brownell, *et al.*, Personal Responsibility And Obesity: A Constructive Approach To A Controversial Issue, 29 HEALTH AFFAIRS No. 3 (2010), at 386 ("Changing food prices is a means of creating better defaults."). Such taxes are therefore similar to the "default"-focused strategy represented by the Ban. The critical point about the Ban, under *Boreali*, is simply that the size limitations imposed by the Ban are one possible strategy, among others, for targeting specific foods. Even if a legislature decides to single out such foods, it is a further

legislative task to choose among the many possibilities for doing so. The Council and other legislative bodies are uniquely suited to fulfill this, and they did fulfill this task in declining to adopt laws targeting sugar-sweetened drinks. The Board had no power to perform this legislative balancing on its own.

Critically, because the Board made these legislative policy decisions as a threshold matter, the Ban is not saved simply because the Ban also involves additional scientific and health considerations, or because the Ban accommodates DOH's enforcement jurisdiction. To be sure, had the City Council previously enacted legislation expressing the public policy that New Yorkers' consumption of sugar-sweetened beverages should be discouraged by banning large portion sizes, and had the City Council delegated to the Board the task of filling in the details of this policy, then a measure like the Ban might very well satisfy *Boreali*. But of course, the City Council has not done so. It therefore does not matter that the Ban may reflect some degree of scientific or technical expertise – the Ban's underlying policy framework never received legislative consideration or approval, as *Boreali* demands.

B. The Ban Creates a Novel Regulatory Regime Without Legislative Guidance or Approval

The trial court correctly concluded that no provision of the City Charter empowered the Board to enact the Ban. Defendants claim authority to enact the Ban based on their general powers "to regulate all matters affecting the health in the city of

New York," including their more specific jurisdiction "to supervise the reporting and control of communicable and chronic disease" and to "supervise and regulate the food and drug supply of the city." *See* Appellants' Br. at 30-31. But this generalized authority does not permit or direct the Board to regulate safe and legal foods differently on the basis of dietary consumption patterns, as the Ban seeks to do. In enacting the Ban, the Board ventured far beyond the limits of legislative guidance and approval, and into a regulatory arena where no legislative body has yet established an appropriate public policy. Thus, the Board did enact the Ban on a "clean slate."

Of particular concern to the *amici curiae* Council Members is Defendants' assertion that the Board possesses the power to enact measures like the Ban based on the Board's prior efforts to restrict use of lead paint and artificial trans fats, or to require calorie count labeling in certain establishments. *See* Appellants' Br. at 34-35. This assertion is incorrect.

Importantly, although Defendants contend that the Board's trans-fat restrictions are "particularly instructive," the Council's actions following the measure's passage indicate that the Board actually could not have validly enacted the measure pursuant to its authority under the Charter. Similar to the Ban here, the Board selected a specific policy option – an outright ban in restaurants – over other potential policies for reducing

New Yorkers' trans-fat consumption. For these reasons, the trans-fat ban was effectively a legislative act, which would not have survived a challenge under *Boreali*.

But importantly, there never was an opportunity for such a challenge. Unlike the Ban here, where the Council was effectively shut out, the Board developed its trans-fat ban at around the same time as the Council's equivalent measure. *See* Transcript, Minutes of the Committee on Health, New York City Council (Mar. 1, 2007) ("March 1st Trans-Fat Hearing"), at 6.[6] At Council hearings, it was noted that one reason the Council passed the trans-fat ban was to "strengthen the Board of Health's acts legally, [to] take away any potential challenges to what they've done." *Id.* at 7. In other words, by legislatively ratifying the Board's action, the Council made moot any legal challenges – like the one here – to the Board's rulemaking. So even though the Board's enactment of the trans-fat ban was likely impermissible on its own, the Council foreclosed any challenge under *Boreali* by enacting the exact same ban itself. *See id.* Thus, the Council's ratification of the Board's trans-fat ban actually emphasizes the limits of the Board's authority – the Board cannot enact rules on its own establishing new public policy with substantial non-health concerns, but must instead seek Council authority to do so.

[6] *Available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=669382&GUID=492C647D-FBEE-4B72-8946-D9EBEC10023B.

In this vein, Defendants incorrectly contend that the Council "implicitly recognized" the Board's authority to promulgate the trans-fat ban. *See* Appellants' Br. at 34-35. In fact, the legislation merely recites the obvious fact that the trans-fat restrictions already appeared in the City's Health Code, which the Board has the authority to amend under § 558 of the City Charter. But importantly, the legislation never states that the substance of this rule was actually within the Board's jurisdiction to enact under §§ 556 or 558 of the Charter, or that the Council believed the Board could validly act unilaterally in this regard. In light of the hearing testimony described above, members of the Council clearly thought the Board did not possess such unilateral authority. For these reasons, the Board's action on trans fats says nothing about its ability to enact a measure like the Ban without the City Council's approval.

For somewhat different reasons, the Board's calorie-labeling rule also does not indicate that the Board's powers extend so broadly as to permit direct restrictions on the consumption of safe and legal foods. As with the trans-fat ban, this rule has not faced a challenge under *Boreali*. But in any event, it is a very different rule compared with the Ban. The calorie labeling rule does not single out any particular food and is purely informational – it does not change the difficulty or cost of obtaining a particular food while making exceptions for other foods. Thus, the calorie-labeling rule, unlike the Ban,

applies across different food types, and does not impinge the same non-health concerns such as individual liberty or privacy interests with respect to food preferences.

The Board's ban on lead paint falls even further afield from the Ban at issue here. By restricting use of lead paint, the Board permissibly sought to limit exposure to a known toxin. *See* R.C.N.Y. tit. 24, § 173.13. But this is completely different from sugar-sweetened drink consumption. Unlike lead paint, there is nothing inherently unsafe about these drinks. Rather it is New Yorkers' excessive preference (in the Board's view) for such drinks that drives the Board's claimed health concern, not any specific property of the drinks.

Of course, unlike the health conditions caused by lead exposure, obesity is not caused by exposure to any particular toxin, nor does it spread similarly to the communicable and food-borne diseases whose control has historically been the core function of municipal health departments. *See* Introductory Notes to New York City Health Code, Title II ("[T]he control of communicable diseases remains one of the Board's core functions.").

Instead, obesity and obesity-related ailments develop based on a person's personal characteristics and environment – including social, behavioral, and cultural factors. *See* The Evidence Report at xi. The fact that obesity is tied to such non-physical factors means that, as a disease or health condition, obesity presents fundamentally different

public health challenges compared with communicable diseases, or even chronic diseases amenable to direct treatment using public facilities, as with water fluoridation. Thus, the Board's "supervisory" and "control" powers under the Charter with respect to such diseases – i.e., under N.Y.C. Charter § 556(c)(2) – say nothing about the extent of the Board's power to override individual preferences that might contribute to a complex condition like obesity.

Defendants apparently recognize that obesity presents a unique public health challenge that may require powers that go beyond the Board's traditional authorities. *See* Appellants' Br. at 33 (acknowledging that "a different regulatory strategy may be needed" for issues that do not fall within the regulatory model for communicable disease (citation omitted)). The *amici curiae* Council Members also recognize this fact – indeed, the Council has considered, and continues to develop, the new policy strategies that might be required to address obesity and the complex factors associated with it. But precisely because these strategies are so new, they impinge a wide array of social, political, and economic concerns in ways that are very different from the Board's traditional public health roles. Thus, it is up to the City's and the State's legislative bodies to develop and approve these strategies in the first instance. Because no legislature has yet done so, the Board lacked the requisite legislative guidance when it enacted the Ban on its own.

C. The Issue of Sugar-Sweetened Beverage Consumption Is an Area of Ongoing Legislative Debate

The *amici curiae* Council Members are well aware that the City Council has considered, but rejected, a number of measures that relate to sugar-sweetened beverage consumption. Defendants incorrectly argue, however, that they may act unilaterally in this field simply because neither the Council nor the State legislature has specifically considered banning large portion sizes as a means of reducing such consumption. This approach reads these legislative efforts far too narrowly. The salient point is that no legislative body has approved of restrictions on sugar-sweetened beverages, despite intense deliberation over many different possible approaches for doing so.

Specifically, the Council recently considered a resolution – N.Y.C. Council Res. No. 1265-2012 (Mar. 2012)[7] – that would have sought state legislation to add an excise tax to certain sugar-sweetened beverages. Like the Ban, this measure would have endorsed a specific means of discouraging their consumption – i.e., by increasing their cost relative to other foods via a tax. *Id.* The Council did not approve this resolution, however.

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[7] *Available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102924&GUID=B0BB5DD1-56C8-431C-A191-221D3A678B4E&Options=ID%7cText%7c.

A separate proposed Council Resolution – N.Y.C. Council Res. No. 0768-2011 (Apr. 2011)[8] – would have favored an alternative and differently targeted method for discouraging sugar-sweetened beverage consumption. Instead of a tax that would increase the cost of these beverages for all consumers, this Resolution would have asked the U.S. Department of Agriculture to permit the City to prohibit the use of food stamps for sugary beverages (but excluding "milk, milk substitutes, or fruit juices with no added sugar"). *Id.* Thus, the Resolution sought to discourage such beverage purchases by withholding a benefit from certain residents, rather than by imposing a cost broadly. This particular mechanism, of course, would have affected the interests of City residents very differently than an excise tax – particularly for low-income residents. It nonetheless represents one policy choice, among many others, for discouraging consumption of sugary beverages. The Council did not approve this resolution, either.

In light of the vigorous public debate that has engulfed proposals such as a soda tax or food stamp restrictions, the legislative results simply indicate that currently there is no achievable compromise for specifically targeting sugar-sweetened drinks, among the many competing views and interests. But it is not the role of administrative bodies to

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[8] *Available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=862347&GUID=14B3F44A-502C-410F-96A2-8420D81DBB6C&Options=ID%7c.

resolve these profoundly difficult political issues on their own, especially when such debates already have been aired in elected, representative bodies like the City Council.

D. The Board's Expertise Was Not Necessary To Make the Fundamental Policy Decisions To Target a Safe and Legal Food, and To Limit Its Availability by Capping Portion Sizes

The trial court was incorrect in assuming that the Ban's enactment required the Board's exercise of specialized expertise. Although some aspects of the Ban may reflect scientific conclusions, it is important to recognize that the critical policy decisions underlying the Ban – i.e., the decisions to target certain sugar-sweetened beverages and to do so by imposing a maximum portion size in some establishments – did not require the Board's special expertise in the health field. Rather, these decisions were basic policy determinations that required weighing the possible health benefits of reducing sugary drink consumption against the important social and economic costs of such regulation.

In other words, the Ban can be understood to comprise two distinct sets of decisions: 1) the threshold legislative policy determinations to single out sugar-sweetened beverages by banning large portion sizes; and 2) more technical decisions such as setting a 25 calorie per 8 fluid ounce threshold for such beverages. If the Board's role were limited to the latter set of decisions, then this rule might have been permissible if a legislative body had properly enacted the first set of threshold policy decisions. But in this case, the Board improperly made both sets of decisions on its own, without any

legislative role or guidance. Thus, the Board's enactment of the Ban also fails the fourth *Boreali* factor.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and order appealed from.

Dated: April 25, 2013

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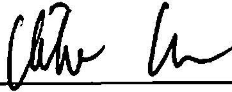

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PRINTING SPECIFICATIONS STATEMENT

This Brief was prepared with Microsoft Word 2011, using the 14-point proportional font Arno Pro for the body, and the 12-point proportional font Arno Pro for footnotes. According to the word processor, the portions of this Brief that must be included in a word count pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(i) contain 6,896 words.

Dated: April 25, 2013

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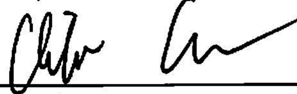

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