RICHARD DEARING
(20 Minutes Requested)

COURT OF APPEALS
STATE 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,

Petitioners-Respondents,

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

APL
2013-00291

- 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,

Respondents-Appellants.

BRIEF FOR APPELLANTS IN RESPONSE TO AMICI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

Appellants submit this brief in response to the briefs amici curiae filed in support of respondents. Respondents' amici do not seriously dispute that the Board of Health's Portion Cap Rule falls within the express terms of the New York City Charter provisions vesting the Board with broad authority to protect the public health. They argue instead that the Rule exceeds an implicit limitation on the Board's powers based in separation-of-powers principles. But amici's arguments cannot be squared with this Court's precedents repeatedly upholding the Board's broad authority to craft reasonable rules to respond to public-health threats.

There is no basis for amici's efforts to sharply curtail the Board's longstanding and long-recognized powers under the City Charter. Amici rely almost entirely on *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), but they ignore the extraordinary nature of the state agency action invalidated in that case. The regulation in *Boreali* sought to effect a sweeping social and cultural shift as to indoor smoking, amid unusually intense and sustained legislative debate on the issue. Nothing in *Boreali* supports the restrictive and intrusive review of municipal rulemaking that amici propose here. The Board's Rule is a measured step to address a significant public-health threat, and it is well within the heartland of lawful agency actions.

Amici's warnings that the Court must intervene to curb a runaway agency rest on a misleading characterization of the Rule as a "ban" or a mandate dictating individual consumption decisions, when the Rule is neither of those things. Amici also sound alarms about hypothetical and far more intrusive rules that they speculate the Board might someday adopt. But amici disregard the effective checks against agency overreaching provided by the political process, as well as the fact that the Board has never adopted the sort of rules that amici hypothesize.

The failure to acknowledge the structural checks that curb overreaching is particularly striking as to the amicus brief filed by certain members of the City Council, along with the New York City Public Advocate ("Members Br."). Those amici do not deny that some or all of them might support a measure similar to the Portion Cap Rule if it were introduced before the Council. They argue instead that the Board needed particularized legislative authority from the Council before it could act. This has never been the law: adopting such a rule now would defy historical practice and hamstring the Board's ability to respond promptly and flexibly to public-health threats, as it has done for well over a century.

POINT I

RESPONDENTS' AMICI PROPOSE A CRAMPED VIEW OF AGENCY AUTHORITY THAT IS UNSUPPORTED BY THE COURT'S PRECEDENTS

We have shown that this Court has long recognized the Board's authority to enact substantive rules and standards in public health, and has repeatedly described the Board's authority as legislative in nature. (App. Br., at pp. 24-27; Reply Br., at pp. 10-14). Respondents' amici contend that this Court's decisions describing the Board's power do not mean what they say. Amici argue that those decisions were intended to mean only that the Board has "substantive rulemaking" authority, Members Br., at p. 12, or perhaps just that the Board may "promulgate regulations," Br. Amicus Curiae of Dean Eric Lane, at p. 24 n.5. We have refuted these arguments before. (Reply Br., at pp. 10-23).

Amici also contend that the 1989 revision of the New York City Charter somehow proves that the Board does not possess legislative powers. *See* Members Br., at p. 13; Lane Br., at pp. 10-17. The 1989 Charter Revision was adopted in the wake of the U.S. Supreme Court decision declaring the New York City Board of Estimate unconstitutional, and thus focused on transferring the powers formerly held by the Board of Estimate to other city actors. The Charter Revision history cited by Dean Lane never

mentions the Board of Health's powers. Further, the 1989 Charter Revision made no changes to the relevant text of the provisions (Charter §§ 558 and 556(c)(2) and (c)(9)) that are the basis for the Board's action here and did not materially alter pre-existing provisions defining the Council's role in local legislation. There is thus no merit to amici's suggestion that the 1989 Charter Revision sheds light on the Board's powers or the issues in this case.

Ultimately, this Court need not address whether the Board possesses legislative power, however, because the Portion Cap Rule fits well within the Court's precedents upholding rules adopted by the Board, as well as within the Court's decisions upholding rules promulgated by other agencies that do not share the Board's distinctive history and broad powers. Arguments to the contrary rest on an unsupported and unduly constricted conception of agency authority.

A. Agencies May Adopt Substantive Standards Under Delegated Authority, Without First Receiving Particularized Legislative Direction.

There is no foundation to the contention of respondents' amici that the Board lacked authority to adopt the Portion Cap Rule without first receiving specific direction from the City Council. Longstanding practice and precedent recognizes the Board's ability to adopt substantive public-health measures under its broad authority under the Charter to enact and

amend the City Health Code (formerly, the Sanitary Code) to protect and preserve the security of life and health, without requiring additional and particularized legislative direction.

For example, in 1959, the Board made New York City one of the first localities to restrict the use of lead paint in dwellings, without any specific legislation from the Council authorizing the Board to target that long-marketed product. (N.Y.C. Health Code § 211.13(c) (1959). A few years later, this Court upheld a Board rule banning tattooing in New York City, except for medical purposes, without specific legislation authorizing the Board to regulate tattoo parlors. *See Grossman v. Baumgartner*, 17 N.Y.2d 345, 350-51 (1966). And the same year, this Court upheld a Board rule providing for fluoridation of the City's water supply, without specific legislation authorizing the Board to address long-term dental health or direct the inclusion of health-promoting additives in drinking water. *See Paduano v. City of N.Y.*, 17 N.Y.2d 45 (1966), *aff'g*, 24 A.D.2d 437 (1st Dep't 1965); *aff'g on op. below*, 45 Misc. 2d 718 (Sup. Ct. N.Y. Co. 1965). These examples show that the Board has broad authority to identify threats to the public health and craft measures to address them, and need not wait for the City Council to take the first step charting a particular path before it may act.

The amici supporting respondents offer a series of reasons why this Rule purportedly exceeds the Board's authority, though past measures did not, but none of those reasons withstands scrutiny. In essence, amici contend that there is something unique about the obesity crisis that deprives the Board of any power to address the crisis and reduce the morbidity caused by it. But there is no carve-out in the City Charter that exempts health risks associated with obesity from the Board's authority to protect the public health. No one disputes that the obesity epidemic is one of the greatest public health crises facing the City and Nation today. It would be bizarre, and contrary to historical practice, to hold the Board powerless to respond to the health threats from obesity, absent marching orders from the Council. *See generally* N.Y. City Dep't of Health and Mental Hygiene, *Protecting Public Health in New York City: 200 Years of Leadership*, 46-50 (2005) (discussing programs to prevent chronic disease, including diabetes and heart disease, dating to the late 1950s).

Respondents' amici suggest that the availability of a range of policy options to address the health threats posed by the obesity crisis means that the Board cannot adopt any of those options without specific legislative guidance. *See* Members Br., at pp. 20-23. But the Court has not confined agency rulemaking authority to the execution of ministerial or mechanical

judgments involving little or no policy discretion. In *Matter of Levine v. Whalen*, for instance, this Court upheld the State Legislature's delegation of authority to the State Department of Health to both develop and administer state policy regarding hospital services "to provide for the protection and promotion of the health of the inhabitants of the state." 39 N.Y.2d 510, 516 (1976). The Court affirmed that the Legislature could "assign broad functions to the department and to leave to it the duty of bringing about the result pointed out by statute," and further noted that many other general delegations of rulemaking authority had previously been sustained. *Id.* at 517. *See also*, Br. Amicus Curiae of Gillian E. Metzger, *et al.*, at p. 7 ("Acceptance of general agency delegations and refusal to require legislative articulation of specific administrative policies are the hallmark of this Court's separation of powers jurisprudence").

This Court has upheld numerous agency rules reflecting judgments about policy. For example, the existence of a range of policy approaches for promoting dental health did not doom the fluoridation rule upheld in *Paduano*. Nor did the existence of a range of potential policy approaches as to succession rules for rent-stabilized apartments lead the Court to invalidate a state regulation that expanded the class of "family members" eligible for succession. *Rent Stabilization Assoc. of NYC v.*

Higgins, 83 N.Y.2d 156, 166-170 (1993), *cert. denied*, 512 U.S. 1213 (1994). The succession regulation rested on an agency judgment that "family members" should not be limited to persons related by blood or marriage, but should include other co-habitating persons who show emotional and economical interdependence, such as same-sex partners, persons in de facto marriages, or others in living arrangements considered "nontraditional." *Id.* This Court sustained the succession regulation as a lawful exercise of agency authority.

Similarly, the Court upheld a state health regulation that restricted the ability of chiropractors to use X-rays by providing that only certain licensed doctors and dentists could administer X-rays. *See Chiropractic Ass'n of N.Y., Inc. v. Hilleboe*, 12 N.Y.2d 109 (1962). That rule did not ban X-rays, which of course can be highly useful, but rather aimed to reduce individuals' exposure to X-ray radiation. The Court held that "it lay within the technical competence of the [agency] to determine where the principal sources of ionizing radiation are, . . . and to adopt such measures as to limit such exposure where, in the judgment of the [agency], it is excessive in the sense that the extent of the exposure outweighs the benefit derived." *Id*. at 120. Thus, it is simply not true that agencies are disabled from acting in areas that require choices among policy approaches.

There is no basis for amici's repeated contention that the threshold judgment to address sugar-sweetened beverages represents a public-policy decision of a nature and dimension that only a legislative body can make. *See* Members Br., at pp. 17-23. The Board's decision to adopt a measure directed at sugar-sweetened beverages lay well within its public health competence: studies show that sugar-sweetened beverages (a) are the single highest source of added sugar in the modern American diet, (b) have almost no nutritional value, and (c) do not create a feeling of fullness, which means that their consumption typically does not displace other caloric intake (Record on Appeal ("R.") 1092-1094; 1539; 1552-1553; 1556). These are all amply supported science-based points, not matters of foundational public policy. Many decisions to address particular health risks—whether stemming from dental cavities or lead paint or chiropractic X-rays—involve a "policy" choice of this type. Agencies regularly make such judgments.

Nor is there merit to amici's argument that the Rule falls outside the Board's authority on the ground that the public-health risks at issue may arise largely from individual behavior. *See* Members Br., at p. 20. As a threshold matter, the Rule does not dictate individual consumption choices: it is not a ban on sugar-sweetened beverages, and does not limit the quantity of any beverage that an individual may consume in a sitting or at a

location. By altering the maximum container size for sugar-sweetened beverages, the Rule merely changes the default options presented to the consumer, so as to facilitate more conscious consumption choices. In aiming to influence choices, without dictating them, the Rule is akin to educational outreach or labeling initiatives (see, e.g., R. 1582 [describing the Department of Health's advertising and educational outreach programs regarding sugary drinks]).

More broadly, initiatives designed to produce changes in behavior are important tools in addressing public-health issues. *See* Br. Amicus Curiae of National Association of County and City Health Officials, *et al.*, at pp. 32-33 ("[B]ehavior economics and consumer psychology play increasingly regular roles in the formulation of modern public health policy"). Such initiatives are necessary to respond to the obesity crisis—"perhaps the gravest and most pervasive public health issue of our time." Br. Amicus Curiae of National Alliance of Hispanic Health, *et. al.*, at pp. 3-7. There is no principled reason to bar the Board from responding to public-health threats with programs that aim to produce changes in behavior.

Although respondents and their amici suggest that their arguments are particular to rules addressing the obesity crisis, they are in fact following a familiar playbook that has long been used by interests

seeking to ossify or obstruct regulatory development. For example, although amici now suggest that lead paint restrictions were an obvious step to address an "inherently harmful substance" (Members Br., at p. 28.), such rules triggered fierce industry opposition when first proposed. The paint industry fought legal restrictions targeting their product: they denied that lead paint presented a hazard, and argued that any danger would be addressed by replacing "slum" buildings and better educating low-income parents. *See* Gerald Markowitz & David Rosner, *Deceit and Denial*, 99-105 (Univ. of California Press 2002).

In a similar vein, the plaintiffs that challenged the Board's fluoridation rule noted the existence of other policy approaches for promoting dental health, citing "the admitted widespread availability of . . . toothpaste, tablets, and other products containing fluorides." *Paduano v. City of N.Y.*, 17 N.Y.2d 875 (1966), Br. of Plaintiffs-Appellants, at p. 35. The same plaintiffs also warned that upholding fluoridation would create a slippery slope that could lead to use of water additives to "control[] population growth, or alleviate the harmful effects of cigarette smoking, or reduce or eliminate the desire to drink liquor, or abate hay fever and other conditions too numerous to list." *Paduano*, Br. of Plaintiffs-Appellants, at p. 45. This Court correctly upheld the fluoridation rule over those meritless

objections and alarmist predictions, and it should likewise uphold the Portion Cap Rule over similar claims here.

B. Amici Attempt To Expand *Boreali v. Axelrod* Far Beyond Its Appropriate Scope.

In their efforts to curtail the Board's historical authority, respondents' amici rely primarily on *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). But they fail to recognize that *Boreali* constitutes a narrow safeguard against extraordinary agency action, not a statewide straitjacket on effective and responsive rulemaking. The lower courts in New York have also recently read *Boreali* far too broadly—in the ten months since the Appellate Division's erroneous ruling here, trial courts have struck down state and local regulations on *Boreali* grounds in at least four separate cases.[1] In sharp contrast, this Court has not treated *Boreali*'s discussion of the "coalescing circumstances" presented in that case as establishing a generally applicable four-factor standard against which all agency rule-making must be

[1] *See Ahmed v. City of N.Y.*, 2014 N.Y. Misc. LEXIS 1678 (Sup. Ct., N.Y. Co. 2014) (invalidating rule of city taxi commission regarding fare deductions); *Agencies for Children's Therapy Servs., Inc. v. N.Y. State Dep't of Health*, Sup. Ct., Nassau Co. Index No. 15763/12 (Feinman, J.) (decided Apr. 8, 2014) (invalidating State Department of Health rules addressing conflicts of interest and use of public funds in state program to provide developmental services to disabled infants and toddlers); *Greater N.Y. Taxi Ass'n v. N.Y. City Taxi and Limousine Comm'n*, 42 Misc.3d 324 (Sup. Ct., N.Y. Co. 2013) (invalidating city taxi commission's rules under which the City contracted with an exclusive vendor for taxi vehicles); *Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Office of Parks, Recreation & Historic Preservation*, 975 N.Y.S.2d 593 (Sup. Ct., Albany Co. 2013) (invalidating state parks regulation establishing outdoor no-smoking areas within certain state parks, historic sites and recreational facilities). All four decisions have been appealed.

measured. And the Court has not struck down another regulation based on *Boreali*'s "coalescing circumstances" discussion since it issued that decision over twenty-five years ago.

Properly read, *Boreali* represents a limited restraint on exceptional state agency actions that violate constitutional separation-of-powers principles by intruding on the Legislature's authority to set fundamental social and economic policy. Because constitutional separation-of-powers principles do not apply to municipalities, and because the Board's broad historical powers under the City Charter go far beyond those of typical administrative agencies, *Boreali* is not implicated here. (App. Br., at pp. 20-28; Reply Br. at pp. 8-24). *See also* Br. Amici Curiae of Paul A. Diller, *et al.*, at pp. 23-27.

In any event, *Boreali*'s analysis comes into play at the state level only where an administrative agency has engaged in "broad-based public policy determinations." *Higgins*, 83 N.Y.2d at 169. The decision may bar a state agency from "trespass[ing] on a sensitive policy area that is within the Legislature's special province," but it would not apply to a regulation that, like the Portion Cap Rule, addresses "a narrower, more technical, and less sensitive issue." *Casado v. Markus*, 16 N.Y.3d 329, 337-38 (2011).

Boreali's central and defining feature, virtually ignored by respondents' amici, is the remarkable nature of the regulation at issue there, particularly given the context of its adoption. By a single rulemaking in 1987, the State Public Health Council sought to effect a sweeping change in New York law regarding smoking in indoor locations. *See* Record on Appeal, *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), at pp. 35-38 (setting forth text of Public Health Council regulation).

First, the regulation banned smoking in a wide variety of indoor spaces accessible to the public—including taxicabs and limousines; all schools; hospitals; arenas; auditoriums; clubhouses; courthouses; stadiums; elevators; gymnasiums; restrooms; waiting rooms and waiting areas; spas and health clubs; enclosed areas with a swimming pool; food markets; stores; banks; and other commercial establishments. *Id.* at 36 (10 N.Y.C.R.R. § 25.2(a)(1)-(5) (1987)).

Second, the regulation required all food service establishments with a capacity of over fifty persons to create segregated non-smoking and smoking areas, and set forth special rules regarding segregated spaces for bingo halls and bowling alleys. *Id.* (10 N.Y.C.R.R. § 25.2(a)(5)(iii)-(iv) and (6) (1987)).

Third, the regulation required all employers in the State to provide smoke-free indoor work areas for non-smoking employees and to designate certain common areas as smoke-free. *Id.* (10 N.Y.C.R.R. § 25.2(b) (1987)).

Fourth, the regulation expressly exempted from any restriction certain private conventions; bars; food service establishments with a capacity of fifty persons or less; private homes, residences, and automobiles; certain private social functions; hotel and motel rooms; and retail tobacco stores. *Id.* (10 N.Y.C.R.R. §§ 25.2(a)(5)(i)-(ii), 25.4 (1987)). The regulation was thus a comprehensive and multifaceted code that would have effected a profound shift in the treatment of indoor smoking across much of society in New York. *Id.* at 37 (State Register notice acknowledging that indoor smoking regulation would "apply to virtually all private entities in the State, except bars, restaurants with a seating capacity of 50 or less, and tobacco stores").

In addition to the unprecedented breadth of the state regulation at issue in *Boreali*, the Public Health Council enacted that regulation only after the Legislature had steadfastly refused to extend existing indoor smoking laws. In 1975, the Legislature had restricted "smoking in certain designated [public] areas," such as "libraries, museums, theaters and public

transportation facilities." *Boreali*, 71 N.Y.2d at 6-7. Over the next dozen years, forty bills were introduced in the State Legislature to expand smoking restrictions to other indoor areas—including many bills that proposed modest extensions of indoor smoking restrictions, and several others that would have broadly restricted smoking in workplaces and indoor areas accessible to the public, as the later-promulgated regulation sought to do. *See* Record on Appeal, *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), at pp. 76-89 (detailing bills). But none of the forty bills passed. *Id.* The comprehensiveness and breadth of the challenged regulation and the distinctive history predating its adoption were but two of the "coalescing circumstances" which showed that the Public Health Council had "usurped the Legislature's prerogative." 71 N.Y.2d at 11.

This Court's decision in *Boreali* stressed that only the "combination" of circumstances presented, viewed against the backdrop of then-unprecedented nature and scope of the indoor smoking rule, invalidated the rule. *Id.* As a result, language from *Boreali* cannot be read—in isolation and out of context, more than a quarter-century later—without considering the nature and circumstances of the regulation that was before the Court in that case.

As a purported example of agency overreach, the Portion Cap Rule pales in comparison to the regulation struck down in *Boreali*. The Portion Cap Rule is a measured step to slow the deadly epidemic of obesity by addressing the distinctive health risks presented by sugar-sweetened beverages. The Rule is not a ban and does not limit the amount of a sugar-sweetened beverage that an individual can consume. It simply limits the maximum container size, at a level twice the serving size recommended by the U.S. Food and Drug Administration, in order to foster more conscious choices about consumption of sugar-sweetened beverages. (R. 1559, ¶27).

Nor is there any record of sustained legislative consideration and stalemate here comparable to that presented in *Boreali*, even if such a legislative record at the City Council could somehow be said to narrow the Board's pre-existing powers. The amici Council Members and Public Advocate cite only three unsuccessful resolutions that were introduced before the City Council: one would have called on the State Legislature to enact a statewide excise tax on sugar-sweetened beverages, another would have called on the U.S. Department of Agriculture to allow New York City to prohibit use of food stamps to buy sugar-sweetened beverages, and the third would have called on the U.S.D.A. to require warning labels on sugar-sweetened beverage packaging. *See* Members Br., at pp. 30-32 & n.13.

The cited resolutions, if passed, would have simply expressed the sentiment of the Council, not enacted binding law. *See* N.Y. Municipal Home Rule Law § 2(9) (defining local law to exclude resolutions); *see also* Charter § 32. None of the resolutions involved limitations on container size, and none went to a full Council vote on the merits. This is hardly a record of "intense [legislative] deliberation." Members Br., at p. 30. If three unsuccessful resolutions addressing different measures were sufficient to preclude agency action in a field, a small minority of legislators, or even a single legislator, could broadly foreclose agency action simply by introducing unsuccessful bills. *Boreali* should not be transformed into a recipe for freezing in place the status quo.

POINT II

AMICI'S WARNINGS ABOUT AGENCY OVERREACHING DISREGARD THE CHECKS PROVIDED BY THE POLITICAL PROCESS

The amici Council Members and the Public Advocate argue that, by acting without awaiting specific legislative authorization from the Council to address obesity or sugar-sweetened beverages, the Board has set a "dangerous precedent" that raises a threat of unchecked agency power. Members Br., at pp. 3; 6-11). Amici imply that judicial intervention is the only way to curb such alleged overreach.

But as we have shown above, and in our earlier briefs, the Portion Cap Rule fits comfortably within the Board's powers under the New York City Charter. *See* App. Br., at pp. 20-28; 41-49; Reply Br., at pp. 8-24; 26-34. The amici's speculative concerns about future hypothetical actions by the Board ignore the multiple and important ways that the political process provides effective checks against potential agency overreach and preserves opportunities for different or additional legislative action.

The political process provides a range of protections that permit effective responses to agency overreaching and minimize the risk of unchecked rulemaking posited by amici. For example, the State Legislature may exercise its preemption authority; the Mayor, as appointing authority, is accountable to the citywide electorate; the appointment and reappointment of Board members is subject to the advice and consent of the City Council; the Charter provisions vesting powers in the Board may be amended by state law or by referendum; or the Council may exercise its powers of review and oversight (Charter § 29) to ensure the Board's accountability. The beverage industry, in particular, has ample opportunity and ability to voice objections in all of those arenas. *See* Cathleen F. Crowley, *Why the state soda tax lost its fizz*, Albany Times-Union (Nov. 10, 2010) (reporting that the beverage

industry spent $13 million on lobbying to defeat state excise tax on sugary soda).

Contrary to the suggestions of respondents' amici, the Board is not proposing any "drastic shift in legislative authority." Members Br., at p. 8. It is respondents and their amici who seek a sharp break from the past: they seek a new rule that would prevent the Board from responding to health crises such as the obesity and type 2 diabetes epidemics, unless and until the City Council has passed enabling legislation detailing specific measures that the Board may adopt.

Not only has the Court rejected any such requirement, see Point I.A, *supra*, but the longstanding approach permitting Board action without particularized enabling legislation makes good sense, given the Board's historical role as a body of experts dedicated to protecting and promoting the health of New York City residents. The Board's focus, expertise, and autonomy fosters prompt and flexible action in response to public health threats.

By contrast, the Council is a general body that must attend to a broad range of matters involved in the City's governance. Requiring the Board to return to the Council again and again before acting, when the area of public health has already been committed to the Board in the City

Charter, would hamstring the Board's effectiveness as a public health agency and profoundly transform its role without approval of the voters or the State Legislature. *See* Diller Br. at p. 16 (requiring specific legislative authorization for agency proposals "hamstrings agencies and hinders smart and effective regulation").

Nor is there any merit to amici's attempt to paint the long-existing relationship between the Board and the City Council as a threat to individual liberty. *See, e.g.*, Br. Amicus Curiae of Washington Legal Found. *et al.*, at pp. 13-18. The Board has existed for a century and a half without unduly invading personal freedoms. Nor does the Portion Cap Rule intrude on liberty: its limitation on the maximum container size that may be used for sugar-sweetened beverages by food-service establishments merely seeks to ensure that persons who consume large amounts of such a beverage have made a deliberate decision to do so.

As we have shown, the distinctive role of the Board is deeply embedded in the structure of the City's government in order to protect the public. *See* App. Br., at pp. 21-23; Reply Br., at pp. 9-10. To be sure, the City Council also possesses concurrent power in certain areas where the Board may act. The question of how to resolve a potential conflict between a particular rule adopted by the Board of Health and a particular local law

enacted by the City Council in such areas is not presented in this case, because the Council has not enacted any law that conflicts with the Portion Cap Rule. Such a question would arise in the future only if the bodies proved unable to work out their differences in the case of a conflict, and if neither decided to defer to the other under the particular circumstances. To this point, the Board and the Council, both acting in accordance with legislative and judicial authority, have co-existed amicably for many decades. Both bodies have reason to avoid pressing any conflict to a judicial resolution, and the institutional incentives for accommodation thus operate as a further curb on potential overreaching by the Board.

It is not necessary to theorize here about the prospect of a local law that conflicted with the Portion Cap Rule, and prudence counsels against drawing firm lines in this area based on hypothetical situations. If courts and legislatures could easily predict, evaluate, and plan effective responses to possible future health threats, the Legislature would not have needed to create the Board and grant it broad powers. The question presented in this case is whether the Board required specific enabling legislation from the City Council *before* it could adopt the Portion Cap Rule. Answering yes to that question would contravene the long-recognized powers of the Board and the precedents of this Court.

The City's residents have been well served by the existing arrangement permitting appropriate action in the area of public health to be taken by the Board, without requiring enactment of specific enabling legislation beforehand, and with room for further consideration, refinement, or adjustment afterward. For example, after the Board first adopted a restriction on the use of artificial trans fats, the Council continued with its own review of that issue. Several months later, the Council enacted a trans-fats restriction identical to the Board's, after holding a committee hearing at which representatives of the Board testified.

Amici incorrectly suggest (Members' Br., at pp. 24-26) that the Council's action on trans fats demonstrates that the Board lacked authority to adopt the ban on its own, citing a statement by the sponsor of the Council's bill that one reason for the Council to enact a local law was to place the restriction on "stronger legal footing" and "take away any potential challenge" to it. Transcript of Minutes of the Hearing before the Committee on Health, March 1, 2007, at 6-7.[2] But stating that the enactment of a local law would place the restriction beyond challenge is hardly the same as saying that the Board's rule was invalid. Neither the sponsor of the Council

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

bill nor any other council member opined that a legal challenge to the Board's trans fats rule would or should succeed.

Indeed, both the bill's sponsor and the then-Council Speaker praised the Board for its actions regarding artificial trans fats. *See* Hearings before the City Council Committee on Health and the full Council. *Id.*; Transcript of the Council Meeting, March 14, 2007, at 48-50.[3] Most tellingly, the legislative findings for Local Law 12 of 2007 (in Section 1 of the bill itself), which were adopted by the City Council, stated that the Board had acted to restrict trans fats "pursuant to the authority granted to it by § 558" and that the Council had decided "to incorporate the ban on artificial trans fat into the Administrative Code." (R. 627). This is wholly supportive of the Board's authority.

In sum, no principle of law or policy supports amici's efforts to short-circuit implementation of the Board's reasonable public health initiative, and the review and dialogue that may continue thereafter, through novel court-imposed limits on the Board's authority.

[3] http://legistar.council.nyc.gov/View.ashx?M=F&ID=670211&GUID=86FF2241-8CA9-4AAA-B096-6D7EB7FDA67E;
http://legistar.council.nyc.gov/View.ashx?M=F&ID=670024&GUID=799C45CE-F800-43A6-967E-0ABF15B0A9C9;

CONCLUSION

The decision and order of the Appellate Division, First Department should be reversed.

Respectfully submitted,

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