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N.Y.C. SODA BAN MISCONCEPTIONS: WHY THE REAL ISSUE IS NOT FUNDAMENTAL
CHRISTINE MANSOUR

Introduction

As part of former Mayor Michael Bloomberg’s attempt to make New Yorkers healthier, several initiatives were passed. Smoking is now prohibited in restaurants and bars, a trans-fat ban was implemented throughout the entire city, and restaurants now post the calorie information of their meals on menus.¹ However one of his initiatives to combat obesity, the Portion Cap Rule or as it is more commonly known the “Soda Ban,” has become the subject of much debate throughout the country.

Many across the media including NPR, the New York Times, and Jon Stewart, have derided and lauded the ban.² The ban has inspired so much discussion that the governor of Mississippi in 2013, as a response to New York City’s Portion Cap Rule, signed a law to prevent counties, districts, and towns from limiting portion sizes.³ This law mandated that only the legislature has the power to limit portion sizes because, as the governor claimed, “It is simply not the role of the government to micro-regulate citizens.”⁴

The ban was passed in New York City by the Board of Health (“BOH”) and on its face limits all sugary drinks to 16-ounce cups.⁵ The ban defines a sugary drink as a “carbonated or non-carbonated beverage” that is non-alcoholic which was “sweetened by the manufacturer or

¹ Michael Barbaro, *Poll Shows New Yorkers Are Deeply Conflicted Over Bloomberg’s Legacy*, N.Y. TIMES, Aug. 25, 2013, at MB2.

² Fred Mogul, *Unlike Soda Tax, Bloomberg Says Big Soda Size Ban is His Call*, WNYC, (May 31, 2012), <http://www.wnyc.org/story/213632-unlike-soda-tax-bloomberg-says-big-soda-size-ban-his-call/>; Barbaro, *supra* note 1; *The Daily Show with Jon Stewart* (Comedy Central television broadcast May 31, 2012), available at <http://www.thedailyshow.com/watch/thu-may-31-2012/drink-different---pick-your-poison>.

³ Holly Yan, *No soda ban here: Mississippi passes ‘Anti-Bloomberg’ bill*, CNN, (Mar. 21, 2013), <http://www.cnn.com/2013/03/21/us/mississippi-anti-bloomberg-bill/>.

⁴ *Id.*

⁵ Maximum Beverage Size, 24 R.C.N.Y. § 81.53 (2012).

establishment with sugar or another caloric sweetener” containing more than “25 calories per 8 fluid ounces of beverage” and “does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.”⁶ Yet, the rule provides numerous drink and location exemptions.⁷ It is not only the ban itself but also these exemptions that led to litigation based upon a claim that the ban violated separation of powers and was arbitrary and capricious.⁸ The New York City Department of Health & Mental Hygiene filed a motion for leave to appeal to the state’s highest court, which was granted, citing five issues the court should consider in relation to the ban.⁹ Part of the City’s argument was that the ban did not violate separation of powers nor was it arbitrary and capricious.¹⁰ The Court of Appeals of New York, in a 4-2 decision, affirmed the lower courts’ findings that the ban violated separation of powers in New York and the BOH “exceeded the scope of its regulatory authority by adopting the Portion Cap Rule.”¹¹ Notably absent from all court decisions, but foremost in the public debate, was the issue of whether the ban attempts to regulate a fundamental liberty right: that of how much soda should the government allow citizens to drink and by extension a free speech right wherein purchase power is akin to speech.

This Note argues that the majority opinion of the Court of Appeals of New York was correct in determining that the BOH violated separation of powers.¹² The Portion Cap Rule was an attempt by former Mayor Bloomberg and the BOH to usurp the legislative authority of the City Council, which was exclusively granted to the City Council in several N.Y.C. Charters. The

⁶ *Id.*

⁷ *Id.*

⁸ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 2013 A.D. LEXIS 5423, at *15 (N.Y. App. Div. July 30, 2013) (did not decide on arbitrary and capricious nature because the court determined it was invalid under separation of powers); *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 2013 Misc. LEXIS 1216, at *35 (N.Y. Sup. Ct. Mar. 11, 2013) (decided that the ban was arbitrary and capricious and violated separation of powers).

⁹ Respondents - Appellants’ Notice of Motion for Leave to Appeal to the N.Y. Court of Appeals at 4, (N.Y. 2013) (No. 653584/12).

¹⁰ *Id.* at 2-3.

¹¹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 2014 N.Y. LEXIS 1442, at *24-25 (N.Y. June 26, 2004).

¹² *Id.*

implications in N.Y.C. of what the City argued for would have granted the Mayor and the BOH virtually unchecked legislative authority; this would be a clear violation of separation of powers as executive administrative agencies are supposed to enforce but not create laws.

Part I of this Note gives an overview of the obesity epidemic, its causes, and how much obesity-related healthcare costs. Part II examines the Portion Cap Rule itself and what the BOH has exempted from the rule. Part III analyzes the authority that the legislature granted to the BOH and what it actually allows the BOH to accomplish. Part IV discusses how the rule violated separation of powers, failed the four factor *Boreali* test, was arbitrary and capricious, and thus the majority opinion of the Court of Appeals of New York was proper. Part V discusses why the issue in this case is not a fundamental liberty right and even if it were, the ban would nonetheless be unconstitutional.

Part I: An Obesity Overview

A. The Obesity Epidemic in the United States

Obesity, and its subsequent diseases, is the leading cause of preventable death in the United States, second only to smoking.¹³ From 1990 to 2010, the obesity rates in America dramatically increased.¹⁴ Currently, more than a third of the American adult population is considered obese and the number continues to rise across racial, educational, gender, and socioeconomic demographics.¹⁵ Among children and adolescents obesity rates have tripled since

¹³ *Mayor Bloomberg, Public Advocate DeBlasio, Manhattan Borough President Stringer, Montefiore Hospital CEO Safyer, Deputy Mayor Gibbs and Health Commissioner Farley Highlight Health Impacts of Obesity*, NYC.gov (June 5, 2012),

http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012a%2Fpr200-12.html&cc=unused1978&rc=1194&ndi=1 (hereinafter *Health Impacts of Obesity*).

¹⁴ *Adult Obesity Facts*, CENTER FOR DISEASE CONTROL (Aug. 16 2013), <http://www.cdc.gov/obesity/data/adult.html>.

¹⁵ *What is Obesity?*, OBESITY ACTION COALITION (2013), <http://www.obesityaction.org/understanding-obesity/obesity> (defining obesity as “[A] condition that is associated with having an excess of body fat, defined by genetic and environmental factors that are difficult to control when dieting... [H]aving a Body Mass Index (BMI) of 30 or greater.”); *Adult Obesity Facts*, *supra* note 14.

1980; 17% of Americans aged 2-19 years old are now considered obese, making obesity the most common disease in children.¹⁶ However, unlike adults, there is a gender and racial gap when it comes to childhood obesity. Latino boys and African American girls are the populations most impacted by this disease.¹⁷

The dangers associated with obesity are well known: it increases the risk for developing heart disease, diabetes, and hypertension to name only a few of the numerous health related consequences.¹⁸ In addition, there are numerous economic consequences to obesity not only for the individual but also for the United States health care system at the local, state, and federal levels. In 2008 alone, the total costs associated with obesity were over \$157 billion; this includes direct costs, like treatment services, indirect costs, like insurance, and costs provided by Medicaid and Medicare.¹⁹ The causes of obesity include a combination of several factors including genetics, environment, such as driving instead of walking, and diseases.²⁰ Of these, an individual can only control the environmental factors, such as diet and exercise.

B. Obesity in NYC

As of 2007, 22% of New Yorkers were classified as obese, with the highest rates in the poorer neighborhoods: 8.5% in Chelsea compared to 29.8% in East Harlem and more than 30% in the South Bronx.²¹ The direct health care costs to the city to treat and manage obesity are \$4

¹⁶ *Data and Statistics*, CENTER FOR DISEASE CONTROL (Jan. 11, 2013), <http://www.cdc.gov/obesity/data/childhood.html>; *What is Childhood Obesity?*, OBESITY ACTION COALITION (2013) <http://www.obesityaction.org/understanding-obesity-in-children/what-is-childhood-obesity> (defining childhood obesity when a child's BMI for age percentile is "[G]reater than 95 percent").

¹⁷ *Data and Statistics*, *supra* note 16.

¹⁸ *Causes and Consequences*, CENTER FOR DISEASE CONTROL (Apr. 27, 2012), <http://www.cdc.gov/obesity/adult/causes/index.html>.

¹⁹ *Id.*; *In re N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 2013 Misc. at *10.

²⁰ *Causes and Consequences*, *supra* note 18.

²¹ Jennifer L. Black & James Macinko, *The Changing Distribution and Determinants of Obesity in the Neighborhoods of New York City, 2003-2007*, 10 AM. J. EPIDEMIOLOGY 1, 7 (2010).

billion and rising each year.²² An estimated 5,800 New Yorkers die each year due to complications and diseases stemming from obesity.²³

Among children, specifically the poorest children, obesity rates are higher.²⁴ In 2006, more than 40% of New York City's children enrolled in the Head Start program had BMIs classifying them as overweight or obese.²⁵ For children, the dangers of childhood obesity are compounded by the potential of a lifelong struggle with weight and the resulting diseases. Obese children are more likely to develop Type II Diabetes at a younger age, suffer from asthma, experience joint pain and discomfort, and are at a 70% increased risk for cardiovascular disease.²⁶ Children who are overweight are more likely to become obese upon reaching adulthood. These overweight children, upon becoming obese adults, will put a further strain on the city's health system in the future.²⁷

C. Major Environmental Sources of Obesity: Where does it come from?

The rise in sugary drink consumption and portion sizes account, in large part, for the rise in obesity.²⁸ Between the 1950s and today, the standard portion size of a sugary drink has increased from between 6.5-12-ounces to a 42-ounce bottle made available in 2011.²⁹ This increase in portion size has led to an increase in caloric intake from the sugary drinks.³⁰ A 20-

²² Mike Bloomberg, *Combating Obesity*, MIKE BLOOMBERG
<http://www.mikebloomberg.com/index.cfm?objectid=b7ee3b90-c29c-7ca2-fe35c0860a2075bd>.

²³ *Id.*

²⁴ *NYC Vital Signs – Obesity in Early Childhood*, NYC.gov (Mar. 2006),
<http://www.nyc.gov/html/doh/downloads/pdf/survey/survey-2006childobesity.pdf>.

²⁵ *Id.*

²⁶ *Basics about Childhood Obesity*, CENTER FOR DISEASE CONTROL (Apr. 27, 2012),
<http://www.cdc.gov/obesity/childhood/basics.html>.

²⁷ *Health Impacts of Obesity*, *supra* note 13.

²⁸ *A Growing Problem*, CENTER FOR DISEASE CONTROL (Apr. 17, 2013),
<http://www.cdc.gov/obesity/childhood/problem.html>; *Sugary Drinks and Obesity Fact Sheet*, HARVARD SCH. OF PUBLIC HEALTH (2013), <http://www.hsph.harvard.edu/nutritionsource/sugary-drinks-fact-sheet/>; Brief for Respondents-Appellants at 43, *In re N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 2013 A.D. 1 (N.Y. App. Div. 2013) (No. 653584/12).

²⁹ *Sugary Drinks and Obesity Fact Sheet*, *supra* note 28.

³⁰ *Id.*

ounce soda can contain between 15-18 teaspoons of sugar and more than 240 calories, while a 64-ounce soda can have more than 700 calories.³¹ For instance, in 1955 a soda from McDonald's was 7-ounces, while today it can be 32-ounces or larger.³² This phenomenon is not limited to McDonald's; portion sizes in general have increased as well.³³ For example, plate sizes have increased from 9 to 12 inches coinciding with larger portions and a rise in obesity.³⁴ The availability of larger portions thus encourages people to eat more.³⁵

In addition, the beverage industry spends nearly half a billion dollars on advertising targeting children ages 2-17.³⁶ These children become lifetime consumers of sugary drinks, yet they are also the ones hardest hit by the health impacts because they deal with a lifetime of struggle with weight and related complications. Studies have shown that the greater an individual's consumption of sugary drinks, the more likely it is for that individual to be overweight or obese.³⁷ This is due to the high sugar content and low satiety in the sugary drinks.³⁸ The danger with sugary beverages in particular is that the body does not recognize the excess calories from sugar dissolved in water and this leads to additional calories being consumed to satiate the appetite.³⁹

D. Why target sugary drinks?

³¹ *Id.*

³² Brief for Respondents-Appellants, *supra* note 28, at 43.

³³ *A Growing Problem*, *supra* note 28.

³⁴ *The Leonard Lopate Show: Please Explain: Calories*, (WNYC Broadcast Sept. 20, 2013), available at <http://www.wnyc.org/story/please-explain-calories/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Vasanti S. Malki et al., *Intake of sugar-sweetened beverages and weight gain: a systematic review*, 84 AM. J. CLINICAL NUTRITION 274, 274 (2006).

³⁸ *Id.*

³⁹ Brief for Respondents – Appellants, *supra* note 28, at 42 (quoting the Chair of the Dep't of Nutrition at Harvard University's Sch. of Public Health).

Sugary drinks are a leading driver of obesity and the largest component of the additional 200-300 calories that Americans are consuming in comparison to 30 years ago.⁴⁰ The former Mayor and the Board of Health (“BOH”) decided that the government needed to address the City’s rising obesity and diabetes rates.⁴¹ Due to the high consumption of sugary drinks and their connection to weight gain, both the former Mayor and the BOH believed that a cap on sugary drink portion sizes would be the best way to reduce obesity and diabetes rates of New Yorkers.⁴² The Center for Disease Control, Let’s Move, and the American Heart Association, among others, supported the former Mayor and the BOH’s efforts to reduce obesity by capping the portion size of sugary drinks.⁴³

To reinforce their view that capping the portion size of sugary drinks would be the best way to combat obesity, the former Mayor and BOH cited several studies linking portion sizes with the amount people eat claiming that when people are given “larger portions [they] will eat more without recognizing that they are doing it.”⁴⁴ However, the problem with the studies that former Mayor Bloomberg and the BOH relied on is that the author of the studies found those results when people were *unknowingly* given larger portions.⁴⁵ When people are unknowingly given more, they are unlikely to notice a change in portion size.⁴⁶ However, when consumers purchase a soda they are conscious of the size they are choosing to consume.⁴⁷ People choose to

⁴⁰ *Id.* at 42-44.

⁴¹ Susan Kansagra, *Maximum Size for Sugary Drinks: Proposed Amendment of Article 81*, NYC.gov (June 12, 2012), http://www.nyc.gov/html/doh/downloads/pdf/boh/max_size_sugary_drinks_BOH.pdf; Brief for Respondents – Appellants, *supra* note 28, at 41-45.

⁴² Kansagra, *supra* note 41.

⁴³ *Id.*

⁴⁴ *Id.*; Brief for Respondents – Appellants, *supra* note 28, at 41-45.

⁴⁵ Brian Wansink & David Just, *How Bloomberg’s Soft Drink Ban Will Backfire on NYC Public Health*, THE ATLANTIC (July 16, 2012, 2:35PM), <http://www.theatlantic.com/health/archive/2012/06/how-bloombergs-soft-drink-ban-will-backfire-on-nyc-public-health/258501/>.

⁴⁶ *Id.*

⁴⁷ *Id.*

purchase the 20, 48, or 64-ounce size sodas or refill their cups.⁴⁸ The former Mayor and the BOH cite as a primary reason for the soda ban the fact that they believe that the government has a compelling interest in preventing obesity.⁴⁹

Part II. What is the ban and what are the exemptions?

The rule in controversy is 24 R.C.N.Y. § 81.53, which places a limit on the maximum size cup that a food service establishment (“FSE”) can offer to customers.⁵⁰ The rule is former Mayor Bloomberg’s and the Board of Health’s response to the obesity epidemic that is striking New York City at the moment.⁵¹ The rule defines a sugary drink as a “carbonated or non-carbonated beverage” that is non-alcoholic, “sweetened by the manufacturer or establishment with sugar or another caloric sweetener,” that has more than “25 calories per 8 fluid ounces of beverage,” and “does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.”⁵² The rule further stipulates that the volume of milk or milk substitute is “presumed to be less than or equal to 50 percent unless proven otherwise by the food service establishment serving it.”⁵³ Milk substitute has been defined as “any liquid that is soy-based and is intended by its manufacturer to be a substitute for milk.”⁵⁴ The rule also defines the maximum cup size that FSEs are allowed to sell.⁵⁵ FSEs are unable to “sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces,” yet FSEs may also not

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Maximum Beverage Size, 24 R.C.N.Y. § 81.53 (2013) (This was added by resolution to Article 81 in September 2012. Enforcement has never occurred due to an injunction issued by Judge Tingling. It was struck from the code due to the decision from the Court of Appeals of New York).

⁵¹ Brief for Respondents – Appellants, *supra* note 28, at 2.

⁵² 24 R.C.N.Y. § 81.53(1).

⁵³ 24 R.C.N.Y. § 81.53.

⁵⁴ 24 R.C.N.Y. § 81.53(2).

⁵⁵ 24 R.C.N.Y. § 81.53(3).

“sell, offer, or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces.”⁵⁶

It is first important to note that the rule does not apply to beverages mixed with alcohol.⁵⁷ Other drinks exempted under the rule include 100 percent fruit juices, fruit smoothies, milkshakes, and mixed coffee drinks.⁵⁸ The next exemption in the rule is that soymilk is the only liquid allowed as a milk substitute, ruling out other milk substitutes such as rice, almond, or coconut milk.⁵⁹

On its face the rule appears to apply to all FSEs as defined under 24 R.C.N.Y. § 81.03(s) but the BOH declared that convenience stores, corner markets, gas stations, bodegas, and “other similar businesses” would be exempt because those places are subject to inspection by the New York State Department of Agriculture and Markets (“Department of Agriculture”) and not under BOH control due to the Memorandum of Understanding (“MOU”) between the two departments.⁶⁰

In addition, the BOH counts as a single serving two and three liter bottles.⁶¹ If the goal is to limit portion sizes to encourage healthier choices and reduce obesity rates, how does counting a two or three liter bottle as a single serving accomplish that goal? Furthermore, during the proceedings in the New York Supreme Court, the BOH decided that it would allow 17-ounce

⁵⁶ 24 R.C.N.Y. §§ 81.53(3)(b-c).

⁵⁷ 24 R.C.N.Y. § 81.53(1)(A).

⁵⁸ Brief for Respondents – Appellants, *supra* note 28, at 27-8; Matter of N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at 9.

⁵⁹ 24 R.C.N.Y. § 81.53(2) (emphasis added); Janet Kinoshian, *Overwhelmed by Milk Substitutes?*, AARP (Aug. 15, 2012), <http://www.aarp.org/health/healthy-living/info-08-2012/milk-substitutes-five-healthy-choices.html>.

⁶⁰ Food Preparation and Food Establishments, Definitions, 24 R.C.N.Y. § 81.03(s) (defining a food service establishment 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, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle.”); Brief for Plaintiffs-Petitioners at 11, *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 2013 A.D. 1 (N.Y. App. Div. 2013) (No. 653584/12); *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at 9-10.

⁶¹ Brief for Plaintiffs-Petitioners, *supra* note 60, at 49.

cups thus changing the prior prohibition on 16.9-ounce bottles.⁶² This change to accommodate current bottle sizes in the middle of a trial exemplifies a critical issue with the ban: its arbitrary and capricious nature. As a rule, 24 R.C.N.Y. § 81.53 has so many exceptions that it truly does not prevent people from consuming more than 16-ounces of what the BOH and former Mayor Bloomberg considered to be a sugary drink.

Part III: By Passing the Ban the BOH Has Exceeded Its Statutory Authority

Administrative agencies do not have the same lawmaking or legislative power that has been vested with the legislature. The New York State Constitution provides for a separation of powers between the legislative and executive branches of local government.⁶³ Courts have consistently respected the individual powers of each branch of government, requiring that neither branch invade the powers of the others.⁶⁴ In New York City, the New York City Charter further protects this by vesting the City's legislative power with the City Council and providing for distinct legislative and executive branches.⁶⁵ It is the Mayor of New York who embodies the executive branch and has been granted the power to appoint heads of administrations and departments.⁶⁶ Even though the Mayor is empowered to "implement and enforce legislative pronouncements emanating from the Council...the Mayor 'may not go beyond stated legislative policy and prescribe a remedial device not embraced by the policy.'"⁶⁷ In order for the Mayor to be able to

⁶² *Id.*

⁶³ N.Y. Const. art. IX § 1(a) ("Every local government... [S]hall have a legislative body elective by the people thereof.").

⁶⁴ *Subcontractors Trade Ass'n v. Koch*, 61 N.Y.2d 422, 427 (N.Y. 1984).

⁶⁵ *Id.*; *Under 21, Catholic Home Bureau for Dependent Children v. New York*, 65 N.Y.2d 344, 356 (N.Y.) (1985); N.Y.C. Charter § 21 (1989).

⁶⁶ N.Y.C. Charter § 3 (1988); N.Y.C. Charter § 6 (1967).

⁶⁷ *Subcontractors Trade Ass'n*, 61 N.Y.2d at 427 (quoting *In re Broidrick v. Lindsay*, 39 N.Y.2d 642, 645-6 (N.Y. 1976)).

devise plans to fix social problems, it is the legislature that must first delegate that power to the Mayor.⁶⁸

Through the New York City Charter, the Department of Health and Mental Hygiene has the jurisdiction to “regulate all matters affecting health in the city of New York... perform all those functions and operations performed by the city that relate to the health of the people of the city.”⁶⁹ Specifically, N.Y.C. Charter § 556 gives the BOH the power to regulate and supervise the milk and water supplies, determine the public health needs of the city, supervise and control communicable and chronic diseases, “supervise and regulate the food and drug supply of the city,” and promote or provide for public education and programs.⁷⁰ Furthermore, N.Y.C. Charter § 558 gives the BOH the power to “add to and alter, amend or repeal any part of the health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state.”⁷¹

The City argued that the BOH has legislative authority and the ability to issue substantive rules and standards in public health, citing Charters §§ 556 and 558.⁷² The City further argued that the BOH was given plenary powers of legislation by the New York City Charter Revision Commission.⁷³ Citing cases decided before the 1989 amendments to the City Charter, the City argued that the Court of Appeals had recognized the plenary powers of the BOH to act “in a legislative capacity under State legislative authority.”⁷⁴ In particular, the City cited to *Grossman v. Baumgartner* to underscore their position that the BOH has legislative power.⁷⁵ While *Grossman* did recognize that the Legislature “intended the Board to be the sole legislative

⁶⁸ *Id.* at 429.

⁶⁹ N.Y.C. Charter § 556 (1988).

⁷⁰ N.Y.C. Charter §§ 556(c)(9), 556(d)(4-7).

⁷¹ N.Y.C. Charter § 558(b) (1979).

⁷² Brief for Respondents - Appellants, *supra* note 28, at 17.

⁷³ *Id.* at 18.

⁷⁴ *Id.* at 20.

⁷⁵ *Id.* at 21.

authority within the City of New York in the field of health regulation,” this was tempered with the recognition that the regulations should not be “inconsistent with or contrary to State laws dealing with the same subject matter.”⁷⁶

Nevertheless, the health issue in *Grossman* was the direct link between tattooing and hepatitis and, again, this was decided before the 1989 amendment to the New York City Charter and before the 1979 amendment to N.Y.C. Charter § 558 clarifying the scope of the BOH’s power.⁷⁷ In addition, unlike legislation enacted by the City Council or State Assembly, but consistent with other administrative actions, the BOH’s rules are subject to arbitrary and capricious review under Article 78.⁷⁸ Furthermore, the BOH is subject to oversight by the State Public Health Council, Commissioner, and the Department of Health: departments that do not have any legislative ability or powers.⁷⁹ It is difficult to understand how a board that is subject to oversight by non-legislative bodies can itself wield legislative powers.

The dissent from the Court of Appeals of New York, however, advocated the position that the City’s approaches to public health support the BOH’s position due to the broad authority it had been given in the past and its “special structure” to address health issues expeditiously.⁸⁰ The dissent further noted that New York’s highest court has characterized the BOH’s powers as legislative in the past and viewed the BOH’s authority as nearly legislative.⁸¹ Judge Read continued by articulating that the prior amendments did not switch the BOH’s “source of

⁷⁶ *Grossman v. Baumgartner*, 17 N.Y.2d 345, 351 (N.Y. 1966); Brief for Respondents - Appellants, *supra* note 28, at 21.

⁷⁷ *Grossman*, 17 N.Y.2d at 349; Brief for Plaintiff - Petitioners, *supra* note 60, at 21(citing the Report of the Comm. on Health in Favor of Approving and Adopting a Local Law to Amend the N.Y.C. Charter in relation to Defining Powers of the Board of Health (1979) to show a concern for separation of powers: “[R]egulations passed by the Board of Health may be overly broad and so invade the providence of the City Council’s legislative authority.”).

⁷⁸ *Patgin Carriages Co. v. N.Y.C. Dep’t of Health and Mental Hygiene*, 28 Misc. 3d 1229(A) (N.Y. Sup. Ct. 2010).

⁷⁹ Brief for Plaintiff - Petitioners, *supra* note 60, at 22-23.

⁸⁰ *In re N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 2014 N.Y. at *30.

⁸¹ *Id.* at *39-41.

delegated powers from state legislature to the Council.”⁸² Moreover, Judge Read opined that the history of the BOH to regulate public health leads to the only conclusion that its regulations have “force and effect of state law” and therefore it is not required for the Council to authorize the regulation of sugary drinks.⁸³

The majority disagreed holding that the City Charter gave only regulatory and not legislative authority to the BOH.⁸⁴ The majority continued that the Charter never granted the BOH authority to make laws and the 1979 amendments were made precisely to ensure that the BOH was not regulating too broadly and invading the legislative authority of the City Council.⁸⁵ The majority reinforced this position by stating that “a rule had the force of law but it is not a law.”⁸⁶

Courts have agreed that the legislature may delegate its regulatory powers to administrative agencies, but that must be done “in light of the limitations that the Constitution imposes.”⁸⁷ Even though it has been recognized that administrative agencies may be given the authority “to fill in details and interstices and to make *subsidiary* policy choices consistent with the enabling legislation,” creating a new rule is not interstitial.⁸⁸ It is well settled law that when the executive, here former Mayor Bloomberg and the BOH, acts “inconsistently with the Legislature or usurps its prerogatives” the principle of separation of powers is violated.⁸⁹ Because the Court of Appeals of New York majority found that the BOH’s authority is regulatory not legislative, they continued to the issue of whether the BOH exceeded its regulatory authority by promulgating the

⁸² *Id.* at *44.

⁸³ *Id.* at *44-45.

⁸⁴ *Id.* at *10.

⁸⁵ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *11-12.

⁸⁶ *Id.* at *13.

⁸⁷ *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (N.Y. 1987) (landmark case in NY deciding if a regulation violates separation of powers, there is a four factor test that came out of this case).

⁸⁸ *Dorst v. Pataki*, 90 N.Y.2d 696, 699 (N.Y. 1977) (quoting *In re Citizens For An Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 410 (N.Y. 1991))(emphasis added).

⁸⁹ *Clark v. Cuomo*, 66 N.Y. 2d 185, 189 (N.Y. 1985).

Portion Cap Rule.⁹⁰ This is in contrast to what the dissent found as the only issue in the case: whether the BOH acted within the bounds of its state delegated powers.⁹¹

However, as the majority from the Court of Appeals of New York found, the Portion Cap Rule was legislation masquerading as a ban under the BOH. Only the City Council and the State Assembly can pass legislation in the city and state of New York.

Part IV: The Soda Ban is *Ultra Vires* under the *Boreali* four factor test for separation of powers.

The leading case in New York to determine if a restriction or board action was properly adopted by an administrative agency and did not violate separation of powers is *Boreali v. Axelrod*.⁹² The issue in *Boreali* was whether the Public Health Council overstepped its delegated authority when it promulgated a comprehensive code to govern tobacco smoking in open public areas.⁹³ The court created a four-factor analysis to determine if the administrative agency did violate separation of powers when enacting the new tobacco code.⁹⁴ The first factor considered is if the regulatory scheme was “laden with exceptions based solely upon economic and social concerns.”⁹⁵ The second is did the agency create “its own comprehensive set of rules without legislative guidance.”⁹⁶ The third factor is did the agency act “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.”⁹⁷ The fourth and final factor to be considered is if there was any “special expertise or technical competence in the field of health” involved in developing the regulation being challenged.⁹⁸ When creating this test, the court was

⁹⁰ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *14.

⁹¹ *Id.* at *31 (arguing that it was within its delegated powers).

⁹² *Boreali*, 71 N.Y. 2d at 8-9.

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 12-14.

⁹⁵ *Id.* at 11-12.

⁹⁶ *Id.* at 13.

⁹⁷ *Id.*

⁹⁸ *Boreali*, 71 N.Y.2d at 14.

foremost concerned about not allowing the legislature to cede its policy-making responsibility to an administrative agency, or to have an administrative agency seize power reserved for the legislature.⁹⁹

In *Boreali*, because the tobacco code failed the four-factor analysis, the Public Health Council was deemed to have “exceeded the permissible scope of its mandate by using it as a basis for engaging in inherently legislative activities.”¹⁰⁰ For an agency to have exceeded its mandated authority, it is not necessary to have violated all four factors, but when the factors, viewed in combination, show that the agency engaged in a policy-making activity, this is found to be in violation of separation of powers.¹⁰¹ Once an agency engages in policy-making in an area where it has not been delegated authority, the agency has acted as the legislature and a regulation that violates separation of powers will be deemed invalid.¹⁰²

A. Did the ban balance competing concerns of public health and economic costs?¹⁰³

The presence of exemptions in this case is particularly telling when deciding the first *Boreali* factor against the former Mayor and BOH.¹⁰⁴ This is because “exemptions typically run counter to such goals and cannot be justified as simple implementations of legislative values.”¹⁰⁵ It could not be said that the BOH acted solely with a view towards public health when the exemptions were taken into account.¹⁰⁶ The exemptions listed in the ban regulate where someone can purchase large sugary drinks and what kind of large sugary drink they are purchasing.¹⁰⁷ Exempting grocery stores, convenience stores, corner markets, and gas stations but not movie

⁹⁹ *Id.* at 9.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 14.

¹⁰² *Id.*

¹⁰³ *Boreali*, 71 N.Y.2d at 12.

¹⁰⁴ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *17-18.

¹⁰⁵ *Id.* (quoting *Boreali*, 71 N.Y.2d at 14) (the goals being those of the rule, in this case a cap on sugary drink portions to improve obesity rates in N.Y.C.).

¹⁰⁶ *Id.* at *18.

¹⁰⁷ *Id.* at *9-10; 24 R.C.N.Y. § 81.53.

theaters, stadiums, or food trucks shows that in creating the rule the BOH weighed the potential benefits of obesity reduction with the economic impact upon these industries if they were not able to sell large sugary drinks.¹⁰⁸ The same can be said for the exemption given to alcoholic beverages and milkshakes, some of which contain more sugar and calories than the large portion sodas.¹⁰⁹

The BOH defended these considerations by claiming that they are outside the scope of BOH regulations due to an MOU between the State Department of Health and the State Department of Agriculture and Markets.¹¹⁰ The City further argued that sodas mixed with alcohol are also exempt because it is the New York State Alcoholic Beverage Control Law that regulates the sale of alcohol thus making it outside the scope of the BOH's authority.¹¹¹ However, the MOU cited calls for cooperative efforts among the agencies to assure food protection; there was no cooperation between agencies upon creating and implementing the ban.¹¹² Moreover, the BOH has always retained the right to "apply generally applicable rules to alcohol and the establishments that serve it" by law.¹¹³

Further proof of the weighing of economic factors against potential health benefits was found in the Health Commissioner's own words.¹¹⁴ The Health Commissioner "went as far as to indicate that in addition to promoting health, the ban would help ameliorate obesity-related

¹⁰⁸ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *18.

¹⁰⁹ Brief for Plaintiffs – Petitioners at 50-51, *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2012 N.Y.S. (N.Y. Sup Ct. 2013) (No. 653584/2012) (compare a pitcher of Coca-Cola with a pitcher of rum and Coca-Cola); *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *9,*18.

¹¹⁰ Brief for Appellants' at 37, *In re* N.Y. Statewide Coalition of Hispanic Chamber of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2014 N.Y. (N.Y. 2014) (APL 2013-00291).

¹¹¹ *Id.* at 36.

¹¹² Brief for Plaintiffs - Petitioners at 61, *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2014 N.Y. (N.Y. 2014) (APL-2013-00291).

¹¹³ *Id.*

¹¹⁴ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *18.

health care expenditures in New York.”¹¹⁵ The exemptions written into the rule show that the BOH compromised between competing social and economic concerns and private interests. The most notable of private interest exemptions is the ubiquitous 7-11 Big Gulp, which comes in sizes ranging from 20–50-ounces.¹¹⁶ 7-11 received an exemption for its 50-ounce Double Big Gulp, which can have about 600 calories when filled with Coca-Cola, because it is a convenience store.¹¹⁷ The Court of Appeals of New York was not convinced that the exemptions in the rule were solely health related because the adoption of the Portion Cap Rule or “an outright prohibition of sugary beverages, that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics. That is policy-making, not rule-making.”¹¹⁸

The BOH claimed that the regulation of FSEs to protect health has long been a core goal of the agency.¹¹⁹ However the BOH also admitted that, traditionally, the scope of power it had was with *infectious diseases*; it was in 2006 where the BOH expanded its scope to chronic diseases by regulating artificial trans fats.¹²⁰ The goal of the soda ban was to discourage New Yorkers from consuming sugary drinks by placing a maximum on the possible size that could be ordered.¹²¹ This looked beyond health benefits and concerns by attempting to manipulate choices available to consumers.¹²² As the Court of Appeals of New York found, there were other ways

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *18-19; Aaron Edwards, *At 7-Eleven, the Big Gulps Elude a Ban by the City*, N.Y. TIMES, June 6, 2013, at A20 (in spring 2012 7-11 reduced the Double Big Gulp from 64 ounces to 50 ounces because “[C]onsumers found it easier to carry.”).

¹¹⁷ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *18-19; Edwards, *supra* note 116, (600 calories is about 25% of the recommended caloric intake for “[A] 30-year-old, 160 pound man who exercises regularly.”).

¹¹⁸ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *21.

¹¹⁹ Thomas R. Frieden, et al., *Public Health in New York City, 2002-2007: Confronting Epidemics of the Modern Era*, INT. J. OF EPIDEMIOLOGY vol. 37, Issue 5 (2008) at 970.

¹²⁰ *Id.*

¹²¹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *19; 24 R.C.N.Y. § 81.53.

¹²² *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *19.

the BOH could have approached reducing soda intake besides banning some large sugary drinks in some FSEs.¹²³

This also ventured into lawmaking, something within the realm of the State Assembly and the City Council but not the BOH or the Mayor’s office.¹²⁴ What the BOH was doing with the rule was making soda or sugary drinks a more expensive choice for consumers by forcing them to purchase two 16-ounce cups instead of one 32-ounce cup.¹²⁵ By influencing, or attempting to influence, decisions that consumers make about their beverage choice and size, the Supreme Court of New York Appellate Division found that the decision by the BOH to regulate a product that was never categorized as dangerous is inherently a policy decision and thus for the Legislature to determine and not the BOH.¹²⁶ The Supreme Court of New York Appellate Division further found that the ban was “especially suited for legislative determination as it involves ‘difficult social problems’ which must be resolved by ‘making choices among competing ends.’”¹²⁷ In other words, when weighing health concerns, consumer diet choices, and business financial interests, all the courts of New York determined that the task is best left to the Legislature to determine the best course of action to take, not the BOH or Mayor’s office.¹²⁸

Judge Read’s dissent argued that there is “no obvious reason why ‘economic consequences,’ ‘tax implications for small business owners’ and ‘personal autonomy’ are ‘ends.’”¹²⁹ Judge Read believed that these were factors the BOH properly must take into account

¹²³ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *20 (stating posted warnings akin to calorie content on menus could have been used).

¹²⁴ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *19.

¹²⁵ *Id.* at *19-20.

¹²⁶ *Id.* at *20 (“[T]he Board necessarily concluded, as a threshold matter, that health concerns outweigh the cost of infringing on individual rights to purchase a product the Board has never categorized as inherently dangerous...this threshold decision to regulate a particular food is inherently a policy decision.”).

¹²⁷ *Id.* at *20-21 (quoting *Boreali*, 71 N.Y.2d at 13).

¹²⁸ *Id.*; *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *21.

¹²⁹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *54.

when determining the best way to obtain its public health goals.¹³⁰ Judge Read further determined that the BOH’s decision was the result of a cost benefit analysis that is performed daily and the “ends-means test” the majority notes under the first *Boreali* factor has no legal basis.¹³¹ Judge Read argued that the “proper standard for our review is whether the regulation is so lacking in reason for its promulgation that it is essentially arbitrary” and that the Portion Cap Rule passed the test.¹³²

However, the abundance of exemptions and the failure of the BOH to work cooperatively with the Department of Agriculture were indicative of the fact that more than the health concerns of New Yorkers were being considered when the Portion Cap Rule was written.¹³³ The BOH, when writing the rule, took into account non-health policy considerations effectively failing the first *Boreali* factor.¹³⁴

B. Did the agency write on a clean slate creating its own comprehensive set of rules without benefit of legislative guidance?¹³⁵

The second *Boreali* factor asks if the BOH wrote on a clean slate when it created the Portion Cap Rule. Administrative agencies are permitted to engage in interstitial rule-making. This occurs when an agency fills in the details of a broad legislative mandate to make it operational; when the agency goes beyond filling in it exceeds its limits on authority.¹³⁶ In this case there was no existing gap that needed to be filled in by the Portion Cap Rule.

The City cites the N.Y.C. Charter as giving the BOH a broad grant of general and specific authority to “regulate all matters affecting the health in the city of New York.”¹³⁷

¹³⁰ *Id.* at *55.

¹³¹ *Id.* at *56-57.

¹³² *Id.* at *57.

¹³³ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *21.

¹³⁴ *Id.*

¹³⁵ *Boreali*, 71 N.Y.2d at 13.

¹³⁶ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *23.

¹³⁷ N.Y.C. Charter § 556.

Additionally, the Charter states that the BOH has the power to “supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health” and to “supervise and regulate the food and drug supply of the city.”¹³⁸ Although the Court has upheld broad grants of authority to administrative agencies in the past, those cases were found to not have the same circumstances found in *Boreali* or did not have the exemptions that are present throughout the Portion Cap Rule.¹³⁹ To further bolster the City’s position that the Portion Cap Rule did not write on a clean slate, the City cites 24 R.C.N.Y. § 47.61, which establishes nutrition requirements for group day care facilities.¹⁴⁰ Section 47.61, similar to the soda ban, limits the types of beverages that can be served to children. No child is to receive any beverage with “added sweeteners, artificial or natural,” children cannot be served more than “six (6) ounces of 100% juice per day,” and children age two and older can only be served “milk with 1% or less milk-fat unless milk with a higher fat content is medically required.”¹⁴¹

However, this rule affects all group day care facilities in N.Y.C. and does not affect sizes available for purchase by consumers.¹⁴² Merely because there is rule affecting beverages available to children in controlled settings that does not provide the gap that is needed for the soda ban to pass the *Boreali* factors. The soda ban was written on a clean slate because it targets

¹³⁸ N.Y.C. Charter §§ 556(c)(2) & 556(c)(9).

¹³⁹ N.Y. State Health Facilities Ass’n v. Axelrod, 77 N.Y.2d 340, 348 (N.Y. 1991) (the Court found that the Legislature had given basic policy decisions to the Public Health Council and the choice for achieving the ends, to prevent nursing homes participating in the Medicaid program from discriminating against Medicaid patients, was within the authority of the agency); Statharos v. New York City Taxi and Limousine Comm’n, 198 F.3d 317, 322 (2d Cir. 1999) (finding that there was no blank slate because the legislation gave the Commission the power to “[I]ssue regulations to ensure the financial responsibility of medallion owners. The regulations in the instant case aim to do just that, and, unlike the regulations invalidated in *Boreali*, they do not contain exemptions based on economic or social grounds.”).

¹⁴⁰ 24 R.C.N.Y. § 41.67 (2008).

¹⁴¹ 24 R.C.N.Y. §§ 41.67(b)(1-3).

¹⁴² 24 R.C.N.Y. § 47.61.

consumer choices in only some FSEs.¹⁴³ 24 R.C.N.Y. § 47.67 does not have any gaps that the soda ban fills in.

The State Assembly and City Council have struck down prior attempts to regulate soda; neither body has adopted a statute defining any policy toward soda consumption.¹⁴⁴ The majority in the Court of Appeals of New York found that creating “an entirely new rule that significantly changes the manner in which sugary beverages are provided to customers at eating establishments is not an auxiliary selection of means to an end: it reflects a new policy choice.”¹⁴⁵ The majority found that the BOH wrote the Portion Cap Rule without legislative guidance and did not fill in any independent legislation gaps.¹⁴⁶ By enacting the Portion Cap Rule, the BOH wrote on a clean slate violating the second *Boreali* factor.

C. Is the agency acting in an area that the legislature has repeatedly tried and failed to reach agreement?¹⁴⁷

If the legislature appears unable to agree on a way to solve a problem, or has repeatedly tried and failed, an agency cannot attempt to fill what it sees as a vacuum and impose its own solution.¹⁴⁸ Nonetheless, there is a distinction drawn between failed legislative action and legislative inaction. Inaction will not violate the *Boreali* factor, but failed legislative action will.¹⁴⁹ In New York City and New York State, there have been several prior attempts to target sugary drinks and sodas.¹⁵⁰ In the City, there were resolutions attempting to place warning labels on sugar sweetened beverages, to add certain sugary drinks to prohibited goods available for

¹⁴³ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *24.

¹⁴⁴ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *24 (noting that the public policy purpose of the Portion Cap Rule is to regulate excessive soda consumption).

¹⁴⁵ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *22.

¹⁴⁶ *Id.* at *23.

¹⁴⁷ *Boreali*, 71 N.Y.2d at 13.

¹⁴⁸ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *27 (quoting *Boreali*, 71 N.Y.2d at 8).

¹⁴⁹ *Id.* at *28.

¹⁵⁰ *Id.*

food stamp purchase, and even to add an excise tax on sugar sweetened beverages, all of which failed.¹⁵¹ At the state level there were bills to prohibit the sale of sugary drinks on government property and to prohibit stores with ten or more employees from displaying candy or sugary drinks in the check out aisle, among many others.¹⁵² In all cases, the bills failed.

The Portion Cap Rule attempted to achieve the same result as the prior bills, but in a different manner: by limiting the size that can be purchased.¹⁵³ Thus, it is addressing the same policy area that the City Council and State Assemblies in New York City and State have already rejected.¹⁵⁴ The majority in the Court of Appeals of New York found that inaction on the part of both legislatures constituted additional evidence that the Portion Cap Rule was new policy and not “preexisting legislative policy.”¹⁵⁵ Because it is an area where the Legislatures, both city and state, tried and failed to reach an agreement, the Portion Cap Rule violated the third *Boreali* factor.

D. Was special expertise or technical competence used in the development of the ban?¹⁵⁶

In deciding if there was special or technical competence used in formulating the ban, there was a split between the trial and appellate divisions. The Supreme Court of New York Appellate Division reasoned that because the board did not use any special expertise or technical

¹⁵¹ N.Y.C. Res. No. 1265 (2012) (adding an excise tax on sugar sweetened beverages, failed); N.Y.C. Res. No. 1264 (2012) (asking the FDA to require warning labels on sugar sweetened beverages, failed); N.Y.C. Res. No. 0768 (2011) (asking the USDA to authorize N.Y.C. to add some sugary drinks to the list of prohibited goods for city residents who receive Food Stamps).

¹⁵² *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *28 (citing Assembly Bill No. A10010 (prohibits sale of sugar sweetened beverages at FSEs and vending machines on government property, failed); Assembly Bill No. S67004 (tax on beverage syrups and soft drinks, failed); Assembly Bill No. A41004 (tax on beverage syrups and soft drinks, failed); Assembly Bill No. A10965 (prohibiting purchase of non-nutritious food items with Food Stamps, failed)).

¹⁵³ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *28.

¹⁵⁴ *Id.* (“This is a strong indication that the legislature remains unsure of how best to approach the issue of excessive sugary beverage consumption.”).

¹⁵⁵ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *23

¹⁵⁶ *Boreali*, 71 N.Y.2d at 14.

competence in developing the rule that it violated the final *Boreali* factor.¹⁵⁷ No expert was brought in to create the Portion Cap Rule. The Supreme Court of New York Appellate Division found it dispositive that the rule was enacted without any change from its drafting by the Mayor's office.¹⁵⁸

However, the Supreme Court of New York found that the BOH's choice to not make changes demonstrated an agreement with the language, not a failure to exercise expertise or technical competence.¹⁵⁹ The Supreme Court of New York reasoned that those persons on the BOH have the expertise or technical competence needed to be able to enact a portion cap on sugary drinks.¹⁶⁰ The Supreme Court of New York further articulated that the development requirement of *Boreali* does not require an agency to draft its own regulations.¹⁶¹ An agency can demonstrate expertise and technical competence when, upon challenge, it can show where and how the expertise and technical competence was exercised.¹⁶²

The majority in the Court of Appeals of New York found no need to address this part of the *Boreali* test.¹⁶³ The majority noted that this was not done with the intent to imply that the fourth factor was insignificant, merely that "the fact that the rule was adopted with very little technical discussion" could alert the courts to a policy-making intent of a regulation.¹⁶⁴

E. Do All Four Factors Need to Be Present to Violate *Boreali*?

¹⁵⁷ *In re* Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *30-31.

¹⁵⁸ *Id.*

¹⁵⁹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 N.Y. Misc. at *33-34.

¹⁶⁰ See N.Y.C. Charter § 553(a) ("[B]oard shall consist of ten members, five of whom shall be doctors of medicine who shall each have had not less than ten years experience in any or all of the following: clinical medicine, neurology or psychiatry, public health administration or college or university public health teaching...[N]on-physician members shall hold at least a masters degree in environmental, biological, veterinary, physical, or behavioral health or science, or rehabilitative science or in a related field, and shall have at least ten years experience in the field in which they hold such degree.").

¹⁶¹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 N.Y. Misc. at *33.

¹⁶² *Id.*

¹⁶³ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *24.

¹⁶⁴ *Id.*

One of the issues the City raised in its Motion for Leave to Appeal is whether all four factors of the test are required and, if not, how should the factors, once found, be weighed.¹⁶⁵ *Boreali* itself stated that none of the four factors alone is sufficient to conclude that the administrative body usurped the legislature's power, but that "all of these circumstances, when viewed in combination, paint a portrait of an agency that has improperly assumed for itself...[that] which characterizes the elected Legislature's role in our system of government."¹⁶⁶ The Supreme Court of New York Appellate Division interpreted this to mean that the four factors are to be interpreted as "indicators of the usurpation of the legislature, rather than a talismanic rule of four required elements that must all be present in every case."¹⁶⁷

At the trial level, the Supreme Court of New York did not find that all four *Boreali* factors were violated, only three, and yet still found that the rule could not be upheld.¹⁶⁸ Contrary to the City's position, the Supreme Court of New York Appellate Division is not the first to state that all four factors do not need to be present to invalidate a rule because the *Boreali* Court stated it when they made their ruling.¹⁶⁹ The majority in the Court of Appeals of New York reiterated their position that it is all of the circumstances, when viewed together, that will determine whether an agency engaged in policy-making.¹⁷⁰

F. Arbitrary and Capricious Nature of the Ban

¹⁶⁵ Respondents - Appellants' Notice of Motion for Leave to Appeal to the N.Y. Court of Appeals, *supra* note 9, at 22.

¹⁶⁶ *Boreali*, 71 N.Y.2d at 11.

¹⁶⁷ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *15.

¹⁶⁸ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 Misc. at *34.

¹⁶⁹ *Boreali*, 71 N.Y.2d at 11.

¹⁷⁰ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2014 N.Y. at *14-16, *25.

Because the Supreme Court of New York Appellate Division and the Court of Appeals of New York both found that the ban violated separation of powers and the *Boreali* test, those Courts did not discuss the arbitrary and capricious nature of the ban.¹⁷¹

The Supreme Court of New York, however, did discuss whether the ban was arbitrary and capricious. The Court first looked at whether the ban was reasonable.¹⁷² For a ban to be reasonable the BOH only needed to demonstrate a reasonable basis for the Portion Cap Rule.¹⁷³ This requirement was met and the ban was considered reasonable.¹⁷⁴ Yet, the ban's uneven enforcement within a city block paired with its exemptions defeated the stated purpose of the ban.¹⁷⁵

The ban does not apply to all FSEs leading to the inability to purchase a large soda at a restaurant but the ability to go next door to a corner market and purchase a large soda there.¹⁷⁶ Even Jon Stewart noted the particular ludicrousness of this by stating that convenience stores were not regulated because "It's magic."¹⁷⁷ While the BOH countered that according to the MOU, the government is not required to address all facets of a problem at once, the ban was still deemed to be arbitrary due to its unevenness.¹⁷⁸

The ban also excluded beverages that have significantly higher concentrations of sugar sweeteners or calories and placed no limitations on refills, exclusions which also defeated the stated purpose of the ban.¹⁷⁹ The BOH argued that convenience drives food purchases and if it is

¹⁷¹ *Id.*; *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 A.D. at *31.

¹⁷² *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 N.Y. Misc. at *35.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *The Daily Show with Jon Stewart* (Comedy Central television broadcast May 31, 2012), available at <http://www.thedailyshow.com/watch/thu-may-31-2012/drink-different---pick-your-poison>.

¹⁷⁸ *Id.*; Brief for Respondents – Appellants, *supra* note 28, at 47.

¹⁷⁹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 N.Y. Misc. at *35; Brief for Plaintiffs – Petitioners, *supra* note 112 at 71 (quoting Dr. Forman as saying that he did not understand why juices, milk

harder to carry more cups people will not do so, but this implied that the rule was designed to make consumption a conscious and informed choice.¹⁸⁰ These are considerations that the BOH is not supposed to weigh when formulating a rule. The Court argued that these exemptions defeated the purpose of the rule and “gut” it.¹⁸¹ If the goal is to reduce obesity rates in the city, allowing large sugary drinks to remain available at some stores and not others defeats entirely the purpose of the ban.

Part V: The 14th Amendment and Fundamental Liberty Right Concerns

The proper constitutional framework, and issue in this case, is whether the BOH, when creating the Portion Cap Rule, exceeded its statutory authority and encroached on inherent legislative responsibilities thus violating separation of powers. Before a fundamental liberty right can be claimed, the rule, legislation, or law, must clear separation of powers hurdles. Separation of powers is a concept that has been expressly provided for in the N.Y.C. Charter and is considered to be vital to principles of freedom.¹⁸² The Portion Cap Rule clearly violates separation of powers in New York City due to former Mayor Bloomberg and the BOH’s attempt to usurp the authority of the City Council.¹⁸³

However, even though the case was not about fundamental liberty right concerns, much of the rhetoric about it, particularly in the media, was centered on fundamental liberty right concerns and interests.¹⁸⁴ Even Amy Poehler’s hit sitcom, *Parks and Recreation*, entered the collective discussion by having an episode focused solely on a soda ban Leslie Knope was

shakes, and milk containing beverages which have a large amount of calories in them were not included in the rule because it did not appear that the nutritional value outweighed the “[C]alorie contribution to obesity.”).

¹⁸⁰ Brief for Respondents – Appellants, *supra* note 28, at 46 (getting a refill signifies a conscious and informed choice).

¹⁸¹ *In re* N.Y. Statewide Coalition of Hispanic Chambers of Commerce, 2013 N.Y. Misc. at *35.

¹⁸² Under 21 Catholic Home Bureau for Dependent Children, 65 N.Y.2d at 356; New York State Inspection, Sec. & Law Enforcement Emps. V. Cuomo, 64 N.Y.2d 233, 239 (N.Y. 1984).

¹⁸³ Brief for Plaintiffs – Petitioners, *supra* note 112, at 1.

¹⁸⁴ *The Daily Show with Jon Stewart*, *supra* note 177; Holly Yan, *No soda ban here: Mississippi passes ‘Anti-Bloomberg’ bill*, CNN, (Mar. 21, 2013), <http://www.cnn.com/2013/03/21/us/mississippi-anti-bloomberg-bill/>.

attempting to enact that was similar to the Portion Cap Rule in New York City.¹⁸⁵ Generally speaking, a statute will be determined to be unconstitutional if it violates a right guaranteed by the Bill of Rights or is a fundamental right that has not been expressly provided for in the Constitution.¹⁸⁶ When determining if something qualifies as a fundamental liberty right not expressly guaranteed, the courts look to whether it is “fundamental to our scheme of ordered liberty and system of justice.”¹⁸⁷ Accepting the rhetoric that the Portion Cap Rule was infringing on the fundamental liberty right of people to drink as much soda as they wanted, the scrutiny level applied would be strict scrutiny review.¹⁸⁸

Applying strict scrutiny review requires for the government interest in the right to be compelling and the manner in which it is carried out to be narrowly tailored to advance the state’s compelling interest.¹⁸⁹ Even though it can be argued that the government has a compelling interest in the health of its citizens, in particular those who are obese due to the cost on the healthcare system, the rule was not narrowly tailored enough to pass strict scrutiny. Due to what the Supreme Court of New York found to make the ban arbitrary and capricious, these same items would imply that the ban was not narrowly tailored to meet the compelling interest of the state.¹⁹⁰ Because the ban was not a complete citywide ban but only affected certain FSEs, it cannot be argued that it was sufficiently narrowly tailored to pass strict scrutiny. If a person can go to a store less than 10 feet away and purchase a soda larger than what the ban prohibits merely because the establishment does not qualify as an FSE under the Portion Cap Rule, how can the ban be tailored enough to advance the state’s compelling interest in the health of its

¹⁸⁵ *Parks and Recreation: Soda Tax* (NBC television broadcast Sept. 27, 2012).

¹⁸⁶ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034-36 (2010).

¹⁸⁷ *Id.* at 3034.

¹⁸⁸ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (using strict scrutiny).

¹⁸⁹ *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (explaining that the state has a compelling interest in protecting the fetus at the point of viability, but that the Texas statute “swept too broadly” by not providing a distinction between pre and post-viability).

¹⁹⁰ *In re N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 2013 N.Y. Misc. at *35.

citizens? The factors that make the ban arbitrary and capricious are the same factors that would lead to the ban failing a fundamental liberty right claim because it is not narrowly tailored. However, as much as pundits and the media would like this to be the issue, the actual issue is that the ban violated separation of powers and is legislation that was masked as an administrative action.¹⁹¹

Conclusion:

The separation of powers doctrine is important to this country at a state and federal level. It ensures that there are checks and balances in the governing system. The Portion Cap Rule was legislation that an executive agency was trying to pass off as an additional rule to the health code of New York City. Executive agencies cannot create laws or do more than what the legislature has given them allowance to do. The Soda Ban definitively did not pass three of the *Boreali* factors from the four-part test to determine if an executive or agency action crossed the line into legislative territory and was policy-making. In addition, the ban itself with its many exemptions led to it being arbitrary and capricious. The City cited no examples of how it would lead to people making better choices beyond their reliance on the assumption that people would not walk next door or across the street to get a 32 or more ounce soda. To truly enact a large sugary drink ban, as former Mayor Bloomberg wanted to, it is necessary for the Board of Health to either wait for signs from the City Council that they are ready to pass legislation on the topic or remove the exemptions and do a complete citywide ban without any FSE exemptions. Waiting or enacting a complete citywide ban are the only ways in which a large sugary drink ban will ever pass separation of powers, not be arbitrary and capricious, and will begin to reduce sugary drink consumption, and obesity rates, in New York City.

¹⁹¹ This is evidenced by the fact that none of the briefs argued a fundamental liberty right issue, only that the ban violates separation of powers in New York due to the four factor test established in *Boreali v. Axelrod* and is arbitrary and capricious.