SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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

Plaintiffs-Petitioners,

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

– against –

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

Defendants-Respondents.

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Index No. _____

Date Purchased: October 12, 2012

NOTICE OF VERIFIED PETITION

PLEASE TAKE NOTICE that upon the annexed Verified Article 78 & Declaratory Judgment Petition, sworn to on October 11, 2012, the Affirmation of Joshua Marnitz and

exhibits attached thereto, and the supporting Memorandum of Law, an application will be made to this Court, by the undersigned attorneys for Plaintiffs-Petitioners, at the Courthouse located at 60 Centre Street, New York, New York, in the Motion Support Courtroom – Submissions Part, Commercial Division Calendar, Room 130, on November 5, 2012 at 9:30 a.m., for an order and judgment, pursuant to Articles 78 and 30 of the Civil Practice Law and Rules ("CPLR"), granting the relief demanded in the Verified Petition as follows:

(1) Enjoining and permanently restraining Defendants and any of their agents, officers and employees from implementing or enforcing § 81.53 of the New York City Health Code, as purportedly amended by the DOH in September 2012, and declaring §81.53 invalid;

(2) Alternatively, declaring that §§ 556(c)(2) and (c)(9), 558(b) and (c), and/or § 1043 of the N.Y.C. Charter are unconstitutional and in violation of the separation of powers doctrine;

(3) Alternatively, enjoining and permanently restraining Defendants and any of their agents, officers and employees from implementing or enforcing § 81.53 of the New York City Health Code, as purportedly amended by the DOH in September 2012, on the basis that it is unlawfully arbitrary and capricious;

(4) Granting such further relief as this Court deems just and proper, including attorneys' fees and the costs and disbursements of this Proceeding pursuant to CPLR § 8101.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 7804(c), any answer and supporting affidavits shall be served and filed at least five (5) days before the return date of this application, and any reply shall be served and filed at least one day before the return date of this application.

PLEASE TAKE FURTHER NOTICE that New York County is designated as the venue of this Proceeding pursuant to CPLR §§ 506(b) and 7804(b) as it is the County in which the material events giving rise to this Proceeding took place.

Dated: October 11, 2012

New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE; THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION; SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; THE NATIONAL RESTAURANT ASSOCIATION; THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE; and THE AMERICAN BEVERAGE ASSOCIATION, Plaintiffs-Petitioners, For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules, – against – THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. THOMAS FARLEY, in his Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene, Defendants-Respondents.	:	Index No. _____ **VERIFIED ARTICLE 78 & DECLARATORY JUDGMENT PETITION**

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Plaintiffs-Petitioners, by and through their undersigned counsel, respectfully allege as follows:

PRELIMINARY STATEMENT

1. This case is not about obesity in New York City or the motives of the Board of Health in adopting the rule being challenged. This case is about the Board of Health, appointed by the Mayor, bypassing the proper legislative process for governing the City. Over the public objection of 17 members of the City Council, the legislative body elected by the people, the Board of Health has decided to tell the people of New York City how much of certain beverages they should drink. The City Council knows how to legislate; it has considered legislation on obesity and nutrition; and it has repeatedly rejected proposals to address those issues by targeting certain beverages. The Board of Health's decision nonetheless to ban certain sizes of sweetened beverages in certain outlets, imposed by executive fiat, usurps the role of the City Council, violating core principles of democratic government and ignoring the rights of the people of New York City to make their own choices. The ban at issue in this case burdens consumers and unfairly harms small businesses at a time when we can ill afford it. Defendants do not have the legal authority to adopt this beverage ban, and it is arbitrary and capricious in its design and application. The regulation should be struck down.

2. On May 30, 2012, Mayor Michael Bloomberg announced a proposal to prohibit certain food retailers from selling certain sweetened beverages in quantities greater than 16 ounces.[1] The proposal was immediately recognized for what it was— an end-run around the City Council, reflecting an overreaching "nanny administration." The *New York Times*

[1] *See* Josh Margolin & David Seifman, *Mayor Bloomberg Wants to Impose 16-ounce Limit on Sugar Drinks*, N.Y. Post, May 31, 2012, attached hereto as Ex. A to the Affirmation of Joshua Marnitz ("Marnitz Aff."). Unless otherwise noted, all exhibits referenced hereinafter are attached to the Marnitz Affirmation.

condemned the proposal as clear executive "overreach[]."[2] *USA Today* described the proposal as "short on logic and long on intrusion."[3] National Public Radio highlighted the arbitrariness of the proposal—including its carve-outs for alcohol-based drinks, wines, and high-calorie coffee drinks favored by more affluent consumers, which typically contain far more calories than soda.[4]

3. New Yorkers share those sentiments. A recent *New York Times* poll shows that 60 percent of New Yorkers, including majorities in every borough, oppose the Mayor's plan. Only slightly more than 1/3 of New Yorkers think it is a good idea.[5]

4. Undaunted, Mayor Bloomberg presented his proposal to the New York City Board of Health ("Board"),[6] comprised entirely of members he appointed. The Board of Health is a part of the New York City Department of Health and Mental Hygiene ("Department of Health" or "DOH"). Detailed comments and criticisms were offered in opposition to the proposal, including a petition signed by more than 90,000 people urging the Board not to adopt the Mayor's proposal.[7] On September 13, 2012, the Board adopted the Mayor's proposal without making a single substantive change. This new rule (hereinafter, the "Ban") imposes a $200 fine for each violation.[8]

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[2] Editorial, *A Ban Too Far*, N.Y. Times, May 31, 2012, Ex. B.

[3] Editorial, *New York Soda Cap Wouldn't Beat Obesity*, USA Today, June 3, 2012, Ex. C.

[4] *See* April Fulton, *Bloomberg's Sugary Drink Ban May Not Change Soda Drinkers' Habits*, The Salt: NPR's Food Blog, May 31, 2012, Ex.G at Appx. D Tab 5.

[5] Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. Times, Aug. 22, 2012, Ex. D.

[6] The City Record: Official Journal of the City of N.Y., June 19, 2012, at 1574-75, Ex. E.

[7] *See infra* note 26.

[8] *See* The City Record: Official Journal of the City of New York, Sept. 21, 2012, at 2602-03 (to be codified in the Rules of the City of New York (R.C.N.Y.) tit. 24, § 81.53), Ex. H.

5. The Ban applies to restaurants, delis, fast-food franchises, movie theaters, stadiums and street carts, but not to grocery stores, convenience stores, 7-Elevens, corner markets, gas stations and other similar businesses—literally thousands of stores—that sell the same beverage products. As a result, delis and hotdog stands are barred from selling a 20-ounce lemonade, but the 7-Eleven a few feet away remains free to sell Big Gulps.

6. The Ban targets non-diet soft drinks, sweetened teas, sweetened black coffee, hot chocolate, energy drinks, sports drinks, and sweetened juices, but exempts numerous beverages that contain equal or even more calories and sugar. Excluded beverages include all alcoholic beverages, milkshakes, fancy fruit smoothies and mixed coffee drinks, mochas, lattes, and 100% fruit juices. As a result, fans at a ballgame will be able to purchase 20-ounce beers, but not 20-ounce sodas. Diners will be permitted to sell large chocolate milkshakes (about 800 calories each), but will be fined if they sell a 20-ounce cola (only about 240 calories).

7. The Ban allows the sale of multiple 16-ounce beverages, allows unlimited free refills, and allows customers to add as much sugar as they want to any beverage after it is purchased, but it prohibits covered businesses with self-serve fountain drinks from stocking any cups larger than 16 ounces even for use with water, diet soda, or any other drink that has zero calories.

8. Defendants say the Ban will "reacquaint[ ] New Yorkers with more appropriate portion sizes," citing a "[b]ottomless bowls" study.[9] The lead author of that study, Dr. Brian Wansink, has said publicly that the Ban will be an "epic failure."[10] He has stated

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[9] *Id.* at 2603 & n.30, Ex. H.

[10] Dr. Brian Wansink, John Dyson Professor of Marketing and Director of the Cornell Food and Brand Lab at Cornell University, *quoted in* Anemona Hartocollis, *To Gulp or to Sip? Debating a Crackdown on Big Sugary Drinks*, N.Y. Times, May 31, 2012, Ex. I.

unequivocally that the Ban "won't succeed," and that the study has no relevance to consumers who knowingly purchase the beverages they want in the sizes and containers they prefer.[11] Consumers know how much of a beverage they are buying. They buy what they want, and will continue to do so after the Ban goes into effect. They will purchase multiple beverages in smaller sizes, or will go to another store to buy the size they want.

9. The Ban is not an exercise of the Defendant agencies' traditional authority to enforce food safety laws enacted by the legislature. Instead, Defendants have adopted this unprecedented interference with New Yorkers' consumer choice on their own, and drawn lines based on economic or social factors without legislative direction or approval, all despite the fact that the City Council and the State Legislature have repeatedly rejected legislative proposals that would target sweetened beverages, as Defendants have done here. DOH describes the Ban as an "innovative policy," likening it not to traditional agency action, but to federal and state *laws* requiring seatbelt use and restricting smoking.[12]

10. Defendants' unilateral imposition of this novel "policy," which restricts consumer access to lawful products sold in popular and economical quantities, usurps the role of the City Council. The Ban is *ultra vires* as it is fundamentally beyond the role of the executive branch of City government to unilaterally devise and implement social policy. Defendants have sought to accomplish through executive regulation precisely what the New York Court of Appeals in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), said they may not do. In *Boreali*, the Court

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[11] *Id*.; Brian Wansink & David Just, *How Bloomberg's Soft Drink Ban Will Backfire on NYC Public Health,* The Atlantic, July 16, 2012, Ex. G at Appx. D Tab 4.

[12] DOH Summary and Response to Public Hearing and Comments Received Regarding Amendment of Article 81 of the New York City Health Code to Establish Maximum Sizes for Beverages Offered and Sold in Food Service Establishments at 12 (Sept. 6, 2012) ("Response to Comments"), Ex. J.

of Appeals held in no uncertain terms that it was beyond the purview of the State Public Health Council to enact a smoking ban in public areas, holding that striking the proper balance among health concerns, economic costs and intrusion into the lives of citizens is a uniquely legislative function. *Id*. at 12. In this regard, the Ban is indistinguishable from the cigarette smoking ban that was struck down by the Court of Appeals in *Boreali*.

11. Defendants purport to rely upon generalized executive agency rule-making authority contained in sections 1043 and 558(b)-(c), and DOH's "supervision" authority under section 556(c)(2) and (c)(9), of the New York City Charter ("N.Y.C. Charter"). But none of these provisions—nor any other statutory delegation—provides the legislative authorization necessary to justify impinging on the sale and consumption of lawful beverages. The "historic" authority of the executive in New York City has never reached so far.

12. Under the well-settled separation-of-powers doctrine, the City Council is charged with considering, debating, passing, and answering to the electorate for new legislative policy. Unlike the democratically elected City Council, neither the Mayor nor his unelected appointees are vested with plenary legislative authority. Defendants may not bypass the legislature, under the guise of public health, and make fundamental policy choices and establish far-reaching new policy programs all by themselves, no matter how well-intentioned they may be.

13. Defendants' overreaching action will have serious adverse consequences for small businesses in this City. Covered stores will lose business to stores that can continue to advertise and sell the covered beverages in any size container. Covered stores stand to lose sales of all products that would have been bought by consumers who choose instead to go to another store—one exempt from the intrusive Ban—to purchase the beverage products they want.

Defendants have enacted a policy that makes winners and losers among businesses selling the exact same beverages based on arbitrary distinctions unrelated to health.

14. The Ban will also impose tens of millions of dollars of additional, wasteful costs on the companies that manufacture and distribute covered beverages. Beverages currently sold in standard 500-ml (16.9-ounce) bottles will have to be repackaged in 16-ounce bottles, though there is no credible health justification for requiring such wasteful expenditures. Many of the most popular beverages are sold in 20-ounce bottles but not 16-ounce bottles. *See* Affidavit of Mike Redman ("Redman Aff.") ¶ 8. In order to sell popular beverages in 16-ounce bottles, the plants where the beverages are produced will need to be retooled at considerable cost. *Id.*

15. The Board, at the behest of the Mayor, has arbitrarily brushed aside the patent unfairness of the Ban and the economic injury it will cause to covered businesses. At the same time, the Board claims to have determined that the unfairness and economic harm are outweighed by the stated health purposes of the Ban. But such balancing of harms—as determined by the Court of Appeals in *Boreali*—is precisely the sort of policy determination that elected legislatures are required to make, and that unelected agency administrators are precluded from making.

16. Plaintiffs bring this hybrid Article 78 action-proceeding seeking an order enjoining Defendants from implementing or enforcing their unlawful, unprecedented rule that has been adopted *ultra vires* and a declaration that it is invalid. Alternatively, Plaintiffs seek an order declaring that to the extent sections 556(c)(2) and (c)(9), 558(b) and (c), or 1043 of the N.Y.C. Charter grant Defendants authority to create this Ban, that authorization violates well-settled principles of separation of powers.

17. Alternatively, Plaintiffs seek an order and judgment setting aside the Ban pursuant to section 7803(3) of the New York Civil Practice Law and Rules ("CPLR") on the grounds that it is arbitrary and capricious, affected by an error of law, and an abuse of discretion, and enjoining Respondents from implementing or enforcing the Ban.

18. Plaintiffs respectfully request a decision from this Court by December 15, 2012, so that affected businesses can avoid expending funds to comply with a law that Plaintiffs believe should be struck down. The Ban will take effect March 12, 2012, and Plaintiff-Petitioner ABA's members would need at least three months to retool their facilities and equipment to comply. *See* Redman Aff. ¶¶ 9-10.

PARTIES

19. Plaintiff-Petitioner The New York Statewide Coalition of Hispanic Chambers of Commerce ("Hispanic Chambers of Commerce") is a New York not-for-profit corporation and the premiere Hispanic business association in New York State. It represents 25 Hispanic and minority chambers of commerce throughout New York, which in turn represent nearly 200,000 Hispanic businesses. In 2010, the Hispanic Chambers of Commerce was named the official state chamber for New York by the U.S. Hispanic Chamber of Commerce. The Hispanic Chambers of Commerce, its constituent members, and their members support efforts to increase public education and awareness regarding nutrition, healthy eating choices, and physical exercise. *See* Affidavit of Frank Garcia ¶¶ 2-3 ("Garcia Aff.").

20. Plaintiff-Petitioner The New York Korean-American Grocers Association ("KAGRO") is a New York not-for-profit trade association that serves the interests of Korean-American grocery, deli, and store owners in New York City and the greater New York metropolitan area. KAGRO represents approximately 4,000 small businesses throughout the

region, including many stand-alone delis, grocery stores, and convenience stores which do a substantial portion of their sales in prepared foods. These delis and other small businesses are a popular spot for New Yorkers to purchase a variety of tasty and healthy prepared foods, fruits and vegetables, and beverages, along with other grocery staples. In many New York City neighborhoods, these businesses are the only convenient outlet for local residents to purchase their groceries and other daily necessities. *See* Affidavit of Chong Sik Lee ¶¶ 1-3 ("Lee Aff.").

21. Plaintiff-Petitioner Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters ("Local 812") is an affiliated local union of the International Brotherhood of Teamsters and a member of the Soft Drink and Brewery Conference and has approximately 3,600 members. Local 812 is the collective bargaining representative for employees who work in haulage, production, warehouse, distribution and merchandising jobs for the major New York metropolitan soft drink companies. In addition, Local 812 represents employees who work in haulage, warehouse and distribution jobs for companies that have exclusive distribution rights in the New York metropolitan area for several breweries. Affidavit of Edward Weber ¶ 4 ("Weber Aff.").

22. Plaintiff-Petitioner The National Association of Theatre Owners of New York State ("NATO") is a not-for-profit trade association representing movie theaters. In New York City, NATO represents 52 movie theaters, 312 screens, and 1,800 employees across the five boroughs. These theaters offer a variety of beverages options, including beverages covered by the ban, as well as water, diet drinks, coffee and tea. The sale of concessions helps keep ticket prices down, making a night at the movies one of the most affordable forms of entertainment in New York City. Affidavit of Robert Sunshine ¶¶ 1-2, 4-5 ("Sunshine Aff.").

23. Plaintiff-Petitioner The National Restaurant Association ("NRA") is the leading business association for the restaurant and foodservice industry and represents more than 435,000 member restaurant establishments. Six hundred and eighty seven of NRA's member restaurants are located in New York City. Many are operated by small business owners, and the overwhelming majority of these establishments will be impacted by the Ban. Affidavit of Scott DeFife ¶¶ 1, 3 ("DeFife Aff.").

24. Plaintiff-Petitioner The American Beverage Association ("ABA") is a national trade organization representing the non-alcoholic beverage industry, including beverage producers, distributors, franchise companies, and support industries. ABA members bring to market carbonated soft drinks, bottled water (including still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in an assortment of sizes with clear labels that provide nutrition and calorie information so that consumers can make informed choices concerning the beverages that best suit their needs and preferences. The ABA and its members support efforts to educate consumers about nutrition and health, support providing consumers with product-specific information, and support allowing consumers to make their own decisions about the foods and beverages they wish to enjoy. Redman Aff. ¶ 1.

25. Defendant-Respondent the New York City Department of Health and Mental Hygiene ("Department of Health or "DOH") is an administrative agency in the executive branch of the New York City government. The Department of Health includes Defendant-Respondent Board of Health ("Board"), comprised of eleven individuals appointed by and serving at the pleasure of the Mayor pursuant to sections 551 and 553-54 of the N.Y.C. Charter.

26. Defendant-Respondent Dr. Thomas A. Farley is Commissioner of the New York City Department of Health and Mental Hygiene, and serves as Chair of the Board of Health.

HARM TO PLAINTIFFS-PETITIONERS

27. If required to comply with the Ban, Hispanic Chambers of Commerce's members, consisting of numerous Hispanic businesses throughout New York City, will be irreparably harmed. Consumers in search of prohibited beverages will patronize establishments that are not covered by the Ban, rather than covered establishments. Covered businesses will lose not only beverage sales, but also sales of other products. Many of the Coalition's small minority-owned businesses stand to be significantly harmed as a result. *See* Garcia Aff.¶¶ 6-7.

28. If required to comply with the Ban, Plaintiff-Petitioner KAGRO's members will be irreparably harmed. Approximately 1,400 of its 4,000 members will be subject to the Ban and will be barred from selling beverages in sizes that their competitors will be free to sell. These affected members will be subject to repeated fines of $200 per violation, a substantial sum of money for many of the small business owners that comprise KAGRO's membership. Moreover, as a result of the Ban's inconsistent coverage, KAGRO's members who are subject to the Ban will face increased competition from neighboring competitors (both KAGRO members and non-members) that are not subject to the restriction, which will lead not only to significant losses in beverage sales, but also to losses in food and grocery sales due to reduced foot traffic. *See* Lee Aff. ¶¶ 7-11.

29. If the Ban is enforced, Plaintiff-Petitioner Local 812's members will be irreparably harmed. Certain products handled and distributed by Local 812's members are only available in sizes that will be prohibited by the Ban. Thus, the Ban will eliminate these products

from a significant percentage of the New York City market. Job levels in the industry represented by Local 812 directly correlate with the volume of products sold to the retail market place. The elimination of a large number of products from the New York City marketplace as a result of the Ban will result in the loss of jobs covered by Local 812's collective bargaining agreements. Weber Aff. ¶¶ 8-10.

30. Movie theater concession stands are also subject to the Ban, and if required to comply, Plaintiff-Petitioner NATO's member theaters in New York City, as well as their employees and patrons, will incur substantial and irreparable economic harm. Concession revenues represent a significant portion of theater profits and help stabilize ticket prices. To make up for the loss of important concession revenue that will be caused by the Ban, theaters will have to raise ticket prices at a time when ticket sales are already declining and/or reduce other costs, which could mean lower salaries or fewer employees. Sunshine Aff. ¶¶ 6-10.

31. If required to comply with the Ban, Plaintiff-Petitioner NRA's members will be irreparably harmed. Because the Ban does not apply to convenience and grocery stores, the NRA's members will likely incur economic losses and face additional compliance costs that will place them at a disadvantage. Many of their members will likely lose revenue to nearby convenience and grocery stores that are not covered by the Ban, negatively impacting sales and decreasing their often-thin profit margins. In addition, NRA's members may face several burdensome and costly inefficiencies, including potentially reconfiguring their restaurant layouts and changing their food packages offered. For some of their small business members especially, the resulting impact on revenues and profit margins could be devastating. *See* DeFife Aff. ¶¶ 4-7, 10.

32. If required to comply with the Ban, Plaintiff-Petitioner ABA's members will be irreparably harmed. ABA's bottler members will be forced to overhaul their bottling operations including the size, design, bottling, distribution, contracts, and marketing of their products, the costs of which are neither easily predictable nor recoverable but would be substantial. *See* Redman Aff. ¶¶ 3, 8-10.

JURISDICTION AND VENUE

33. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the rule adopted by Defendants is a final determination made in violation of lawful procedure, affected by an error of law, and is arbitrary and capricious. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

34. This Court has personal jurisdiction over Plaintiffs pursuant to CPLR § 301.

35. This Court has personal jurisdiction over Defendants pursuant to CPLR § 302(a)(1).

36. Venue lies in New York County pursuant to CPLR § 506(b) and § 7804(b) because it is where material events giving rise to the Ban took place.

BACKGROUND

A. The City Council And State Legislature On Multiple Occasions Have Rejected Legislative Proposals To Target The Beverages The Board Has Targeted

37. At least three legislative proposals have been introduced in the City Council to curtail or restrict the sale and consumption of sugar-sweetened beverages. After going through the legislative process, *not one* was adopted. These rejected proposals include:

- New York City Council Resolution ("N.Y.C. Council Res.") No. 1265-2012, which would have called upon the New York State Legislature to adopt legislation adding an excise tax on sugar-sweetened beverages;[13]
- N.Y.C. Council Res. No. 1264-2012, which would have called upon the United States Food and Drug Administration to require warning labels on sugar-sweetened beverages;[14] and
- N.Y.C. Council Res. No. 0768-2011, which would have called upon the United States Department of Agriculture to permit New York City to prohibit the use of food stamps to purchase sugar-sweetened beverages.[15]

38. The New York State Legislature has similarly considered several initiatives aimed at limiting or restricting sugar-sweetened beverages in some manner, and after going through the legislative process, *not one was adopted*, including:

- 2011 New York Assembly Bill ("N.Y.A.") No. 10010, which would have prohibited the sale of sugar-sweetened beverages in food service establishments and vending machines located on government property;[16]

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

[14] *See* N.Y.C. Council Res. No. 1264-2012 (N.Y. Mar. 28, 2012) *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102925&GUID=5EAE5E93-0881-4D42-B76C-A47B70E7AAB4&Options=&Search=.

[15] *See* N.Y.C. Council Res. No. 0768-2011 (N.Y. Apr. 6, 2011) *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=862347&GUID=14B3F44A-502C-410F-96A2-8420D81DBB6C&Options=&Search=.

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

- 2011 New York Assembly Bill No. 8812, which would have restricted the placement and sale of certain sugar-sweetened beverages in grocery stores, markets, supermarkets, and general stores;[17]
- 2011 New York Assembly Bill No. 843, which would have imposed additional taxes on certain "sweets or snacks," including sugar-sweetened beverages;[18] and
- 2009 New York Assembly Bill No. 10965, which would have prohibited the purchase of certain items, including sugar-sweetened beverages, with food stamps.[19]

39. Proposals by the Governor of New York to impose a tax on sugar-sweetened beverages have also repeatedly been rejected. In 2009, the State's legislative branch considered but refused to enact an 18% sales tax on sugar-sweetened sodas and juice drinks proposed by Governor David Paterson.[20] The following year, the Legislature considered another proposal by Governor Paterson, this time for a penny-per-ounce tax on soda and other sugar-sweetened beverages. Mayor Bloomberg and the Commissioner of the Department of Health

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

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

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

[20] *See* Marisa Floriani, *Paterson's Proposed Soda Tax: Not the Cure for Obesity,* Albany Government Law Review Fireplace, May 7, 2010, Ex. K.

supported this proposal, but the New York State Legislature chose not to adopt any such measure.[21]

40. The Ban passed by Defendants attempts to accomplish through executive fiat exactly what the City Council and State Legislature have refused to do: restrict sales of sugar-sweetened beverages.

B. The Mayor's Proposal

41. In the face of this consistent history of legislative rejections by the City Council and State Legislature, Mayor Bloomberg decided to take the matter into his own hands. On May 30, 2012, he announced a proposal to prohibit some of New York City's Food Service Establishments ("FSEs")—its restaurants, delis, fast-food franchises, movie theaters, stadiums and street carts—from selling certain sweetened beverages in any cup or container that is able to contain more than 16 fluid ounces.[22]

42. The following day, Mayor Bloomberg and his administration celebrated "National Donut Day" by unveiling an official City proclamation promoting "NYC Donut Day" at a donut-giveaway event in Madison Square Park. The event featured the largest box of Entenmann's Donuts ever created, and the City's proclamation prominently noted that one of the City's partners (Entenmann's Bakery) was "offering lucky winners the ultimate prize—free donuts for a year."[23]

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[21] *See* A.G. Sulzberger, *Bloomberg Says a Soda Tax 'Makes Sense'*, N.Y. Times, Mar. 7, 2010, Ex. L; Glenn Blain & Kenneth Lovett, *Soda Tax Falls Flat, Gov. Paterson Proposes Selling Wine in Grocery Stores to Generate $150M*, N.Y. Daily News, June 26, 2010, Ex. M.

[22] *See supra* ¶ 2; Margolin & Seifman, *supra* note 1, Ex. A.

[23] *See* Office of the Mayor, City of New York, *Proclamation* (June 1, 2012), Ex. N; *see also* N.R. Kleinfield, *Looking at Bloomberg's Soda Ban Through a Doughnut Hole*, N.Y. Times, June 1, 2012, Ex. O.

43. Shortly thereafter, the Mayor also presided over the "weigh-in" for Nathan's annual hotdog eating contest where he "congratulated contestants for gorging themselves, and boasted about the millions of people watching on TV."[24]

44. On June 1, 2012, 14 members of the New York City Council wrote a letter to the Mayor, stating unequivocally their opposition to the beverage ban proposal: "It is not the role of the government to tell us how to live our lives and the City should not attempt to do so, especially without the approval of the people's elected representatives in the Council. We ask that you rescind this proposal and allow people to continue making their own decisions about how much soda they will drink. If you persist in pursuing this proposal, we insist that you put it before the Council for a vote."[25]

45. Disregarding this letter, on or around June 12, 2012, the Mayor bypassed the City Council and submitted his Ban proposal to his Board of Health, comprised entirely of members he appointed. DOH on that same day voted to move the Mayor's initiative forward as a proposed rule pursuant to the New York City Administrative Procedure Act, N.Y.C. Charter § 1043.

46. Written comments opposing the Ban proposal were submitted by City Council members and other elected officials, various community leaders, local business owners, trade associations, scientific experts, individual consumers, and non-profit organizations, among others. The comments cited, in addition to other points: the unwarranted interference with the rights of consumers to purchase lawful beverages in the size containers they prefer; the arbitrary

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[24] William Saletan, *Dr. Pepper and Mr. Hot Dog: Michael Bloomberg Thinks Hot-dog Contests Are Fun, But Soda and Burgers Are Shameful*, Slate, July 11, 2012, Ex. P.

[25] *See* Letter from Members of the New York City Council to M. Bloomberg (June 1, 2012), Ex. F-19.

exclusion of numerous beverages that contain far more calories per serving than the covered beverages; the economic harm the Ban would cause to covered businesses that would be put at a competitive disadvantage against businesses that would not be covered; and the Board's lack of authority to engage in legislative policy-making and do what the City Council and State Legislature had repeatedly refused to do.[26] Indeed, at least 17 members of the City Council made clear to DOH that they are opposed to the Ban.[27]

47. Dozens of opponents of the proposed rule—including several City Council members, the Brooklyn Borough President, local businesses, consumer advocates and concerned citizens, as well as Plaintiffs—also voiced their concerns at a public hearing held on July 24,

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[26] *See* Public Comments Submitted in Response to Proposed Rule to Amend Article 81 of the New York City Code ("Public Comments") by: The American Beverage Association, Ex. G; Andrew Hawkins, operator of an affected establishment, Ex. F-1; Arva Rice, President and CEO of N.Y. Urban League, Ex. F-2; Auntie Anne's, Inc., Ex. F-3; N.Y.C. Brooklyn Community Board 15, Ex. F-4; Cristina Rivera, registered dietitian, Ex. F-5; City Council Member Debi Rose, Ex. F-6; City Council Member Diana Reyna, Ex. F-7; Janet Sternberg, PhD, Assistant Professor of Communication and Media Studies at Fordham University, Ex. F-8; Dunkin' Brands, Inc., Ex. F-9; Elizabeth Berman, President of Continental Food and Beverage, Inc. and on behalf of New Yorkers for Beverage Choice, Ex.F-10; Food Service Packaging Institute, Ex. F-11; City Council Member G. Oliver Koppell, Ex. F-12; The International Franchise Association, Ex. F-13; Jessica Fishman Levinson, registered dietitian and nutrition consultant, Ex. F-14; Baylen J. Linnekin, Executive Director of Keep Food Legal, Ex. F-15; Kevin Wade, owner of an affected small business, Ex. F-16; Brooklyn Borough President Marty Markowitz, Ex. F-17; City Council Member Melissa Mark-Viverito, Ex. F-18; The Council of the City of New York, Ex. F-19; National Automatic Merchandising Association, Ex. F-20; National Restaurant Association, Ex. F-21; New York State Restaurant Association, Ex.F-22; Norman Seigel, civil rights attorney, Ex. F-23; City Council Member Vincent J. Gentile, Ex. F-24; NYS Hispanic Chamber of Commerce, Ex. F-25; Peter J. Pitts, President of the Center for Medicine in the Public Interest, Ex. F-26; Joe Nocera, ADF Companies, Ex. F-27; City Council Member Robert Jackson, Ex. F-28; Robert Sunshine, Executive Director of the National Association of Theatre Owners of NYS, Ex. F-29; Ruth Kava, PhD, Senior Nutrition Fellow for the American Council on Science and Health, Ex. F-30; Seth Goldman, Co-Founder of Honest Tea, Ex. F-31; The Wendy's Company, Ex. F-32; U.S. Congressmen Michael G. Grimm and Robert Turner, Ex. F-33; and Washington Legal Foundation, Ex. F-34.

[27] *See* Response to Comments at 17, Ex. J; *see also supra* ¶ 44 & n.25.

2012.[28] Despite the widespread public interest and highly controversial nature of the Ban proposal, interested parties were limited to five minutes each.[29]

48. DOH was also presented with a petition containing more than 90,000 signatures of New Yorkers opposed to the proposed ban collected by New Yorkers for Beverage Choice, a coalition of individuals, businesses, and community organizations who believe New York City residents and visitors should have the right to buy beverages in the sizes they choose.[30]

49. The owner and founder of Honest Tea (the maker of popular ready-to-drink iced tea products) explained in a *Wall Street Journal* editorial submitted to the record that his company had made a substantial investment in standard-order, 16.9-ounce (500-ml) bottle molds—which it will have to recall, and redistribute to other businesses as a result of the Ban—and expressed his frustrations with "a proposal that arbitrarily complicates the practical realities of commerce."[31]

50. The Chief Executive of Dunkin' Brands similarly noted in a *New York Times* Letter to the Editor that the Ban would create unfair and purposeless disadvantages for certain businesses: "The proposed regulation is flawed because it includes certain businesses and leaves out others, notably convenience stores. This will create some absurd scenarios. Imagine

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[28] *See* Excerpts of Transcript of Public Hearing of DOH Regarding the Opportunity to Comment on the Proposed Amendment of Article 81 of the New York City Health Code (July 24, 2012) ("Hearing Transcript"), Ex. Q.

[29] *See* Pervaiz Shallwani, *Outpouring of Opinions at 'Soda Ban' Hearing*, Wall St. J., July 24, 2012, Ex. R; Hearing Transcript at 5, Ex. Q.

[30] *See* Public Comments submitted by Elizabeth Berman, President of Continental Food and Beverage, Inc. and on behalf of New Yorkers for Beverage Choices, Ex. F-10.

[31] *See* Seth Goldman, Op-Ed., *Mayor Bloomberg and Our 16.9-Ounce Tea*, Wall St. J., July 23, 2012, Ex. G at Appx. D Tab 2.

going to Dunkin' Donuts and being denied a medium iced coffee with skim milk and sugar, only to walk across the street to a convenience store and buy a Super Big Gulp soft drink, containing considerably more sugar."[32]

51. A number of owners of restaurants and tea shops in the city have decried the impact that the proposed ban will have on a popular form of drink called "bubble tea." For example, Lin Guye, an employee at Corner 28, a local eatery, stated that if bubble tea and other beverages sold at Corner 28 are limited to certain sized containers under the Ban, her customers will purchase their drinks at a nearby grocery store (exempt from the Ban), rather than at Corner 28.[33]

C. Adoption Of The Final Rule

52. On September 13, 2012, the Mayor's appointees on the Board of Health adopted the amendments to section 81.53 of the Health Code essentially just as the Mayor proposed, without making a single substantive change to address the comments submitted in response to the proposal.[34]

53. The Ban limits the maximum cup or container size for "sugary drinks" to 16 fluid ounces for all FSEs within New York City.[35] The rule defines "sugary drink" as "a carbonated or non-carbonated beverage that: (A) is non-alcoholic; (B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener; (C) has greater than 25

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[32] Nigel Travis, Chief Executive, Dunkin' Brands, Letter to the Editor, *Bloomberg's Soda Ban*, N.Y. Times, Aug. 1, 2012, Ex. S; *see also* Comments Submitted by Dunkin' Brands Inc., Ex. F-9.

[33] *See* Joe Anuta, *Popular Bubble Tea Jeopardized by Ban*, Queens Campaigner, Aug. 16, 2012, Ex. T.

[34] *See* The City Record, *supra* note 8, at 2602-03, Ex. H.

[35] *Id.* at 2603 (to be codified at R.C.N.Y. tit. 24, § 81.53(b) and (c)).

calories per 8 fluid ounces of beverage; and (D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient."[36]

54. As described above, the Ban contains various exceptions and carve-outs for, *inter alia*, alcoholic beverages, fruit juices, milkshakes, and certain milk-based coffee drinks. Many excluded beverages contain more sugar and many more calories than drinks that are covered.[37]

55. The Ban purports to apply to all FSEs, which are defined under the New York City Health Code as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle."[38] However, under a Memorandum of Understanding between the New York State Department of Health and the New York State Department of Agriculture and Marketing, a food service establishment is subject to inspection by the local Department of Health only if it generates 50% or more of its total annual dollar receipts from the sale of food for consumption on the premises or ready-to-eat for off-premises consumption.[39] The Department of Health has announced that only those FSEs

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[36] *Id.* (to be codified at R.C.N.Y. tit. 24, § 81.53(a)).

[37] *See id.*; Public Comments Submitted by the American Beverage Association in Opposition to the Proposed Amendment of Article 81 ("ABA Comments") at 2, 27, 51-52, Ex. G; Report of Dr. Marilyn Schorin at 1, 9-10 ("Schorin Report"), Ex. G at Appx. A.

[38] R.C.N.Y. tit. 24, § 81.03(s).

[39] Memorandum of Understanding between the New York State Department of Health and the New York State Department of Agriculture and Markets Concerning the Inspection of Food Services Establishments and Food Processing Establishments at 2 (Sept. 20, 2010) ("MOU"), Ex. U.

for which it is responsible for inspections under that Memorandum of Understanding will be subject to the ban.[40]

56. Various other establishments—most notably, grocery and convenience stores—are thus exempt from the Ban because they are subject to inspection by the New York State Department of Agriculture and Marketing,[41] even though the Department of Health otherwise regulates those businesses.[42]

57. The rule sets a maximum fine of $200 for each violation and authorizes citation for one violation per inspection of an FSE.[43]

58. The Ban has been reviewed and approved by the New York Law Department and the New York City Mayor's Office of Operations pursuant to §1043(c) and (d) of the N.Y.C. Charter. On September 21, 2012, the newly-amended § 81.53 of the Health Code was published in the City Record pursuant to §1043 (f) of the City Charter. A true and correct copy of the City Record published on September 21, 2012 is attached hereto as Exhibit H. Thus, although the rule will not be not enforced until March 12, 2013, it is final and effective under §1043 of the N.Y.C. Charter.

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[40] *See* Response to Comments at 11, Ex. J.

[41] *See* MOU at 4, Ex. U (listing examples of establishments over which the Department of Agriculture and Markets has inspection authority); *see also* USA Today, *supra* note 3, Ex. C ("The city doesn't regulate grocery and convenience stores, so Bloomberg's edict wouldn't even kill off the granddaddy of supersized drinks, 7-Eleven's Big Gulp.").

[42] *See* R.C.N.Y. tit. 24, § 181.17; R.C.N.Y. tit. 24, § 181.19 (regulating any business selling tobacco, including grocery stores, convenience stores, and corner markets).

[43] *See* The City Record, *supra* note 8, at 2603, Ex. H.

D. The Ban Represents A Dramatic Departure From The Powers Traditionally Exercised By The Department Of Health

59. Prior actions taken by DOH exemplify its narrow, administrative role in enforcing, reviewing, supervising and promoting prior legislation already enacted by the City Council. *See, e.g.*, DOH, *Notice of Adoption of an Amendment to Chapter 10 (Smoking Under the New York City Smoke-Free Air Act) of Title 24 of the Rules of the City of New York* (2004) (amending Chapter 10 of the Health Code pursuant to its role as "the enforcement officer of the State law" to "harmonize certain provisions" of existing rules with the New York City Smoke-Free Act passed by the City Council as Local Law 47 of 2002, and thus "minimize confusion or uncertainty"), *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/10-24-notice.pdf; *see also* N.Y.C. Local Law No. 47 (2002) ("the [DOH] may promulgate rules . . . necessary to carry out the provisions of this local law").

60. Other regulations promulgated by DOH reflect its administrative role as an executive regulatory agency and not a legislative body. For example, DOH has:

- adjusted the restricted boundaries between bathing beaches and sewage sanitation sites;[44]
- required electronic laboratory reporting to DOH of positive rotavirus, norovirus, RSV, VZV and MRSA test results;[45]
- barred anyone other than a DOH employee from removing a decal on a mobile food vending unit;[46] and

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[44] *See* DOH, *Notice of Intention to Amend Article 167 of the New York City Health Code* (2008), *available at* http://www.nyc.gov/html/doh/downloads/pdf/notice/amend-article-167.pdf.

[45] *See* DOH, *Notice of Adoption to Amend Article 11 of the New York City Health Code* (2008), *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art11-0108.pdf.

[46] *See* DOH, *Notice of Adoption of Amendments to Chapter 6 (Food Units) of Title 24 of the Rules of the City of New York* (2007), *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art6-0319.pdf.

- established point-of-entry posted letter grading for health inspection results in Food Establishments.[47]

61. DOH has never before attempted to subject New Yorkers to administrative regulation of portion sizes of lawful foods or beverages. In fact, no other city or state in the country has adopted such a measure, either through legislation or, as here, by administrative fiat.

62. Previous DOH regulations under Article 81 of the Health Code involved such matters as keeping poisonous products outside of food establishments, or providing consumers with the means to make informed choices where there was a gap to be filled in the legislation governing this policy (*e.g.*, DOH's calorie-posting initiative). *See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009). Indeed, DOH's calorie-posting regulation was only enacted after the United States Congress passed legislation regulating the disclosure of nutritional information to consumers, and expressly provided local governments with the ability to complement the legislation. *See id*. Here, neither Congress, the State Legislature, nor the City Council has established a legislative scheme targeting and restricting the portions of sugar-sweetened beverages.

63. Broader social policy initiatives that have been enacted in recent years have become law only when passed by New York City's elected legislative body, the City Council, and typically only after an extended period of robust and transparent democratic debate.

64. In 2002, for example, Mayor Bloomberg proposed a ban on cigarettes that would prevent smoking in bars and restaurants throughout the City. Following this proposal, the New York City Council, in its role as New York City's legislative body, enacted the New York City Smoke-Free Air Act of 2002. N.Y.C. Admin. Code tit. 17, ch. 5 §§ 17.-501 *et seq*. The

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[47]*See* DOH, *Notice of Adoption of Amendments to Article 81 of the New York City Health Code* (2010), *available at* http://www.nyc.gov/html/doh/downloads/pdf/notice/2010/Article-81.pdf.

Council only did so after extensive debate, presentation of testimony and consideration of scientific, economic, and social evidence. *See N.Y. City C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 490-91 (S.D.N.Y. 2004) (describing legislative process).

65. In 2011, the City Council expanded the Smoke-Free Air Act to ban smoking in public parks and plazas following a proposal for the ban from city health officials the year before. Mayor Bloomberg and Defendant Commissioner Farley supported and promoted the ban as early as September 2009 through DOH's "Take Care New York 2012" health initiative,[48] but relied on the City Council to institute the ban by amending the Smoke-Free Air Act.[49]

66. During a press conference held by the Mayor on July 5, 2010, Defendant Commissioner Farley had acknowledged that the expanded smoking ban "would probably have to be approved by the City Council."[50]

67. As recently as June 2012, Defendant Commissioner Farley stated that "I look forward to working with the Council in the coming months on another important smoking-related proposal—our bill to require landlords to disclose a building's smoking policy to potential tenants."[51]

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[48] *See* DOH, *Take Care New York 2012: A Policy for a Healthier New York City* (Sept. 2009), *available at* http://www.nyc.gov/html/doh/downloads/pdf/tcny/tcny-2012.pdf.

[49] *See* Javier C. Hernandez, *Smoking Ban for Beaches and Parks is Approved*, N.Y. Times, Feb. 2, 2011 (describing a "bitter debate over individual liberties and the role of government"), Ex. V.

[50] Anemona Hartocollis, *Mayor Leans Toward a Smoking Ban at Parks and Beaches*, N.Y. Times, July 6, 2010, Ex. W.

[51] *See* Testimony of Thomas A. Farley before the New York City Council Committee on Health, Committee on Mental Health, Mental Retardation, Alcoholism, Drug Abuse and Disability Services, and Committee on Finance, on FY 2013 Executive Budget 3 (June 4, 2012), Ex. X.

68. Similarly, shortly after DOH banned the use of trans fats in foods served by New York City FSEs in December 2006, the City Council enacted ratifying legislation by a 47-1 voting margin that expressly "incorporate[d] the ban on artificial trans fat into the Administrative Code," thus providing express legislative approval for DOH's actions.[52]

FIRST CAUSE OF ACTION

Request for Relief under Article 78 of the CPLR

69. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 to 68 of this Petition as if fully set forth herein.

70. The New York State Constitution provides that every local government "shall have a legislative body elective by the people thereof." N.Y. Const. art. IX, § 1(a). The New York Municipal Home Rule Law reaffirmed the primacy of city legislative bodies, including in the adoption and revision of city charters and the delegation of authority to local agencies, including over matters of "health and sanitation." *See* N.Y. Mun. Home Rule Law § 10(1)(ii)(c), 10(2), 10(4)(a). The New York City Charter provides that the City Council "shall be the legislative body of the city" and "shall be vested with the legislative power of the city." N.Y.C. Charter ch. 2, § 21.

71. "In New York City, the City Council is the body vested with legislative power." *Subcontractors Trade Ass'n v. Koch*, 62 N.Y.2d 422, 427 (1984). The executive branch "is empowered to implement and enforce legislative pronouncements emanating from the Council, but in doing so the Mayor 'may not go beyond stated legislative policy and prescribe a remedial device not embraced by the policy.'" *Id.* (citation omitted). Before the executive may devise a scheme for ameliorating perceived societal ills, "the legislature must *specifically*

[52] *See* New York, N.Y., Local Law No. 012 of 2007, Council Int. No. 517 (Mar. 28, 2007), Ex. Y.

delegate that power . . . and must provide adequate guidelines and standards for the implementation of that policy." *Id.* at 429 (emphasis in original). The general authority to adopt rules and regulations in the context of a particular field does not authorize an administrative agency to promulgate broad-based legislative policy. *See id.* at 428-29 (holding that new policy created by executive branch requiring that a certain percentage of city contracts be allotted to a particular category of businesses is an "exercise of legislative power" beyond the role of the executive; the authority to promulgate rules and regulations "in regard to the execution of capital projects" was insufficient).

72. Here, DOH relies on sections 1043, 558(b)-(c), and 556(c)(2) and (c)(9) of the New York City Charter as its purported basis for promulgating the Ban.[53] It further invokes its own purported "historic power to regulate restaurants and food safety in New York City."[54]

73. Section 1043(a) of the New York City Charter authorizes administrative agencies in New York City to "adopt rules necessary to carry out the powers and duties" to the extent that they are "delegated to it by or pursuant to federal, state or local law."

74. Section 558(b) of the New York City Charter authorizes DOH, through its Board, to periodically "add to and alter, amend or repeal any part of the health code."

75. Section 558(c) of the New York City Charter provides that "[t]he board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends."

76. Section 556(c) of the New York City Charter merely sets forth matters DOH is authorized to "supervis[e]."

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[53] *See* The City Record, *supra* note 8, at 2602, Ex. H.

[54] *Id.*

77. Section 556(c)(2) of the New York City Charter provides that DOH may "supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health."

78. Section 556(c)(9) of the New York City Charter provides that DOH may "supervise and regulate the food and drug supply of the city and other businesses and activities affecting public health in the city, and ensure that such businesses and activities are conducted in a manner consistent with the public interest and by persons with good character, honesty and integrity."

79. None of these sections of the New York Charter authorizes Defendants to go beyond their administrative role and engage in the unprecedented act of policy-making at issue here, nor is there any support that an administrative agency can bypass the legislature and create policy based on its purported "historic power."

80. Generalized, enabling language authorizing an agency to "make reasonable 'rules and regulations for the conduct of his office or department to carry out its powers and duties'" is insufficient to support sweeping policy-based rule-making. *Thrift Wash, Inc. v. O'Connell*, 11 Misc. 2d 318, 322 (Sup. Ct. N.Y. County 1958) (citations omitted); *see also Subcontractors Trade Ass'n*, 62 N.Y.2d at 429-30 (the Mayor's "General Charter-conferred powers and City Council resolutions … in no way purport to authorize the" power to issue executive orders and implementing rules and regulations that promote awarding of city contracts to small and local businesses, as that "executive action must be deemed an unlawful usurpation of the legislative function").

81. An administrative agency in the executive branch cannot rely upon its own mandate "as a basis for engaging in inherently legislative activities" or promulgating rules

"embodying its own assessment of what public policy ought to be." *Boreali*, 71 N.Y.2d at 9. When an administrative agency moves beyond enforcing policies enacted by the legislative branch and implements policy on its own accord, it is acting outside the scope of its authorized power. *Id.*

82. To interpret Defendants' generally delegated authority in a manner that would grant them the power to create out of whole cloth new policy for the City would violate the separation-of-powers doctrine. *See id*. at 11 (courts reject "administrative actions undertaken under otherwise permissible enabling legislation where the challenged action could not have been deemed within the legislation without giving rise to a constitutional separation of powers problem"); *People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 183 (1st Dep't 2008) (interpreting statute "in accordance with our obligation to construe a statute whenever reasonably possible so as to avoid serious constitutional questions").

83. In *Boreali*, the Court of Appeals held that a broad grant of authority to the New York Public Health Council ("PHC") was insufficient to support the agency's unilateral limitations on smoking in public areas, even though such actions were aimed at social ills and may have been appropriate had they been legislatively authorized. 71 N.Y.2d at 9.

84. The grant of authority at issue in *Boreali* is virtually the same type and scope of rule-making authority the Board of Health here possesses under N.Y.C. Charter § 558. The *Boreali* court explained that "the agency stretched [its authority under Pub. Health Code § 225] beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be." 71 N.Y.2d at 9. The same conclusion must be reached here.

85. The *Boreali* court considered four factors in determining that the PHC had gone beyond mere administrative action and passed a rule that was legislative in nature and hence beyond the scope of its authority. Each of these factors compels the conclusion here that the Ban similarly lies outside the scope of power granted to DOH because it crosses the line of administrative rule-making into the forbidden realm of legislative action.

86. *First*, the *Boreali* court noted that the rule passed by the PHC was "laden with exceptions based solely upon economic and social concerns" with no basis or foundation in public health. *Id*. at 11-12. The Ban here similarly is laden with arbitrary exceptions that have no connection to the purported purpose for the rule. These include: (1) the exemption for high calorie alcoholic beverages; (2) the exemptions for milkshakes, high calorie coffee drinks, unsweetened juices, and several other kinds of beverages that have many more calories per serving than covered beverages; and (3) the exclusion of convenience stores, grocery stores, corner markets, 7-Elevens and other businesses that are permitted to continue selling covered beverages in any size container consumers want. *See supra* ¶¶ 5-7; *infra* ¶¶ 104-129 (Third Cause of Action). Moreover, the Ban does not prohibit unlimited free refills, multiple purchases of 16-ounce beverages, or the addition of sugar by the consumer once a beverage is purchased, but it does bar covered FSEs with self-serve fountains from providing 16-ounce cups even for consumption of water, diet soda, or any other zero-calorie beverage. None of these distinctions bears any meaningful relationship to the purported purpose of the rule—to combat obesity. Where exceptions have "no foundation in considerations of public health," they "demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise." *Boreali*, 71 N.Y.2d at 12. It is "particularly compelling" that these

exclusions and loopholes "run counter to [Defendants'] goals and, consequently, cannot be justified as simple implementations of legislative values." *Id.*

87. *Second*, the *Boreali* court found that the PHC wrote the smoking ordinance on a "clean slate, creating its own comprehensive set of rules without benefit of legislative guidance"; it "did not merely fill in the details of broad legislation describing the over-all policies to be implemented." *Id*. at 13. So too here. Defendants make no pretense of merely implementing legislative policy, and instead openly acknowledge that the Ban implements their own "innovative policy."[55] Defendants have acted unilaterally, not only in the absence of any legislative guidance, but in the face of legislative rejections of efforts to target these same beverages. Defendants have relied entirely on generalized notions of the Board's power, acting on their own preferences, just as the PHC did in *Boreali*. The Ban is undeniably "a far cry from the 'interstitial' rule making that typifies administrative regulatory activity." *Boreali*, 71 N.Y.2d at 13.

88. *Third*, the *Boreali* court explained that "the fact that the agency acted in an area in which the Legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" demonstrated that it exceeded the scope of its authority. *Id*. Similarly here, Defendants have attempted an end-run around the legislative branch. The New York City Council and New York Legislature have continuously decided *not* to pass legislation targeting the consumption of sugar-sweetened beverages, including rejecting the proposed state soda tax that the Mayor and previous Commissioner of DOH unsuccessfully supported. *See supra* ¶¶ 37-39. "Manifestly, it is the

[55] Response to Comments at 12, Ex. J.

province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali*, 71 N.Y.2d at 13.

89. *Finally*, the *Boreali* court noted that the PHC did not exercise any special expertise or technical competence. Rather, the PHC drafted a "simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups," *see id.* at 14, and was not asked to "flesh out details of the broadly stated legislative policies embodied in the Public Health Law," for which it possessed technical competence. *Id*. Like its state counterpart, the DOH here has merely promulgated its own "simple code" on sugar-sweetened beverages with numerous "interest group" carve-outs. It has not fleshed out any "legislative policies," because the legislature has not established such policies, but has instead adopted wholesale a proposal handed to it by the Mayor's Office, thereby enacting new social policy that cannot be traced to any State or City Council legislation. As explained further *infra* ¶¶ 104-129 (Third Cause of Action), the Ban is riddled with exclusions that lack any scientific or technical basis or health justification and evince pure policy judgments by Defendants.

90. Justifications asserted by DOH for its arbitrary Ban confirm that it is usurping the City Council's legislative, policy-making role rather than acting in a proper administrative capacity. First, DOH seeks to justify the Ban's arbitrary exclusions by asserting that the covered beverages are "empty" or "excess" calories.[56] However, many of the covered beverages are fortified with vitamins and minerals,[57] and a wide range of foods and beverages that are excluded from the rule, including wine, beer, other alcoholic drinks, fancy mochas and

[56] *See* The City Record, *supra* note 8, at 2602, Ex. H; Response to Comments at 3-5, 7, 11-13, Ex. J.

[57] *See* ABA Comments at 21, Ex, G.

lattes, certain juices, donuts, buttered popcorn, pork rinds, licorice, and a broad array of candy and other desserts, have high caloric and sugar content and are consumed primarily for enjoyment rather than nutrition. One person's "empty calories" are another person's source of enjoyment. Here DOH is presuming to decide which foods and beverages are okay to consume for pleasure, and which should be subject to restrictions. On the basis of its own subjective judgments, not technical expertise, DOH has decided to impose restrictions on some beverages but not others, and has chosen to exempt beverages that have higher caloric content than covered beverages and no greater nutritional content, and at the same time has included in the ban many beverages that have greater nutritional content than many exempted beverages. This inconsistent treatment reflects policy judgments that are not DOH's to make.

91. DOH is clearly exercising policy-making judgment in settling on its 25 calorie per eight ounce limit and 16-ounce container size. There is simply no reason to draw these lines at the points DOH has chosen as opposed to any other particular point (*i.e.*, 12 ounces or 20 ounces). *See infra* ¶¶ 104-129 (Third Cause of Action). Indeed, DOH states as much in its Response to Comments, expressly conceding that it seeks to "balance[] health impact and feasibility."[58] And the same is true for DOH's decision not to restrict free refills, the number of beverages an individual can buy, or the amount of sugar that a consumer can add to their drink after purchase, for which Defendants have offered no coherent explanation. When these loopholes are contrasted with the provision in the Ban that forbids establishments with self-serve fountains from offering cups larger than 16 ounces even when used for diet sodas, zero-calorie beverages, and water, it is not possible to say DOH is doing anything but making political, economic, and pure policy judgments unrelated to any technical or scientific expertise.

[58] Response to Comments at 11, Ex. J.

92. DOH claims that it has not applied its Ban to alcoholic beverages because the New York State Liquor Authority has jurisdiction over alcoholic beverages. But this is clearly an arbitrary pretext that masks a political decision to exclude alcoholic beverages for other reasons. DOH has exercised jurisdiction over alcoholic beverages in other contexts and even promulgated regulations associated with serving alcohol in New York City (issued pursuant to local law adopted by the City Council).[59] Its inconsistent treatment of alcohol in this context evinces the precise type of political, economic, and social calculus forbidden under *Boreali*.

93. DOH also endeavors to excuse the application of the Ban to some stores but not others on the basis that covered stores are regulated by DOH and excluded stores are regulated by the State Department of Agriculture. As with the alcohol exclusion, this is an arbitrary pretext. DOH could exercise jurisdiction over grocery stores, convenience stores, and the like—and already does.[60] DOH's failure to do so means it is either ignoring the significant economic harm that the Ban's exemptions and exceptions will cause to covered stores and businesses (which is patently arbitrary) or that it has weighed that economic harm against the claimed health benefits of the Ban and concluded the harm is justified (which is precisely the kind of balancing of competing economic, social and health goals that the court in *Boreali* made clear is the province of elected legislative bodies and beyond the authority of administrative agencies).[61] As with prior decisions to impose restrictions on smoking in public places, any decision to proceed with the Ban in the face of its obvious unfairness and the economic hardship

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[59] *See, e.g.*, R.C.N.Y. tit. 24, § 1-02 (DOH regulation requiring establishments licensed by the New York State Liquor Authority to provide health warnings concerning the consumption of alcoholic beverages during pregnancy).

[60] R.C.N.Y. tit. 24, §§ 181.17, 181.19 (regulating tobacco sales in, *inter alia*, grocery stores, convenience stores, and corner markets).

[61] *See* Response to Comments at 9, Ex. J ("It is DOH[]'s position that the potential health benefits outweigh the[] costs" covered FSEs will bear).

it will cause must be made by an elected legislative body, not a Board appointed by the Mayor and acting entirely at his behest.

94. Because Defendants have engaged in legislative policy-making without a proper statutory basis, their promulgation of the Ban constitutes an *ultra vires*, invalid action in excess of their jurisdiction and authority. This conclusion is compelled by well-established principles of constitutional avoidance. *See Boreali*, 71 N.Y.2d at 14; *State v. Enrique T.*, 93 A.D.3d 158, 167 (1st Dep't 2012); *Grasso*, 54 A.D.3d at 183.

95. Because Defendants do not have the authority to pass the Ban, Defendants and their agencies, officers and employees should be enjoined from enforcing the Ban pursuant to CPLR sections 7803 and 7806, and the Ban should be declared invalid.

SECOND CAUSE OF ACTION

Request for Declaratory Relief under Article 30 of the CPLR

96. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 to 68 of this Petition as if fully set forth herein.

97. To the extent that this Court declines to interpret sections 556(c)(2) and (c)(9), 558(b)-(c), and 1043 of the New York City Charter so as to preclude Defendants from enacting the Ban, it should issue a declaratory judgment finding that such a broad delegation of authority violates the separation-of-powers doctrine.

98. In accordance with this constitutional doctrine, the New York City Charter "provide[s] for distinct legislative and executive branches: the City Council 'shall be vested with the legislative power of the city, and shall be the local legislative body of the city,' while the Mayor 'shall be the chief executive officer of the city.'" *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 356 (1985) (citing N.Y.C. Charter ch. 1, § 3 and ch. 2, § 21); N.Y. Const. art. IX, § 1(a)

("[e]very local government . . . shall have a legislative body elective by the people thereof"); *see also* N.Y. Const. art. III, § 1; *id*. art. IV, § 1; *id*. art. VI, § 1 (providing for separation of powers at State level).

99. As officers and/or agencies of the executive branch, Defendants cannot engage in legislative policy-making and may only act pursuant to valid legislative authority. *See, e.g.*, *Under 21*, 65 N.Y.2d at 356 ("[N]o matter how well-intentioned his actions may be, the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council."). "In the absence of such specific authority, the executive action must be deemed an unlawful usurpation of the legislative function." *Subcontractors Trade Ass'n*, 62 N.Y.2d at 429-30.

100. While the legislature may, with reasonable safeguards and standards, delegate certain of its powers to executive agencies to administer the law as enacted by the legislature, it is an "oft-recited principle" in New York "that the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency." *Boreali*, 71 N.Y.2d at 9.

101. This principle applies with equal force to the separate branches of the New York City government, which are divided based on this same principle of governance. N.Y. Const. art. IX, § 1(a); N.Y.C. Charter ch. 2, § 21; *Under 21*, 65 N.Y.2d at 356; *Subcontractors Trade Ass'n*, 62 N.Y.2d at 427.

102. Here, any authorization under the City Charter to Defendants to act in a core legislative capacity in promulgating the Ban constitutes an unconstitutional delegation of the "fundamental policy-making responsibility" of the New York City Council, in violation of the separation-of-powers doctrine. *Cf. Boreali*, 71 N.Y.2d at 9.

103. Accordingly, to the extent this Court finds that §§ 556(c)(2) and (c)(9), 558(b)-(c), and/or § 1043 of the N.Y.C. Charter authorized Defendants to promulgate the Ban, the Court should issue a declaratory judgment pursuant to CPLR 3001 finding these delegations to be unconstitutional as in violation of the separation-of-powers doctrine, and further that the Defendants' actions taken pursuant to them are invalid.

THIRD CAUSE OF ACTION

Request for Relief under Article 78 of the CPLR

104. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 to 68 of this Petition as if fully set forth herein.

105. In addition to having been adopted without authority, the Ban is substantively invalid because it is riddled with arbitrary exclusions, exemptions, and classifications that are unrelated to the stated purpose of the rule. Defendants should be enjoined from enforcing such an arbitrary and capricious Ban. CPLR §§ 7803, 7806.

106. An administrative regulation will be upheld only if it has a "rational basis, and is not unreasonable, arbitrary or capricious." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991); CPLR § 7803(3). Agency rules "are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties*, 78 N.Y.2d at 166.

107. The arbitrary or capricious standard chiefly "'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (citation omitted). Agency action is arbitrary when it is "without sound basis in reason" or "taken without regard to the facts." *Id.*

108. Agency rules and classifications will be invalidated unless they "bear some rational relationship to the goals sought to be achieved, and must otherwise be factually based." *Kelly v. Kaladjian*, 155 Misc. 2d 652, 655 (Sup. Ct. N.Y. County 1992).

109. In making this assessment, courts are limited to considering the reasons an agency "gives for its action, at the time that it takes the action." *Street Vendor Project v. City of N.Y.*, 10 Misc. 3d 978, 986 (Sup. Ct. N.Y. County 2005). "'If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.'" *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (citation omitted); *see also Gabriele v. Metro. Suburban Bus Auth.*, 239 A.D.2d 575, 577 (2d Dep't 1997).

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

110. It is wholly irrational to prohibit selected businesses in New York City from selling covered beverages, while permitting thousands of corner markets, convenience stores, gas stations, and grocery stores in New York City to sell the *exact same beverages in any size*.

111. Under the Ban, consumers will not be able to purchase a soda greater than 16 ounces from a pushcart, food truck, deli, restaurant, theater or athletic stadium, but will be able to walk into any 7-Eleven and buy a 32-ounce Big Gulp or a 50-ounce Double Gulp, and will be able to walk into any corner market and buy a bottled beverage in any size they want. A consumer will be able to buy a 20-ounce coffee at most cafes, which require the consumer to add his or her own sugar, but not at Dunkin Donuts, which adds the sugar for the consumer. Such a hodge-podge scheme will make absolutely no sense to consumers, who will understand that a soda or other beverage is the same no matter where purchased.

112. Further, the distinction between covered and exempt establishments—whether 50% or more of revenues are derived from prepared foods—does not derive from any actual limit on the Department's jurisdiction, and has nothing whatsoever to do with the obesity concerns that purportedly motivated the Ban and application of this distinction will therefore arbitrarily punish or benefit essentially identical competitors on either side of the line. A business that falls just below the cutoff may continue to sell any beverage in any size it wants, but a business that falls just above the cutoff is prohibited from selling the same lawful beverages that its competitor can sell.

113. Stores that are not covered by the Ban now have an economic incentive to compete by touting their greater range of large-sized product offerings, which will actively frustrate the purported purpose of the rule. And stores that are covered are put at a competitive disadvantage, because they can no longer offer what many of their customers want. As already described, these stores stand to lose not only sales of beverages, but sales of other products as customers choose to go where they can buy what they want.

114. The economic harm to these small businesses will serve no purpose, because by frequenting other, non-covered businesses consumers will still be able to purchase the beverages they want in the size containers they want. *See supra* ¶ 8. The Board therefore is merely choosing winners and losers among businesses, distorting the beverage market, and placing every covered business (many of which are small, family-owned establishments) at a competitive disadvantage with every 7-Eleven, grocery store, and gas station on their block.

115. Defendants defend their irrational and nonsensical scheme, which allows 7-Elevens to continue selling Big Gulps while putting the screws to pushcarts and food trucks, by asserting that DOH lacks jurisdiction over the businesses that will be allowed to continue to sell

the banned beverages. But that distinction stems from a patently arbitrary misunderstanding of the Department's jurisdiction, has nothing to do with Defendants purported objective, and it does not in any event excuse New York City from irrationally penalizing delis, restaurants, food carts, food trucks, theaters, and stadiums, while conferring competitive advantages on corner markets or convenience stores that are still permitted to offer beverages in large sizes. *See Law Enforcement Officers Union Dist. Council 82 v. State*, 229 A.D.2d 286, 291 (3d Dep't 1997) (where similar circumstances are regulated differently, "distinction in treatment is arbitrary and capricious"); *Kaladjian*, 155 Misc. 2d at 655 (distinction "must bear some rational relationship to the goals sought to be achieved").

116. Lack of legal authority to promulgate a rule in a rational way does not give license to promulgate a rule that is wholly irrational in its application and will fail to achieve any useful purpose. It is arbitrary to adopt a rule that will cause significant economic harm to a large number of businesses while not achieving any useful purpose. *See Kaladjian*, 155 Misc. 2d at 655-58; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995) (regulatory scheme is irrational where "exemptions and inconsistencies" will "directly undermine and counteract its effects" and "ensure[] that the . . . ban will fail to achieve" its objective).

B. The Exclusion Of Alcoholic Beverages And Other Higher Calorie Beverages Is Arbitrary

117. The exclusion of all alcoholic beverages from the Ban is completely irrational. Beer and soda have nearly the same calories per ounce.[62] Yet under the Ban, fans at a baseball game will be able to buy a 20-ounce glass (or a 24-ounce tall-boy can) of beer, but not a soda in the same size (even though the soda would come with ice and contain fewer ounces of liquid, and therefore fewer calories). The distinction has no health basis and is entirely arbitrary.

[62] *See* ABA Comments at 16, Ex. G.

118. Many alcoholic beverages have *far more* calories than covered beverages. On a per-ounce basis, a martini has *over five times* as many calories as a typical soda, a piña colada has *over four times* as many calories, and wine has nearly *twice as many* calories.[63] A standard 4-ounce martini thus has more calories than a 16-ounce soda (only about 187 calories). A 16-ounce Mike's Long Island Iced Tea has about 454 calories—nearly 2.5 times the calories of a 16-ounce soda. A 23.5-ounce can of Four Loko contains about 660 calories—more than 3.5 times the calories of a 16-ounce soda. Under the Board's paternalistic approach, every one of these alcoholic beverages should be subject to *lower* portion limits than soda. Yet none of these beverages are subject to any size restrictions at all. DOH's alleged reason for excluding alcoholic beverages is that they are regulated by the New York State Liquor Authority. But this completely overlooks and is inconsistent with the fact that DOH *has* promulgated regulations regarding health concerns with alcoholic beverages, including mandating that establishments licensed by the Liquor Authority display materials generated by DOH concerning the health effects of consuming alcohol during pregnancy.[64] The blanket exclusion of these and all other alcoholic beverages is completely arbitrary.

119. Similarly, a chocolate milkshake will have between two to four times as many calories per ounce as a typical 16-ounce soda.[65] A common 24-ounce double chocolaty blended coffee beverage, at 520 calories, has more than *twice* as many calories as a 16-ounce

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[63] *Id.*

[64] *See* R.C.N.Y. tit. 24 § 1-02.

[65] *See* ABA Comments at 16, Ex. G; Schorin Report at 10, Ex. G at Appx. A; Jacob Sullum, *Bloomberg Insists His Plan to Limit New Yorkers' Soda Sizes Cannot Possibly Work*, Reason, May 31, 2012, Ex. G at Appx. D Tab 17.

soda.[66] Even a 16-ounce whole milk mocha latte has substantially more calories than a 16-ounce full calorie soda.[67] Excluding these high calorie beverages from *an ordinance whose sole purpose is to address obesity* also is completely arbitrary. And DOH's argument that milk-based products should be treated differently because they are "more filling" than products impacted by the Ban is yet another arbitrary distinction—since there is no exception for non-milk product drinks that are just as filling, such as a fruit smoothie with added sugar.

120. At bottom, the exclusion of alcoholic beverages, milkshakes and high calorie milk-based coffee drinks is wholly arbitrary, as there is no rational relationship between the stated purpose of the Ban and excluding these beverages from the Ban. *See Kaladjian*, 155 Misc. 2d at 655. Lines are being drawn for reasons that bear no relationship to any health concern, and appear linked entirely to social, economic and political concerns. Such considerations are beyond the purview of executive agencies. *See Boreali*, 71 N.Y.2d at 12 ("operating outside of its proper sphere of authority").

C. The Board's Failure To Present Any Coherent Justification For Setting The Maximum Portion Size at 16 Ounces, Or For Applying It To Beverages With Greater Than 25 Calories Per 8 Ounces, Is Arbitrary

121. The Board has presented no defensible explanation in the administrative record as to why it chose to apply the Ban to beverages with more than 25 calories per 8 ounces. In reality, the Board did not make that choice at all—it was handed to the Board by the Mayor. And Defendants now seek to cobble together a defense of this bright-line standard on the basis of their subjective views of which beverages are acceptably "lightly-sweetened," while expressly

[66] Jacob Sullum, *supra* note 65, Ex. G at Appx. D at Tab 17.

[67] *Id.*

conceding that they have no "standardized . . . scale" to support their standard.[68] It is firmly established that agencies may not settle on bright-line restrictions on a whim. Defendants' failure to present any justification for settling on a bright-line 25-calories standard renders the Ban arbitrary. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 166; *Jewish Mem'l Hosp. v. Whalen*, 47 N.Y.2d 331, 343 (1979); *Kaladjian*, 155 Misc. 2d at 655.

122. Moreover, on the very same day Defendants adopted the Soda Ban, they also adopted another sugary drink restriction—this time governing the nutritional content of beverages served to New York City campers—with a completely different calorie-per-ounce threshold.[69] That rule, which prohibits camps holding permits issued under Article 48 of the Health Code from serving certain beverages to campers, arbitrarily defines "sugary drinks" as "beverages that contain more than ten (10) calories per eight (8) ounces" or that are sweetened in any way—less than half the number of calories per ounce as the Ban.[70] That both amendments were adopted with the stated purpose of addressing obesity, yet define the term "sugary drinks" completely differently, underscores the arbitrary and truly unscientific manner in which Defendants seek to regulate sweetened beverages in New York City.

123. The Board's selection of 16-ounce containers as the standard for regulation is equally arbitrary. No coherent justification for this standard is contained in the administrative record and DOH has merely indicated that it is trying to "balance[] health impact and feasibility."[71] As noted above, such "balancing" moves the Ban beyond the interstitial, gap-

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[68] Response to Comments at 11, Ex. J.

[69] *See* The City Record, *supra* note 8, at 2601-02 (to be codified at R.C.N.Y. tit. 24 § 48.28(a)), Ex. H.

[70] *Id*.

[71] Response to Comments at 11, Ex. J.

filling role that regulations may lawfully serve and into the realm of pure legislating. Moreover, one consequence here is that beverages, such as Honest Tea, sold in standard 500-ml bottles (16.9 ounces) are banned while beverages sold in slightly smaller bottles (16 ounces) are not. The Board has presented no rational basis for treating these products differently. Nor has the Board explained why a 20-ounce limit would not be just as effective to accomplish its objectives as the 16-ounce limit that has been adopted. There is nothing in the administrative record to show that the Board even *considered* any other options, much less any explanation for why other options were not adopted.

124. The final rule also presents no justification for applying the same size limit to cans, bottles with screw-on caps and cups, when these products obviously are quite different. Bottles can be resealed for later consumption. Two-liter and three-liter bottles are not commonly consumed by one person at one sitting. Applying the 16-ounce size limit to two- and three-liter bottles based on the erroneous and unsupported assumption that they always represent a single portion is arbitrary.

125. Similarly, cups typically come with ice and hold less liquid. Applying the same 16-ounce volume limit to cups, as if they hold the same amount of liquid as bottles and cans, is equally nonsensical. Every consumer knows that when beverages are served in cups the added ice displaces a significant amount of liquid beverage. A 16-ounce cup, if filled halfway with ice, will hold less than 12 ounces of soda. The Board in effect has applied a more restrictive standard to sodas served in cups, as compared to cans and bottles, with no explanation in the record and absolutely no health-based justification. The result is to make beverages purchased in cups more expensive to consumers, but for no legitimate or health-based reason.

126. Failure to present any science-based or health-based justification for the bright lines drawn in the rule confirms this is far from the "rational, documented, empirical" analysis that underlies sound agency rule-making. *N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168. The absence of a "justification" with "support in the record" demands that these standards be rejected as arbitrary and capricious. *See Metro. Taxicab Bd. of Trade v. N.Y. City Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 334 (2011).

D. The Rule Contains Other Arbitrary Provisions That Render It Invalid

127. The rule contains no restrictions whatsoever on (1) free refills; (2) the number of 16-ounce beverages an individual consumer can buy at one time; or (3) the amount of sweetener an individual may add to his or her drink.

128. These loopholes ensure that consumers will continue to be able to buy and consume as much beverage as they want so long as they can still afford it. And as already noted, those who want to stick with their preferred size container can simply go to another store nearby, meaning that economic harm will be imposed on some businesses at the expense of others for no valid purpose. These exceptions cannot be grounded in science, and suggest a weighing of purely economic or political factors rather than scientific or health concerns, and are not valid bases for agency rule-making. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 168.

129. The Rule also irrationally bans covered businesses from selling diet or zero-calorie beverages, unsweetened iced tea and other covered beverages in self-service cups that hold more than 16 ounces. Thus, these beverages also will now be more expensive to consumers, and consumers also will have an incentive to go to other stores to purchase these beverages in the sizes they want. The rule thus irrationally interferes with consumer choices that have nothing to do with the Ban's stated objective.

PRIOR APPLICATION

130. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Plaintiffs-Petitioners request that this Court enter an Order:

(a) Enjoining and permanently restraining Defendants and any of their agents, officers and employees from implementing or enforcing § 81.53 of the New York City Health Code, as purportedly amended by DOH in September 2012, on the basis that it is unlawfully *ultra vires*, and declaring § 81.53 invalid;

(b) Alternatively, declaring that §§ 556(c)(2) and (c)(9), 558(b) and (c), and/or § 1043 of the N.Y.C. Charter are unconstitutional because they violate the separation-of-powers doctrine to the extent they are found to have delegated and/or authorized Defendants to promulgate § 81.53 of the New York City Health Code;

(c) Alternatively, enjoining and permanently restraining Defendants and any of their agents, officers and employees from implementing or enforcing § 81.53 of the New York City Health Code, as purportedly amended by DOH in September 2012, on the basis that it is unlawfully arbitrary and capricious;

(d) Awarding Plaintiffs costs and disbursements against Defendants pursuant to CPLR § 8101; and

(e) Granting such other and further relief as the Court deems just and proper.

Dated: October 11, 2012

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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Pursuant to CPLR § 3020, JAMES E. BRANDT, being duly sworn, deposes and says:

I am counsel for Plaintiff-Petitioner The American Beverage Association. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the factual contents thereof as to Plaintiff-Petitioner The American Beverage Association, that the same are true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

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Sworn to before me this 11th
day of October, 2012

Notary Public

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Notary Public, State of New York
No. 02BE6143492
Qualified in New York County
Commission Expires April 10, 2014

VERIFICATION

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS

Pursuant to CPLR § 3020, SALVATORE A. ROMANELLO, being duly sworn, deposes and says:

I am counsel for Plaintiff-Petitioner The National Restaurant Association. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

S. A. Romanello

Salvatore A. Romanello
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 960-1278

Counsel for Plaintiff-Petitioner The National Restaurant Association

Sworn to before me this 11th
day of October, 2012

Nina Edelman

Notary Public

Nina T. Edelman
Notary Public, State of New York
No. 02ED6253624
Qualified in New York
Commission Expires December 27, 2015

VERIFICATION

STATE OF NEW JERSEY)

COUNTY OF ESSEX) SS

Pursuant to CPLR § 3020, MATTHEW N. GRELLER, being duly sworn, deposes and says:

I am counsel for Plaintiff-Petitioner The National Association of Theatre Owners of New York State. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Matthew N. Greller
MATTHEW N. GRELLER, ESQ., LLC
75 Clinton Avenue
Millburn, NJ 07041
(917) 345-0005

Counsel for Plaintiff-Petitioner The National Association of Theatre Owners of New York State

Sworn to before me this 11
day of October, 2012

Notary Public

BRITTANY FARINAS
Notary Public
State of New Jersey
My Commission Expires Mar 22, 2017

VERIFICATION

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS

Pursuant to CPLR § 3020, EVAN H. KRINICK, being duly sworn, deposes and says:

I am counsel for Plaintiff-Petitioner Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Evan H. Krinick
RIVKIN RADLER, LLP
926 RXR Plaza
Uniondale, New York 11556-0926
(516) 357-3483

Counsel for Plaintiff-Petitioner Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters

Sworn to before me this 11th
day of October, 2012

Lissette Rivera
Notary Public

LISSETTE RIVERA
Notary Public, State of New York
No. 01RI6113104
Qualified in Suffolk County
Commission Expires July 19, 2016

VERIFICATION

STATE OF NEW YORK)

COUNTY OF NEW YORK) SS

Pursuant to CPLR § 3020, BEN QUARMBY, being duly sworn, deposes and says:

I am counsel for Plaintiff-Petitioner The New York Statewide Coalition of Hispanic Chambers of Commerce and Plaintiff-Petitioner The New York Korean-American Grocers Association. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Ben Quarmby
MoloLamken LLP
540 Madison Avenue
New York, NY 10022
(212) 607-8170

Counsel for Plaintiffs-Petitioners The New York Statewide Coalition of Hispanic Chambers of Commerce and The New York Korean-American Grocers Association

Sworn to before me this 12
day of October, 2012

Melissa A Rudko (Melissa A. Lyre)
Notary Public

MELISSA ANNE RUDKO
Notary Public, State of New York
No. 01RU6218106
Qualified in New York County
Commission Expires May 24, 2014