EXHIBIT A

PROPOSED MEMORANDUM OF LAW

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. 653584/2012

Motion Sequence No. 001

Hon. Shirley W. Kornreich

MEMORANDUM OF LAW OF
AMICI CURIAE
NEW YORK CITY COUNCIL MEMBERS
DANIEL J. HALLORAN, OLIVER KOPPELL,
FERNANDO CABRERA, LETITIA JAMES, AND ROBERT JACKSON

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PRELIMINARY STATEMENT

This case concerns a critical violation by Defendants[1] of the separation of powers between New York City's legislative and executive branches. The Ban represents a fundamentally new kind of interference with individual liberty and privacy. In light of the competing social and economic interests, the decision to enact the Ban is uniquely legislative. That decision therefore belongs to the New York City Council, as the City's legislative body. Whatever the merits of its goals, the Ban should be invalidated for the simple reason that executive agencies cannot enact such legislative policy on their own, as DOH did here.

As current Council Members, *amici curiae* are deeply concerned by DOH's intrusion into the City Council's legislative authority, in adopting the Ban as law. *Amici curiae* are familiar with the difficult, varied, and politically sensitive issues that must be resolved in order to impose new laws with far-reaching and novel implications on social, economic, and public health concerns. The Ban is exactly this kind of law and therefore should have been approved by the City Council. For this reason, *amici curiae* Council Members support the arguments set forth by Plaintiffs-Petitioners in their Petition and Memorandum of Law ("Pet. Br.").

The Ban engages in exactly the kind of legislative policy-making that the New York Court of Appeals invalidated in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), when a state executive agency attempted to enact such policy through an administrative rule, and without legislative approval. As in *Boreali*, DOH here weighed public health interests with a variety of other social and economic concerns when it enacted the Ban. Similar to other anti-obesity and nutrition legislation that the Council has considered

[1] Consistent with Plaintiffs-Petitioners' Memorandum of Law, filed October 12, 2012, this Memorandum refers to Defendants-Respondents collectively as "Defendants" or "DOH," and to the rule adopted as section 81.53 of title 24 of the Rules of the City of New York as the "Ban."

in the past, DOH necessarily balanced these interests when it decided to target certain sugar-sweetened drinks – food that is safe and legal to consume – and when it selected a specific regulatory mechanism over other potential policies in order to discourage consumption of these drinks. As *amici curiae* can attest, the City Council has itself considered various policy options with similar aims. The Council's rejection of such measures simply reflects a lack of agreement that it is appropriate to specifically target such drinks in order to address obesity, in light of the myriad significant and competing interests surrounding laws like the Ban.

The variety of exceptions created by the Ban are also arbitrary and capricious, with no rational basis in fact. The Ban should be invalidated on this basis as well. Despite DOH's stated concern with excess caloric intake, the Ban does not create exemptions on this basis. It prohibits food trucks and restaurants from selling certain drinks in large cups or containers, while allowing adjacent grocery or convenience stores to do so – despite the fact the drinks are indistinguishable in terms of content and calories. The Ban also singles out sugar-sweetened drinks, while exempting other high-calorie foods and beverages. This uneven application of the Ban creates a host of economic burdens on New Yorkers represented by *amici*.

If upheld, the Ban would set a dangerous precedent. DOH contends that it had authority to adopt the Ban under the New York City Charter, simply as a matter affecting health, but this logic goes too far. Almost any policy decision affecting individual behavior or social and economic choices affects health in some way. This is particularly true for conditions like obesity that are strongly tied to individual behavior and culture. While some individual behavior might very well be worthy of governmental attention, it is critical that these decisions be made by the legislature in the first instance so that any public health concerns may be properly weighed against the social and economic costs of such regulation. For these reasons, this Court should invalidate the Ban.

STATEMENT OF INTEREST

Amici curiae are five New York City Council Members. The New York City Council is the lawmaking body of New York City. Each of its fifty-one elected Council Members represents a Council District in one of the five New York City boroughs. *See* New York City Charter §§ 21-22. The Council has already considered a variety of proposals that, like the Ban here, would have sought to address obesity by discouraging consumption of certain drinks by City residents. *Amici curiae* Council Members have a substantial interest in 1) preserving the separation of powers between the Council and executive agencies; and 2) protecting the interests of businesses and residents in their districts. The Ban implicates both of these concerns. Moreover, *amici* can provide this Court with further information regarding the Council's efforts, and the efforts of other legislative bodies, to enact measures similar to the Ban at issue here.[2]

ADDITIONAL BACKGROUND

In this Memorandum, *amici curiae* offer further details regarding the Council's efforts, and those of other legislative bodies, to select alternative policies seeking the same or similar goals as the Ban.

The City Council's Role in Setting Public Health Policy

The City Council, as New York City's legislative body, has long provided the proper forum for balancing the City's myriad interests in matters of public health. Unlike administrative bodies such as DOH, the City Council is comprised of elected representatives that provide a voice for all City residents. *See* New York City Charter §§ 21-22.

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

The evolution of the City's smoking laws provide one illustration of the Council's critical role in determining the proper balance between public health goals and other social and economic costs. Similar to its anti-obesity efforts, the Council has, for many years, balanced the public health interest in reducing smoking against important social values of individual choice and autonomy, and the varied economic interests of the City's residents and businesses.

At various points in time, and as the interests of City residents have changed, the City Council has selected the most suitable compromises between these goals and costs. In 1995, the Council enacted amendments to the original Smoke Free Air Act of 1988 that expanded its coverage to most office buildings and restaurants, while still exempting bars and smaller restaurants. *See* 1995 N.Y.C. Local Law No. 5, Council Int. No. 232-A; *see also NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 467 (S.D.N.Y. 2004) (describing provisions of statute). Amendments in 2002 extended smoking bans to these smaller restaurants and bars. *See* 2002 N.Y.C. Local Law No. 47, Council Int. No. 256-A; *see also C.L.A.S.H.*, 315 F. Supp. 2d at 467. And further amendments in 2011 barred smoking from the City's public parks and plazas. *See* 2011 N.Y.C. Local Law No. 11, Council Int. No. 332-A. Critically, in enacting all of these amendments, the City Council – not the executive – bore the responsibility of determining the mix of places where smoking would be prohibited, and only after considerable debate and public attention.

The City Council's food-related efforts to combat obesity have involved a similar balancing of public health goals and related costs, through different strategies for promoting healthy eating. But importantly, when targeting specific types of food, it has always been the legislature's responsibility to determine the range of affected foods and the methods – some more intrusive than others – for encouraging or discouraging these foods.

In enacting "green carts" legislation in 2008, for instance, the Council sought to increase the accessibility of fruits and vegetables in neighborhoods with "few healthy food options close to home." 2008 N.Y.C. Local Law No. 9, Council Int. No. 665-A, at § 1. With this law, the Council identified a specific category of food – "[f]resh fruits and vegetables," *id.* § 2(q) – and selected a particular method for encouraging City residents to eat such foods. In this case, the Council opted for an approach centered on small entrepreneurs that would improve City residents' access to these foods, particularly for neighborhoods with a paucity of fresh produce options. The Council created a new pushcart permit category for vendors "solely" of "fresh fruits or vegetables, or both," and authorized DOH to issue these new permits in specific areas that the Council determined were in greater need of such foods. *See id.* at § 2(r); *id.* at § 6 (specifying geographic distribution for green carts permits).

Besides this "green carts" legislation, the Council and other legislative bodies have also examined alternative mechanisms for encouraging residents to consume fresh produce. One resolution before the Council – N.Y.C. Council Res. No. 0901-2011 – would have called on the New York State Legislature to provide a property tax exemption to bodega owners who dedicated at least thirty-percent of their retail space to fresh produce. *See* N.Y.C. Council Res. No. 0901-2011 (June 2011).[3] By using tax expenditures to incentivize fresh produce sales at existing retailers, this resolution would have endorsed a different balance between the City's varied retail interests compared with the "green carts" law, even while seeking the same ultimate goal of improving access to fresh produce. *Cf.* Transcript, Minutes of the Committee on Consumer Affairs, New York City Council (Jan. 31, 2008),[4] at 57 (testimony of Council

[3] *Available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=922279&GUID=5094EA13-3F1E-4856-963D-11F3C88B2956&Options=ID%7c.

[4] *Available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=673892&GUID=7BB804AC-63B1-4182-B273-113AD945F057.

Member Liu questioning effectiveness of green cart proposal and noting that many affected neighborhoods "are already served by grocery stores and bodegas").

Where appropriate, the Council has also selected more intrusive methods of improving the healthfulness of New Yorkers' diets. In 2007, the Council identified a particular class of foods – those containing trans fats – whose consumption should be "as low as possible." 2007 N.Y.C. Local Law No. 12, Council Int. No. 517, at § 1 (internal quotation marks omitted). At the same time, the Council's Committee Report observed that trans-fat free products were increasing in supply and availability. 2007 N.Y.C. Local Law Report No. 12, Council Int. No. 517. The Council therefore opted to reduce the availability of foods containing trans fats by imposing a flat ban on such foods in the City's food service establishments. *See id.*

Although DOH promulgated an equivalent trans-fat prohibition by rule shortly before the law's enactment, Council Member Vallone explained in hearings that the Council had actually started work on the trans-fat ban months before DOH's action. *See* Transcript, Minutes of the Committee on Health, New York City Council (Mar. 1, 2007) ("March 1st Trans-Fat Hearing"), at 6.[5] Importantly, one reason the Council passed the trans-fat ban was to "strengthen the Board of Health's acts legally, [to] take away any potential challenges to what they've done." *Id.* at 7. In other words, by legislatively ratifying DOH's action, the Council made moot any legal challenges – like the one here – to DOH's rulemaking.

Legislative Efforts Targeting Sugar-Sweetened Beverages

In light of the Council's long-standing role of crafting public health policy, including as to diet, it is unsurprising that the Council has already debated whether to establish or to recommend policies

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

targeting sugar-sweetened beverages, specifically. No such proposals or resolutions have passed the City Council or New York State Legislature. They illustrate, however, the scope of the ongoing legislative debate. Importantly, these legislative bodies have considered, and continue to debate: 1) whether to target these beverages in the first place; and 2) what methods of discouraging their consumption provide a suitable compromise of social and economic costs, and any public health benefits.

For example, the Council recently considered a resolution – N.Y.C. Council Res. No. 1265-2012 (Mar. 2012)[6] – that would have sought state legislation to add an excise tax to certain sugar-sweetened beverages. As in other public health debates, this proposed resolution identified a specific class of foods – "sugar-sweetened beverages" – and would have endorsed a specific means of discouraging its consumption – i.e., by increasing its cost relative to other foods via a tax. *Id.* The Council did not approve this resolution, however.

A separate proposed Council Resolution – N.Y.C. Council Res. No. 0768-2011(Apr. 2011)[7] – would have favored an alternative and differently targeted method for discouraging sugar-sweetened beverage consumption. Instead of a tax that would increase the cost of these beverages for all consumers, this Resolution would have asked the U.S. Department of Agriculture to permit the City to prohibit the use of food stamps for sugary beverages (but excluding "milk, milk substitutes, or fruit juices with no added sugar"). *Id.* Thus, the Resolution sought to discourage such beverage purchases by withholding a benefit for certain residents, rather than by imposing a cost broadly. This particular mechanism, of course, would have affected the interests of City residents very differently than an excise tax –

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

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

particularly for low-income residents. It nonetheless represents one policy choice, among many others, for discouraging consumption of sugary beverages. The Council did not approve this resolution, either.

The New York State Legislature has also recognized its important legislative role in setting appropriate policies with respect to sugar-sweetened beverages. Like the Council, the New York Assembly has considered legislation that would have targeted "sweets or snacks" with additional taxes, *see* 2011 N.Y. Assembly Bill No. A00843 (Jan. 5, 2011),[8] or that would have prohibited the use of food stamps to purchase foods deemed "not nutritional," including sugar-sweetened beverages, *see* 2009 N.Y. Assembly Bill No. A10965 (May 5, 2010).[9] But the Assembly has not approved such measures.

The Assembly has also considered, but has not enacted, other possible strategies for reducing consumption of sugar-sweetened drinks. Each presents alternative policies that target different types of consumers or retailers, and that utilize different means of reducing consumption. New York Assembly Bill No. 10010 (May 1, 2012),[10] for instance, would have flatly prohibited the sale of sugary beverages at food establishments and vending machines, but only if those vendors operated on state government property. Assembly Bill No. A06229 (Mar. 10, 2011),[11] would also have barred the sale of sugary beverages, but only at New York schools. And instead of an outright ban, N.Y. Assembly Bill No. A08812 (Jan. 4, 2012),[12] targeted impulse purchases at larger stores. This Bill would have prohibited stores with ten or more employees from displaying "candy or sugared beverages" at the "checkout counter or aisle." *Id.* Thus, this Bill advocated a more modest limitation on the sale of these foods, but

[8] *Available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A00843&term=2011.
[9] *Available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A10965&term=2009.
[10] *Available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A10010&term=2011.
[11] *Available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A06229&term=2011.
[12] *Available at* http://assembly.state.ny.us/leg/?sh=printbill&bn=A08812&term=2011.

would have applied to a broader range of retailers compared with other proposals. But like the Council, the State Legislature has rejected these various measures targeting sugar-sweetened beverages.

ARGUMENT

I. The Ban Establishes a Legislative Public Policy, Which Defendants Have No Authority To Enact

A. Under Boreali*, the Ban Is the Product of Impermissible Legislative Policy-Making by an Administrative Agency*

Amici curiae agree with Plaintiffs-Petitioners' detailed analysis of the Ban under the four-factors set forth in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). *See* Pet. Br. at 21-41. As current Council Members, *amici curiae* can offer further insight into the elements of the Ban that reflect a balancing of health concerns with other non-health interests. Under *Boreali*, of course, a legislature must perform this balancing in the first instance, for the task of "striking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function." *Boreali*, 71 N.Y.2d at 12. Thus, courts have invalidated regulations under *Boreali* when they include "significant provisions based on non-health related considerations." *Nassau Bowling Proprietors Ass'n v. County of Nassau*, 965 F. Supp. 376, 380 (E.D.N.Y. 1997). The Ban includes such provisions. DOH therefore acted outside of its authority, and in violation of the separation of powers, by proceeding without the Council's approval.

The Ban Is Largely Based on Non-Health Related Considerations

In the experience of *amici curiae* Council Members, efforts to encourage or discourage consumption of specific foods impinge on a wide variety of interests, many unrelated to health. Consumers have liberty and privacy interests in eating however they see fit; food retailers and vendors have economic interests in serving consumers and minimizing their compliance costs; food producers wish to promote their own foods at the expense of competitors. These factors, among others, must be considered when singling out particular foods, and when selecting a means of encouraging or

discouraging their consumption. As one Council Member stated during hearings on the "green cart" legislation: "[W]elcome to the politics of food. We can't even deal with food without it being political." *See* Transcript, Minutes of the Committee on Consumer Affairs, New York City Council (Feb. 27, 2008), at 7 (testimony of Council Member Barron).[13]

The Ban is no exception. Broadly speaking, it makes two particularly critical, political policy determinations of the sort that have long been reserved to the Council, especially in its anti-obesity efforts. First, the Ban targets a specific food category – certain sugar-sweetened beverages – that DOH believes some New Yorkers overconsume. Second, the Ban prescribes a specific mechanism to discourage New Yorkers from eating that food – here, dictating a maximum single portion size in certain food service establishments. *See* Notice of Adoption (§ 81.53), The City Record: Official Journal of the City of New York, Sept. 21, 2012 ("Notice of Adoption"), at 2602-03 (Marnitz Aff. in Support of Pet. Br. ("Marnitz Aff."), Exh. H). Both of these decisions require that health concerns be balanced with a variety of other non-health concerns – cost, individual privacy and liberty, and equal treatment, among others. Under *Boreali*, such decisions are uniquely legislative. *See Boreali*, 71 N.Y.2d at 12.

In targeting only certain sugar-sweetened drinks with the Ban, for instance, DOH plainly looked beyond health concerns. Indeed, since a basic premise of the Ban is that New Yorkers "are consuming excessive quantities of sugary drinks," *see* Notice of Adoption at 2602, DOH's decision to regulate consumption of these drinks required that any health concerns be weighed against New Yorkers' strong preference (according to DOH) for consuming such drinks. In other words, even though some New Yorkers clearly enjoy drinking sugar-sweetened beverages, DOH decided that health concerns

[13] *Available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=674145&GUID=A13D0D77-1CDC-40BE-879F-90EBA7905C32.

outweighed the costs of infringing individual liberty and privacy to purchase such drinks. But as the Council's own experience bears out, and as further evidenced by the intense public interest in the Ban with nearly 40,000 comments submitted, *see id.*, any decision to regulate a particular food in the first place is profoundly political. Thus, such decisions must reflect a balance between health concerns, individuals' liberty to choose food for their diet, and businesses' financial interest in providing that food for purchase. An executive agency cannot perform this balancing on its own. *See Boreali*, 71 N.Y.2d at 12.

DOH's decision to target a specific food rather than traditional food hazards such as toxins or food-borne pathogens, and without targeting other high calorie foods or drinks, highlights the Ban's novelty and the need for legislative approval. Importantly, DOH nowhere states that sugary drinks are inherently unsafe to consume. Their public health significance is simply that they add calories to one's diet, and that, in DOH's view, some New Yorkers enjoy them to an "excessive" degree, leading to obesity and obesity-related ailments. *See* Notice of Adoption at 2602. (The ailments DOH links to sugary drinks are the same as those it links to obesity – heart disease, diabetes, and weight gain. *See id.*) But "calories," per se, are not dangerous. Indeed, they are a necessity for life. *See, e.g., Metzen v. United States*, 19 F.3d 795, 802 (2d Cir. 1994) (noting that if "calorie intake is too low, [a] person might not intake enough nutrients necessary to sustain life"). And if "calories" were dangerous in some sense, then essentially all food bears the same potential danger, even though most foods are unaffected by the Ban.

Thus, any public health risk from sugar-sweetened drinks does not arise from the drinks themselves, but from the *behavior* of some New Yorkers in consuming these drinks, in conjunction with other high-calorie foods in their diets and a lack of physical activity. DOH's decision to regulate these drinks on the basis of consumer preference is, however, a far cry from DOH's traditional role in regulating foods that carry some inherent danger when consumed. This decision therefore required a fresh balancing of the relevant health concerns and social costs, which only the Council could perform.

DOH also engaged in this uniquely legislative balancing when it opted to regulate the maximum portion size of such drinks, in certain establishments, instead of adopting some other regulatory strategy. As *amici curiae* Council Members can attest, even if there is agreement as to a specific goal, there may be many potential policies for achieving this goal – each presenting a different balance of costs and benefits to different parties. But without any legislative guidance or delegated authority, DOH had no power to select a portion-size rule over other policy options on its own, as it did.

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

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

The relative merits of these different policy options, compared with the Ban, is not directly relevant to this litigation, of course. The salient point is that these alternative options exist, and that the

decision to adopt one over the others is intensely political. It requires a balancing of DOH's stated health concerns with innumerable other interests. This is a balancing that the Council and other legislative bodies are uniquely suited to fulfill, and did fulfill in declining to adopt laws targeting sugar-sweetened drinks. DOH cannot now perform this legislative balancing on its own.

Defendants' Legislative Policy-Making Created Numerous Exceptions in the Ban Based on Social and Economic Concerns

The Ban can and should be invalidated based simply on the fact that it includes these "significant provisions based on non-health related considerations," but was promulgated without legislative approval or guidance. *Nassau Bowling*, 965 F. Supp. at 380. The legislative character of the Ban is, of course, also apparent under each of the four *Boreali* factors.

With respect to the first factor, for instance, the fact that the Ban is "laden with exceptions" based "upon economic and social concerns" is a simple consequence of DOH's underlying policy decisions to target certain sugar-sweetened drinks, specifically, and to do so with a portion-size requirement in certain restaurants. Plaintiffs-Petitioners' analysis bears this out. *See* Pet. Br. at 23-29. The Ban burdens affected businesses with strict portion-size limits (but only as to the covered beverages), but leaves other businesses free to sell the very same beverages without any size limitation. This unequal treatment of different businesses as to the very same food product indicates that non-health concerns necessarily motivated this distinction. Likewise, the Ban's exclusion of pure fruit juices, dairy- and soy-based drinks, alcoholic beverages, and all foods reflects DOH's judgment that the calories those foods provide should be preferred above others. More importantly, it reflects DOH's apparent belief (which the Council had not endorsed) that its judgment should override New Yorkers' individual preferences as to these specific drinks. This latter conclusion, however, is legislative, for it requires "[s]triking the proper balance among health concerns, cost and privacy interests." *Boreali*, 71 N.Y.2d at 12.

It does not matter that the Ban targets the portion size of covered drinks, rather than their monetary cost (as in a tax) or total consumption (as with a ban or hard limitation). Like these other regulatory strategies, the Ban directly regulates the food choices available to New Yorkers. Importantly, the Ban makes it more difficult for New Yorkers to purchase larger beverage quantities, whether they intend to consume the quantity on their own or to share.

Thus, it is irrelevant that the Ban does not make it *impossible* to drink larger quantities. Taxes likewise make it more difficult, but not impossible, to consume a targeted item. Indeed, it has been recognized that taxes on particular foods are merely one way of adjusting the "default" choices for consumers. *See* Kelly D. Brownell, *et al*., Personal Responsibility And Obesity: A Constructive Approach To A Controversial Issue, 29 HEALTH AFFAIRS No. 3 (2010), at 386 ("Changing food prices is a means of creating better defaults."). Such taxes are therefore similar to the "default"-focused strategy represented by the Ban. *See* Summary and Response to Public Hearing and Comments, Sept. 6, 2012 ("DOH Response to Comments"), at 6 (Marnitz Aff., Exh. J) (asserting the Ban would be effective because "[p]atterns of human behavior indicate that consumers overwhelmingly gravitate towards the default option"). The critical point about the Ban, under *Boreali*, is simply that the size limitations imposed by the Ban are one possible policy, among others, for targeting specific foods. Even if a legislature decides to single out such foods, it is a further legislative task to choose among the many possibilities for doing so.

The Ban Creates a Novel Regulatory Regime Without Legislative Guidance and in an Area of Ongoing Legislative Debate

Of particular concern to *amici curiae* is the lack of legislative input on the Ban. DOH created the Ban on a "clean slate" and adopted the Ban on its own after the Council and State Legislature decided

not to enact or endorse legislation that similarly focused on sugar-sweetened beverages. The Ban therefore fails the second and third *Boreali* factors.

It is telling that in adopting the Ban, Defendants do not cite authority under any legislation specific to sugary drinks, anti-obesity efforts, or even nutrition generally. *See* Notice of Adoption at 2602. This is unsurprising, of course, because no such authority exists. The Council has never permitted DOH to consider or balance the kinds of non-health factors that underlie the key public policy decisions represented in the Ban. No legislation specifically directs DOH to regulate foods differently on the basis of dietary consumption patterns.

While there are certainly health-related aspects to regulating New Yorkers' diets, there are also important social and economic concerns such as individuals' freedom to enjoy foods of their choice, and the interest of business to provide such enjoyment. It is up to the legislature to decide the appropriate balance between these varied interests, or to give guidance when delegating such decisions as appropriate. *See Boreali*, 71 N.Y.2d at 11-12. No legislative body has done so with respect to the Ban. Moreover, in regulating consumption of foods that do not inherently present a food safety hazard, the Ban is a far cry from the food safety regulation that typifies DOH's role in this area. In this regard, DOH truly did enact the ban on a "clean slate."

Both the Council and New York State Legislature have considered regulating sugar-sweetened drinks, specifically, but have declined to do so – it is plainly an area of ongoing debate. As discussed, the State Legislature has considered but declined to impose an excise tax on such beverages that had gubernatorial support (as well as the Mayor's), and the Legislature has considered banning such drinks outright in certain contexts. These measures, like the Ban, all would have targeted these drinks to address obesity. The City Council has considered similar measures but has also decided not to recommend or enact any measures related to these drinks. *See* Additional Background, *supra*.

Of course, legislative inaction, reflecting the decision not to regulate sugar-sweetened drinks, specifically, is not an abdication of this field to the executive. As the Court of Appeals has stressed, "repeated failures by the Legislature to arrive at such an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own." *Boreali*, 71 N.Y.2d at 13. Indeed, in light of the vigorous public debate that has engulfed proposals such as the soda tax, the legislative results simply indicate that currently there is no achievable compromise for specifically targeting sugar-sweetened drinks, among the many competing views and interests. But it is not the role of administrative bodies to resolve these profoundly difficult political issues on their own, when such debates already have been aired in elected, representative bodies like the City Council or New York State Legislature. *See id.*[14]

B. The New York City Charter Does Not Provide Defendants Authority To Promulgate the Ban

Amici curiae agree with Plaintiffs-Petitioners that nothing in the New York City Charter authorizes DOH to enact a rule that, like the Ban, constitutes legislative policy-making. *See* Pet. Br. at 32-41. One point merits further discussion from the perspective of *amici* – the Ban represents a startling expansion of DOH's claimed authority under the Charter, despite DOH's suggestion that the Ban is similar to its past efforts to protect the health of New Yorkers, *see* DOH Response to Comments at 12. Thus, DOH's past rulemaking efforts do not establish that the Ban falls within DOH's powers.

[14] Because the City Council and New York State Legislature have decided not to target sugar-sweetened beverages, DOH's Ban also fails the fourth *Boreali* factor because it does not "flesh out" the details of any legislative policy. Thus, the critical policy decisions underlying the Ban – the decisions to target certain sugary beverages and to do so by imposing a maximum portion size in some establishments – did not require DOH's special expertise in the health field. Rather, these decisions were basic policy determinations that required weighing the possible health benefits of reducing sugary drink consumption against the important social and economic costs of such regulation.

In justifying the Ban as a permissible form of regulation under its authority to "regulate all matters affecting health in the City," DOH points to past rules that it claims likewise "protect the health of New Yorkers." *Id.* These included rules banning lead paint, controlling tuberculosis, establishing calorie labeling requirements, and banning trans fat from restaurants. *See id.* But DOH's enactment of these rules does not actually show that the Ban falls within DOH's authority under the Charter, when DOH acts without any Council approval.

DOH's trans-fat ban provides the closest analogue to the Ban here, but the Council's actions following its passage suggest that DOH could not have validly enacted the measure under its own authority under the Charter. DOH's trans-fat ban targeted a type of food that is generally non-toxic and disease-free, but associated with health conditions such as heart disease. *See* Board of Health, Notice of Adoption of an Amendment (§81.08) to Article 81 of the New York City Health Code, at 1-2.[15] Similar to the Ban here, DOH selected a specific policy option – an outright ban in restaurants – over other potential policies for reducing New Yorkers' trans-fat consumption. *See id.* at 1. For these reasons, the trans-fat ban was effectively a legislative act, which would not have survived a challenge under *Boreali*. But importantly, there never was an opportunity for such a challenge. Unlike the Ban here, where the Council was effectively shut out, DOH developed its trans-fat ban at around the same time as the Council's equivalent measure. *See* March 1st Trans-Fat Hearing, at 6. So even though DOH's enactment of the trans-fat ban was likely impermissible on its own, the Council foreclosed any challenge under *Boreali* by enacting the exact same ban itself. *See id.* Thus, the Council's ratification of DOH's trans-fat

[15] *Available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf.

ban emphasizes the limits of DOH's authority – DOH cannot enact rules on its own establishing new public policy with substantial non-health concerns, but must instead seek Council authority to do so.

DOH's remaining examples are much further afield from the Ban, and provide no support for DOH's authority to enact the Ban. In banning lead paint, for instance, DOH sought to limit residents' exposure to a known toxin. *See* R.C.N.Y. tit. 24, § 173.13. But this is completely different from sugar-sweetened drink consumption. Unlike lead paint, there is nothing inherently unsafe about these drinks. Rather it is New Yorkers' excessive preference (in DOH's view) for such drinks that drives DOH's claimed health concern, *see* Notice of Adoption, at 2602 – not any specific property of the drinks.

Similarly, DOH's tuberculosis control efforts bear little resemblance to the Ban's attention to obesity and obesity-related ailments. Unlike obesity, tuberculosis is a dangerous, *communicable* disease, and the core function of health departments has long been to control such diseases and prevent extensive person-to-person spreading. *See* Introductory Notes to New York City Health Code, Title II ("[T]he control of communicable diseases remains one of [DOH's] core functions."). But obesity does not spread in this way. Rather, it develops based on a person's personal characteristics and environment – including social, behavioral, and cultural factors. *See* National Institutes of Health, Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report ("The Evidence Report"), at xi (1998).[16] The fact that obesity is tied to such non-physical factors means that as a disease or health condition, obesity presents fundamentally different public health challenges compared with communicable diseases. Thus, DOH's "control" powers under the Charter with respect to such diseases – i.e., under Section 556(c)(2), which DOH cites as authority for the Ban here, *see* Notice of Adoption, at 2602 – says nothing about the extent of DOH's power to override

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

individual preferences that might contribute to a non-communicable condition like obesity. And importantly, as Plaintiffs-Petitioners observe, DOH's tuberculosis control efforts had the support of the State Legislature, unlike the Ban here. *See* Pet. Br. at 40 n.85.

DOH's calorie labeling rule also does not indicate that DOH's powers extend so broadly, to literally "all matters affecting health." *See* DOH Response to Comments, at 12. As with the trans-fat ban, this rule has not faced a challenge under *Boreali*. But in any event, it is a very different rule compared with the Ban. The calorie labeling rule does not single out any particular food and is purely informational – it does not change the difficulty or cost of obtaining a particular food while making exceptions for other foods. Thus, this rule, unlike the Ban, applies across different food types, and does not impinge non-health concerns such as individual liberty or privacy interests with respect to food preferences.

In enacting the Ban, DOH relied on an expansive and unsupportable reading of its authority under the Charter. Although DOH claims that the Ban is similar to past rules under this authority, this is not so. Under *Boreali* and principles of constitutional avoidance, the Charter cannot be interpreted to grant DOH the power to enact the fundamentally legislative Ban without the Council's approval.

C. As Precedent, the Ban Would Permit Defendants To Usurp the Council's Legislative Role and To Interfere with Individual Liberties Unilaterally on Any Health-Related Matter

Of enormous concern to *amici curiae*, as Council Members, is the precedent that the Ban would represent if upheld as a valid exercise of DOH's power under the City Charter, and the profound danger to individual liberty that such power presents. In a letter to the Mayor, several *amici* and other Council Members expressed such concerns, in urging that the Ban be put before the Council. *See* Letter from the Members of the New York City Council to M. Bloomberg (June 1, 2012) (Marnitz Aff., Exh. F-19). In adopting the Ban, DOH has asserted that the Charter alone grants it the power to "regulate all matters affecting health in the City of New York," including "the supervision and regulation of the food supply

and control of chronic disease." DOH Response to Comments, at 12. But if the Ban is upheld on this basis, the same rationales underlying the Ban would permit DOH to regulate directly an exceedingly broad range of behavior it deems to "affect[] health."

Specifically, DOH seeks to utilize its power to "control . . . chronic disease," N.Y.C. Charter § 556(c)(2), and its more general power to regulate "all matters affecting health," *id.* at § 556, as levers to extend DOH's authority over any behavior that might be associated with chronic disease or conditions like obesity and obesity-related ailments. But the range of such behaviors is vast. After all, while DOH believes that drinking sugary beverages contributes to dangerous chronic diseases, so too does eating fatty foods, exercising too infrequently, or watching too much television.

Under DOH's interpretation of the Charter, DOH would be empowered to regulate such behaviors with no input from the Council, as with the Ban. DOH would have vast unilateral powers to decide how to regulate, in addition to deciding what to regulate. DOH might choose to use a better-defaults approach similar to the maximum portion size of the Ban, and perhaps dictate maximum portion sizes for all foods. But under DOH's interpretation, nothing in the Charter would prohibit more intrusive policies – through rulemaking, DOH could mandate servings of vegetables with restaurant meals or require exercise prior to food purchases. Such activities might be worthy of encouragement, but cannot be enforced as law without any involvement by elected legislative representatives.

This potential outcome is a simple result of the fact that "hardly any aspect" of behavior "does not interrelate with public health policy" in some way, *see Health Ins. Ass'n v. Corcoran*, 154 A.D.2d 61, 72 (3d Dep't 1990) – particularly given that behavioral, social, and cultural factors are all tied to conditions like obesity. *See* The Evidence Report, at xi. But this connection does not, and cannot under *Boreali*, give DOH "*carte blanche*" to further its "own objectives in public health policy." *Health Ins. Ass'n*, 154 A.D.2d at 72. In *Boreali* itself, the Court of Appeals made clear that the Public Health Commission

could not dictate legislative public policy on anti-smoking measures, even though – similar to DOH's authority under the Charter – the Commission was empowered to deal with "any matters affecting the . . . public health." *See id.* at 9 (alteration in original) (addressing N.Y. Pub. Health Law § 225(5)(a)).

However well-intentioned its goals might be with the Ban, DOH's claimed ability to regulate behavior based on its health value presents a significant threat to individual liberty and privacy interests. Individuals have an important interest in acting and eating as they see fit, even at the expense of their personal health. While the state may interfere with this interest in some cases, the decision to do so is a matter of important public policy. Such decisions must be reserved to the legislature.

II. The Ban Is Arbitrary and Capricious

Amici curiae agree that the Ban is also invalid because it is arbitrary and capricious under N.Y. C.P.L.R. § 7803(3). *See* Pet. Br. at 43-57. *Amici* can further emphasize, based on their familiarity with the needs and interests of their districts, that the particularly objectionable aspects of the Ban are its illogical and arbitrary distinctions between different types of food service establishments, and equally caloric foods. The very same sugary drink – in the exact same size container – may be prohibited at a food truck but permitted in the bodega next door, though both may sell milkshakes without restriction. Yet these businesses seek to sell identical products with identical potential contributions to obesity, while milkshakes are more caloric than many sugar-sweetened drinks. As a health matter, these distinctions have no "sound basis in reason" and were "generally taken without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). With no "rational basis" for such distinctions, *id.*, the Ban must be invalidated.

The great number of public comments, including those of several *amici*, should have brought to DOH's attention the absurdity of the Ban's distinction between regulated and non-regulated

establishments, and the severe effects such unequal enforcement could have on businesses within the *amici* Council Members' districts. Council Member Halloran, for instance, warned that "[f]amily operators" of "movie theatres, restaurants, coffee shops, even ice cream parlors" would be "given the choice of cutting their employees or basically folding up shop and going home because their profit margins are already too small." "Yet right next door the[] local 7-11 can still sell the supersized, 128-ounce Big Gulp . . . ." Transcript, Public Hearing of the Board of Health Regarding the Opportunity To Comment on the Proposed Amendment of Article 81, July 24, 2012 ("Ban Hearing Transcript"), at 8-9 (Marnitz Aff. Exh. Q). Council Member Koppell similarly stressed the arbitrary nature of the Ban: some outlets may continue to sell large sodas, yet the Ban does not cover all high sugar beverages – "[j]ust a selected few." *Id.* at 19. Importantly, he observed that the distinctions were "not based on health criteria" but rather on "who has regulatory jurisdiction." *Id.*

Council Member James also expressed opposition to the Ban, despite her strong interest in the anti-obesity goals of the Ban, and her familiarity with the impact of obesity-related diseases on her community. *Id.* at 34-35. But in speaking with businesses in her district, she came to "oppose the ban because it's arbitrary in nature." *Id.* at 37. She noted that the Ban "will apply to some small business, particularly minority owned businesses, and will not apply in a consistent fashion." *Id.* Because the Ban does not apply to the chains or supermarkets, "it sets up an unfair competitive advantage." *Id.* Council Member Mark-Viverito contrasted the arbitrariness of the Ban with the trans-fat ban, which the Council itself adopted (unlike the Ban here), and which applied "across the board, thereby creating a level playing field." *Id.* at 40. The Ban's arbitrary distinctions were "a major concern for many local East Harlem food establishments, most of which are sandwiched between grocery stores, delis[,] and bodega[s]." *Id.* at 41. Likewise, Council Member Jackson relayed the views of businesses in his community – that the ban "is unfair" where one restaurant owner would be unable to sell 20-ounce soft

drinks "while the pharmacy chain store next door can." *Id.* at 94. The Council Member stressed that the "small family owned business are already under tremendous pressure" and simply "can't compete" under the Ban. *Id.*

Despite this considerable focus on the harms generated by the Ban's distinctions between regulated and non-regulated establishments, DOH offered no rational basis for imposing such unequal treatment of sellers offering identical foods. Importantly, this distinction does not bear any "rational relationship to the goals sought to be achieved" by the Ban – i.e., a reduction in sugary drink consumption to address the obesity epidemic. *See* Notice of Adoption, at 2602-03. After all, identical sugary drinks have the same effect on obesity, no matter where they are purchased. Yet DOH persisted in exempting certain food retailers despite testimony of Council Members – members of the legislative body that is best equipped to address such issues – that such exemptions would impose considerable economic harms to City businesses.

DOH's counterpoint was its assertion that it was "improbable" that consumers would purchase drinks from a non-regulated entity, simply to obtain a larger portion size. *See* DOH Response to Comments, at 9. But DOH provided no factual support for this belief. Specifically, DOH's understanding that the convenience of "one-stop" shopping is a food purchasing behavior paradigm, *see id.*, does not provide any support for the Ban's distinction because this view – even if true – merely suggests that a food business regulated under the Ban might not experience a total loss as to sugar-sweetened drinks. Indeed, under this view, regulated businesses would lose *food* purchases along with beverages, because consumers preferring larger drinks would find it more convenient to purchase their entire meal at non-regulated businesses. Thus, DOH's reasoning does not refute the important concern of *amici curiae*'s constituents that their economic losses would be significant. The Ban's exceptions for

certain establishments simply impose new competitive disadvantages between different sellers of the same regulated drinks, but without any justification rooted in fact.

DOH seems to admit that this distinction between otherwise similar food service establishments is not a product of any reasoned health-related analysis, but may instead stem from DOH's belief regarding the limits of its inspection authority. *See* DOH Response to Comments, at 11. Whether or not DOH actually is so constrained, *see* Pet. Br. 46-48, this issue might never have arisen had the Council properly debated and enacted such a measure, perhaps in cooperation with the State Legislature and State Department of Agriculture. The arbitrariness of this distinction stems in large part from the fact that the Ban is fundamentally an attempt at legislative policy-making. Because DOH has neither authority nor competence to enact such policy, the resulting Ban is unsurprisingly arbitrary.

Amici have likewise stressed the irrationality of targeting sugar-sweetened beverages based on their caloric content and consumers' preference, while exempting foods and drinks that are equally (if not more so) tempting or caloric. In this vein, Council Members provided testimony that the Ban "cannot possibly hope to impact, let alone address, the real underlying health issues of obesity," Ban Hearing Transcript at 11-12 (Council Member Halloran), and is "not based on health criteria," *id.* at 19 (Council Member Koppell). *See also id.* at 37 (testimony of Council Member James that obesity is a "complex problem" and that "a simple ban will not get at the issue"); *id* at 41-42 (testimony of Council Member Mark-Viverito that the Ban "does not address the root cause of the obesity epidemic," even while efforts to encourage exercise opportunities are "severely underfunded"). If higher calorie intake is the targeted cause of obesity here, *see* Notice of Adoption at 2602, DOH had no factual basis for singling out sugar-sweetened drinks alone. Many foods exempted by the Ban contribute calories while adding little or no nutritional value (candies, for instance), yet many drinks covered by the Ban provide additional nutrients including essential vitamins and minerals (sweetened fruit juices, for instance).

There is no lack of interest in the City Council for achieving the same anti-obesity goals as the Ban. But as Council Member Jackson observed, it is the City Council that "should be in a position to establish policy in the City of New York, particularly a policy of this magnitude." Ban Hearing Transcript at 38. Even though the Mayor's office sought to pass the Ban for the good of the City, Council Member Halloran has stressed that such legislation must nonetheless be "introduced in the [C]ouncil, and [go] through the legislative process" to achieve a proper outcome – one that accounts fully for all of the varied interests among City residents. *Id.* at 10.

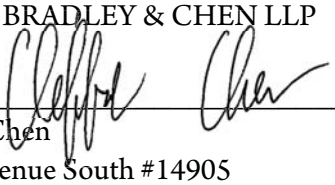
Only in a legislative body like the Council can far-reaching, fundamental policy decisions be made that reflect a process of vigorous debate and compromises between competing interests. DOH is simply not competent, nor permitted, to balance such significant non-health concerns. Whatever the merits of the Ban as broad policy, it must be invalidated because DOH impermissibly enacted a policy on its own that is fundamentally legislative, and because the Ban's uneven application is both arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Dated: November 7, 2012

WATKINS, BRADLEY & CHEN LLP



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