

2013

**The New York City Sugar-Sweetened Beverage Portion Cap Rule:
Lawfully Regulating Public Enemy Number One in the Obesity
Epidemic Note**

Kara Marcello

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https://opencommons.uconn.edu/law_review/231

CONNECTICUT LAW REVIEW

VOLUME 46

DECEMBER 2013

NUMBER 2

Note

THE NEW YORK CITY SUGAR-SWEETENED BEVERAGE PORTION CAP RULE: LAWFULLY REGULATING PUBLIC ENEMY NUMBER ONE IN THE OBESITY EPIDEMIC

KARA MARCELLO

Faced with an obesity epidemic, on September 13, 2012, the New York City Board of Health became the first local administrative body to amend its health code to restrict the size of sugar-sweetened beverages sold in the food service establishments subject to its jurisdiction. A legal challenge led by the American Beverage Association quickly followed.

In March 2013, the New York County Supreme Court struck down the portion cap rule. The challengers succeeded by arguing that the Board's promulgation of the portion cap rule violated the separation of powers doctrine under the state constitution by usurping the power endowed to the New York City Council. In addition, the court held that the portion cap rule was arbitrary and capricious. The Appellate Division affirmed the decision in July 2013. In October 2013, the New York Court of Appeals agreed to hear the case.

This Note defends the legality of the portion cap rule as a valid exercise of the Board of Health's police power. This Note elucidates the power of the Board, which is ultimately derived from the state, through an examination of municipal home rule, the city charter, commentary illustrating the intent of the state legislature, and case law. The decisions of the courts striking down the portion cap rule represent a fundamental misunderstanding of the quasi-legislative powers of the Board of Health to address the evolving public health needs of the people of New York City.

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THE NEW YORK CITY SUGAR-SWEETENED BEVERAGE PORTION CAP RULE: LAWFULLY REGULATING PUBLIC ENEMY NUMBER ONE IN THE OBESITY EPIDEMIC

KARA MARCELLO*

I. INTRODUCTION

On September 13, 2012, New York City became the first local government to amend its health code to cap the portions of sugar-sweetened beverages¹ sold at food service establishments.² The New York City Board of Health passed the portion cap rule in response to the connection between consumption of sugar-sweetened beverages and the obesity³ epidemic plaguing the city.⁴ Public health laws, like the portion

* University of Connecticut School of Law, J.D. Candidate 2014; Boston University, B.A. *magna cum laude* 2010. I would like to thank Professor Lindsay Wiley and Professor Loftus Becker for their thoughtful feedback. I also wish to thank my twin Kate Marcello for her medical guidance and support. In addition, I would like to thank my friend Mike Samsel for calling my attention to the portion cap rule. Last but not least, I would like to thank my colleagues on the *Connecticut Law Review* for their extraordinary assistance.

¹ “Sugar-sweetened beverages,” or “SSBs,” are synonymous with sugary beverages when used in this Note. They are commonly defined as “beverages that contain added, naturally derived caloric sweeteners such as sucrose (table sugar), high-fructose corn syrup, or fruit-juice concentrates, all of which have similar metabolic effects.” Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 *NEW ENG. J. MED.* 1599, 1599 (2009).

² Bd. of Health, *Notice of Adoption of an Amendment (§ 81.53) to Article 81 of the New York City Health Code*, N.Y.C. DEP’T HEALTH & MENTAL HYGIENE 1 [hereinafter *Notice of Adoption*], available at <http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/notice-adoption-amend-article81.pdf>.

³ “For adults, overweight and obesity ranges are determined by using weight and height to calculate . . . the ‘body mass index’ (BMI).” *Defining Overweight and Obesity*, CDC, <http://www.cdc.gov/obesity/adult/defining.html> (last updated Apr. 27, 2012). For a majority of people, BMI “correlates with [the individual’s] amount of body fat.” *Id.* “An adult who has a BMI between 25 and 29.9 is considered overweight,” while “[a]n adult who has a BMI of 30 or higher is considered obese.” *Id.*

⁴ “Epidemic” is conventionally used to refer to a nationwide problem and is defined as “affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time.” *Epidemic*, M-W.COM, <http://www.merriam-webster.com/dictionary/epidemic> (last visited Nov. 3, 2013). In contrast, a “pandemic” is conventionally used to refer to a global problem and is defined as “occurring over a wide geographic area and affecting an exceptionally high proportion of the population.” *Pandemic*, M-W.COM, <http://www.merriam-webster.com/dictionary/pandemic> (last visited Nov. 3, 2013); see also Barry M. Popkin et al., *Global Nutrition Transition and the Pandemic of Obesity in Developing Countries*, 70 *NUTRITION REVS.* 3, 4 (2012) (estimating that, in 2008, 1.5 billion adults worldwide were considered overweight or obese). For purposes of this Note, “epidemic” is used due to the Note’s focus on the obesity problem in the United States and New York City in particular.

cap rule, are the foundation of “legal preparedness for obesity prevention and control, because they . . . specify rights and responsibilities of private parties.”⁵ A growing body of research demonstrates the role such laws can play in decreasing the incidence of obesity.⁶

Obesity is a national problem. More than one-third of American adults, or 35.7%, are obese.⁷ The United States Surgeon General has labeled obesity prevention a “community responsibility.”⁸ A national goal set in 2000 to reduce the incidence of obesity in ten years has fallen far “out of reach.”⁹ The problem is projected to continue and proliferate, and a recent survey estimates that by 2015, “41% of American adults will be obese, and 24% of children and adolescents will be overweight or obese.”¹⁰ If the law does not intervene, American children may live less healthy, shorter lives than the previous generation.¹¹

The obesity epidemic “is unlikely to yield to any single policy intervention, so it is important to pursue multiple opportunities to obtain incremental gains.”¹² The portion cap rule reflects the hallmark of public health regulation as a “partial and incremental” response to the health threat posed by obesity.¹³ Targeting obesity by regulating the consumption of sugar-sweetened beverages is not a new innovation.¹⁴ Excise taxes on sugar-sweetened beverages have received growing consideration among

⁵ Judith A. Monroe et al., *Legal Preparedness for Obesity Prevention and Control: A Framework for Action*, 37 J.L. MED. & ETHICS 15, 16 (2009).

⁶ *Id.* It is the law that “shapes the situational and environmental influences that drive both dietary intake and physical activity,” while groups of stakeholders, including the government and the food industry, attempt to use the law to alter those influences. Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 90 (2007).

⁷ *Adult Obesity Facts*, CDC, <http://www.cdc.gov/obesity/data/adult.html> (last updated Aug. 16, 2013).

⁸ Alderman et al., *supra* note 6, at 90.

⁹ Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 772 (2008).

¹⁰ *Id.* (citing Youfa Wang & May A. Beydoun, *The Obesity Epidemic in the United States—Gender, Age, Socioeconomic, Racial/Ethnic, and Geographic Characteristics: A Systematic Review and Meta-Regression Analysis*, 29 EPIDEMIOLOGIC REVS. 6, 22 (2007)).

¹¹ Michael Cardin et al., *Preventing Obesity and Chronic Disease: Education vs. Regulation vs. Litigation*, 35 J.L. MED. & ETHICS (SPECIAL SUPPLEMENT) 120, 120 (2007).

¹² Brownell et al., *supra* note 1, at 1603.

¹³ Brief for the Nat’l Ass’n of Local Bds. of Health et al. as Amici Curiae Supporting Respondents-Appellants at 12, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 110 A.D. 3d 1 (N.Y. App. Div. 2013). “Given the multi-factorial nature of threats to the public’s health, an incremental approach is not only legal, but often necessary.” *Id.* at 9.

¹⁴ The portion cap rule is not the first regulation aimed at decreasing SSB consumption in New York City. See Anne Barnhill & Katherine F. King, *Evaluating Equity Critiques in Food Policy: The Case of Sugar-Sweetened Beverages*, 41 J.L. MED. & ETHICS 301, 301 (2013) (noting the “recent, unsuccessful effort by New York State to exclude sweetened beverages from the items eligible for purchase in New York City with [the] Supplemental Nutrition Assistance Program”).

policymakers, public health advocates, and the media.¹⁵ In 2008, the Congressional Budget Office (CBO) suggested a federal excise tax on sugar-sweetened beverages to fund health care reform, which the CBO estimated would generate \$50 billion in revenue between 2009 and 2018.¹⁶ Although President Barack Obama entertained the idea of an excise tax on sugary beverages as a part of health care reform, the plan was “smothered” by Americans Against Food Taxes¹⁷ and other soft drink industry lobbyists.¹⁸

Some health and policy advocates are specifically calling for local governments to take action to quell the obesity crisis.¹⁹ The New York City Board of Health answered the call by enacting the portion cap rule. Subsequently, the deep pockets of the American Beverage Association (ABA)²⁰ were quick to challenge the legality of the rule by filing a petition to block and invalidate it with the New York County Supreme Court.²¹ On March 11, 2013, one day before the regulation was set to take effect, Judge Milton Tingling granted the ABA’s order to enjoin and permanently restrain the City from implementing or enforcing the portion cap rule.²² The City appealed the next day.²³ On July 30, 2013, the Appellate

¹⁵ Tatiana Andreyeva et al., *Estimating the Potential of Taxes on Sugar-Sweetened Beverages to Reduce Consumption and Generate Revenue*, 52 PREVENTIVE MED. 413, 413 (2011).

¹⁶ *Id.* at 413–14.

¹⁷ Membership includes “the soft drink makers, their suppliers, and such mass-marketers as McDonald’s and Domino’s Pizza.” Tom Hamburger & Kim Geiger, *Soda Tax Fizzles: Targeting Lawmakers and Nutritionists, Beverage Firms Put a Stopper in the Plan*, L.A. TIMES, Feb. 7, 2010, at A1.

¹⁸ *Id.* Although “public health advocates thought the tax would be a natural for congressional Democrats looking for revenue to fund expanded health insurance coverage,” the plan was not embraced by some White House staff, and “[a] key congressional committee, after initially seeming receptive, ended up refusing to consider it.” *Id.*

¹⁹ See, e.g., INST. OF MED. & NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., LOCAL GOVERNMENT ACTIONS TO PREVENT CHILDHOOD OBESITY, at S-1 (Lynn Parker et al. eds., 2009), available at <http://www.nccor.org/downloads/downloads/Local%20Gov%27t%20Actions%20to%20Prevent%20Childhood%20Obesity.pdf> (“Local government leadership is critical to both reducing and preventing further increases in childhood obesity. The places in which people live, work, study, and play have a strong influence on their ability to consume healthy foods and beverages and engage in regular physical activity. Local governments make decisions every day that affect these environments.”).

²⁰ The ABA “is the trade association that represents America’s non-alcoholic beverage industry.” *History*, AM. BEVERAGE ASS’N, <http://www.ameribev.org/about-aba/history/#> (last visited Nov. 3, 2013). According to the ABA website, “[t]he non-alcoholic beverage industry . . . has a direct economic impact of \$141.22 billion.” *Id.*

²¹ See *infra* Part III.C.

²² N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, No. 653584/2012, 2013 WL 1343607, at *20 (N.Y. Sup. Ct. Mar. 11, 2013).

²³ Notice of Appeal by Respondents at 1, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, No. 653584/2012 (N.Y. Sup. Ct. Mar. 12, 2013).

Division affirmed Judge Tingling's ruling.²⁴ A few days later, the City appealed the decision to the New York Court of Appeals.²⁵ On October 17, 2013, the New York Court of Appeals agreed to hear the case.²⁶

This Note will defend the New York City portion cap rule by arguing that the regulation is a legal exercise of the New York City Board of Health's power and can ultimately withstand legal challenges by the fervent opposition. Part II will stress the state of the nation's obesity epidemic and the increased research on the connection between sugar-sweetened beverage consumption and obesity and chronic illnesses. Part III will provide an overview of the history of the New York City Board of Health and Department of Health and Mental Hygiene. Then, Part III will introduce the portion cap rule and detail the legal challenge currently being litigated. Part IV will discuss the powers of the Board of Health by first providing an overview of municipal home rule and then analyzing the modern version of the New York City Charter and applicable case law. Part IV will also detail other recent Board of Health regulations aimed at curbing obesity. Part V will support Mayor Michael Bloomberg's assertion that "the judge is one-hundred percent wrong,"²⁷ by illustrating that Judge Tingling's and the Appellate Division's rulings represent a fundamental misunderstanding of the powers of the Board of Health, as well as a misapplication of the *Boreali* framework and the standard of judicial review governing Board of Health rulemaking. Part VI will address potential arguments concerning the Board of Health's authority under the United States Constitution, specifically the Commerce Clause and the Equal Protection Clause.

II. SUGAR-SWEETENED BEVERAGE CONSUMPTION AND THE NATION'S OBESITY EPIDEMIC

The latest edition of the national dietary guidelines reveals that, across the country, "the prevalence of obesity has doubled and in some cases tripled between the 1970s and 2008."²⁸ New York is among the many

²⁴ N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 110 A.D. 3d 1, 16 (N.Y. App. Div. 2013).

²⁵ *NYC to State Top Court: Review Big-Soda Ban Ruling*, SALT LAKE TRIB. (Aug. 5, 2013), <http://www.sltrib.com/sltrib/money/56693345-79/court-board-drinks-health.html.csp>.

²⁶ Daniel Wiessner, *New York Court to Hear Bloomberg's Appeal to Restore Soda Ban*, REUTERS (Oct. 17, 2013), <http://www.reuters.com/article/2013/10/17/us-nycsodaban-appeal-idUSBRE99G0T620131017>. At the time of this Note's publication, the date of the argument has not been set; the Appellant Reply Brief is not due until February 28, 2014. *Court of Appeals Court Docket*, COURT OF APPEALS STATE OF N.Y., <https://www.nycourts.gov/ctapps/courtpass/Docket.aspx> (search by APL Number 2013-00291) (last visited Dec. 15, 2013).

²⁷ *Morning Joe* (MSNBC television broadcast Mar. 13, 2013) (interview of N.Y.C. Mayor Bloomberg by Mika Brzezinski).

²⁸ U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS 9 (7th ed. 2010) [hereinafter DIETARY GUIDELINES], available at

states facing the challenges of obesity, as 2011 data from the Centers for Disease Control and Prevention (CDC) shows that approximately 24.5% of adult residents in New York are obese.²⁹ According to one report, if it follows current trajectories, New York State's obesity rate could reach 50.9% by 2030.³⁰ Strikingly, within the confines of New York City, 58% of adult residents are currently considered overweight or obese.³¹ Various medical studies emphasize that this obesity epidemic has a close relationship with sugary beverages—a common part of the American diet.

A. *Medical Studies Link Sugar-Sweetened Beverages to Obesity and Related Health Problems*

The health problems most often associated with obesity include type 2 diabetes,³² heart disease,³³ and certain types of cancer,³⁴ leading to the conclusion that “obesity can increase the risk of premature death.”³⁵ Despite the fact that “[d]ietary recommendations to prevent chronic diseases have always been controversial,”³⁶ the correlation between sugary beverage consumption and obesity is gaining increased recognition,³⁷ and “[t]he science base linking the consumption of sugar-sweetened beverages to the risk of chronic diseases is clear.”³⁸

<http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PolicyDoc.pdf>.

²⁹ *Adult Obesity Facts*, *supra* note 7.

³⁰ *Adult Obesity Rate in New York Could Reach 50.9 Percent by 2030, According to New Study*, TR. FOR AM.'S HEALTH, <http://tfah.org/reports/obesity2012/?stateid=NY> (last visited Nov. 3, 2013).

³¹ *Notice of Adoption*, *supra* note 2, at 2.

³² Type 2 diabetes is a chronic illness characterized by high levels of sugar in the blood; an individual with type 2 diabetes is insulin resistant, with the fat, liver, and muscle cells responding incorrectly to insulin. *Health Guide: Type 2 Diabetes*, N.Y. TIMES, <http://health.nytimes.com/health/guides/disease/type-2-diabetes/overview.html> (last updated June 28, 2011). When blood sugar is not stored for energy, it causes sugar to build up in the blood; this condition is called hyperglycemia. *Id.*

³³ “The well-documented adverse physiological and metabolic consequences of a high intake of refined carbohydrates such as sugar include the elevation of triglyceride levels and of blood pressure and the lowering of high-density lipoprotein cholesterol levels, which would be expected to increase the risk of coronary heart disease.” Brownell et al., *supra* note 1, at 1601.

³⁴ DIETARY GUIDELINES, *supra* note 28, at 20.

³⁵ *Id.* at 9.

³⁶ Joanne Slavin, *Beverages and Body Weight: Challenges in the Evidence-Based Review Process of the Carbohydrate Subcommittee from the 2010 Dietary Guidelines Advisory Committee*, 70 NUTRITION REVS. 111, 112 (2012).

³⁷ See Jason M. Fletcher et al., *Are Soft Drink Taxes an Effective Mechanism for Reducing Obesity?*, 30 J. POL'Y ANALYSIS & MGMT. 655, 656 (2011) (“The rise in obesity has coincided with the rise in soft drink consumption.”); see also *id.* at 656–57 (asserting that “there are few compelling studies that can explicitly make a causal claim for a connection between soda consumption and obesity,” but nonetheless concluding that “the many potential links with a wide array of poor health outcomes suggest that there could be potential improvements in the health of the population from public policies that are effectively able to reduce soda consumption”).

³⁸ Brownell et al., *supra* note 1, at 1604.

A recently released study that spanned multiple decades and involved more than 33,000 Americans “has yielded the first clear proof that drinking sugary beverages interacts with genes that affect weight, amplifying a person’s risk of obesity beyond what it would be from heredity alone.”³⁹ The expansive genetic study arrived at the following conclusion:

[T]he combined genetic effects on BMI and obesity risk among persons consuming one or more servings of sugar-sweetened beverages per day were approximately twice as large as those among persons consuming less than one serving per month. These data suggest that persons with greater consumption of sugar-sweetened beverages may be more susceptible to genetic effects on adiposity. Viewed differently, persons with a greater genetic predisposition to obesity appeared to be more susceptible to the deleterious effects of sugar-sweetened beverages on BMI. Our findings further underscore the need to test interventions that reduce the intake of sugary drinks as a means of reducing the risk of obesity and related diseases.⁴⁰

In addition, researchers at the Harvard School of Public Health conducted a meta-analysis study that pooled data from eleven other studies and demonstrated that sugary beverage consumption “is associated with a clear and consistently greater risk of metabolic syndrome and type 2 diabetes.”⁴¹ One portion of the study included 19,431 participants and 5,803 cases of metabolic syndrome.⁴² Participants in the highest category of sugary beverage intake, drinking one to two beverages per day, were

³⁹ Marilyn Marchione, *Soda, Other Sugary Drinks More Firmly Tied to Obesity in New Studies*, HUFFINGTON POST (Sept. 21, 2012), http://www.huffingtonpost.com/2012/09/21/obesity-soda-sugary-drinks_n_1904732.html?view=print&comm_ref=false. For a full discussion of the study’s methodology, see Qibin Qi et al., *Sugar Sweetened Beverages and Genetic Risk of Obesity*, 367 NEW ENG. J. MED. 1387, 1388–89 (2012).

⁴⁰ Qi et al., *supra* note 39, at 1393. The strengths of the study “include the prospective design, the large sample, use of repeated measures of sugar-sweetened beverage intake and BMI, comprehensive coverage of the established BMI-associated genetic factors, and replication of the results across three cohorts.” *Id.* at 1395.

⁴¹ Press Release, Harvard Sch. Pub. Health, *Sodas and Other Sugar-Sweetened Beverages Linked to Increased Risk of Type 2 Diabetes, Metabolic Syndrome* (Oct. 27, 2010), available at <http://www.hsph.harvard.edu/news/press-releases/sugar-sweetened-beverages-sodas-diabetes-metabolic-syndrome/>. The study has been hailed as “the first meta-analysis to quantitatively review the evidence linking sugar-sweetened beverages with type 2 diabetes and metabolic syndrome.” *Id.* Metabolic Syndrome “is the name for a group of risk factors that raises your risk for heart disease and other health problems, such as diabetes and stroke.” *What Is Metabolic Syndrome?*, NAT’L HEART, LUNG, & BLOOD INST., <http://www.nhlbi.nih.gov/health/health-topics/topics/ms/> (last updated Nov. 03, 2011). If an individual has at least three of the five following risk factors, they are considered to have metabolic syndrome: abdominal obesity, a high triglyceride level, a low HDL cholesterol level, high blood pressure, or a high fasting blood sugar. *Id.*

⁴² Press Release, Harvard Sch. Pub. Health, *supra* note 41.

found to have a 20% greater risk of developing the syndrome than those in the lowest category of intake.⁴³ Another portion of the study that followed 310,819 participants and 15,043 cases of type 2 diabetes revealed that participants in the highest category of sugary beverage intake had a 26% greater risk of developing type 2 diabetes than participants in the lowest category of intake.⁴⁴ The researchers determined that the risk of developing metabolic syndrome and type 2 diabetes through the consumption of sugary beverages results not only from the corresponding increase in weight, but also from “the high levels of rapidly absorbable carbohydrates in the form of added sugars, which are used to flavor these beverages.”⁴⁵ Consequently, scholars and prominent organizations, such as the American Heart Association, are calling for dramatic reductions in consumption of sugary beverages.⁴⁶

B. *The Pervasiveness of Sugar-Sweetened Beverages in the American Diet*

Sugary beverages are “ubiquitous” and “sugar-and-calorie laden.”⁴⁷ Defined in the Dietary Guidelines as “soda, energy drinks, and sports drinks,” sugar-sweetened beverages comprise 36% of added sugar intake and rank as the highest source of added sugar in the American diet.⁴⁸ Relatedly, “soft drinks represent the largest category of energy intake among adults in the U.S.”⁴⁹ Further, there is evidence that people do not limit caloric consumption from other foods after consuming sugary beverages.⁵⁰ Fructose, an ingredient found in sugary beverages, may affect physiological processes and result in a feeling of starvation, effectively provoking more food consumption.⁵¹ These sugary beverages “are not necessary for survival, and an alternative (i.e., water) is available at little or no cost.”⁵² Thus, in the context of the obesity epidemic, soft drinks have

⁴³ Vasanti S. Malik et al., *Sugar-Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes*, 33 DIABETES CARE 2477, 2481 (2010).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2482.

⁴⁶ *Id.* at 2477.

⁴⁷ *Drink Water, Coffee, and Tea Instead of Sugary Beverages*, 35 ENVTL. NUTRITION 3, 3 (2012).

⁴⁸ DIETARY GUIDELINES, *supra* note 28, at 28. *But see Notice of Adoption, supra* note 2, at 2–3 (relying on a 2000 article published in the *Journal of the American Dietetic Association* to assert that sugary drinks, as “the largest source of added sugar in the average American’s diet, compris[e] nearly 43% of added sugar intake”). In addition, “sugar-sweetened fruit drinks,” defined as “fruit-flavored drinks, fruit juice drinks, and fruit punch,” comprise ten percent of calories from added sugar intake. DIETARY GUIDELINES, *supra* note 28, at 28 & n.54.

⁴⁹ Fletcher et al., *supra* note 37, at 656.

⁵⁰ *Id.*

⁵¹ *See id.* (“[F]ructose may act to block the leptin signal pathway (where leptin is a protein hormone that plays a key role in regulating energy expenditure, appetite, and metabolism), resulting in a sense of starvation and driving further food intake.”).

⁵² Brownell et al., *supra* note 1, at 1603.

been labeled public enemy number one.⁵³

It is worthwhile to note that sugar-sweetened beverages have a significant impact on the health of America's youth. Soda is devoid of non-caloric nutrients and may, in the long run, contribute to malnutrition, especially in children.⁵⁴ According to the CDC, sugary beverage consumption has risen one hundred percent among young adults since the 1970s.⁵⁵ These young Americans receive excess amounts of the daily-recommended amounts of sugar from sugary beverages, which in turn contributes to the increasing rates of childhood obesity.⁵⁶ This undoubtedly motivated health advocates and organizations to sign on to a letter to the Commissioner of the Food and Drug Administration (FDA), which argued for the addition of health notices on sugary beverages to help implement the national dietary guidelines.⁵⁷

There is a definite connection between sugar-sweetened beverage consumption and obesity. Sugar-sweetened beverages ultimately lead to weight gain due to their "high added sugar content, low satiety potential and incomplete compensatory reduction in energy intake at subsequent meals after consumption of liquid calories, leading to positive energy balance."⁵⁸ Although it is only one component of American dietary intake, sugar-sweetened beverage consumption deserves to be the subject of government regulation, given the research demonstrating its connection to the obesity epidemic and its ubiquity in the American diet.

III. THE NEW YORK CITY BOARD OF HEALTH: FROM REGULATING TO CONTAIN A YELLOW FEVER OUTBREAK TO THE PORTION CAP RULE

For over two hundred years, the New York City Board of Health has

⁵³ Cardin et al., *supra* note 11, at 122. The recommendation to decrease intake of sugary beverages has been championed by the Institute of Medicine, the American Heart Association, the Obesity Society, and many other organizations. Sonia Caprio, *Calories from Soft Drinks—Do They Matter?*, 367 NEW ENG. J. MED. 1462, 1463 (2012); *see also* Affidavit of Commissioner Thomas A. Farley at 4, N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/2012, 2013 WL 1343607 (N.Y. Sup. Ct. Mar. 11, 2012) [hereinafter Affidavit of Commissioner Farley] (asserting that "research recently published in the *New England Journal of Medicine* on September 21, 2012 provided further confirmation that sugary drinks are associated with obesity").

⁵⁴ Fletcher et al., *supra* note 37, at 656.

⁵⁵ *Drink Water, Coffee, and Tea Instead of Sugary Beverages*, *supra* note 47, at 3.

⁵⁶ *Should the Federal Government Regulate Sugary Drinks?*, HEALTH CARE EXPERTS BLOG (Nov. 1, 2011, 11:49 AM), <http://healthcare.nationaljournal.com/2011/11/should-the-federal-government.php>.

⁵⁷ Organizations that signed the letter included the New York Department of Health, American Public Health Association, the California Center for Public Health Advocacy, the Boston Public Health Commission, the Philadelphia Department of Public Health, and the El Paso, Texas, Department of Health. *Health Warnings Urged for Soda & Other Sugary Drinks*, CTR. FOR SCI. PUB. INT. (Jan. 3, 2011), <http://www.cspinet.org/new/201101031.html>.

⁵⁸ Malik et al., *supra* note 43, at 2482.

responded to a number of infectious disease outbreaks. More recently, the regulations promulgated by the Board of Health have responded to the incidence of chronic disease. The promulgation of the portion cap rule evidences this latter trend.

A. *History of the New York City Department of Health and the Board of Health*

The New York City Board of Health, considered the predecessor to the Department of Health and Mental Hygiene,⁵⁹ was first established in 1805 pursuant to an ordinance of the New York City Common Council.⁶⁰ Responding to the outbreak of yellow fever, the Common Council determined that the City needed more control over sanitation in order to curb the epidemic.⁶¹ In February 1866, the state legislature passed a public health law creating the Metropolitan Board of Health.⁶² Of the nine board members, three had to be physicians appointed by the governor, which took control of health matters out of the sole hands of politicians and gave some of it to health professionals.⁶³ The law rendered the Metropolitan Board of Health the most powerful local public health body in the country, as it proceeded to respond to a cholera epidemic.⁶⁴ In 1870, while New York City operated under the corrupt hold of Tammany Hall,⁶⁵ a new city charter was adopted to revert control over health matters back to the City.⁶⁶ The charter formed a New York City Department of Health, which was overseen by a Board of Health.⁶⁷ Instead of appointment by the governor,

⁵⁹ N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, PROTECTING PUBLIC HEALTH IN NEW YORK CITY: 200 YEARS OF LEADERSHIP 1 (2005) [hereinafter PROTECTING PUBLIC HEALTH: 200 YEARS], available at <http://www.nyc.gov/html/doh/downloads/pdf/bicentennial/historical-booklet.pdf>.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* During “the next half-century, the Board generally took a reactive stance, meeting whenever an epidemic threatened the city.” *Id.*

⁶² *Id.* at 12.

⁶³ *Id.*; see *New York City Board of Health, History: From Typhus to Trans Fat*, <http://www.nyc.gov/html/doh/html/about/boh.shtml> (last updated Mar. 5, 2013) (“Everything changed in 1866, when the New York State Legislature expanded the Board and insulated it from political influence by setting aside seats for physicians and scientists.”). The impetus for this change was the Tammany machine. See PROTECTING PUBLIC HEALTH: 200 YEARS, *supra* note 59, at 12 (“In the late 1850s, reformers began calling for the state legislature to establish an independent city health department that would not be controlled by the corrupt Tammany machine. The first public health bill proposing such a department was introduced in 1859.”).

⁶⁴ PROTECTING PUBLIC HEALTH: 200 YEARS, *supra* note 59, at 15.

⁶⁵ See *Teaching Eleanor Roosevelt Glossary*, ELEANOR ROOSEVELT PAPERS PROJECT, <http://www.gwu.edu/~erpapers/teachinger/glossary/tammany-hall.cfm> (last visited Nov. 17, 2013) (“Tammany Hall was the name given to the Democratic political machine that dominated New York City politics from the mayoral victory of Fernando Wood in 1854 through the election of Fiorello LaGuardia in 1934.”).

⁶⁶ PROTECTING PUBLIC HEALTH: 200 YEARS, *supra* note 59, at 15–16.

⁶⁷ *Id.* at 16.

members were appointed by the mayor.⁶⁸ Despite the fact that the Board of Health and the Health Department were headed by appointees of Tammany Hall, “the physicians and other experts in these divisions created a buttress against political influence.”⁶⁹ At the beginning of the twentieth century, the Health Department labored to address a tuberculosis epidemic and high childhood mortality rates,⁷⁰ followed by the polio and influenza epidemics.⁷¹ By the mid-twentieth century, infectious diseases were largely controlled,⁷² while “[c]hronic disease, including diabetes, heart disease, high blood pressure, and cancer, became the next frontier for public health.”⁷³ Since the 1950s, the Health Department has responded to a variety of public health concerns including the AIDS epidemic of the 1980s,⁷⁴ a resurgence of tuberculosis,⁷⁵ the West Nile virus,⁷⁶ and the public health effects of the September 11, 2001, terrorist attacks.⁷⁷ Following voter approval, the Department of Health merged with the Department of Mental Health, Mental Retardation and Alcoholism Services in 2002, becoming the Department of Health and Mental Hygiene as it is known today.⁷⁸ That same year, Thomas R. Frieden became the Commissioner of the Department.⁷⁹ Commissioner Frieden initiated health surveys “to monitor the health of each community and increased the Department’s focus on programs that address chronic disease and health inequities.”⁸⁰ Thomas Farley was appointed New York City Health Commissioner in May 2009,⁸¹ and has continued Frieden’s commitment to fighting chronic disease.

1. *The Composition of the Board of Health*

The current New York City Board of Health in the City’s Department of Health and Mental Hygiene comprises one chairperson who serves as

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 20, 23. In 1900, the Board of Health passed an ordinance requiring mandatory reporting by physicians of all tuberculosis cases, which was the leading cause of death in New York City. *Id.* at 20.

⁷¹ *Id.* at 26.

⁷² *Id.* at 46.

⁷³ *Id.* at 49. This new development in public health led the City Health Department in 1958 to establish a Health Research Council with a budget of \$7 million to study chronic and infectious diseases. *Id.*

⁷⁴ *Id.* at 52.

⁷⁵ *Id.* at 60.

⁷⁶ *Id.* at 64.

⁷⁷ *Id.*

⁷⁸ *Id.* at 63–64.

⁷⁹ *Id.* at 67.

⁸⁰ *Id.*

⁸¹ *Biography of Thomas Farley, M.D., M.P.H.*, NYC.GOV, <http://www.nyc.gov/html/doh/html/about/commish-bio.shtml> (last visited Nov. 3, 2013).

the New York City Health Commissioner and ten members who are appointed by the mayor to serve for a term of six years without compensation.⁸² Five of the members must be doctors of medicine, with at least ten years' experience in one of the following areas: clinical medicine, neurology, psychiatry, public health administration, or college level public health teaching.⁸³ The other five members are not mandated to be doctors, but must meet certain education and experience requirements.⁸⁴

B. *The Portion Cap Rule and the New York City Board of Health's Reasoning*

On September 13, 2012, the New York City Board of Health voted⁸⁵ to enact Mayor Michael Bloomberg's proposal to limit the size of sugar-sweetened beverages sold in food service establishments⁸⁶ to sixteen ounces or less.⁸⁷ The portion cap rule amends article 81 of the New York City Health Code—which concerns regulations applicable to food preparation and food establishments as found in title 24 of the Rules of the City—by adding section 81.53.⁸⁸ To fall within the purview of the portion

⁸² N.Y.C. CHARTER § 553.

⁸³ *Id.*

⁸⁴ *Id.* These five members must hold at least a master's degree in environmental, biological, veterinary, physical, or behavior health or science, or a related field, and must have at least ten years' experience in that field. *Id.* The current Board consists of seven physicians, one Doctor of Public Health (Dr.P.H.), one Ph.D., and one M.P.H. *New York City Board of Health, Meet the Current Members*, NYC.GOV, <http://www.nyc.gov/html/doh/html/about/boh.shtml> (last updated Mar. 5, 2013). Of the seven physicians, three also have an M.P.H.; one of those three members is also a Dr.P.H. *Id.*

⁸⁵ The amendment and regulation passed with an affirmative vote by eight board members; one member abstained, one member was not present for the vote, and one member had recently retired. Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 14, 2012, at A24.

⁸⁶ The proposal defined food service establishments as those that are regulated by the Department of Health. *Notice of Adoption*, *supra* note 2, at 1. Article 81 of the Health Code:

[A]ppplies to all food service establishments and non-retail processing establishments where food, as defined in Article 71 of this Code, is prepared and offered for service, including but not limited to: mobile food vending units, mobile food vending commissaries, other food commissaries and shared or communal kitchens that are not inspected or regulated according to the State Agriculture and Markets Law, vending machines, temporary food service establishments, caterers, cafeterias, charitable organizations' kitchens, social clubs, delicatessens, restaurants, and, bars.

24 R.C.N.Y. § 81.01 (2013).

⁸⁷ The vote to limit the size of sugar-sweetened beverages to sixteen ounces took place after a public hearing and a subsequent six-week public comment period, during which over 38,000 public comments were received, with 32,000 supporting the regulation. Affidavit of Commissioner Farley, *supra* note 53, at 4, 21. After the public comment period, “[n]o changes [were] made to the amendment in response to comments the Department received. The language . . . [was] modified to clarify that the limitation extends to any cup or container used for a sugary drink or provided for a self-service drink.” *Notice of Adoption*, *supra* note 2, at 3.

⁸⁸ *Notice of Adoption*, *supra* note 2, at 2–3.

cap rule, the sugar-sweetened beverage must be: (1) sweetened with sugar or another caloric sweetener by more than twenty-five calories per eight fluid ounces of beverage; (2) no more than fifty percent milk⁸⁹ or milk substitute by volume; and (3) non-alcoholic.⁹⁰ Carbonated and non-carbonated beverages alike may be subject to the regulation,⁹¹ but one hundred percent fruit juices are exempt.⁹² Food service establishments and self-serve establishments cannot sell, offer, or provide a beverage meeting the definition of a sugar-sweetened beverage in a cup or container greater than sixteen ounces.⁹³ Thus, cups or containers of sixteen fluid ounces or less are allowed.⁹⁴ Under the rule, a fine of no more than \$200 will be imposed per violation on those who do not follow the regulation,⁹⁵ however, fines were not set to go into effect until March 2013.⁹⁶

Included in the notice of adoption are the reasons for the Board of Health's actions. The phenomenon of individuals consuming their meals outside of the home means that they are increasingly exposed to oversized

⁸⁹ Although the Health Department realized that the milk exception will leave beverages that are calorie dense or contain added sugar outside the reach of the regulation, the "exclusion for drinks containing a majority of dairy (by volume) balances the nutritional benefits for consumers." Affidavit of Commissioner Farley, *supra* note 53, at 20. The Health Department elaborated:

[T]he nutritional profile of these beverages differs dramatically from that of sugary drinks. Sugary drinks generally contain no nutrients other than sugar, while milk and milk products contain calcium, vitamin D and potassium—3 of the 4 "nutrients of concern" often found deficient in the diets of Americans, according to the USDA. In addition, dairy products play an important role in a balanced, healthy diet, may have a protective effect against certain diseases and weight gain, and research shows they have a greater effect on satiety than sugary drinks.

Id.

⁹⁰ *Notice of Adoption, supra* note 2, at 5. "Alcoholic beverages are not subject to the Portion Cap Rule because service of these products is regulated by the State Liquor Authority." Affidavit of Commissioner Farley, *supra* note 53, at 20.

⁹¹ *Notice of Adoption, supra* note 2, at 5.

⁹² Affidavit of Commissioner Farley, *supra* note 53, at 20 ("Pure fruit juice is exempted as it has no added sugar and provides many of the same nutritional benefits as the fruit or vegetable from which it is derived. Sugary drinks, in contrast, contain almost no nutrients other than sugar.").

⁹³ This includes self-service cups. *Notice of Adoption, supra* note 2, at 5. The portion cap is set at sixteen ounces because "[s]ixteen ounces balances health impact and feasibility for restaurants, indicating that complying with this regulation is possible and not overly burdensome. Manufacturer-sealed products such as cans are easily available to purchase. Affidavit of Commissioner Farley, *supra* note 53, at 20.

⁹⁴ The media headlines on September 13, 2012, calling New York City's action a "soda ban" are attributable more to the media's use of hyperbole and flare for dramatization than to the facts of the regulation. See, e.g., Michael Howard Saul, *NYC Board of Health Passes "Soda Ban,"* WALL ST. J. METROPOLIS BLOG (Sept. 13, 2012, 11:12 AM), <http://blogs.wsj.com/metropolis/2012/09/13/nyc-board-of-health-passes-soda-ban/> (announcing in the headline a "soda ban" but conceding in the article that the law only implements a ban on the sale of large sugary drinks).

⁹⁵ *Notice of Adoption, supra* note 2, at 5–6.

⁹⁶ See *id.* at 1, 3 (noting the amendment was adopted September 13, 2012, and would take effect six months from that date).

sugar-sweetened beverages.⁹⁷ According to a community health survey⁹⁸ conducted by the Department of Health in 2010, fifty-eight percent of New York City adults are overweight or obese, while more than twenty percent of public school children in the city are obese.⁹⁹ Diabetes, cardiovascular disease, and increased mortality are a few of the devastating health consequences of obesity¹⁰⁰—which is taking the lives of six thousand New Yorkers every year.¹⁰¹ In the city, “chronic conditions [such as type 2 diabetes, heart disease, and obesity] now cause a higher toll of preventable human suffering than even the most prevalent communicable diseases. Their burden also uses more of society’s resources.”¹⁰²

The Board also emphasized the connection between sugar-sweetened beverage consumption and the obesity epidemic:

Americans consume 200–300 more calories daily than 30 years ago, with the largest single increase due to sugary drinks. Sugary drinks are also the largest source of added sugar in the average American’s diet, comprising nearly 43% of added sugar intake. A 20 ounce sugary drink can contain the equivalent of 16 packets of sugar. These drinks are associated with long-term weight gain among both adults and youth.¹⁰³

⁹⁷ *Id.* at 1.

⁹⁸ The survey’s methodology is described as the following:

The New York City Community Health Survey (CHS) is a telephone survey conducted annually by the DOHMH, Division of Epidemiology, Bureau of Epidemiology Services. CHS provides robust data on the health of New Yorkers, including neighborhood, borough and citywide estimates on a broad range of chronic diseases and behavioral risk factors. . . . The survey results are analyzed and disseminated in order to influence health program decisions, to increase the understanding of the relationship between health behavior and health status, and to support health policy positions.

Survey Data on the Health of New Yorkers, NYC.GOV, <http://www.nyc.gov/html/doh/html/data/survey.shtml> (last visited Aug. 20, 2013).

⁹⁹ *Notice of Adoption*, *supra* note 2, at 2.

¹⁰⁰ See Affidavit of Commissioner Farley, *supra* note 53, at 3 (“Obesity is a risk factor for many debilitating and often fatal chronic diseases and health conditions, including heart disease, cancer, stroke, osteoarthritis, hypertension, gall bladder disease and type 2 diabetes. Adults who are obese are almost twice as likely to develop diabetes as those who are overweight and almost three times as likely to develop it as those who are at a healthy weight.”).

¹⁰¹ Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg, Deputy Mayor Gibbs, Health Commissioner Farley and Brice Ratner Announce Barclays Center Will Voluntarily Adopt Regulations to Limit Size of Sugary Beverages (Sept. 13, 2012), *available at* http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2012b%2Fpr326-12.html&cc=unused1978&rc=1194&ndi=1.

¹⁰² Affidavit of Commissioner Farley, *supra* note 53, at 4–5.

¹⁰³ *Notice of Adoption*, *supra* note 2, at 2.

Alarming, a 2010 community health survey showed that 30% of New York adults drink one or more sugary beverage per day.¹⁰⁴ And the figure is “much higher in minority and low-income communities.”¹⁰⁵ The rate of consumption among the city’s youth is also very concerning. In 2009, 26% of public school students consumed two or more sugar-sweetened beverages per day, with 44% of children aged six to twelve years old consuming more than one per day.¹⁰⁶ The Board of Health noted its particular concern with the portion sizes available to consumers and the effect such portions have on consumption:

The trend toward larger portion sizes has occurred in parallel with increases in the prevalence of obesity and people being overweight. Serving sizes of manufacturer-packaged carbonated soft drinks have exploded—the original Coca-Cola bottle size was 6.5 fluid ounces, which is significantly smaller than the vast majority of sizes for sale today. Fountain drink portions at restaurants are also growing—beverage portion sizes at McDonald’s have increased 457% since 1955, from 7 fluid ounces to 32 fluid ounces. Some restaurants in New York City offer individual drink sizes up to 64 fluid ounces. A sugary drink of this size contains 780 calories and 54 teaspoons of sugar, and no nutrients. Larger portions lead to increased consumption and calorie intake. When people are given larger portions they unknowingly consume more and do not experience an increased sense of satiety.¹⁰⁷

The incidence of obesity in the City in combination with the trend toward larger drink portions and increased consumption serve as the foundation for the Board’s reasoning behind adoption of the portion cap rule.

C. *The American Beverage Association’s Legal Challenge to the Portion Cap Rule*

The American Beverage Association (ABA) filed a verified petition with the New York County Supreme Court on October 11, 2012, seeking to enjoin and permanently restrain the Department of Health and the Board of

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Health from enforcing the regulation, and to invalidate it.¹⁰⁸ In the alternative, the ABA sought to declare the provisions of the New York City Charter granting the Board of Health its rulemaking and regulatory powers unconstitutional as a violation of the separation of powers doctrine under the state constitution,¹⁰⁹ or else to declare the regulation unlawfully arbitrary and capricious.¹¹⁰

On March 11, 2013, Judge Tingling granted the order to enjoin and permanently restrain the City from implementing or enforcing the regulation.¹¹¹ The ABA succeeded in arguing that, by promulgating the regulation and circumventing the City Council, the Board “exceeded [its] authority and impermissibly trespassed on legislative jurisdiction.”¹¹² The ABA specifically pointed to the four-factor analysis set out in *Boreali v. Axelrod*¹¹³ as the standard for determining when a violation of the separation of powers doctrine under the state constitution has been committed.¹¹⁴ Judge Tingling found that three of the four factors supported granting the ABA’s motion, concluding the regulation was illegally promulgated in violation of the separation of powers doctrine.¹¹⁵ In addition, Judge Tingling assessed the reasonableness of the regulation and whether it was arbitrary and capricious.¹¹⁶ Although acknowledging the regulation’s reasonableness, he concluded that the “loopholes in [the] Rule effectively defeat [its] stated purpose,” and therefore concluded that the regulation was “fraught with arbitrary and capricious consequences.”¹¹⁷

¹⁰⁸ Notice of Verified Petition at 1–2, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health and Mental Hygiene, No. 653584/2012, 2013 WL 1343607 (N.Y. Sup. Ct. Mar. 11, 2012).

¹⁰⁹ *Id.* at 2. The separation of powers doctrine is “implied by the separate grants of power to each of the coordinate branches of government.” *Clark v. Cuomo*, 486 N.E.2d 794, 797 (N.Y. 1985); *see* N.Y. CONST. art. III, § 1 (“The legislative power of this state shall be vested in the senate and assembly.”); *see also* Jennifer Weiss, *Soda Ban Challenge Has Its Day in Court*, WALL ST. J. METROPOLIS BLOG (Jan. 23, 2013, 6:54 PM), <http://blogs.wsj.com/metropolis/2013/01/23/soda-ban-challenge-has-its-day-in-court/> (asserting that under the separation of powers argument, “lawyers for business groups said the Bloomberg Administration didn’t have the authority to push the regulations through without City Council approval”).

¹¹⁰ Notice of Verified Petition, *supra* note 108, at 2.

¹¹¹ *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 1343607, at *20.

¹¹² *Id.* at *6.

¹¹³ 517 N.E.2d 1350, 1355–56 (N.Y. 1987).

¹¹⁴ Notice of Verified Petition, *supra* note 108, at 29–31.

¹¹⁵ *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 1343607, at *8–18, *20.

¹¹⁶ *Id.* at *20.

¹¹⁷ *Id.* at *34. Judge Tingling found it to be arbitrary and capricious:

[B]ecause it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule.

The City appealed the decision the next day.¹¹⁸ The Appellate Division affirmed Judge Tingling's ruling, finding that "all four *Boreali* factors indicat[ed] . . . the usurpation of legitimate legislative functions."¹¹⁹ Therefore, the court held that the Board of Health violated the separation of powers doctrine.¹²⁰ The Appellate Division did not find it necessary to address whether the portion cap rule was also arbitrary and capricious.¹²¹

IV. THE POWER OF THE BOARD OF HEALTH TO AMEND THE HEALTH CODE

A. *An Overview of Municipal Home Rule*

The power of local governments has evolved over time. In 1907, the Supreme Court, declared in *Hunter v. City of Pittsburgh*¹²² that "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."¹²³ Thus, the "State . . . at its pleasure, may modify or withdraw all such [municipal] powers[,] . . . repeal the charter and destroy the corporation."¹²⁴ In a similar vein, Iowa Supreme Court Chief Justice John Dillon, in what has been branded "Dillon's Rule,"¹²⁵ declared that:

[A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.¹²⁶

Id.

¹¹⁸ Notice of Appeal by Respondents, *supra* note 23.

¹¹⁹ *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 110 A.D. 3d 1, 9 (N.Y. App. Div. 2013).

¹²⁰ *Id.* at 16.

¹²¹ *Id.*

¹²² 207 U.S. 161 (1907).

¹²³ *Id.* at 178. The Court upheld the constitutionality of an act of the Pennsylvania General Assembly authorizing the consolidation of Pittsburgh and Allegheny. *Id.* at 174, 181. A majority of the voters living in the two cities collectively voted for the consolidation, but the majority of voters in the smaller city of Allegheny voted against it. *Id.* at 174–75.

¹²⁴ *Id.* at 178–79.

¹²⁵ See Richard Shattuck, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*—*Chemical Bank v. Washington Public Power Supply System*, 59 WASH. L. REV. 653, 655 (1984) (acknowledging that the Washington Supreme Court had "adopted the narrow, nineteenth-century approach to municipal corporation powers summarized by 'Dillon's Rule'").

¹²⁶ *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868); see also GERALD E. FRUG ET AL.,

Under either formulation, it is clear that municipalities have no inherent power.

Since *Hunter* and Dillon's declarations, states have granted municipalities certain powers through legislation or state constitutional amendments to reform the legal relationship between states and municipalities, most notably through the home rule movement.¹²⁷ Home rule is a concept of municipal autonomy and self-government under which "the state grants . . . powers to the citizens of a local area to structure, organize, and empower their own local government."¹²⁸ Although home rule in relation to Dillon's Rule has been described as "a competing model of municipal governance,"¹²⁹ it may in any given jurisdiction be as limiting as Dillon's Rule.¹³⁰

In New York, municipal home rule is a long-standing constitutional principle.¹³¹ The home rule movement in New York State manifested as a concerted effort to provide municipalities with autonomy over local affairs and freedom from state legislative interference.¹³² Initially, and as a result of the Constitutional Convention of 1894, a provision was added to the state constitution granting cities the power to veto special legislative enactments that related to their property, affairs, or government.¹³³ The Home Rule Amendment of 1924, i.e., article XII of the state constitution,

LOCAL GOVERNMENT LAW 139 (5th ed. 2010) (presenting an excerpt from John Dillon's Commentaries on the Law of Municipal Corporations section 237).

¹²⁷ See FRUG ET AL., *supra* note 126, at 158 (asserting that the home rule movement was the most important political effort aimed at restructuring the legal relationship between states and cities).

¹²⁸ Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon's Rule, a Common Law Restraint on Municipal Power?*, 29 N.C. CENT. L.J. 194, 201 (2007).

¹²⁹ *Id.*

¹³⁰ See, e.g., *McCrorry Corp. v. Fowler*, 570 A.2d 834, 838, 840 (Md. 1988) (holding that a Montgomery county ordinance that created a private cause of action against abusive employment practices encroached on an area that was a statewide problem and went above the Maryland constitution's grant to municipalities to have the full power to enact local laws).

¹³¹ See *Kamhi v. Town of Yorktown*, 547 N.E.2d 346, 348 (N.Y. 1989) (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century"). Despite that fact, "[h]ow constitutional home rule can be reconciled with the *Hunter* principle is an enduring puzzle in American local government law. . . . [O]bservers struggle to make sense of this seeming contradiction between the idea of local governments as *supplicants* and the idea of these governments as *governance partners*." Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338 (2009).

¹³² Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966).

¹³³ 11 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 2-3 (1938) [hereinafter PROBLEMS RELATING TO HOME RULE]. That provision of article XII became known as the "suspensory veto," and divided the cities of the state into three classes depending on size. Joseph L. Weiner, *Municipal Home Rule in New York*, 37 COLUM. L. REV. 557, 560 (1937). Any act of the state legislature relating to the property, affairs, or government of cities and which did not affect all of the cities in one of the classes had to be submitted to the mayors of the cities affected for their acceptance or rejection; "[t]he consequence of rejection was merely that a second passage by the State Legislature was necessary to make the law effective." *Id.*

replaced the 1894 provision and added a “far more extensive definition of the power of cities to rule themselves, retaining only the phrase property, affairs or government.”¹³⁴ The scope of a city’s power over its “property, affairs or government” was subjected to limited and vague judicial interpretation.¹³⁵

Under the “emergency clause” of the Home Rule Amendment of 1924, the state legislature was allowed “on receipt of an emergency message from the Governor to pass, by two-thirds majority vote, laws relating to the ‘property, affairs, or government’ of cities, which are special in terms or effect.”¹³⁶ An “emergency” did not necessitate invocation of the emergency clause.¹³⁷ The courts have long acknowledged home rule as empowering the localities of the state.¹³⁸ Although the New York Court of Appeals acknowledged under the home rule provision of the constitution that the state legislature was no longer the only lawmaking body, the court also asserted that “[t]here is no constitutional provision that the legislative body for passing ordinances or laws of a city shall rest in an assembly or a board of alderman or any other body.”¹³⁹

In 1964, the New York State Legislature’s “home rule package” went into effect, which included provisions of article IX of the state constitution and such statutes as the Municipal Home Rule Law and the Statute of Local Governments.¹⁴⁰ The Municipal Home Rule Law served to implement article IX of the constitution.¹⁴¹ Home rule in New York consists of dual assertions of local government power through “limitations on State intrusion into matters of local concern and affirmative grants of power to local governments.”¹⁴² Under the New York Constitution article IX, local governments retain the powers granted in the Statute of Local Governments and the general laws of the state, as well as provision of the

¹³⁴ PROBLEMS RELATING TO HOME RULE, *supra* note 133, at 3.

¹³⁵ *Id.* at 5.

¹³⁶ *Id.*

¹³⁷ *See id.* at 6 (acknowledging that “[m]ost of the emergency laws [dealt] largely with charter amendments of often trifling concern” and other non-emergencies).

¹³⁸ In 1936, the New York Court of Appeals acknowledged that “the Home Rule provision of the Constitution . . . has restricted the legislative powers of the Senate and the Assembly, and has vested power in cities.” *Mooney v. Cohen*, 4 N.E.2d 73, 74 (N.Y. 1936).

¹³⁹ *Id.*

¹⁴⁰ *Kamhi v. Town of Yorktown*, 547 N.E.2d 346, 348 (N.Y. 1989).

¹⁴¹ *DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 189 (N.Y. 2001) (noting that the law “specifically gives a municipality, such as the City of New York, the power to enact local laws for the protection and enhancement of its physical and visual environment and for the government, protection, order, conduct, safety, health and well-being of persons or property therein” (internal quotation marks omitted)).

¹⁴² *Kamhi*, 547 N.E.2d at 348; *see also* James D. Cole, *Local Authority to Supersede State Statutes*, N.Y. ST. B.J., Oct. 1991, at 34, 34 (“Under Article IX of the State Constitution, home rule in New York has two basic components.”).

state constitution.¹⁴³ In addition, local governments “have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law”¹⁴⁴ that relates to “[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein.”¹⁴⁵ This power under the constitution reiterates the power under the Municipal Home Rule Law, and is the authority from which local governments derive their police power.¹⁴⁶ The acknowledged purpose of article IX is to promote strong local government.¹⁴⁷ Under the Statute of Local Governments, municipalities have “[t]he power to adopt, amend and repeal ordinances, resolutions, and rules and regulations in the exercise of its functions, powers and duties.”¹⁴⁸

Consistent with the past constitutional home rule amendment, the state legislature may enact either general laws,¹⁴⁹ which concern the property, affairs or government of localities, or special laws, which can be passed only if one of two stated conditions exist.¹⁵⁰ The Municipal Home Rule Law empowers localities to adopt a new or revised city charter and provides the ways in which a charter commission may be appointed.¹⁵¹ Ultimately, the charter must be submitted to the city’s electorate for a vote

¹⁴³ N.Y. CONST. art. IX, § 2(c).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 2(c)(10).

¹⁴⁶ N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) (McKinney 2012); see N.Y. STATE DEP’T OF STATE, JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES: ADOPTING LOCAL LAWS IN NEW YORK STATE 7–8 (reprint 2012), available at http://www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf (“The police power has been defined generally as the power to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace and prosperity of the municipality . . .”).

¹⁴⁷ See *Town of Black Brook v. State*, 362 N.E.2d 579, 581 (N.Y. 1977) (holding that to give effect to such a purpose, a municipality has standing to challenge an Act of the state legislature when the legislation is challenged as a violation of the home rule guarantees of article IX of the state constitution).

¹⁴⁸ N.Y. STAT. LOCAL GOV’TS § 10(1) (McKinney 2012).

¹⁴⁹ A general law is defined in the home rule context as “[a] state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.” Cole, *supra* note 142, at 34 n.6.

¹⁵⁰ N.Y. CONST. art. IX, § 2(b)(2) (Lexis current through 2013). This provision effectively means the “emergency” upheld in *Mooney*, which triggered the adoption of the modern New York City Charter in 1923, would not be permissible for New York City today. See Eliot J. Kirshnitz, Recent Development, *City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule in New York*, 74 ST. JOHN’S L. REV. 935, 943 n.41 (2000) (describing how article IX of the New York Constitution provides that, “for cities besides New York City, the state may act in emergencies certified by the Governor and concurred in by two-thirds of the legislature”).

¹⁵¹ N.Y. MUN. HOME RULE LAW § 36; see N.Y. STATE DEP’T OF STATE, *supra* note 146, at 27 (“All cities in the State are governed by city charters which set forth the basic organization and administration of government for the city. Cities are authorized to enact new or revised city charters and to amend existing charters.”).

and approved by a majority to become effective.¹⁵²

The home rule provisions under the New York Constitution grant local government broad police powers in enacting laws and regulations “relating to the welfare of its citizens.”¹⁵³ However, two powerful restrictions are placed on the police power of localities. First, the local government cannot adopt a law that is inconsistent with the general laws or constitution of the state.¹⁵⁴ Second, the local government cannot exercise its police power within in an area of regulation that has been preempted by the state legislature.¹⁵⁵

B. *The History and Provisions of the New York City Home Rule Charter Empowering the Board of Health*

1. *Historical Context of the Adoption of the Modern City Charter*

“The purpose of a home rule charter is to render the city as nearly independent as possible from state interference.”¹⁵⁶ A city charter is properly characterized as the “organic law of the city’s being.”¹⁵⁷ Although an older charter had been in place and the Board of Health had acted pursuant to it,¹⁵⁸ voters of the city adopted the revised New York City Home Rule Charter, which provides the modern structure of the Board of Health, at the general election of 1937.¹⁵⁹ In 1934, acting under the emergency clause of the Home Rule Amendment of 1924, the Governor of New York initiated the state legislature’s passage of the New York City Charter Revision Commission Act (the “Revision Act”).¹⁶⁰ The Revision Act provided for the appointment of a commission by the mayor to prepare

¹⁵² N.Y. MUN. HOME RULE LAW § 36 (5)(b), (d).

¹⁵³ N.Y. State Club Ass’n, Inc. v. City of New York, 505 N.E.2d 915, 917 (N.Y. 1987), *aff’d*, 487 U.S. 1, 1 (1988).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Home Rule City Has Power to Enact Impact Fee Ordinance*, MCQUILLIN MUN. L. REP., May 2005, at 6, 6 (internal quotation marks omitted).

¹⁵⁷ N.Y.C. CHARTER REVISION COMM’N, PROPOSED CHARTER FOR THE CITY OF NEW YORK AND REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION 6 (1936) [hereinafter N.Y.C. CHARTER REVISION COMM’N REPORT].

¹⁵⁸ See *People v. Blanchard*, 42 N.E.2d 7, 8 (N.Y. 1942) (“The Sanitary Code was formulated by the Board of Health of the city pursuant to authority conferred by the city charter.”); see also N.Y.C. CHARTER REVISION COMM’N REPORT, *supra* note 157, at 4 (“The Greater New York [City] Charter was enacted in 1897 and revised in 1901. It was not itself a complete compilation of the law affecting the city. No such compilation has been made since the Consolidation Act was adopted in 1882.” (citations omitted)).

¹⁵⁹ The Charter became effective January 1, 1938. *In re Bakers Mut. Ins. Co. of N.Y.*, 92 N.E.2d 49, 51 (N.Y. 1950); N.Y. STATE CONSTITUTIONAL CONVENTION COMM., NEW YORK CITY GOVERNMENT FUNCTIONS AND PROBLEMS 5 (1938) [hereinafter N.Y. STATE CONSTITUTIONAL CONVENTION COMM. REPORT].

¹⁶⁰ Murray Seasongood, *The New York City Charter*, 51 HARV. L. REV. 948, 948 (1938) (book review).

a new city charter, which would become effective upon approval by the electorate.¹⁶¹ As one commentator observed, “The new charter of the City of New York differs from ordinary home rule charters . . . [since] it was necessary to have the State Legislature initiate the charter-making machinery, because the municipal assembly was unwilling to do so.”¹⁶²

The revised charter was proposed only after public participation.¹⁶³ In its 1936 report, the City Revision Commission noted its concern with the disordered organization of the laws governing the City.¹⁶⁴ For instance, the provisions of the old charter included authority not given to the City within the home rule power; many of these offending provisions were removed to create “a short-form charter, as contemplated by the [state] Legislature, setting forth the structure of the city government and the manner in which it is to operate.”¹⁶⁵ The Commission thought it wise “to limit the contents of the charter itself, so far as practicable, to matters subject to local action under the home rule power.”¹⁶⁶

Another concern of the City Charter Revision Commission was the manner in which it was formed under the state legislature’s Revision Act—whose creation was prompted by a declaration of an emergency by the governor.¹⁶⁷ The Commission noted that this practice constituted a flagrant violation of “the home rule principle.”¹⁶⁸ Specifically, the Commission

¹⁶¹ *Id.* at 948–49.

¹⁶² Weiner, *supra* note 133, at 572.

¹⁶³ See N.Y.C. CHARTER REVISION COMM’N REPORT, *supra* note 157, at 2 (“At the outset of its work the Commission afforded to the people of the city an opportunity to express their views on charter revision in writing and at public hearings publicly advertised and held during February, 1935, and thereafter commenced its investigation and consideration of the existing structure of the government of the city and its administrative processes.”). The Commission also met frequently with experts qualified to discuss the problems of government and administration. *Id.* In April 1936, the Commission released the draft of the proposed charter and preliminary report. *Id.* Subsequent hearings were held on the proposed charter in all five boroughs to give the public ample opportunity to participate. *Id.* at 3.

¹⁶⁴ See *id.* at 5 (“In the period of more than half a century which has elapsed . . . the laws relating to the City of New York have grown haphazard in an overwhelming mass of statutes without any system or arrangement. In this disorderly growth conflicts and inconsistencies have multiplied . . . so that it is a matter of the greatest difficulty today to ascertain the law on any particular question affecting the government of the city. Neither the Charter of 1897 nor the revision of 1901 now in force attempted to bring order out of this confusion.”). Due to this confusion, the State legislature passed a law in 1936 establishing a Board of Statutory Consolidation in order to consolidate “all the living law of the city in a complete codification, and . . . to prepare an administrative code in harmony with the provisions of the charter so that when the code is completed the charter and the code will contain all the law relating to the city.” *Id.* at 5–6. The Board of Consolidation consisted of the “Mayor, the Comptroller, the President of the Board of Aldermen and the Corporation Counsel.” *Id.* at 5. It is fair to say that at the time of the adoption of the new City Charter, the laws and administrative code underwent a complete overhaul.

¹⁶⁵ *Id.* at 6.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* at 41–42 (noting that the Charter “should [now] be far less open to impairment by state legislation”).

¹⁶⁸ *Id.* The Commission acknowledged that the Home Rule Amendment strived to prevent

hoped that “the new short-form charter . . . [would] be less subject to [state] legislative interference and [would] stimulate the exercise of the home rule power in the City of New York.”¹⁶⁹ With the hope of achieving this end, the new charter purposely only pertained to “matters directly affecting the property, government and affairs of the city.”¹⁷⁰

The State also acknowledged the need to enable New York City to deal with its own matters: “[G]overnmental problems of the City of New York are peculiar to it. Nowhere else in the state does one meet the same conditions.”¹⁷¹ At the time, New York City was the largest city in the world with a population of over seven million people, and it accounted for over half the individuals living in the state.¹⁷² In addition, the City also had to address the problems exacerbated by “a daily floating population of half a million people.”¹⁷³ In particular, the Committee acknowledged the challenges to health and police services in the city.¹⁷⁴

According to the Constitutional Convention Committee of 1938:

The New Charter was intended only to outline in skeleton form the agencies of the city government and their basic functions. It does not purport to embody all of the provisions of law relating to the government of the city. It provides the structural framework of the city government and is intended to set forth the organic law relating to the city. It was intended that the details of administration be included in an administrative code. Such a code was to reenact all provisions of law affecting the city which were consistent with the provisions of the New Charter.

*An analogy might be drawn in describing the relationship between the administrative code and the charter as on a par with the relationship between the statutory law and the constitution of a sovereign body, wherein those provisions which were intended to be flexible and to yield to changing conditions would be subject to easy amendment, while primary grants of powers and important limitations upon abuses of power would be contained in a body of law which would express fundamental principles and ideals of government.*¹⁷⁵

“charter tinkering” on the part of the state legislature. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 41.

¹⁷¹ N.Y. STATE CONSTITUTIONAL CONVENTION COMM. REPORT, *supra* note 159, at 2.

¹⁷² PROBLEMS RELATING TO HOME RULE, *supra* note 133, at 1–2.

¹⁷³ N.Y. STATE CONSTITUTIONAL CONVENTION COMM. REPORT *supra* note 159, at 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 5–6 (emphasis added).

The State Constitutional Convention Committee envisioned the city administrative agencies serving a key role in promulgating regulations to address the peculiar problems of governance in the city. The view of the city charter as a skeletal form paralleled the New York City Revision Commission's object to create a short-form charter.¹⁷⁶

According to the State Committee, under the charter, "the Board of Health . . . appointed by the Mayor, has plenary powers in relation to the enactment of Sanitary Code provisions. It may legislate with the force and effect of law on any matter where the health and safety of the people are concerned."¹⁷⁷ At the same time, the State Constitutional Commission observed that, under the charter, the City Council "possesses the sole legislative power of the City."¹⁷⁸ The City Charter Revision Commission similarly noted that the City Council "is vested with the entire legislative power of the city . . . and local laws may be initiated only in the Council, which will alone constitute the local legislative body under the City Home Rule Law."¹⁷⁹ However, the City Revision Commission also declared: "The Board of Health exercises extraordinary *police powers* affecting the health of the city. By its power to adopt a sanitary code the Board has plenary powers of *legislation*."¹⁸⁰ The report further noted: "The important *legislative* and semi-judicial powers of the Board of Health are recognized by giving to it a greater degree of independence through the lengthening of the terms of its members . . . and making them overlap and allowing removal only on charges. . . . [Certain] members must be doctors of medicine."¹⁸¹

2. Provisions of Today's Charter Empowering the Board of Health

Under New York State law, localities are allowed to enact and enforce

¹⁷⁶ See *supra* text accompanying notes 165 and 169 (noting the charter revision committee's intent to create a short-form charter).

¹⁷⁷ N.Y. STATE CONSTITUTIONAL CONVENTION COMM. REPORT, *supra* note 159, at 14. For purposes of this Note, "Sanitary Code" and "Health Code" are synonymous. The Sanitary Code was the predecessor to the modern Health Code. *Paduano v. City of New York*, 257 N.Y.S.2d 531, 534 (N.Y. Sup. Ct. 1965), *aff'd*, 218 N.E.2d 339 (N.Y. 1966); see *Metro. Ass'n of Private Day Sch., Inc. v. Baumgartner*, 245 N.Y.S.2d 733, 736 (N.Y. Sup. Ct. 1963) ("The attacked sections stem from a complete revision of the former Sanitary Code, which the Board of Health found no longer kept pace with a health and welfare philosophy capable of reflecting the changing times and modes of city living. Accordingly, in order to properly fulfill its duties for the preservation of life, care and promotion of the public health of the City of New York, the Board of Health found that there was a need to revise the former Sanitary Code in existence since 1914 and bring into being a new health code. . . . After a period of three and one-half years, the present New York City Health Code was drafted as an annotated code with introductory notes, each section followed by the reviser's notes containing the derivation of the section and other pertinent references.").

¹⁷⁸ *Id.* at 7

¹⁷⁹ N.Y.C. CHARTER REVISION COMM'N REPORT, *supra* note 157, at 7.

¹⁸⁰ *Id.* at 38 (emphases added).

¹⁸¹ *Id.* (emphasis added).

their own health codes, with the one caveat that the regulations of the local boards of health must at least comply with the minimum standards set forth under the State Sanitary Code.¹⁸² Accordingly, “[i]n granting the localities this power, the State has disclaimed any intention to preempt or supersede local health codes and their enforcement mechanisms.”¹⁸³ In addition, New York City is specifically exempted from article three of the New York Public Health Laws, which provides for the organization of local boards of health.¹⁸⁴

The charter establishes the Board of Health within the City’s Department of Health and Mental Hygiene.¹⁸⁵ The Board of Health has jurisdiction to add to, alter, and amend the health code pertaining to “all matters and subjects to which the power and authority of the department extends.”¹⁸⁶ The New York City Health Code is codified in title twenty-four of the Rules of the City of New York,¹⁸⁷ and maintains the force and effect of law.¹⁸⁸ The Board retains jurisdiction “to regulate all matters affecting health in the City of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city.”¹⁸⁹ The Board of Health is specifically charged with the power to “supervise the reporting and control of communicable and *chronic diseases* and conditions hazardous to life and health.”¹⁹⁰ The charter does not set forth an exhaustive list of matters over which the Board of Health’s jurisdiction extends.¹⁹¹ However, the charter specifies that the Board is empowered to “supervise and regulate the food and drug supply of the city and other businesses and activities affecting public health in the city, and ensure that such businesses and activities are conducted in a manner consistent with the public interest.”¹⁹² The Board of Health may confer

¹⁸² N.Y. PUB. HEALTH LAW § 228(3) (McKinney 2012) (“Local laws, ordinances or regulations which comply with at least the minimum applicable standards set forth in the sanitary code shall be deemed not inconsistent with such code.”).

¹⁸³ *People v. 230 W. 54th St. Corp.*, 516 N.Y.S.2d 395, 397 (N.Y. Crim. Ct. 1987).

¹⁸⁴ *See* N.Y. PUB. HEALTH LAW § 312 (McKinney 2012) (“Unless otherwise expressly provided, the provisions of this article except section three hundred ten of this chapter shall not apply to the city of New York.”). Under section 310, “[t]he [state] commissioner may annul or modify an order, regulation, by-law or ordinance of a local board of health concerning a matter which in his judgment affects the public health beyond the territory over which such local board of health has jurisdiction.” *Id.* § 310.

¹⁸⁵ *See supra* Part III.A (providing a historical overview of the Board of Health)

¹⁸⁶ N.Y.C. CHARTER § 558(c).

¹⁸⁷ Declaration of Thomas R. Frieden at 1–2, *N.Y. State Rest. Ass’n. v. N.Y.C. Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (No. 1:08-cv-01000-RJH), [hereinafter Declaration of Frieden 2007].

¹⁸⁸ N.Y.C. CHARTER § 558(a).

¹⁸⁹ *Id.* § 556.

¹⁹⁰ *Id.* § 556(c)(2) (emphasis added).

¹⁹¹ *Id.* § 556.

¹⁹² *Id.* § 556(c)(9); *see* Affidavit of Commissioner Farley, *supra* note 53, at 2 (“[O]versight of the City’s restaurants is a historical and core public health function that the Department has performed for

additional powers on the Department of Health and Mental Hygiene within the limits of the state constitution and laws, as well as the city charter itself.¹⁹³ The amendments to the health code may be enforced by fine, penalty, forfeitures, and imprisonment.¹⁹⁴ In addition, the Board of Health is given rulemaking authority under the charter, which sets out rulemaking procedures that provide for an opportunity for public notice and an opportunity for public comment.¹⁹⁵

C. Case Law Interpreting the Powers of the Board of Health

The New York State Legislature's authority to grant local governments the ability to regulate local health affairs has long been upheld against challenges asserting that such delegation violates the separation of powers doctrine of the state constitution.¹⁹⁶ The New York City Health Code is "a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer to the authority of the Legislature."¹⁹⁷ This exception to the separation of powers doctrine derives from the home rule provisions of the state constitution and the Municipal Home Rule Law, which vests power in the cities over their own affairs.¹⁹⁸ Significantly, the New York Court of Appeals in *Mooney v.*

many decades. The State of New York has recognized this by designating me, as the Commissioner of the Department, to be the permit-issuing official for food service establishments operating here.").

¹⁹³ N.Y.C. CHARTER § 558(b).

¹⁹⁴ *Id.* A violation of the health code is treated as a misdemeanor. *Id.* § 558(e).

¹⁹⁵ *Id.* § 1043(a), (b)(1), (e).

¹⁹⁶ See *People v. Blanchard*, 42 N.E.2d 7, 8 (N.Y. 1942) (upholding the New York City Charter granting the Board of Health the ability to establish the Health Code, against a challenge that the state legislature, in granting the ability to establish such a charter, delegated to a local board legislative power in violation of the separation of powers doctrine under article III, section 1 of the state constitution); *Cooper v. Schultz*, 32 How. Pr. 107, 126 (N.Y. Com. Pl. 1866) (upholding the state statute creating the New York Metropolitan Board of Health against a constitutional challenge that the legislature was delegating away its legislative power, by acknowledging that the state legislature "constantly exercises the powers of conferring upon local bodies created for public purposes, the authority to make and to enforce by-laws or ordinances," and specifically observing the tradition of those empowered public bodies "to make rules and regulations for the protection of the public health, which were enforced with the effect of law"); see also Recent Case, *Constitutional Law—Separation of Powers—Delegation of Legislative Powers to Boards of Health*, 20 HARV. L. REV. 147, 147 (1906) ("Except in the case of municipal corporations, the legislature cannot constitutionally delegate its lawmaking power to agents. This rather vague rule has been liberally interpreted in favor of boards of health. For example, a statute authorizing measures preventive of smallpox confers constitutional authority upon a board to compel vaccination during an epidemic." (citations omitted)).

¹⁹⁷ *Blanchard*, 42 N.E.2d at 8.

¹⁹⁸ See *Mooney v. Cohen*, 4 N.E.2d 73, 74 (N.Y. 1936) (asserting that the home rule provisions vest in localities "the power to adopt and amend local laws, not inconsistent with the Constitution and laws of the state, relating to many matters which are therein considered to be the property, affairs or government of the city"); see also *People v. 230 W. 54th St. Corp.*, 516 N.Y.S.2d 395, 396 (N.Y. Crim. Ct. 1987) ("It has long been established that New York City has the police power to enact and enforce laws such as Section 558(e) of the NYC Charter for the protection, safety, health and well-being of persons and property within its control under Municipal Home Rule Law, Section 10(1)(ii)(a)(11) and

*Cohen*¹⁹⁹ noted the freedom of municipalities to enact local laws, stating: “No limitation is here found upon the method by which these local laws shall be adopted, and no replica of the State Senate and Assembly is necessary.”²⁰⁰

As the New York Court of Appeals affirmed, the “main business of safeguarding the public health has always of necessity been done by local boards.”²⁰¹ The court has declared that:

The deduction is clear from section 558 of the City Charter—which empowers the Board of Health to legislate in the field of health generally . . . —that the [state] Legislature intended the Board of Health to be the sole legislative authority within the City of New York in the field of health regulations as long as those regulations were not inconsistent with or contrary to State laws dealing with the same subject matter.²⁰²

Consequently, “[t]he power of the Board to enact provisions for the furtherance and protection of health has long been established as a constitutional exercise of power.”²⁰³ The Board of Health retains the power to “act in [a] legislative capacity under State legislative authority.”²⁰⁴ The police power granted to the Board from the state is broad, “limited only by the requirement that there be a reasonable relationship to the public health or welfare and that it not be exercised arbitrarily.”²⁰⁵

In an illustrative case, *Grossman v. Baumgartner*,²⁰⁶ the regulation at issue amended the health code to prohibit tattooing in New York City²⁰⁷

(4)(a), (b) and Article IX, Section 2(c) of the NYS Constitution.”)

¹⁹⁹ 4 N.E.2d 73.

²⁰⁰ 4 N.E.2d at 74.

²⁰¹ *Blanchard*, 42 N.E.2d at 8.

²⁰² *Grossman v. Baumgartner*, 218 N.E.2d 259, 263 (N.Y. 1966); see *Schulman v. N.Y.C. Health & Hosp. Corp.*, 342 N.E.2d 501, 502 n.1 (N.Y. 1975) (citing to *Grossman* for the proposition that “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”).

²⁰³ *Paduano v. City of New York*, 257 N.Y.S.2d 531, 535–36 (N.Y. Sup. Ct. 1965) (concluding that a fluoridation regulation of the Board of Health was directed toward the “security of the life and health” of the residents of the City in order “to cope with the serious and growing public health problem of tooth decay and dental neglect,” and was therefore within the jurisdiction of the Department of Health), *aff’d*, 260 N.Y.S.2d 831 (N.Y. App. Div. 1965), *aff’d*, 218 N.E.2d 339 (N.Y. 1966).

²⁰⁴ *Id.* at 538.

²⁰⁵ *Metro. Ass’n of Private Day Sch., Inc. v. Baumgartner*, 245 N.Y.S.2d 733, 736–37 (N.Y. Sup. Ct. 1963).

²⁰⁶ 218 N.E.2d 259.

²⁰⁷ The regulation allowed tattooing for a medical purpose and by a licensed physician or osteopath. *Grossman*, 218 N.E.2d at 261. The Appellate Division inaccurately asserted that the regulation at issue in *Grossman* only prohibited tattooing of a child under sixteen years old. N.Y.

because evidence established a connection between tattooing and serum hepatitis.²⁰⁸ The plaintiffs, former owners of tattoo parlors, went out of business due to the regulation.²⁰⁹ The opposition to the regulation asserted an identical argument to the one made by the petitioners challenging the portion cap rule, arguing that the tattoo regulation was an unconstitutional exercise of legislative power in violation of the separation of powers doctrine.²¹⁰ The New York Court of Appeals in *Grossman* quickly disposed of this argument:

As this court wrote in the *Blanchard* case, “Within limits that are to be measured by tradition, the State may commit to local governments the power to regulate local affairs. . . . On that basis, the main business of safeguarding the public health has always of necessity been done by local boards or officers through sanitary by-laws or ordinances which have been accorded the force of law.”²¹¹

Despite the mandate of the separation of powers doctrine that the “[l]egislature make the critical policy decisions, while the executive branch’s responsibility is to implement those policies,” the New York Court of Appeals “has always understood that the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets.”²¹² Further, the court has “acknowledged that there need not be a specific and detailed legislative expression authorizing a particular executive act as long as ‘the basic policy decisions underlying the regulations have been made and articulated by the Legislature.’”²¹³ Due to the inherent ambiguity of legislative inaction, failure on the part of the legislature to enact a law pertaining to the subject matter of a regulation or order by the executive branch is not inevitably indicative of legislative disapproval.²¹⁴ The court views the mandate of the separation of powers

Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 110 A.D. 3d 1, 13–14 (N.Y. App. Div. 2013).

²⁰⁸ *Grossman*, 218 N.E.2d at 262 (“A review of the evidence given by defendants’ witnesses thoroughly demonstrates the [regulation’s] compelling medical necessity . . .”).

²⁰⁹ *Id.* at 261.

²¹⁰ *Id.* at 262.

²¹¹ *Id.* at 262–63 (quoting *People v. Blanchard*, 42 N.E.2d 7, 8 (N.Y. 1942)).

²¹² *Bourquin v. Cuomo*, 652 N.E.2d 171, 173 (N.Y. 1995).

²¹³ *Id.* (quoting *N.Y. Health Facilities Ass’n, Inc. v. Axelrod*, 569 N.E.2d 860, 863 (N.Y. 1991)). Therefore, “[i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated.” *Id.* (alteration in original) (quoting *Clark v. Cuomo*, 486 N.E.2d 794, 797 (N.Y. 1985)).

²¹⁴ *See id.* at 175 (“[T]he Legislature considered but failed to enact a bill substantially similar to the provisions of the Executive Orders ultimately issued by the Governor. . . . [T]he plaintiffs argued that such failure should be taken as proof of hostile legislative intent. As we [have] said . . . however, ‘that proposed legislation similar to [the] Executive Order was not passed does not indicate legislative disapproval of the programs contemplated by the order.’” (quoting *Clark*, 486 N.E.2d at 798)).

doctrine from a commonsense perspective, demonstrating a “long-standing and steadfast refusal to construe the . . . doctrine in a vacuum.”²¹⁵ Out of necessity, there will be overlap between the powers of the separate branches of government.²¹⁶

Under the city charter, the Board of Health is granted the discretionary power to amend or repeal the health code in order to meet the demands of changing public health needs.²¹⁷ Recently, a regulation amending the health code by establishing a list of wild animals prohibited from the city was upheld against a challenge that the delegation of powers under the New York City Charter violated the separation of powers doctrine.²¹⁸ The plaintiffs did not meet their burden in demonstrating that the delegation of powers to the Board violated the separation of powers doctrine, “particularly given the expertise of the Board of Health in areas of public health and medicine.”²¹⁹ The plaintiffs also did not demonstrate that in promulgating the regulation, the Board acted arbitrarily or capriciously or contrary to law.²²⁰ The court acknowledged that the Board of Health derived its power from sections 556 and 558 of the New York City Charter, and under “the police powers of the Executive Branch to control the harboring of animals, especially wild or dangerous animals.”²²¹

1. *Proper Judicial Review of a Board of Health Regulation*

A health code amendment promulgated pursuant to the Board of Health’s police power is afforded a presumption of constitutionality.²²² After establishing the legality to enact the amendment, the review by a court of law “is *limited* to whether . . . [the] determination is rationally based, i.e., whether it is unreasonable, arbitrary or capricious.”²²³ An amendment of the health code will be upheld if there is “compelling medical necessity” supporting the amendment or when it cannot be said that the Board, given its expertise, promulgated an unreasonable

²¹⁵ *Id.* at 173.

²¹⁶ *See id.* (citing to the overlap between the branches of government in a case concerning an Executive Order against a challenge that the Governor circumvented the state legislature).

²¹⁷ *See* N.Y. State Soc’y of Surgeons v. Axelrod, 572 N.E.2d 605, 607–08 (N.Y. 1991) (observing that a similar Public Health Law granting the state Public Health Council (PHC) the discretion to “establish, and from time to time, amend and repeal sanitary regulations, to be known as the sanitary code of the state of New York,” reflects the flexibility granted to the PHC to adapt to conditions “in order to deal with changing public health concerns”).

²¹⁸ *Glass v. City of New York*, No. 121839/99, 2002 WL 1461895, at *1–2 (N.Y. Sup. Ct. June 14, 2002).

²¹⁹ *Id.* at *2.

²²⁰ *Id.*

²²¹ *Id.* at *1.

²²² *See* Metro. Ass’n of Private Day Sch., Inc. v. Baumgartner, 245 N.Y.S.2d 733, 737 (N.Y. Sup. Ct. 1963) (“This presumption is of course rebuttable, but he who would rebut must show that there is no permissible interpretation of all the facts which justify the imposition of such police powers.”).

²²³ N.Y. State Soc’y of Surgeons v. Axelrod, 572 N.E.2d 605, 609 (N.Y. 1991) (emphasis added).

regulation, devoid of justification.²²⁴ The New York Court of Appeals has declared that “[t]he police power [of the Board] is exceedingly broad, and the courts will not substitute their judgment of a public health problem for that of eminently qualified physicians in the field of public health.”²²⁵

D. *The Board of Health’s Commitment to Combating Obesity*

Increasingly, “[p]olicymakers, public health professionals, advocacy groups, and researchers . . . recognize law as a valuable tool for the prevention of chronic diseases and of obesity in particular.”²²⁶ This truth has been demonstrated by the regulatory actions of the New York City Board of Health, under former Commissioner Frieden and current Commissioner Farley.

The Board of Health has responded to the childhood obesity epidemic in a number of ways. In 2006, the Board adopted new requirements for the nutritional value of food and beverages served in group day care facilities licensed by the Department of Health.²²⁷ In January 2007, the Department of Health implemented a rule promulgated by the Board of Health “mandating that day care services provide at least sixty minutes of specified types of daily physical activity.”²²⁸

In addition, in December 2005, the Board of Health amended the health code to require the reporting of blood sugar (Hemoglobin A1C) test results to the Department of Health in an attempt to curb diabetes.²²⁹ This was followed by the year of trans-fat regulation.²³⁰ At the beginning of

²²⁴ *Grossman v. Baumgartner*, 218 N.E.2d 259, 262 (N.Y. 1966).

²²⁵ *Id.*; see also *N.Y. State Soc’y of Surgeons*, 572 N.E.2d at 609 (“We cannot substitute our judgment for that of qualified experts in the field of public health unless their judgment is ‘without justification.’” (quoting *Grossman*, 218 N.E.2d at 262)).

²²⁶ *Monroe et al.*, *supra* note 5.

²²⁷ *Id.* at 17. Under the regulation, “[b]everages with added sweeteners, whether artificial or natural, shall not be provided to children.” 24 R.C.N.Y. § 47.61(b)(1) (2013).

²²⁸ 24 R.C.N.Y. § 47.61; *Monroe et al.*, *supra* note 5, at 17. The rule also:

[P]roscribed television, video, and “other visual recordings” for children younger than 2 years of age; restricted viewing to 60 minutes daily for older children; and limited viewing to “educational programs or programs that actively engage child movement.” Additional requirements were approved in September 2008 for outdoor activity and play equipment.

Id. (quoting 24 R.C.N.Y. § 47.61).

²²⁹ *Id.* at 123–24. Dr. Frieden, the Health Department Commissioner “is enthusiastic about the new program, hoping it will reduce the number of people in New York City with uncontrolled diabetes, particularly Type 2 diabetes.” *Id.* at 121. The records must include the patient’s name, date of birth, address, physician, and other information. Wendy K. Mariner, *Medicine and Public Health: Crossing Legal Boundaries*, 10 J. HEALTH CARE L. & POL’Y 121, 121 (2007).

²³⁰ “[A]lso referred to as trans fatty acid or partially hydrogenated oil, [trans-fat] is created by adding hydrogen to vegetable oils, turning them into solid fats; trans-fat is used commercially primarily to extend shelf life and add taste to cooked foods. This ‘bad’ fat contributes to heart disease and obesity.” Eloisa C. Rodriguez-Dod, *It’s Not a Small World After All: Regulating Obesity Globally*, 79

2006, a federal regulation promulgated by the FDA required inclusion of trans-fat content in the nutritional labels of packaged foods.²³¹ Then, the New York City Board of Health amended the health code in December 2006, mandating that artificial trans-fats be virtually removed from food served in the City's restaurants.²³²

Perhaps one of the most widely publicized initiatives of the Board of Health concerned the posting of calories on menus and menu boards in restaurants. In a lawsuit challenging the regulation, the Board of Health stated that "calories are the single most important piece of nutritional information related to weight gain."²³³ As Department of Health Commissioner Frieden explained, the Board promulgated the regulation "because the Board and Department are charged with the prevention and control not just of communicable diseases, but also of chronic diseases and their risk factors. Calorie posting will allow New Yorkers to make the healthy choices needed to prevent or manage chronic diseases associated with obesity."²³⁴ The regulation required all chain restaurants with fifteen or more establishments nationwide to display calorie content.²³⁵ The New York City menu labeling regulation set a trend for the nation,²³⁶ and the federal government eventually followed suit. The Patient Protection and Affordable Care Act, passed by Congress in March 2010, promulgated a national nutritional disclosure regulation, requiring food establishments with twenty or more locations to disclose nutritional information regarding

MISS. L.J. 697, 699–700 (2010).

²³¹ 21 C.F.R. § 101.9(c)(2)(ii) (2006); Rodriguez-Dod, *supra* note 230, at 699.

²³² Rodriguez-Dod, *supra* note 230, at 700. Specifically, under the regulation:

No foods containing artificial trans fat . . . shall be stored, distributed, held for service, used in preparation of any menu item or served in any food service establishment or by any mobile food unit commissary, as defined in § 89.01 of this Code or successor provision, except food that is being served directly to patrons in a manufacturer's original sealed package.

²³³ 24 R.C.N.Y. § 81.08(a). "The Health Department followed the U.S. Food and Drug Administration labeling regulations in permitting, however, service of foods that contain less than 0.5 grams of trans fat per serving." Rodriguez-Dod, *supra* note 230, at 700.

²³⁴ N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007).

²³⁵ Declaration of Frieden 2007, *supra* note 187, at 5.

²³⁶ 24 R.C.N.Y. § 81.50(a)(1). The Board's first attempt at a menu labeling regulation only applied to those restaurants that voluntarily chose to make calorie content information available, and the court found the regulation expressly preempted by the Nutrition Labeling Education Act. *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 363. Not surprisingly, however, "[t]aking its cue from the district court's opinion, on January 22, 2008, the New York City Board of Health repealed and modified the 2006 regulation . . ." N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 121 (2d Cir. 2009).

²³⁷ Liza M. Escapa Lima, *From the Big Apple to Big Ben: An Insight into Menu Labeling*, 18 ILSA J. INT'L & COMP. L. 1, 10 (2011). Following the regulation, "numerous menu labeling laws [were] implemented across the country." *Id.*

standard menu items.²³⁷

To continue the City's proactive approach in addressing the obesity epidemic and the chronic diseases associated with obesity, Mayor Bloomberg charged Linda Gibbs, Deputy Mayor of Health and Human Services, and Cas Holloway, Deputy Mayor of Operations, with assembling a multi-agency obesity task force.²³⁸ Convening in January 2012, the task force was charged with recommending innovative and aggressive solutions to the obesity epidemic.²³⁹ The task force concluded that, second only to tobacco, obesity is a leading cause of preventable death and kills 5800 New York City residents every year.²⁴⁰ The task force found that fifty-eight percent of adults, or 3,437,000 individuals, were overweight or obese.²⁴¹ According to its findings, "[s]ugary drinks are the leading items associated with excess intake of calories in adults" and such drinks "are now ubiquitous, calorie dense, cheap, served in large portion sizes and aggressively promoted" in the city.²⁴² Likely due to the "ubiquity" of the beverages, the task force found sugary drinks to be the largest contributor to the average caloric intake increase of two hundred to three hundred calories per day over the last thirty years.²⁴³

V. AMENDING THE HEALTH CODE TO ENACT THE PORTION CAP RULE IS A VALID EXERCISE OF THE BOARD'S POLICE POWER

In his opinion, Judge Tingling ruled that the portion cap rule violated the separation of powers doctrine under *Boreali* and, further, was an arbitrary and capricious regulation.²⁴⁴ The Appellate Division affirmed that decision under the *Boreali* analysis without addressing whether the

²³⁷ Patient Protection and Affordable Care Act, Pub. L. 111-148, § 4205, 124 Stat. 119, 573-77 (2010) (codified as amended at 21 U.S.C. 343(q) (2012)). Food establishments covered by the section must post calories next to the menu item, and the recommended daily caloric intake must be posted on the menu. Escapa Lima, *supra* note 236, at 10. On the issue of preemption, state and local governments cannot impose nutrition labeling requirements on restaurants and vending machines covered by the Act and accompanying rules that are not identical to federal requirements; but states and localities can, however, impose requirements on restaurants and vending machines not covered by the Act. *Questions and Answers on the New Nutrition Labeling Requirements*, U.S. FDA, <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm248731.htm> (last updated Apr. 24, 2013); *see also* Escapa Lima, *supra* note 236, at 10 ("This federal law will preempt any state law regarding menu labeling . . . supersed[ing] any local ordinance or regulation.").

²³⁸ CITY OF N.Y., REVERSING THE EPIDEMIC: THE NEW YORK CITY OBESITY TASK FORCE PLAN TO PREVENT AND CONTROL OBESITY 2 (2012), *available at* http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf.

²³⁹ *Id.*

²⁴⁰ *Id.* at 4.

²⁴¹ *Id.*

²⁴² *Id.* at 5.

²⁴³ *Id.*

²⁴⁴ N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/2012, 2013 WL 1343607, at *20 (N.Y. Sup. Ct. Mar. 11, 2013).

rule was arbitrary and capricious.²⁴⁵ Both courts arrived at erroneous conclusions based on their misunderstanding of the Board of Health's police power and misapplied the *Boreali* standard. In addition, Judge Tingling blatantly misapplied judicial review in his ruling that the portion cap rule was arbitrary and capricious.

A. *The Relationship Between the Board of Health and City Council*

The power of the Board of Health is not merely grounded in tradition;²⁴⁶ it is grounded in law. The state legislature conferred upon localities the ability to legislate and regulate to address local affairs, through municipal home rule.²⁴⁷ Under the current Municipal Home Rule Law, localities may adopt a home rule charter to codify their organic law.²⁴⁸ Municipalities derive this police power from the state,²⁴⁹ and as the New York Court of Appeals has acknowledged, the Board of Health has broad discretion in the exercise of its police power.²⁵⁰

Under the charter, New York City's municipal structure provides for a powerful Board of Health, charged with promulgating regulations to meet the health demands of the city. The New York City Charter Revision Committee intended to vest a broad police power in the Board of Health to amend and alter the health code. The observations of the State Convention Committee substantiate this intention. Both committees, while acknowledging that the charter vested in the City Council the sole legislative power of the City, affirmed that the police power granted to the Board of Health ranks as a quasi-legislative plenary power.²⁵¹ In the opinion of the state legislature, the power of the Board of Health neither impinges upon nor usurps the power of the City Council.

Therefore, any argument that the Board of Health circumvented the

²⁴⁵ N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 110 A.D. 3d 1, 11–12 (N.Y. App. Div. 2013).

²⁴⁶ See N.Y. Statewide Coal. of Hispanic Chambers of Commerce, 2013 WL 1343607, at *7 (asserting that respondents relied on “the history of the New York Legislature’s grants of authority as well as the history of the City Charters [as] creat[ing] a quasi legislative body uniquely charged with enacting laws protecting the public health in New York City” (internal quotation marks omitted)).

²⁴⁷ See *supra* Part IV.A.

²⁴⁸ See *supra* note 151 and accompanying text.

²⁴⁹ See *supra* notes 153–64 and accompanying text (discussing the derivation of the municipal police power).

²⁵⁰ See N.Y. State Soc’y of Surgeons v. Axelrod, 572 N.E.2d 605, 607–08 (N.Y. 1991) (observing that a similar Public Health Law granting the state PHC the discretion to “establish, and from time to time, amend and repeal sanitary regulations, to be known as the sanitary code of the state of New York,” reflects the flexibility granted to the PHC to adapt to conditions “in order to deal with changing public health concerns” (internal quotation marks omitted)); *supra* text accompanying note 217 (acknowledging the discretionary power of the Board of Health).

²⁵¹ See *supra* Part IV.B.1 (acknowledging the parallel assertions of the state constitutional convention committee and the city charter revision committee).

City Council by enacting the portion cap rule is illogical. The Appellate Division inaccurately claimed that the Board “derives its power to establish rules and regulations directly and solely from . . . the City Council.”²⁵² Both the City Council and Board of Health are vested with their respective legislative powers by the state legislature. The intent of the state legislature is controlling, and that intent was for the Board of Health to be the authority in the field of health regulation in the City.²⁵³ The New York Court of Appeals has noted that the powers of each body cannot be neatly separated, hence overlap is inevitable.²⁵⁴

The fact that the city charter was adopted in response to the particular needs of the city clarifies that the distribution of power between the City Council and the Board of Health was deliberate. As has been acknowledged recently, “[a]s part of New York City’s regulatory authority to protect the public health and safety, the City, through legislation enacted by the City Council and rulemaking promulgated by City agencies, passes laws and regulations to safeguard public health and safety in the City.”²⁵⁵ As far back as the state legislature’s creation of the Metropolitan Board of Health, the Board ranked as a local body of experts in the area of public health, insulated from the political process.²⁵⁶ The Board specifically retains the authority to regulate the business and activities of food service establishments in a way that promotes the *public* interest.²⁵⁷ The Board does not regulate such establishments in the name of special interest. The New York City Charter Committee particularly noted the independence granted to the members of the Board.²⁵⁸ Given the political influence of the food and beverage industry,²⁵⁹ it is unsurprising that the members of the Board of Health—appointed by the mayor and intentionally insulated from the political process—promulgated the portion cap rule rather than the City Council. The Board of Health’s trend-setting calorie posting and trans-fat regulations may similarly be characterized as enactments that

²⁵² N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 110 A.D. 3d 1, 7 (N.Y. App. Div. 2013).

²⁵³ See *supra* Part IV.B.1.

²⁵⁴ See *supra* note 216 and accompanying text.

²⁵⁵ Michelle Goldberg-Cahn, *Federal Preemption of Public Health and Safety Rules*, 18 CITY L. 73, 73 (2012).

²⁵⁶ See *supra* Part III.A (providing a historical overview of the powers of the Board of Health).

²⁵⁷ See *supra* note 192 and accompanying text.

²⁵⁸ See *supra* Part IV.B.1.

²⁵⁹ See, e.g., Aviva Shen, *FDA Stalls on Obamacare’s Calorie Labeling Rule to Accommodate Special Interests*, THINK PROGRESS (Mar. 13, 2013), <http://thinkprogress.org/health/2013/03/13/1703541/fda-menu-labeling/?mobile=nc> (acknowledging that three years after the federal menu labeling law was enacted by Congress under the Patient Protection and Affordable Care Act, “the Food and Drug Administration is still deliberating on the extremely thorny issue of how to accommodate various special interests in executing the law,” with “[t]he latest delay concern[ing] clashing interests in the restaurant and grocery lobbies, which believe they should be exempt from the labeling rules” (emphasis omitted)).

bypassed the City Council. However, as one scholar noted, “[t]he real difference between more restrictive trans-fat bans and less restrictive soda regulations may be that trans-fat bans do not prompt industry-funded opposition to the same degree that regulations of big soda do.”²⁶⁰

As the New York Court of Appeals noted in *Grossman*, the argument that the Board of Health violated the separation of powers doctrine ignores the explicit powers granted to it under the charter and delegated to it by the state legislature. The Board is explicitly granted the power to regulate in order to control chronic disease, which it has passionately done in response to the obesity epidemic.²⁶¹ The portion cap rule, like the calorie posting regulation, represents the intersection of the Board’s powers to regulate food service establishments and to control chronic disease. The Court of Appeals has affirmed that it is the Board of Health’s business to regulate such matters, derived from the power granted by the state and city charters.²⁶²

B. *Misplaced Reliance on Boreali v. Axelrod*

At the time *Boreali v. Axelrod* was decided, the state legislature had failed to ban smoking in all public places,²⁶³ so the state Public Health Council (PHC) promulgated a regulation to fill the void.²⁶⁴ The Court of Appeals held that the PHC usurped its power as a state administrative agency, rendering the regulation at issue invalid.²⁶⁵ The court concluded that the PHC violated the separation of powers doctrine under the state constitution because the “line between administrative rule-making and legislative policy-making . . . [was] transgressed.”²⁶⁶

The court relied on the presence of four “circumstances” to invalidate the regulation. First, exceptions to the regulation were “based solely upon economic and social concerns;” the exemption of bars, convention centers and small restaurants from the regulation was not founded upon considerations of public health.²⁶⁷ The Court declared that it is “a uniquely legislative function,” to “[s]trik[e] the proper balance among health

²⁶⁰ Lindsay F. Wiley et al., *Who’s Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility*, 41 J.L. MED. & ETHICS 88, 90 (2013).

²⁶¹ See *supra* Part IV.D.

²⁶² See *supra* note 202 and accompanying text.

²⁶³ 517 N.E.2d 1350, 1352 (N.Y. 1987).

²⁶⁴ The regulation “prohibit[ed] smoking in a wide variety of indoor areas that are open to the public, including schools, hospitals, auditoriums, food markets, stores, banks, taxicabs and limousines.” *Id.* It also excluded certain establishments including restaurants with seating capacity fewer than fifty, as well as motel and hotel rooms. *Id.*

²⁶⁵ *Id.* at 1351.

²⁶⁶ *Id.* at 1355. In other words, “the agency stretched [the enabling] statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.” *Id.* at 1353.

²⁶⁷ *Id.* at 1355.

concerns, cost and privacy interests.”²⁶⁸ Second, the court considered the fact that the PHC “wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.”²⁶⁹ Third, the Court determined that the particular circumstances in *Boreali* warranted consideration of the fact that the legislature had repeatedly failed to enact legislation, “unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem.”²⁷⁰ Finally, the court determined that “no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged.”²⁷¹

The *Boreali* separation of powers framework should not dictate the legality of the portion cap rule, which concerns the relationship between the New York City Board of Health and the New York City Council. The *Boreali* framework fails to account for this unique relationship; notably, the New York Court of Appeals has not decided a case employing the *Boreali* analysis to the Board of Health–City Council relationship. Due to the power of the New York City Board of Health, and unlike the relationship between the PHC and the state legislature, “[s]triking the proper balance among health concerns, cost and privacy interests”²⁷² is not “a uniquely legislative function” reserved for the City Council. The Board of Health retains plenary powers of legislation.²⁷³ The Board of Health is an independent body of health care experts charged with addressing the peculiar health needs of the city.²⁷⁴ The commentary available at the time of the modern city charter’s adoption elucidates the relationship between the Board of Health and City Council; the Board of Health maintains quasi-legislative power to promulgate regulations under the health code, while the City Council retains power as a legislative body. In addition, as New York’s highest court has acknowledged, *local* health boards are charged with safeguarding the public health.²⁷⁵ Applying the *Boreali* framework to the local level is problematic and flawed; the analysis fails to account for the specific role of local boards of health envisioned by the state legislature and confirmed by the Court of Appeals. Judge Tingling and the Appellate Division ignored the entire line of case law that confirms the broad powers of the Board of Health. A thorough investigation of the intent of the state legislature in empowering the Board of Health was

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 1356.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 1355.

²⁷³ *See supra* Part IV.B.1.

²⁷⁴ *See supra* Part IV.B.1.

²⁷⁵ *See supra* notes 200, 211 and accompanying text (describing cases in which the court has charged local health boards with regulating local affairs).

notably absent from both opinions. Instead, the Tingling opinion went through a superficial and lengthy history of the city charter, while the Appellate Division endeavored to employ only the *Boreali* analysis.²⁷⁶

Even if one assumes, *arguendo*, that the *Boreali* framework does apply to the Board of Health and City Council, the four prong analysis would still weigh in favor of the portion cap rule's constitutionality. The portion cap rule was promulgated in response to the obesity epidemic plaguing the city.²⁷⁷ As the Board of Health recognized and a growing body of research confirms, sugar-sweetened beverages are fueling the obesity epidemic.²⁷⁸ Therefore, under the first consideration, the portion cap rule was promulgated in the name of health considerations. The "loopholes" of the portion cap rule were not fueled by political considerations. For example, the exclusion of alcoholic beverages from the rule resulted from state law that preempts the regulation of alcoholic beverages by the Board of Health or the City Council.²⁷⁹

Under the second consideration, the Board of Health maintains the broad authority to regulate chronic illness. The fact that the portion cap rule was allegedly enacted on a "clean slate" is irrelevant given the Board's broad plenary powers to legislate.

In addressing the third *Boreali* consideration, it must be noted that the Board of Health has extraordinary power granted under state law. The Board of Health has historically promulgated rules aiming to decrease the incidence of obesity within the city, as illustrated by the menu labeling and trans-fat regulations, which have withstood legal challenges.²⁸⁰ The *Boreali* court explicitly noted that given the particular circumstances of the case, consideration of the fact that the state legislature had not passed a smoking ban in public places was proper. However, given the balance of power between the Board of Health and the City Council, the failure of the City Council to pass a law regulating sugar-sweetened beverages should not be considered.

Under the fourth consideration, the Board of Health itself is composed of health professionals. Research by health experts elucidates the connection between sugar-sweetened beverage consumption and obesity. The portion cap rule is, therefore, grounded in expertise.

²⁷⁶ N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 110 A.D. 3d 1, 7–16 (N.Y. App. Div. 2013); *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 1343607, at *11–15.

²⁷⁷ See *supra* Part III.B.

²⁷⁸ See *supra* Part II.

²⁷⁹ Memorandum of Law for Respondents at 27–28 & n.27, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 653584/2012, 2013 WL 1343607 (N.Y. Sup. Ct. Mar. 11, 2013).

²⁸⁰ See *supra* Part IV.D.

C. *The Regulation Is Not Arbitrary and Capricious*

Although Judge Tingling acknowledged the regulation's reasonableness, he concluded that the "loopholes in [the] Rule effectively defeat[ed] [its] stated purpose," and therefore the regulation was "fraught with arbitrary and capricious consequences."²⁸¹ Some of the regulation's alleged "loopholes" include the following: it does not apply to grocery stores and 7-Elevens; it does not apply to one hundred percent fruit juices and beverages that are at least fifty percent milk; and it does not limit self-service refills.²⁸² However, Judge Tingling's conclusion that the regulation is arbitrary and capricious resulted from an improper judicial review of the portion cap rule.

The regulation's main objective was to improve the health of residents due to the obesity epidemic in the city and curb the incidence of chronic conditions that have inevitably followed. As the Board of Health made clear, the increased portions of sugary beverages and coinciding increase in caloric intake, by both adults and children, have added to the obesity epidemic.²⁸³ The link between sugar-sweetened beverages and obesity and chronic illnesses is also supported by empirical research.²⁸⁴ The regulation cannot reasonably be judged to have been enacted devoid of any justification, considering the compelling medical necessity supporting its promulgation. The New York Court of Appeals affirmed that the "compelling medical necessity" principle is the proper standard of review for a Board of Health action.²⁸⁵ A court should not substitute its own judgment for that of the Board of Health.

The regulation's alleged "loopholes" are reasonable and do not render the regulation arbitrary and capricious. The portion cap rule "reflects an incremental approach to addressing the complex epidemic of obesity, consistent with the [Board of Health's] historic practice of tackling complex health problems in a step-wise manner."²⁸⁶ The fact that sugar-sweetened beverages are devoid of nutritional value necessitated promulgation of the portion cap rule.²⁸⁷ In contrast, one hundred percent fruit juices and drinks made predominately with milk are not devoid of

²⁸¹ *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 1343607, at *20.

²⁸² *See id.* ("It is arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule."); *supra* Part III.B (detailing the provisions of the regulation).

²⁸³ *See supra* Part III.B.

²⁸⁴ *See supra* Part II.A.

²⁸⁵ *See supra* notes 206, 224 and accompanying text (giving examples of cases in which the court upheld laws based on a "compelling medical necessity").

²⁸⁶ Brief for the Nat'l Ass'n of Local Boards of Health et al., *supra* note 13, at 7–8.

²⁸⁷ *See supra* Part III.B.

nutritional value.²⁸⁸ Also, grocery stores and 7-Elevens are simply not regulated by the Board of Health, and they fall under the regulatory control of the State.²⁸⁹ Consistent with the fact that the Board of Health has limited jurisdiction, with regulatory power only over those food service establishments subject to article 81 of the New York City Health Code, the “initial rule is a modest one, to be built on incrementally once it has been evaluated.”²⁹⁰

Self-service refills are not regulated, but neither is the practice of consumers purchasing a sixteen ounce soda at one restaurant, then walking down the street and purchasing a second sixteen ounce soda to get their thirty-two ounce soda fix. Enforcement of a limit on refills or the number of beverages one consumer can purchase at one time from multiple food service establishments would be impossible and untenable. These practices are thus outside the purview of the regulation. Although Judge Tingling is within his rights to disagree with the particular terms of the regulation, it is not the role of the judiciary to substitute its judgment for that of a local board of health intentionally comprised of medical experts. According to public health law experts, “[a]lthough the Portion Cap Rule does not prevent all industry strategies that encourage people to consume excessive quantities of high-calorie beverages, there is every reason to anticipate that it will be effective in reducing consumption in the regulated restaurants.”²⁹¹

VI. THE LEGALITY OF THE BOARD OF HEALTH’S REGULATION UNDER THE U.S. CONSTITUTION

In addition to the arguments grounded in state law, there are potential legal challenges that may be asserted against the New York Board of Health’s portion cap rule under the federal Constitution.²⁹² Two of these challenges are addressed below.

²⁸⁸ Affidavit of Commissioner Farley, *supra* note 53, at 20.

²⁸⁹ Memorandum of Law for Respondents, *supra* note 279, at 27.

²⁹⁰ Brief for the Nat’l Ass’n of Local Boards of Health et al., *supra* note 13, at 11.

²⁹¹ *Id.* at 8. Consequently, “[t]he Rule should be upheld as a crucial first step towards reducing consumption of the high-calorie beverages that are a major contributor to obesity.” *Id.*

²⁹² See Jennifer L. Pomeranz & Kelly D. Brownell, *Portion Sizes and Beyond—Government’s Legal Authority to Regulate Food-Industry Practices*, 367 *NEW ENG. J. MED.* 1383, 1384–85 (asserting that “[g]overnments have the authority to act in this arena, and though industry may launch legal challenges, there does not appear to be a sound basis for that opposition to prevail.”); see also *NYC Ban on Big Sodas Could Face Legal Test*, *CRAIN’S* (June 14, 2012, 3:53 PM), http://www.crainsnewyork.com/article/20120614/RETAIL_APPAREL/120619933 (stating the belief of a constitutional law professor at Pace University that the rule may violate the Commerce Clause of the Constitution).

A. Dormant Commerce Clause

Under the Commerce Clause, “[a]ll objects of interstate trade merit Commerce Clause protection,”²⁹³ as Congress has the power to regulate “[c]ommerce . . . among the several States.”²⁹⁴ The Commerce Clause, “[t]hrough phrased as a grant of regulatory power to Congress . . . has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”²⁹⁵ The Dormant Commerce Clause applies with equal force to municipalities.²⁹⁶ As a threshold matter, sugar-sweetened beverages are properly characterized as articles of interstate commerce.

Under Dormant Commerce Clause jurisprudence, the first step of the analysis is to determine whether the regulation at issue “regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.”²⁹⁷ Discrimination manifests as differential treatment of in-state and out-of-state economic interests, with such treatment benefiting the in-state interests and working to the detriment of the out-of-state interests.²⁹⁸ If the regulation is discriminatory, it is deemed “virtually *per se* invalid.”²⁹⁹ If the regulation is nondiscriminatory with only incidental effects on interstate commerce, the regulation is valid unless the burden is in excess of the “putative local benefits.”³⁰⁰

Here, the regulation is nondiscriminatory, as it actually works to the detriment of in-state economic interests; if New Yorkers are willing to purchase sugary beverages over sixteen ounces, such business would arguably bolster the economic business of New York City restaurants and other regulated proprietors. The regulation only affects businesses within the borders of New York City and is “neutral [and] locally focused.”³⁰¹ In

²⁹³ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

²⁹⁴ U.S. CONST. art. I, § 8, cl. 3.

²⁹⁵ *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 98 (1994).

²⁹⁶ *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (“[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause . . .”).

²⁹⁷ *Or. Waste Sys., Inc.*, 511 U.S. at 99 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)) (internal quotation marks omitted).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (internal quotation marks omitted).

³⁰¹ *See Am. Trucking Ass’n, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 434 (2005) (holding that Michigan’s one hundred dollar fee on trucking transactions within the state’s borders did not offend the dormant Commerce Clause because it did not “facially discriminate against interstate or out-of-state activities,” and applied “evenhandedly to all carriers” in the state, and asserting “[n]othing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause”).

addition, in contrast to cases where regulations have been struck down as striving toward “a presumably legitimate goal . . . achieved by the illegitimate means of isolating the State from the national economy,”³⁰² New York City is not attempting to isolate itself from the national economy.

Notably, the Supreme Court has declared that “incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.”³⁰³ The portion cap rule may produce some incidental burdens on interstate commerce, as manufacturers of sugar-sweetened beverages will not be able to sell their products that are over sixteen ounces in the food service establishments subject to the regulation. However, the local benefits of the regulation vastly outweigh the incidental burden on interstate commerce. New York City is facing a severe obesity epidemic that negatively affects the health of its residents. According to the New York City Department of Health and Mental Hygiene, fifty-eight percent of adult residents in New York City are either overweight or obese.³⁰⁴ In passing the regulation, the Board of Health relied on a study revealing that six thousand New Yorkers die annually from the health consequences of obesity.³⁰⁵ Considering the alarming rates of sugar-sweetened beverage consumption, in combination with the established connection between sugary beverage consumption and obesity and chronic health problems, the potential local benefits of the portion cap rule to the obesity epidemic plaguing New York City are great.

In addition, the Supreme Court has acknowledged the tendency to treat laws of local governments that are not discriminatory on their face with more leniency when the locality legislates under its “vested . . . responsibility [to] protect[] the health, safety, and welfare of its citizens.”³⁰⁶ The “dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.”³⁰⁷ It weighs heavily in favor of constitutionality that the New York City regulation was enacted pursuant to the Board of Health’s legitimate police power.

³⁰² *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

³⁰³ *Id.* at 623–24.

³⁰⁴ *Notice of Adoption*, *supra* note 2, at 2.

³⁰⁵ *See supra* note 101 and accompanying text.

³⁰⁶ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). The Court upheld the constitutionality of the law at issue against a dormant Commerce Clause challenge and noted that the ordinance was enacted by the local government’s police power “in an effort to address waste disposal, a typical and traditional concern of local government.” *Id.* at 347.

³⁰⁷ *Id.* at 343.

B. *Equal Protection Clause of the Fourteenth Amendment*

Under the Constitution, the ABA could argue that soda drinkers and sugary beverage consumers at large are being denied Equal Protection under the Fourteenth Amendment.³⁰⁸ A more likely argument under the Equal Protection Clause may be asserted in regard to the food service establishments falling under the regulation, specifically small and minority-owned businesses.³⁰⁹ However, the Supreme Court has acknowledged:

The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. . . . [T]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.³¹⁰

Here, the regulation neither implicates a suspect classification³¹¹ nor impinges upon a fundamental right. Therefore, a court need only conclude that the portion cap rule bears a rational relationship to a legitimate governmental interest. As acknowledged by the Supreme Court:

Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes

³⁰⁸ See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

³⁰⁹ See Memorandum of Law for the N.Y. State Conference of the NAACP & the Hispanic Federation as Amici Curiae Supporting Plaintiffs-Petitioners at 7–8, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 653584/2012, 2013 WL 1343607 (N.Y. Sup. Ct. Mar. 11, 2013) (asserting that the Board did not consider “those who own and operate the small businesses disproportionately affected by this Ban,” and that the regulation “[a]t its worst . . . arbitrarily discriminates against citizens and small business owners in African-American and Hispanic communities”); Jason Kessler, *Groups: NYC Soda Ban Unfair to Small, Minority-Owned Businesses*, CNN (Jan. 25, 2013, 6:24 AM), <http://inamerica.blogs.cnn.com/2013/01/25/groups-nyc-soda-ban-unfair-to-small-minority-owned-businesses/> (“New York City’s attempt to keep people from fattening up on sugary soft drinks, by banning some of them, would disproportionately hurt small, minority-owned businesses, according to the NAACP and the Hispanic Federation.”).

³¹⁰ *Nordlinger v. Hahn* 505 U.S. 1, 10 (1992).

³¹¹ It is extremely unlikely and borderline absurd to attempt to argue that the food service establishments subject to the regulation are a suspect class. It would be more absurd to suggest sugar-sweetened beverage consumers are a suspect class under the U.S. Constitution.

fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.³¹²

A court will uphold the validity of a regulation if it “appears that any classification which the regulation may involve has a reasonable basis within the knowledge and experience of the official body by which it was promulgated.”³¹³ The rational basis test is a deferential standard.³¹⁴ Given the “strong presumption that legislative enactments are constitutional . . . a party contending otherwise bears [a] heavy burden.”³¹⁵

There is no doubt that the New York City Board of Health has a legitimate interest in decreasing the incidence of obesity among its citizenry. A rational relationship exists between restricting the size of sugar-sweetened beverages sold in the food service establishments regulated by the Board and the goal of decreasing the incidence of obesity in the city. Sugar-sweetened beverages rank as the largest contributor to the recent increase in average caloric intake in the city,³¹⁶ and the connection between sugar-sweetened beverage consumption and obesity can no longer be ignored. The fact that grocery stores and 7-Elevens are not subject to the regulation does not weigh in favor of concluding that the regulation is discriminatory or irrational.³¹⁷ The Board of Health did not have the jurisdictional power to regulate those businesses.³¹⁸ In addition, the Board did not act irrationally merely by addressing the obesity

³¹² *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). In addition, “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* at 315.

³¹³ *Stracquadanio v. Dep't of Health of N.Y.*, 32 N.E.2d 806, 808 (N.Y. 1941). The court in *Stracquadanio* further stated that the court “may declare such a regulation invalid only in the event that it is so lacking in reason for its promulgation that it is essentially arbitrary.” *Id.*

³¹⁴ *See People v. Knox*, 903 N.E.2d 1149, 1154 (N.Y. 2009) (“The rational basis test is not a demanding one. We have repeatedly quoted the United States Supreme Court’s description of it as ‘a paradigm of judicial restraint.’” (quoting *Beach Commc'ns Inc.*, 508 U.S. at 314)). The New York Court of Appeals, with regard to a Board of Health regulation of milk, declared that:

If the regulation . . . challenged bears a reasonable relation to a bona fide purpose by the Board of Health to safeguard the milk supply of the city of New York as an incident to the protection and promotion of public health, then the promulgation of the regulation was a valid exercise of the Board’s authority.

Stracquadanio, 32 N.E.2d at 808.

³¹⁵ *Knox*, 903 N.E.2d at 1154.

³¹⁶ *See supra* text accompanying note 243.

³¹⁷ *See N.Y.C. Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 533 (S.D.N.Y.) (“A law will not fail to pass constitutional muster under equal protection analysis merely because it contains classifications which are underinclusive . . .”), *aff'd*, 71 F.3d 405 (2d Cir. 1995).

³¹⁸ *See supra* note 309 (noting that these businesses are regulated by the state).

epidemic incrementally.³¹⁹

VII. CONCLUSION

The portion cap rule is a polarizing regulation. According to a poll conducted by the *New York Times* prior to the passage of the regulation, six out of ten New York City residents opposed the regulation, calling it a “bad idea.”³²⁰ It has also been reported that “[m]embers of virtually every major constituency, from Republican politicians to the Daily Show’s Jon Stewart, have vociferously objected to the Mayor’s plan.”³²¹ On the other side of the debate, according to Linda Gibbs, the Deputy Mayor for Health and Human Services, who oversees the City’s Department of Health and Mental Hygiene:

People move less and eat more, portion sizes have grown and sugary beverages—full of empty calories—have grown exponentially and nearly 6,000 New Yorkers are now dying each year of obesity-related illness. The question rightly becomes not “how dare the government intervene,” but “how dare the government fail to intervene?”³²²

The portion cap rule is a constitutionally valid and necessary amendment to the health code to curb the obesity epidemic in New York City. The Board of Health regulates food service establishments in the public interest, not in the name of special interests. Despite the current and potential legal challenges asserted against the portion cap rule, the measure

³¹⁹ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (“[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting others.” (citation omitted)); *Justiana v. Niagara Cnty. Dep’t of Health*, 45 F. Supp. 2d 236, 242–43 (W.D.N.Y. 1999) (pertaining to an Equal Protection challenge against a regulation of the county Board of Health, the court asserted that “the Board does not act irrationally by addressing the problems presented by ETS [environmental tobacco smoke] one step at a time—that is, by restricting smoking in some public places rather than others”); see *NYC Ban on Big Sodas Could Face Legal Test*, *supra* note 292 (indicating that, according to Rick Hills, a professor of law at New York University, “[c]ourts . . . have repeatedly ruled that the government can try to eradicate societal ills one step at a time”).

³²⁰ Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Soda Ban, Calling It an Overreach by Bloomberg, a Poll Finds*, N.Y. TIMES, Aug. 23, 2012, at A19. In addition, nearly 450,000 New Yorkers signed a petition opposing the ban, which was drafted by an advocacy group formed immediately after the plan to restrict sugary beverages was announced. Lindsey Coblenz, *Shaking up the Soda Industry: Faced with a Ban on Large Sugary Beverages in New York City, the Soda Industry Is Looking to Revamp Its Image with Both Consumers and Nutrition Advocates*, FOOD MANUFACTURING, Nov.–Dec. 2012, at 50, 50.

³²¹ Nathan Sadeghi-Nejad, *NYC’s Soda Ban Is a Good Idea, but a Tax Would Be Better*, FORBES (Sept. 13, 2012), <http://www.forbes.com/sites/natesadeghi/2012/09/13/nycs-soda-ban-is-a-good-idea-but-a-tax-would-be-better/>.

³²² Donya Currie, *States in Brief: New York City Bans Large Sugary Drinks*, NATION’S HEALTH, Nov.–Dec. 2012, at 11, 11.

should be upheld as a legal exercise of the Board's powers. The Board amended the city's health code pursuant to the broad police power granted to it by the state legislature and city charter. The portion cap rule is an assertion of power under the Board's power to regulate chronic disease affecting the city—a power that has been used and upheld before to combat obesity. Increased portion sizes and the role of sugar-sweetened beverages in increasing city residents' caloric intake formed the foundation of the Board's reasoning for the measure. But above all, the link between sugar-sweetened beverage consumption and obesity—which in turn increases the risk of severe chronic conditions—motivated the promulgation of the portion cap rule. The portion cap rule's effectiveness and influence on other governmental bodies facing the public health crisis of obesity remains to be seen.