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

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE; THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION; SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; THE NATIONAL RESTAURANT ASSOCIATION; THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE; AND THE AMERICAN BEVERAGE ASSOCIATION, Plaintiffs-Petitioners, -against- THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. THOMAS FARLEY, in his Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene, Defendants-Respondents.	:	Index No. 653584/2012

BRIEF OF JENNIFER L. POMERANZ OF THE RUDD CENTER FOR FOOD POLICY AND OBESITY AT YALE UNIVERSITY, PETER D. JACOBSON OF THE PUBLIC HEALTH LAW ASSOCIATION, LAWRENCE O. GOSTIN OF THE O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW AT GEORGETOWN UNIVERSITY, CHANGELAB SOLUTIONS, PUBLIC HEALTH LAW CENTER, AND THE NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS

Jennifer L. Pomeranz of the Yale University Rudd Center for Food Policy and Obesity, Peter D. Jacobson of the Public Health Law Association, Lawrence O. Gostin of the O'Neill Institute for National and Global Health Law at Georgetown University, ChangeLab Solutions, the Public Health Law Center at William Mitchell College of Law, and the National Association

of Local Boards of Health, submit this brief in support of defendants-respondents New York City Department of Health and Mental Hygiene (DOHMH), New York City Board of Health (BOH), and Dr. Thomas Farley (collectively "New York City") and against plaintiffs' Motion for Declaratory Relief and a Permanent Injunction.

I. STATEMENT OF INTEREST

Jennifer L. Pomeranz, JD, MPH is the Director of Legal Initiatives at the Yale University Rudd Center for Food Policy & Obesity (Rudd Center). The Rudd Center's mission is to improve the world's diet, prevent obesity, and reduce weight stigma by establishing connections between sound science and public policy, developing targeted research and expressing a dedicated commitment to real change. The Rudd Center strives to improve practices and policies related to nutrition and obesity to promote objective, science-based approaches to policy and to maximize the impact on public health.

Peter D. Jacobson, JD, MPH, is a Professor of Health Law and Policy at the University of Michigan School of Public Health and the President of the Public Health Law Association (PHLA). PHLA was formed in 2003 as a non-profit membership organization to serve as an independent voice for public health attorneys and other stakeholders who shape, use, teach, study, or conduct research in the field of public health law and policy. PHLA is dedicated to using public health law to promote healthy people and healthy communities through dialogue, partnerships, education, and research.

Lawrence O. Gostin, JD, LLD, is a University Professor, O'Neill Chair in Global Health Law, and the Director of the O'Neill Institute for National and Global Health Law at Georgetown University (O'Neill Institute). The O'Neill Institute responds to the need for innovative solutions to the most pressing national and international health concerns and

emphasizes the importance of public and private law in health policy analysis. The essential vision for the O'Neill Institute rests upon the proposition that the law has been, and will remain, a fundamental tool for solving critical health problems in our local, national, and global communities. By contributing to a more powerful and deeper understanding of the multiple ways in which law can be used to improve health, the O'Neill Institute hopes to encourage key decision-makers in the public, private, and civil society sectors to employ the law as a positive tool to enable individuals and populations in the United States and throughout the world to lead healthier lives.

ChangeLab Solutions is a nonprofit organization dedicated to promoting healthy communities nationwide. ChangeLab Solutions develops legal and policy tools to create lasting change, working with advocates, public officials, and others who want to improve public health conditions where they live, learn, work, and play, especially for those who are at highest risk because they have the fewest resources. The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN), a project of ChangeLab Solutions, serves as the legal technical assistance center for the Robert Wood Johnson Foundation's national initiative to reverse the childhood obesity epidemic. NPLAN creates and helps implement model policies aimed at increasing the availability and appeal of nutritious food, particularly in low income neighborhoods.

The Public Health Law Center is a public interest legal resource center dedicated to improving health through the power of law. Located at the William Mitchell College of Law in Saint Paul, Minnesota, the Center helps local, state, and national leaders promote public health by strengthening public policies. The Center supports efforts by public officials and community leaders to develop, implement, and defend effective public health laws and policies, including

laws and policies to promote access to healthy foods and discourage overconsumption of unhealthy foods. The Center also serves as the National Coordinating Center of the Network for Public Health Law, which offers specialized legal technical assistance to health departments nationwide on a wide range of issues relating to public health law, authority, and practice. The Public Health Law Center and its programs have filed amicus briefs in numerous state and federal cases involving significant questions of public health authority.

The National Association of Local Boards of Health (NALBOH) informs, guides, and is the national voice for the boards that govern health departments and shape public health policy. Driven by a mission to strengthen and improve public health governance, NALBOH interacts with member boards, affiliates, and other state and national partners to advance leadership, board development, health priorities, and public health policy. Since its inception, NALBOH has connected with board of health members and elected officials from across the country to help them fulfill the public health governance functions in their states and communities. From food safety and obesity prevention to e-cigarettes and toxic exposures, NALBOH has issue experts to support boards of health in promoting and protecting the health of their communities.

The obesity epidemic is a public health crisis in the United States. New York City is addressing the epidemic by regulating the maximum size of sugary drinks available for sale in food service establishments. Based on the best scientific evidence available about the hazards of consuming large portions of sugary drinks and the recommendations of public health experts, amici curiae support New York City's regulation.

II. BACKGROUND

In New York City, 58% of adults are overweight or obese and more than 20% of the city's public school children are obese. *See* Notice of Adoption at 2. Obesity is a significant health issue and increases the risk for cardiovascular disease, type 2 diabetes, hypertension, stroke, sleep apnea, liver disease, gallbladder disease, infertility, and certain types of cancer, including endometrial, breast, and colon.[1] Sugary beverages are a known public health threat and a primary driver of the obesity epidemic. Notice of Adoption at 2. Sugary beverage intake is associated with dental caries, increased energy intake, overweight, obesity, and is an independent risk factor for diabetes and heart disease.[2] Sugary drinks have been identified as "the single largest contributor of calories and added sugars to the American diet."[3] Thus, the association between sugary beverage consumption and weight gain is stronger than for any other food or beverage.[4]

Food service establishments are a chief source of food and beverage consumption by New York City residents, as approximately one third of daily caloric intake comes from outside the home. Id. at 1. The United States Department of Agriculture found that total calorie intake has arisen over the last several decades, especially from food eaten outside the home.[5] Portion

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[1] CDC. Overweight and Obesity. Health Consequences. April 27, 2012. Available: http://www.cdc.gov/obesity/adult/causes/index.html.

[2] Heller, K.E., Burt, B.A. and Eklund, S.A. Sugared soda consumption and dental caries in the United States. *Journal of Dental Research.* 2001;80:1949–1953; Malik, V.S., Popkin, B.M., Bray, G.A., Despres, J.P. and Hu, F.B. Sugar-sweetened beverages, obesity, type 2 diabetes mellitus, and cardiovascular disease risk. *Circulation*. 2010;121(11): 1356–1364; Ludwig D., Peterson K., Gortmaker S. Relation between consumption of sugar sweetened drinks and childhood obesity; a prospective, observational analysis. *Lancet*. 2001;357: 505–508; Malik, V.S., Schulze, M.B. and Hu, F.B. Intake of sugar-sweetened beverages and weight gain: A systematic review. *American Journal of Clinical Nutrition*. 2006;84: 274–288.

[3] Institute of Medicine. Accelerating Progress in Obesity Prevention. The National Academies Press. Washington, DC. 2012, at p.167.

[4] Woodward-Lopez G., Kao J., Ritchie L. To what extent have sweetened beverages contributed to the obesity epidemic? *Public Health Nutrition.* 2010;23:1-11.

[5] USDA Economic Research Service. Food and Nutrient Intake Data: Taking a Look at the Nutritional Quality of Foods Eaten at Home and Away From Home. June 2012. Available: http://www.ers.usda.gov/amber-waves/2012-june/data-feature-food-and-nutrient-intake-data.aspx.

sizes, including for sugary beverages, offered at food service establishments have also increased dramatically over the last several decades, which has been found to lead to greater intake among consumers.[6] Id. at 2. The New York City DOHMH studied the city residents' sugary drink consumption and found that both adults and youth are consuming large portions of sugary beverages per day.[7]

In an effort to address these public health issues, the BOH adopted Amendment §81.53 Maximum Beverage Size to Article 81 of the New York City Health Code on September 13, 2012 ("Regulation §81.53"). The regulation sets a maximum cup size of sixteen ounces permissible for sale and self-service of sugary beverages available at food service establishments. The beverages covered by Regulation §81.53 are those that are calorically sweetened, greater than 25 calories per 8 fluid ounces of beverage, and contain no more than 50% milk or milk substitute.

III. ARGUMENT

A. The New York City Board of Health Has the Clear Authority to Pass Regulation §81.53

The New York City defendants have the authority to regulate the serving size of cups available in food service establishments. The DOHMH has been granted the authority to regulate both food service establishments and the food supply of the city in order to control chronic disease. See New York City Charter Sections 558(b) and (c). New York City enacted Regulation §81.53 pursuant to this authority.

[6] Diliberti N., Bordi P., Conklin M., Roe L., Rolls B. Increased portion size leads to increased energy intake in restaurant meal. *Obesity Research*. 2004;12(3):562-8; Young L., Nestle M. The contribution of expanding portion sizes to the US obesity epidemic. *American Journal of Public Health*. 2002;92:246-9.

[7] New York City Department of Health and Mental Hygiene. Community Health Survey 2010; Alberti P., Noyes P. Sugary drinks: How much do we consume? New York, NY. New York City Department of Health and Mental Hygiene, 2011.

In their petition, plaintiffs acknowledge that the New York Municipal Home Rule Law delegates authority to local agencies over matters of both "health and sanitation." Petition ¶70. But plaintiffs fail to understand that modern public health problems in the United States and New York City stem from chronic disease. The most pressing public health problems today are obesity and obesity-related disease, such as diabetes and coronary heart disease.[8] Long gone are the public health problems that historically affected large cities stemming from a lack of sanitation and high incidence of communicable disease. If health departments refused to act on this reality, they would be failing to meet their responsibilities to protect the public's health.

The New York City DOHMH is charged with addressing modern public health problems, and has been granted specific authority to this end over food service establishments, the food supply, and chronic disease. Section 556(c)(9) of the Charter provides the DOHMH authority to "regulate the food and drug supply of the city and other business and activities affecting public health in the city." In addition, the DOHMH is empowered to "control … chronic diseases and conditions hazardous to life and health." Section 556(c)(2). The grant of power is clear and repeated in plaintiffs' brief. Petition at ¶ ¶ 77, 78. New York City's Regulation §81.53 is a clear exercise of this authority and there is nothing administratively questionable about its passage.

The BOH passed Regulation §81.53 to address obesity by regulating the permissible serving size of sugary beverages offered by the city's food service establishments. This regulation is reminiscent of New York City's regulations addressing artificial *trans* fat and calorie labeling on menus of food service establishments regulated by the DOHMH. See §81.08, §81.50. The United States Court of Appeals for the Second Circuit upheld New York City's calorie labeling law against legal challenge, *New York State Restaurant Association v. New York*

[8] F as in Fat: How obesity threatens America's Future 2012. Trust for America's Health. September 2012. See http://healthyamericans.org/report/100/.

City Board of Health, 556 F.3d 114 (2d Cir. 2009), and the artificial *trans* fat regulation was adopted without incident.[9] Both regulations have been in effect in the city for several years. Like Regulation §81.53, both regulations targeted the internal practices of the food service establishments regulated by the DOHMH. These regulations were enacted to address obesity and obesity-related diseases to support public health. And all three regulations are straightforward applications of the DOHMH's authority over food service establishments and its charge to control chronic disease. These are core public health functions. Plaintiffs' interests in not complying with this public health regulation do not cast doubt on the validity of the rule.

B. Regulation §81.53 is a Valid Exercise of Core Public Health Functions.

New York City, like all state and local health agencies, is charged with protecting public health. To this end, it would be inimical to the population's health for defendants not to have the authority to address the most pressing public health problems of our time: obesity and related chronic diseases. Obesity is a significant health issue and, as discussed above, increases the risk for many types of disease. The increased incidence and prevalence of obesity in the United States and New York City[10] over the last several decades can be pinned in large part to changes in our modern food environment. [11] See Notice of Adoption at 2.

Food service establishments offer large portions of unhealthy items, including sugary drinks.[12] See Notice of Adoption at 2. As discussed above, sugary beverage intake is associated

[9] Board of Health Votes to Phase out Artificial Trans Fat from New York City Restaurants. December 5, 2006. See http://www.nyc.gov/html/doh/html/pr2006/pr114-06.shtml.
[10] See Affirmation of Dr. Thomas Farley, New York City Health Commissioner.
[11] Brownell K.D. Food Fight. McGraw Hill. New York. 2004.
[12] Young L., Nestle M. The contribution of expanding portion sizes to the US obesity epidemic. American Journal of Public Health. 2002;92:246-9.

with a whole host of health problems, including obesity, diabetes and heart disease.[13] Addressing these chronic diseases is an obvious priority for health agencies around the country.[14]

New York City has undertaken an extensive effort to address chronic disease related to the food supply in the city. To achieve this goal, an important aspect of its overall strategy involves regulating food service establishments. Just as New York City legally regulated the words on food service establishments' menus, it can regulate the size of a cup available for sale. As a result, Regulation §81.53 is an example of a valid public health regulation and is well within the purview of a health agency's core function and basic authority.

C. *Boreali* Does Not Apply To Regulation §81.53

The basic premises on which plaintiffs rely to claim that the case of *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), applies to Regulation §81.53 are flawed. *Boreali* involved an attempt by the New York State Public Health Council to exceed its legislative mandate by regulating tobacco use in a manner in which the state legislature specifically tried and failed to legislate. 71 N.Y.2d at 13. In doing so, the Council passed a regulation based on social and economic concerns with exceptions that ran counter to the goals of the rule. Id. at 12. This is not the case here. Plaintiffs' attempt to politicize the regulation and their own economic concerns do not invalidate a lawful regulation with a purely public health focus. Plaintiffs' argument is tantamount to suggesting that if DOHMH chooses not to regulate all aspects of a problem, it lacks authority to regulate any particular aspect, no matter how deleterious to the public's health. If health agencies could regulate specific, highly consequential, health problems documented by evidence *only* if it regulated all analogous health problems, it would chill public health regulation—and thus be adverse to the general welfare of New York City residents.

[13] See fn. 2.
[14] National Association of Local Boards of Health, *NALBOH Position Statement: Nutrition, Physical Activity & Obesity*. 2010. Available: http://www.nalboh.org/pdffiles/CH%20pdfs/Nutrition_PA_Obesity_Pos_Stmt2010.pdf.

First, unlike the situation in *Boreali*, DOHMH did not attempt to circumvent the political process or otherwise create a subordinate legal entity to regulate sugary drinks. Instead, DOHMH relied exclusively on its delegated authority to protect the public's health.

Second, contrary to *Boreali*, where the Court found the regulatory scheme was "laden with exceptions based solely upon economic and social concerns," 71 N.Y.2d at 12, all of the classifications in the present regulation were made based purely on health factors. As noted above, sugary beverages, as defined in Regulation §81.53, have been found in scientific studies to cause overweight, obesity, diabetes and heart disease.[15] Contrary to plaintiffs' suggestion, milk-based drinks have not been found to have the same health consequences as the sugary drinks captured in Regulation §81.53. In fact, consumption of milk is associated with positive nutrient intake and a reduced risk of cardiovascular disease, diabetes, and hypertension.[16] Thus, the exclusion of milk-based drinks from Regulation §81.53 is based purely on the science and represents the best evidence from a public health perspective. Because milk-based drinks do not fall into the same category of sugary beverages, they are not a proper item to be the target of the current regulation.

By way of example, if New York City had created the classification to protect the business or economic interests of manufacturers, marketers or retailers of milk-based drinks, that would be inappropriate economic or social purposes. On the contrary, New York City's classification is based on public health concerns stemming from scientific studies revealing that consuming high levels of specific sugary beverages produce poor health outcomes. New York

[15] See fn. 2.
[16] Sebastian R.S., Goldman J.D., Wilkinson Enns C., LaComb R.P. Food Surveys Research Group. Fluid Milk Consumption in the United States, What We Eat In America, NHANES 2005-2006. USDA. Dietary Data Brief No. 3. September 2010. Available: http://ars.usda.gov/Services/docs.htm?docid=19476.

City chose to regulate only those beverages supported by the science and the exclusion of other types of products does not run counter to the public health goals of the regulation.

In addition, the evidence further confirms that people are exposed to and consume larger portions when they eat out at food service establishments.[17] Consumers in New York City obtain a large portion of their meals from food service establishments and these establishments have been found to offer excessive beverage sizes. Notice of Adoption at 2. The DOHMH found that 34 ounce beverages are commonly offered in food service establishments but that some offer up to 64 ounce servings. Id. These are the very same food service establishments covered by the New York City regulation. It is noteworthy that in these food service establishments, consumers are often consuming large servings of sugary beverages along with an entire meal. This is troubling because the body does not compensate from caloric intake from sugary liquids by reduction in other forms of calories.[18] This means that people do not eat less when they consume calories from sugary beverages, as they might if they consumed the same calories from whole foods.

Third, contrary to plaintiffs' contentions, Petition ¶ 87, the fact that a regulation is "innovative" is not legally relevant. In fact, provided the agency acts on the basis of scientific data, the fact that the regulation would have a significant impact adds to its legitimacy. Because New York City DOHMH is at the forefront of public health law nationally, it is often the first to adopt important regulations. For example, when New York City enacted the country's first menu labeling law it was considered innovative. As was the case then and is the case now, this does not implicate *Boreali*. Although innovative, this regulation is an unremarkable regulation of

[17] See fn. 6.
[18] Vartanian L.R., Schwartz M.B., Brownell K.D. Effects of Soft Drink Consumption on Nutrition and Health: A Systematic Review and Meta-Analysis. *Am J Public Health.* 2007;97:667–75.

conduct[19] that carries out defendants' administrative function to address public health and the food supply in the city.

Fourth, as confirmed by plaintiffs, Petition ¶¶ 37-39, the City Council never considered, debated or failed to come to an agreement on a bill to regulate the serving sizes of sugary beverages. Unlike in *Boreali*, there have been no failures or "repeated failures by the Legislature to arrive at such an agreement" on this topic. 71 N.Y.2d at 13. The City Council has never even debated a sugary drink serving size restriction. The legislature has, however, charged New York City with addressing the city's food supply, and controlling chronic disease under New York City Charter Sections 558(b) and (c). Regulation §81.53 meets that charge. A minority of City Council members' vocalization of their personal disagreement with the regulation during the notice and comment phase of rulemaking does not create or support a *Boreali* claim.

Lastly, in *Boreali*, the Court emphasized that, "no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged" in that case. 71 N.Y.2d at 14. This contravenes the facts in the present case. Plaintiffs' very suggestion that the regulation should have covered other "high calorie" items such as alcohol and milk-based drinks, Petition ¶ 86, reveals that Defendants' expertise was specifically required to construct a scientifically-based regulation. Unlike plaintiffs' suggested drinks, only sugary beverages that are covered by the regulation have been shown to cause the health problems of obesity, diabetes and heart disease in scientific studies.[20] The plaintiffs' complaint to the contrary highlights the need for health expertise to interpret the data and pass an appropriate science-based regulation.

[19] Pomeranz J.L. Advanced policy options to regulate sugar-sweetened beverages to support public health. *Journal of Public Health Policy*. 2012;33:75-88.
[20] See fn. 2.

Even more telling than the plaintiffs' Petition is that the city council members who testified at the Public Hearing on July 24, 2012 evidenced a striking dearth of knowledge about the causes of obesity, demonstrating how much the DOHMH's expertise is needed to address this chronic disease in the city. One chief objections voiced by several of the opposing city council members were that the Board of Health should focus on physical education and physical activity instead of serving sizes. Hearing July 24, 2012. However, all the research on obesity indicates that while physical activity has health benefits and physical education is a proper pursuit (especially for schools), food and beverage consumption plays the primary role in the obesity epidemic. Studies reveal that physical exercise cannot burn the amount of calories consumed through an unhealthy diet, especially one consisting of large portions of sugary beverages.[21] Further, the physical activity rates of U.S. youth, for example, have not significantly decreased as youth obesity rates have significantly increased.[22] Studies support New York City's expert opinion that the food environment- and particularly sugary beverages- play a larger role in obesity outcomes than physical activity.[23] Thus, clearly the DOHMH's expertise was required to address one of the primary drivers of obesity: large portions of sugary beverages.

There is no legal insufficiency to New York City's serving size restriction. Regulation §81.53 is an expression of a core public health authority and captures the products with public health ramifications; as such, it does not implicate *Boreali*.

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[21] Pontzer H., Raichlen D.A., Wood B.M., Audax Z., Mabulla P., Racette S.B., Marlowe F.W. Hunter-Gatherer Energetics and Human Obesity. PLOS One. 2012. Available: http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0040503#.

[22] Li S., Treuth M.S., Wang Y. How active are American adolescents and have they become less active? Obes Rev. 2010 Dec;11(12):847-62; Jean Adams. Trends in physical activity and inactivity amongst US 14–18 year olds by gender, school grade and race, 1993–2003: evidence from the youth risk behavior survey. BMC Public Health. 2006;6:57.

[23] Lee I.M., Shiroma E.J., Lobelo F., Puska P., Blair S.N., Katzmarzyk P.T. Effect of physical inactivity on major non-communicable diseases worldwide: an analysis of burden of disease and life expectancy. The Lancet. 2012;380(9838):219-229.

IV. CONCLUSION

For the foregoing reasons, we urge the Court to find for defendants-respondents and dismiss plaintiffs-petitioners' motion for declaratory relief and a permanent injunction.

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Respectfully submitted,

Attorney for Amici Curiae:

/s/ Brian L. Bromberg
Brian L. Bromberg (BB: 6264)
Bromberg Law Office, ¶C.
40 Exchange Place, Suite 2010
New York, NY 10005
(212) 248-7906

Amici Curiae:

Jennifer L. Pomeranz, JD, MPH
Director of Legal Initiatives
Yale Rudd Center for Food Policy & Obesity
Yale University
309 Edwards Street
New Haven, CT 06520
(203) 432-6700

Peter D. Jacobson, JD, MPH
President Public Health Law Association
Professor of Health Law and Policy
Director, Center for Law, Ethics, and Health
University of Michigan School of Public Health
1415 Washington Heights
Ann Arbor, Michigan 48109

Lawrence O. Gostin, JD, LLD
Linda D. & Timothy J. O'Neill Professor of Global Health Law
Faculty Director, O'Neill Institute for National and Global Health Law
Professor of Medicine, Georgetown University
Professor of Public Health, the Johns Hopkins University
Georgetown Law

574 McDonough Hall
600 New Jersey Avenue, NW
Washington, DC 20001

And these organizations:

ChangeLab Solutions
Public Health Law Center
National Association of Local Boards of Health