

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,

Index No. 653584/2012

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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**RESPONDENTS' MEMORANDUM OF LAW IN RESPONSE TO THE MOTIONS TO APPEAR  
AS AMICUS CURIAE FILED BY THE BUSINESS COUNCIL OF NEW YORK STATE, INC.  
AND FIVE NEW YORK CITY COUNCIL MEMBERS**

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November 19, 2012

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Respondents the New York City Department of Health and Mental Hygiene (“Department”), the New York City Board of Health (“Board”) and Dr. Thomas Farley, Commissioner of the Department (collectively “Respondents”), by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, submit this memorandum of law in response to the motions to appear as amicus curiae filed by the Business Council of New York State, Inc. (“Business Council”), and by five New York City Council Members (“Council Members”). While the Respondents take no position on whether these two motions should be granted, in the event that one or both motions are granted the Respondents respectfully request that this memorandum of law also be considered by this Court.

## ARGUMENT

### **THE BOARD’S ADOPTION OF THE PORTION CAP RULE DID NOT EXCEED ITS STATUTORY AUTHORITY.**

#### **I. Neither the State Constitution nor State Law Precludes the Board from Adopting the Portion Cap Rule.**

The Business Council argues that the Board did not have the authority to adopt the provision at issue in this lawsuit, section 81.53 of the New York City Health Code (“Portion Cap Rule”), because matters “related to health are state matters.” Business Council Br., at 7. In doing so, it ignores New York State Constitution Article IX, section 2(c)(ii)(10), which explicitly authorizes local governments to adopt provisions relating to the “safety, health and well-being of persons or property therein.” The Business Council attempts to rely on Article XVII, section 3 of the Constitution to support its argument that only the state could adopt the Portion Cap Rule. Yet this provision provides in pertinent part:

The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner,

and by such means as the legislature shall from time to time determine. [emphasis added]

The Business Council fails to cite to any constitutional or state law provision that precludes the Board from addressing the obesity epidemic in New York City (or specifically enacting the Portion Cap Rule), or any provision that precludes the Board from addressing a matter in New York City that may also be a state concern. Nor does the Business Council cite to any constitutional or state law provision that conflicts with the Portion Cap Rule.

The cases relied on by the Business Council illustrate this shortcoming. For instance, in Ainslie v. Lounsbery, 275 A.D. 729, 729 (3<sup>rd</sup> Dep't 1949), a local law conflicted with a state law (specifically, the local Binghamton law established a "different method of appointment and different qualifications for the city examining board of plumbers" than that permitted by state law). Similarly, in NYS Public Employees Federation v. City of Albany, 72 N.Y.2d 96, 101 (1988), the City of Albany enacted legislation prohibiting non-residents from parking on certain city streets which conflicted with specific provisions of the State's Vehicle and Traffic Law. In stark contrast, no such state law (or constitutional provision) conflicts with the Portion Cap Rule. Even assuming that the Board is subject to a standard preemption analysis, casual references to "state concerns" in other cases on other laws do not create preemption if a local body with appropriate powers (whether the City Council or the Board) is not acting in conflict with any particular statute or statutory scheme. If this were not true, then the City Council and the Board would be essentially paralyzed. Matter of Roth v. Cuevas, 158 Misc. 2d 238, 246-248 (Sup. Ct., N.Y. Co.), aff'd, 197 A.D.2d 369 (1<sup>st</sup> Dep't), aff'd for reasons stated in Sup. Ct. op., 82 N.Y.2d 791 (1993) (silence by the State Legislature on a subject matter does not of itself imply preemption).

Not only is there a lack of conflict between the Portion Cap Rule and any state constitutional provision or state law, but in fact the Board is implementing the broad authority given to the Legislature in Article XVII, section 3 of the State Constitution. That section permits the Legislature to assign duties to agencies of the state or its subdivision, in the discretion of the Legislature. As set forth in extensive detail in the Respondents' Opposition Memorandum of Law ("Respondents' Br.") [Docket # 71], the Legislature did exactly that when it established the Board and set forth its quasi-legislative powers in the New York City Charter ("Charter") and the predecessors to the Charter over a century ago. See Respondents' Br., at 13-21. The clear roots of these powers in a unique legislative delegation should not be ignored or minimized; the Board<sup>1</sup> has been given extraordinary authority by the State Legislature and the courts over health matters in New York City, as a matter of state policy. See Yenem Corp. v. 281 Broadway Holdings, 18 N.Y.3d 481, 491 n.4 (2012) ("we have previously given elevated treatment to local ordinances derived from special laws, finding that they reflect the 'policy of the state' and, in some circumstances, may even override a conflicting state law embodying a countervailing public policy..."). See also Respondents' Br., at 13-17.

Moreover, based on this legislative history, appellate courts hold that the Board has a broad mandate to protect public health. See, e.g., People v. Weil, 286 A.D. 753, 757 (1st Dep't 1955) (the Board "is invested with the power, extraordinary as to administrative agencies, to formulate standards as well as to issue orders enforceable by penal sanctions. . . . The Sanitary

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<sup>1</sup> The Charter authorizes the Board to "therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter . . . ." It further charges the Board with "embrac[ing] in the health code all matters and subjects to which the power and authority of the department extends." NYC Charter §§ 558(c), (d). It similarly confers on the Department a broad grant of authority to "regulate all matters affecting the health in the city of New York." NYC Charter § 556.

Code [now the Health Code] may, therefore, ‘be taken to be a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer of the authority of the Legislature.’” (quoting People v. Blanchard, 288 N.Y. 145, 147 (1942) (statutory citations omitted)); Paduano v. City of New York, 45 Misc.2d 718, 721, 724 (Sup. Ct. N.Y. Co.), aff’d on op. below, 24 A.D.2d 437 (1st Dep’t 1965), aff’d, 17 N.Y.2d 875 (1966), cert. denied, 385 U.S. 1026 (1967) (“the Board of Health has the power to, and did, act in legislative capacity under State legislative authority”); Schulman v. New York City Health & Hospitals Corp., 38 N.Y.2d 234, 237 n.1 (1975) (“the Board of Health has been recognized by the Legislature as the sole legislative authority in the field of health regulation in the City of New York” (emphasis added)). See also Respondents’ Br., at 18-21.

## II. **Boreali Does Not Preclude the Board from Adopting the Portion Cap Rule.**

The memorandum of law submitted by a handful of City Council<sup>2</sup> Members argues that the Board did not have the authority to enact the Portion Cap Rule, contending that Boreali v. Axelrod, 71 N.Y.2d 1 (1987) mandates that the rule should be invalidated. They are wrong. The Council Members reiterate many of the same arguments made by petitioners, and they fail for the reasons detailed in the Respondents’ Brief.

To start, Boreali cannot be applied to the Board, which itself substitutes for a legislative body under a robust line of case law. See Respondents’ Br., at 13-21. Moreover, even if Boreali is determined to apply to the Board, it should be applied with deference to the

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<sup>2</sup> Five of the 51 members of the City Council signed onto the Council Member Memorandum of Law. It also bears noting that it has been reported that the City Council’s attorneys, at the specific request of Speaker Christine Quinn, confirmed that the Board has the jurisdiction and power to approve the Portion Cap Rule. Michael Howard Saul, Beverage Leaders, Businesses File Suit Against ‘Soda Ban’, Wall St. J., October 12, 2012, at Metropolis Home Page and at <http://blogs.wsj.com/metropolis/2012/10/12/beverage-leaders-businesses-to-file-suit-against-soda-ban/>.

unique role of the Board, as established by the legislative history and the extensive applicable case law. See Yenem, 18 N.Y.3d at 491 fn 4 (local provisions such as Charter § 558 that are “derived from special laws ... that reflect the ‘policy of the state’” are entitled to “elevated treatment”). And even if it is determined that the Board is not entitled to special consideration, the Boreali claim still fails since none of the four “coalescing circumstances” present in Boreali are present here.<sup>3</sup>

First, as set forth in the extensive record before the Board (as well as Commissioner Farley’s affidavit), there is an obesity epidemic afflicting New Yorkers, and sugary drinks play a unique role in this epidemic. See Farley Aff., at ¶¶ 3-6. The Portion Cap Rule was adopted to address this epidemic, and is based solely on health considerations; it does not consider economic and social factors such as those present in Boreali. While the rule does not apply to all beverages, its exceptions are based on health concerns, not economic and social concerns.

The rule excludes drinks that “contain more than 50 percent of milk or milk substitute by volume as an ingredient” (Section 81.53(a)(1)(D)) since milk contains nutrients -- calcium, vitamin D and potassium -- while sugary drinks “generally contain no nutrients other than sugar.” Farley Aff. ¶ 35; Exhibit<sup>4</sup> H, Board Memorandum, at 11 (citations omitted). Moreover, since milk based beverages “have a greater effect on satiety than sugary drinks,” it

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<sup>3</sup> Numerous post-Boreali cases reiterate the requirement (first articulated in Boreali) that a combination of factors must be present for there to be a violation of the separation of powers doctrine. See, e.g., Festa v. Leshen, 145 A.D.2d 49, 62 (1<sup>st</sup> Dep’t 1989). See also Respondents’ Br., at 22-23.

<sup>4</sup> Referenced exhibits are attached to the Verified Answer previously submitted by the Respondents.

may reduce a person's subsequent food and drink intake.<sup>5</sup> Id. (citations omitted). And while the rule applies to food service establishments licensed by the Department, it does not apply to retail food stores regulated by the New York State Department of Agriculture and Markets. The Board, however, did not specifically exempt these retail stores from the rule; rather, these stores fall within the group of businesses that are regulated by the State<sup>6</sup> and thus are exempt from all of Health Code Article 81's requirements. If it is determined that these retail stores must be treated as food service establishments, the Department will require that they obtain food service establishment permits and comply with all of the requirements in Article 81, including the Portion Cap Rule. Finally, since the New York State Alcoholic Beverage Control Law preempts local laws that pertain to the sale, distribution or consumption of alcohol, the Board could not legally limit the size of alcoholic beverage containers and, accordingly, it properly exempted them from the scope of the Portion Cap Rule. See also Respondents' Br., at 23-29.

Second, in contrast to the broad language of the New York Public Health Law at issue in Boreali, the Charter provisions that form the basis for the adoption of the Portion Cap Rule are much more specific; the Board consequently did not enact the rule on a clean slate. The Charter does provide the Department with an extraordinary grant of authority to "regulate all matters affecting the health in the city of New York," and to perform acts "as may be necessary and proper to carry out the provisions" of the chapter. Charter §§ 556 & 556(e)(4). Unlike the

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<sup>5</sup> The Portion Cap Rule is geared towards sugary drinks -- rather than, for instance, fatty food -- because they are a leading cause of the obesity epidemic. Exhibit K, Notice of Adoption, at 2. And while the rule does not prohibit free refills or multiple purchases, consumers typically choose the default option, and thus consumers will have to make a conscious decision to consume more than 16 ounces of a sugary drink. Exhibit H, Board Memorandum, at 6.

<sup>6</sup> The State Department of Agriculture and Markets regulates entities that primarily generate their revenue from goods that are not ready to eat food whereas those that derive most of their revenue from ready to eat food are regulated by local departments of health.

regulations invalidated in Boreali, however, the Charter goes on to identify specific areas that may be regulated by the Department, including the “control of communicable and chronic diseases” and the oversight of the “food and drug supply of the city.” Charter §§ 556(c)(2) & (9) (emphasis added). Such grants of authority have repeatedly been upheld by the Courts. See, e.g., Statharos v. New York City Taxi & Limousine Comm’n, 198 F.3d 317, 321-322 (2<sup>d</sup> Cir. 1999). See also Respondents’ Br., at 29-31.<sup>7</sup>

Third, unlike Boreali, there is no history of legislative failure here; neither the New York City Council nor the New York State Legislature has considered legislation covering the subject matter of the Portion Cap Rule, portion size limits. To start, the cited City Council’s proposals are merely resolutions, which if passed would have simply expressed the sentiment of the Council. See N.Y. Municipal Home Rule Law § 2(9) (defining local law “... but shall not mean or include [a] resolution ... of the legislative body ....” [emphasis added]); Charter § 32. In addition, unlike Boreali where the Legislature had already enacted legislation and thereafter considered 40 bills on the same subject, none of the proposals before either the City Council or the State Legislature concerned portion size. See Respondents’ Br., at 14-16.

Fourth, and finally, the Board relied on its expertise in establishing the Portion Cap Rule and its specific parameters. The specialized expertise of the Board was required to methodically analyze the scientific arguments made by those favoring and opposing the proposal, including the size limitation and types of beverages that would be covered by the portion cap. The Board Memorandum addressed claims that, among others, questioned the association between sugary drinks and obesity, and between sugary drinks and chronic disease,

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<sup>7</sup> Even if it was determined that this one prong cuts against Respondents, it is well established that prevailing on one factor is insufficient. See Boreali, 71 N.Y.2d at 11; Festa, 145 A.D.2d at 62.

claims that questioned the link between portion size and consumption, and claims that questioned the efficacy of the policy. See Exhibit “H,” Board Memorandum. The Board Memorandum noted that the “great weight of evidence ... supports a link between sugary drinks and the obesity epidemic.” Exhibit “H,” Board Memorandum, at 3 (citations omitted). The Board Memorandum also noted the causal mechanism of the link between sugary drinks and obesity, “namely that liquid food is interpreted differently by the body than solid food and is less satiating ... [which suggests] that individuals that consume sugary drinks do not compensate for these calories by reducing their calorie intake elsewhere.” Exhibit “H,” Board Memorandum, at 4 (citations omitted). In addition, the Board Memorandum noted that research has shown that ‘unit bias’ manifests in the “strong tendency to finish what is served, as that is the effective unit.” Farley Aff ¶¶ 29 & 30; Exhibit H, Board Memorandum, at 5 & 6. And finally, the Board Memorandum noted that numerous studies -- conducted in a variety of settings with an array of food and beverages -- consistently demonstrate that people consume more when offered larger portion sizes.<sup>8</sup> Exhibit H, Board Memorandum, at 5.

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<sup>8</sup> The Council Members also contend that the Portion Cap Rule would, as precedent, permit the Board to usurp the City Council’s legislative role. Council Member Br., at 19-21. However, the Board's adoption of the Portion Cap Rule was not such a usurpation, but rather an exercise of its own extraordinary and broad independent authority, delegated by the State Legislature and recognized by the appellate courts for over a century, to act in the area of public health policy. Moreover, since the Portion Cap Rule does not conflict with any local laws enacted by the City Council, this Court need not address the question of overlapping jurisdiction where an enactment of the City Council conflicts with an action of the Board. There is simply no such conflict here.

### **III. The Board's Adoption of the Portion Cap Rule was Rational and Reasonable and Neither Arbitrary nor Capricious.**

The Council Members also incorrectly contend that the Portion Cap Rule is arbitrary and capricious. Preliminarily, given its legislative and appellate court treatment, the Board is entitled to deference that goes well beyond the deference afforded a typical administrative agency. Moreover, even if the standard deference is applied, the Board's enactment withstands scrutiny since, among other reasons, those seeking to invalidate a regulation have "the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence." *Id.* at 331-32 (emphasis added, citations omitted). Consolation Nursing Homes v. Comm'r NYS Dep't of Health, 85 N.Y.2d 326, 331 (1995) (citations omitted).

The vast record considered by the Board establishes that its adoption of the Portion Cap Rule had a rational basis, and was neither unreasonable, arbitrary nor capricious. This record established that there is an obesity epidemic among New York City residents: more than half of New York City adults are obese or overweight, and more than 20 percent of the City's public school children are obese. Exhibit "K," Notice of Adoption at 2 (citations omitted). The effects of obesity can be devastating: it is a risk factor for heart disease, cancer and diabetes.

The record established that sugary drinks play a unique role in the obesity epidemic. In comparison to 30 years ago, Americans consume an additional 200 to 300 calories per day, "with the largest single increase due to sugary drinks." *Id.* (citations omitted). And sugary "drinks are also the largest source of added sugar in the average American's diet, comprising nearly 43% of added sugar intake." *Id.* (citations omitted). New Yorkers consume vast quantities of sugary drinks. In low-income neighborhoods many residents "report drinking 4 or more sugary drinks daily." *Id.* (citations omitted).

The record also provided a rational basis for its determination to establish portion caps for sugary drinks.<sup>9</sup> Specifically, numerous studies demonstrate that people consume more when offered larger portion sizes. Exhibit “H,” Board Memorandum, at 5 (citations omitted). In addition to consuming more when offered larger portions, the Board Memorandum noted a study that found “people did not compensate for their additional beverage intake by consuming less food, indicating that consuming large, calorie dense sugary drinks with meals can and does lead to excess calorie intake.” Id. at 5 (citations omitted).

In addition, the record established that the Board had a rational basis to set a portion cap even though people could still purchase two or more beverages from a food service establishment, such establishments would not be barred from offering free refills and people could purchase larger beverages from a retail outlet that was not a food service establishment. The Board Memorandum concluded that patterns “of human behavior indicate that consumers overwhelmingly gravitate towards the default option” and that with the adoption of the Portion Cap Rule consumers “intent upon consuming more than 16 ounces would have to make conscious decisions to do so.” Exhibit “H,” Board Memorandum, at 6 (citations omitted). As an Assistant Professor of Medicine and Health Policy at New York University of Medicine stated: “We know that convenience drives many food purchases, particularly fast food purchases. If it becomes harder to carry two or more cups, people will be less likely to do so.” Exhibit “H,” Board Memorandum, at 6.

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<sup>9</sup> The Council Members also argue that the Portion Cap Rule fails because it does not regulate sales of sugary drinks in retail stores. But as note *supra*, retail stores are not licensed by the Department, and thus are exempt from the requirements of Article 81 of the New York City Health Code.

CONCLUSION

In the event that this Court grants the motions of either the Business Council or the Council Members, Respondents respectfully request that the Court consider this memorandum of law, and based on it and Respondents' prior submissions, deny the petition and dismiss this proceeding.

Dated: New York, New York  
November 19, 2012

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