

Court of Appeals
STATE OF NEW YORK

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE,
THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION, SOFT DRINK AND
BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, THE NATIONAL RESTAURANT ASSOCIATION, THE NATIONAL
ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE and THE AMERICAN
BEVERAGE ASSOCIATION,

Plaintiffs-Petitioners-Respondents,

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

—against—

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THE
NEW YORK CITY BOARD OF HEALTH, and DR. THOMAS FARLEY, in his official
capacity as Commissioner of the New York City Department of Health and Mental
Hygiene,

Defendants-Respondents-Appellants.

MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*
BY THE CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA, NATIONAL BLACK CHAMBER OF COMMERCE,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
NATIONAL ASSOCIATION OF MANUFACTURERS, THE QUEENS
CHAMBER OF COMMERCE, AND NEW YORK ASSOCIATION OF
CONVENIENCE STORES IN SUPPORT OF PLAINTIFFS-
PETITIONERS-RESPONDENTS

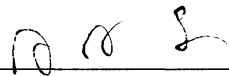
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United States of America, National Black Chamber of Commerce, National
Federation of Independent Business, National Association of Manufacturers, The
Queens Chamber of Commerce, and New York Association of Convenience Stores*

PLEASE TAKE NOTICE THAT, upon the annexed affirmation of Alexandra A.E. Shapiro, dated April 25, 2014, and the materials attached thereto, The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Queens Chamber of Commerce, and New York Association of Convenience Stores will move this Court at the New York State Court of Appeals, located at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on the 5th day of May, 2014, at 10:00 am, or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici* to file a brief *amici curiae*.

Dated: April 25, 2014

Respectfully submitted,



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NEW YORK STATEWIDE COALITION OF
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NATIONAL ASSOCIATION OF THEATRE
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AMERICAN BEVERAGE ASSOCIATION,

Plaintiffs-Petitioners-Respondents,

vs.

THE NEW YORK CITY DEPARTMENT OF
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THOMAS FARLEY, in his official capacity as
Commissioner of the New York Department of
Health and Mental Hygiene,

Defendants-Respondents-Appellants.

Docket No. APL-2013-
00291

New York County Clerk's
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**AFFIRMATION IN
SUPPORT OF MOTION
FOR LEAVE TO
APPEAR AS *AMICI
CURIAE***

ALEXANDRA A.E. SHAPIRO, an attorney duly licensed to practice law
before the courts of the State of New York, hereby affirms the following under
penalty of perjury.

1. I am a member in good standing of the Bar of the State of New York
and a partner with the law firm Shapiro, Arato & Isserles LLP. I represent the
proposed *amici curiae*, The Chamber of Commerce of the United States of

America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Queens Chamber of Commerce, and New York Association of Convenience Stores (collectively, “*Amici*”) in this matter. This affirmation is made in support of *Amici*’s Motion for Leave to File Brief as *Amici Curiae* in support of Plaintiffs-Petitioners-Respondents.

2. The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of more than three million business and professional organizations of every size, in every industry, and from every region of the country. The U.S. Chamber’s members are central to the nation’s economy. The U.S. Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation’s business community. This case is of particular importance to the U.S. Chamber given the extraordinary nature of New York City’s proposed Portion Cap Rule on sugary drinks.

3. The National Black Chamber of Commerce (“NBCC”) is a nonprofit, nonpartisan and nonsectarian organization. It represents nearly 100,000 African-American-owned businesses and indirectly represents an underlying membership

of more than 2.1 million African-American-owned businesses nationwide. The NBCC has over 190 affiliated chapters located throughout the country.

4. The National Federation of Independent Business Small Business Legal Center (“NFIB Small Business Legal Center”), is a nonprofit public interest law firm and is the legal arm of the National Federation of Independent Business (“NFIB”). NFIB is the nation’s leading small business association, representing about 350,000 small businesses across the United States. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases like this one that will impact small businesses. The NFIB Small Business Legal Center advances the rights of small business owners to freely provide goods and services without unnecessary restrictions and defends the freedom of consumers to make reasonable lifestyle choices with respect to the products they consume.

5. The National Association of Manufacturers (the “NAM”) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

6. The Queens Chamber of Commerce (“QCC”) has been serving the borough of Queens since 1911. The QCC works to foster economic growth and prosperity in Queens, by promoting the interests of business through advocacy, networking, and education.

7. Founded in 1986, the New York Association of Convenience Stores (“NYACS”) is a member-driven not-for-profit trade association that leads, safeguards, and forges a favorable environment for New York State's diverse, dynamic community of neighborhood convenience stores. NYACS provides return on membership investment by continuously delivering vital knowledge, a unified voice on legislative and regulatory issues, access to business solutions, and ways for members to share ideas, address common challenges, and build relationships. The NYACS membership consists of 180 companies that operate convenience stores, ranging in size from one store to over 300. Collectively, its retail members operate more than 1,500 store locations from Hamburg, Erie County to Hempstead, Long Island that serve nearly 1.3 million customers per day. Over half of NYACS’s member retail companies are single-store operators. NYACS supports providing customers with nutritional information and allowing them to exercise their freedom to choose food and beverages.

8. The purpose of *Amici*’s brief is to aid the Court in understanding the effects that New York City’s proposed Portion Cap Rule on sugary drinks will

have on businesses in New York City and throughout the nation. *Amici* collectively represent the interests of millions of businesses and professional organizations throughout the country. *Amici*'s members are interested in promoting careful and intelligent approaches to anti-obesity regulation, which will provide meaningful redress to the obesity problem and do so in a cost-effective manner. As *Amici* demonstrate, the Board improperly ignored promising alternatives to the Portion Cap Rule. In particular, industry-led initiatives, including public-private partnerships, have been used to combat numerous complex social problems, including health and wellness challenges. The Board's failure to consider these alternatives resulted in a missed opportunity to develop a collaborative and comprehensive approach to addressing obesity in New York City.

9. Instead, the Board opted for its Portion Cap Rule, which is an example of an ill-considered and poorly designed approach to tackling a complex, national social problem. In enacting the Rule, the New York City Department of Health and Mental Hygiene and the Board of Health ("the Board") acted unlawfully by attempting to legislate in an area reserved for the New York City Council. Moreover, in doing so, they abandoned virtually every fundamental principle of responsible regulation. The Board failed to demonstrate that the means they chose, a cap on certain sugary-sweetened beverages, will successfully achieve its stated

goal of reducing obesity, and the Board ignored evidence suggesting the Portion Cap Rule may in fact backfire. Because the Board acted beyond its limited mandate, it lacked the authority to meaningfully consider the substantial costs the Rule will impose on businesses, and ignored the troubling concerns related to the Rule's arbitrary and nonsensical system of loopholes. Due to New York City's prominence, the Rule's flaws are likely to affect business in other jurisdictions and threaten to create a patchwork of inconsistent state and local laws.

10. A copy of *Amici's* brief is attached hereto as Exhibit A.

WHEREFORE, on behalf of The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Queens Chamber of Commerce, and New York Association of Convenience Stores, I respectfully request that the Court grant their motion to participate in this appeal as *Amici Curiae*.

Dated: April 25, 2014

Respectfully submitted,



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EXHIBIT A

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Defendants-Respondents-Appellants.

**AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, NATIONAL BLACK CHAMBER
OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT
BUSINESS, NATIONAL ASSOCIATION OF MANUFACTURERS, THE
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OF CONVENIENCE STORES IN SUPPORT OF PLAINTIFFS-
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April 25, 2014

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f), *Amici Curiae* make the following disclosure:

The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Queens Chamber of Commerce, and New York Association of Convenience Stores are not-for-profit business federations with no parents, subsidiaries, or affiliates.

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of more than three million business and professional organizations of every size, in every industry, and from every region of the country. The Chamber’s members are central to the nation’s economy. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation’s business community. This case is of particular importance to the Chamber given the extraordinary nature of New York City’s proposed Portion Cap Rule on sugary drinks.

The National Black Chamber of Commerce (“NBCC”) is a nonprofit, nonpartisan and nonsectarian organization. It represents nearly 100,000 African-American-owned businesses and indirectly represents an underlying membership of more than 2.1 million African-American-owned businesses nationwide. The NBCC has over 190 affiliated chapters located throughout the country.

The National Federation of Independent Business Small Business Legal Center (“NFIB Small Business Legal Center”), is a nonprofit public interest law firm and is the legal arm of the National Federation of Independent Business (“NFIB”). NFIB is the nation’s leading small business association, representing about 350,000 small businesses across the United States. To fulfill its role as the

voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases like this one that will impact small businesses. The NFIB Small Business Legal Center advances the rights of small business owners to freely provide goods and services without unnecessary restrictions and defends the freedom of consumers to make reasonable lifestyle choices with respect to the products they consume.

The National Association of Manufacturers (the “NAM”) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Queens Chamber of Commerce (“QCC”) has been serving the borough of Queens since 1911. The QCC works to foster economic growth and prosperity in Queens, by promoting the interests of business through advocacy, networking, and education.

Founded in 1986, the New York Association of Convenience Stores (“NYACS”) is a member-driven not-for-profit trade association that leads, safeguards, and forges a favorable environment for New York State's diverse,

dynamic community of neighborhood convenience stores. NYACS provides return on membership investment by continuously delivering vital knowledge, a unified voice on legislative and regulatory issues, access to business solutions, and ways for members to share ideas, address common challenges, and build relationships. The NYACS membership consists of 180 companies that operate convenience stores, ranging in size from one store to over 300. Collectively, its retail members operate more than 1,500 store locations from Hamburg, Erie County to Hempstead, Long Island that serve nearly 1.3 million customers per day. Over half of NYACS's member retail companies are single-store operators. NYACS supports providing customers with nutritional information and allowing them to exercise their freedom to choose food and beverages.

Amici collectively represent the interest of millions of businesses and professional organizations throughout the country. New York City's remarkable ban on the sale of certain sugar-sweetened beverage ("SSB") products sold by some outlets (referred to variously as the "Portion Cap Rule," the "Rule," and the "Ban") raises important issues for *Amici* and their members, who are interested in promoting careful, intelligent, and market-based approaches to complex, national social problems. In sharp contrast, the Portion Cap Rule is a reckless, ill-conceived, top-down regulation that has little chance of meaningfully affecting the Board's purported health objectives. Although national health and wellness trends

are particularly significant to *Amici* because of their impact on the costs of health care, which are often borne by employers, the Rule does nothing to address these issues. *Amici* are independently motivated to respond to the demands of the marketplace and are responsive to consumer concerns about health. But the Rule overlooks private-sector responses, and public-private partnerships, that can more effectively and meaningfully address complex national health issues. In addition, the Portion Cap Rule vastly exceeds the limited scope of the Board's delegated authority. Finally, the Rule not only imposes profound costs on *Amici*'s business members operating in New York City; it has implications and public policy consequences that extend far beyond New York, which threaten to balkanize the laws governing beverage sales and severely disrupt national distribution chains.

It is imperative that a regulatory agency's approach to the obesity problem—especially an agency in New York City—is responsible and responsive.

Unfortunately, the Portion Cap Rule is the poster child for ill-considered, poorly-designed, expensive, intrusive, and ineffective regulation.

PRELIMINARY STATEMENT

As the First Department correctly concluded and Plaintiffs-Respondents explain, in enacting the Portion Cap Rule,¹ the New York City Department of Health and Mental Hygiene and the Board of Health (collectively, “the Board”) exceeded the scope of their authority by attempting to legislate in an area reserved for the New York City Council. In doing so, the Board not only acted beyond the scope of its delegated authority, it also abandoned virtually every fundamental principle of responsible regulation. There is no evidence or reason to believe that the Rule’s fix—a cap on certain SSBs—will achieve its stated objective of reducing obesity. And the Board failed to adequately consider if the Rule might even make the obesity problem worse.

In light of its obvious costs—both to the economy and to personal freedoms—the decision to enact a measure like the Portion Cap Rule inescapably involves conscious trade-offs and should not be undertaken without a rigorous cost-benefit analysis. Here, the Board engaged in a superficial, half-baked cost-benefit analysis that it had no authority to undertake in the first place. Where, as here, the governing law requires this type of complicated policy decision to be

¹ The Rule prohibits certain covered food service establishments (“FSEs”) from selling “sugary drinks” in containers larger than 16 fluid ounces and from selling self-service cups, for any beverage, larger than 16 fluid ounces. N.Y.C.R.R. tit. 24, § 81.53(b)–(c). “Sugary drinks” are defined as beverages that are sweetened by a manufacturer or establishment with sugar or a caloric sweetener and that contain greater than 25 calories per eight fluid ounces. § 81.53 (a)(1).

made by the legislature, an agency's unauthorized attempt to "go it alone" is per se irresponsible. The Rule is also littered with arbitrary exceptions and loopholes that further undermine its stated objectives, are unfair to the businesses subject to its onerous terms, and threaten to create a patchwork of inconsistent local laws that will burden the free flow of commerce in the national beverage industry.

The Rule is precisely the kind of misguided, overreaching regulation one would expect from an agency that strays so far from its statutory mission. And it is precisely the kind of ill-considered regulation one would expect from a regulatory process that, as here, lacked transparency and failed to meaningfully consider the views of affected businesses and consumers. In enacting the Ban, the Board unquestionably made the kinds of profound policy choices that, as Plaintiffs-Respondents have demonstrated, are reserved to New York City's legislative branch. The Board cannot escape that conclusion by refusing to acknowledge that it weighed those competing concerns and made those policy choices. The choices and compromises it made are obvious on the face of the rule it promulgated. Its failure to confront those policy choices expressly merely exacerbates the problem, independently rendering its decision arbitrary and capricious.

Far from representing a serious effort to fight obesity, the Rule was little more than a publicity stunt by the former mayor, who thought it appropriate to declare a "Doughnut Day" at the very same time he waged war against SSBs in the

name of public health. At bottom, the Rule is a particularly disturbing example of how government can do more harm than good when it ignores fundamental principles of responsible regulation. When government considers whether or how to address a complex social issue, such as obesity, it should do so carefully, abiding by fundamental principles of separation of powers and responsible regulation. *First*, in order to minimize economic harms and protect personal freedoms, government should engage directly with industry and the public to consider whether non-regulatory, market-based approaches, including public-private partnerships, are sufficient to address a particular policy concern in lieu of top-down regulation. *Second*, a regulatory body, such as the Board, must decline to regulate in the absence of a permissible grant of legislative authority to do so. The Board clearly lacked such authority in this case. And in circumstances where an agency *does* have regulatory authority, the agency should operate well within the zone of that authority, in order to ensure that it is acting with expertise and to limit regulatory overreach. *Third*, a regulation should be based on a strong, well-established connection between the problem to be remedied and the means chosen to address the problem. *Fourth*, complex social issues (like obesity) require policy solutions that reflect a serious balance of the public concerns against the costs and burdens of the proposed regulation. *Fifth*, regulations should be fairly designed and implemented. In practice, this means that regulations should not irrationally

discriminate among businesses or burden them more than is necessary to achieve the objective.² *Sixth*, the regulatory process should be inclusive and transparent, based on and responsive to input from the regulated community.³ The Rule violates each and every one of these common-sense principles.

For all of these reasons, *Amici* submit this brief in support of the judgment below.

ARGUMENT

I. The Board Failed To Consider Industry-Led Solutions And Public-Private Partnerships As Alternatives To Regulation

The first question government should ask when considering whether command-and-control regulation is an appropriate response to a policy problem is whether voluntary and market-based private sector responses may be adequate to address the problem. In particular, government should consider whether voluntary public-private partnerships could adequately address the problem, without the need for government-created restrictions on personal and economic freedoms. It is inexcusable, then, that the Board opted not to engage in a dialogue with industry

² Organisation for Economic Co-operation and Development, *OECD Guiding Principles For Regulatory Quality and Performance* 5, available at, <http://www.oecd.org/fr/reformereg/34976533.pdf>.

³ Eric J. Pan, *Structural Reform of Financial Regulation*, 19 *Transnat'l L. & Contemp. Probs.* 796, 811–12 (2011) (discussing the importance of transparency and freedom from political interference to regulatory systems); *see also* Organisation for Economic Co-operation and Development, *supra* at 5.

and instead adopted the most draconian and liberty-depriving of regulatory responses: *an outright ban*. This top-down approach failed both to recognize existing private sector responses to the obesity problem and to solicit the participation and views of industry in order to devise a collaborative strategy for combating obesity. Industry-led solutions, including public-private partnerships, present a superior alternative to unilateral, coercive regulation of complex social issues.

A. Public-Private Partnerships Present A Superior Alternative To Top-Down Regulation

Though regulation can play a role in confronting complex social issues, private-based initiatives present a better alternative to regulation—especially to a poorly-crafted and draconian regulatory alternative like the Portion Cap Rule. Public-private partnerships leverage the diversity, reach, and flexibility of businesses to provide innovative solutions to complex, multifaceted problems.⁴ These partnerships allow public entities to take advantage of that flexibility, allowing for experimentation in ways that are less likely to be achieved through regulation.⁵ Coercive regulations often come with the opportunity cost of crowding out private innovation. Businesses subject to the regulations may be

⁴ Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 Ind. Health L. Rev. 139, 148 (2006).

⁵ *Id.*

blocked from crafting their own solutions in response to market demands.⁶

Through partnerships, governments can benefit from businesses' greater opportunity for innovation and experimentation.

Public-private partnerships in some instances provide a framework for collaborative information sharing between the private sector and government, and among the business community. In many instances, businesses that must respond to the market demands of their consumers and customers have both the information and incentive to efficiently monitor and adjust programs that are intended to respond to particular problems.⁷

Moreover, some public problems are too large to be handled by state and local governments alone.⁸ For example, addressing national obesity trends may ultimately require an integrated, comprehensive solution, with governments working hand-in-hand with employers and businesses to create the right mix of incentives and options to promote a healthy lifestyle. Such partnerships have been

⁶ See M. Todd Henderson, *Voice and Exit in Health Care Policy*, Regulation 28, 31 (Spring 2013), available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-9.pdf>.

⁷ Michael L. Marlow & Alden F. Shiers, *Optimal Weight*, Regulation 10, 14 (Summer 2011), available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/8/regv34n2-3.pdf>; Trubek, *supra* at 148–49; Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Substitutes for Regulation*, 111 Mich. L. Rev. 197, 198–99 (2012).

⁸ See Grainne de Burca, *New Governance and Experimentalism: An Introduction*, 2010 Wis. L. Rev. 227, 232 (2010).

used to address a host of complex public policy issues, including, for example, combating counterfeiting,⁹ promoting cybersecurity,¹⁰ improving infrastructure,¹¹ facilitating disaster recovery,¹² fostering international development,¹³ and improving the environment.¹⁴

New York City itself is no stranger to public-private partnerships. For example, working together with city agencies, businesses have helped to protect and preserve much of the City's parkland through partnerships such as the Central Park Conservancy, Friends of the Highline, Open Space Alliance of North

⁹ U.S. Chamber of Commerce, *U.S. Chamber Applauds Public-Private Partnership in Defeating Counterfeiting Ring*, <http://www.uschamber.com/node/5413/%252Fmarch>.

¹⁰ See U.S. Chamber of Commerce, *Improving Our Nation's Cybersecurity Through the Public-Private Partnership* (Mar. 8, 2011), available at <http://www.uschamber.com/sites/default/files/issues/defense/files/2011cybersecuritywhitepaper.pdf>.

¹¹ See Eric Boyer, Rich Cooper, & Janet Kavinoky, *Public-Private Partnerships and Infrastructure Resilience*, National Chamber Foundation, <http://forum.uschamber.com/sites/default/files/PPPs%20and%20Infrastructure%20-%20NCF.pdf>.

¹² Kathy Snyder, *et al.*, *Maryland Businesses Get Their Stake in Emergency Response*, The Role of Business in Disaster Response, at 14–15, available at <http://bclc.uschamber.com/sites/default/files/documents/files/Role%20of%20Business%20in%20Disaster%20Response.pdf>; Mark Cooper, *Public-Private Collaboration: Six Years After Hurricane Katrina*, The Role of Business in Disaster Response, at 16–17, available at <http://bclc.uschamber.com/sites/default/files/documents/files/Role%20of%20Business%20in%20Disaster%20Response.pdf>.

¹³ U.S. Chamber Business Civic Leadership Center, *Global Development*, <http://bclc.uschamber.com/program/global-development>.

¹⁴ U.S. Chamber Business Civic Leadership Center, *Environmental Innovation*, <http://bclc.uschamber.com/program/environmental-innovation>.

Brooklyn, and the Prospect Park Alliance.¹⁵ CitiBike, a privately-funded bikesharing program, provides New Yorkers with a convenient, healthy option for transportation.¹⁶ The Center for Active Design, another public-private partnership, researches and implements active design strategies for New York's buildings and communities.¹⁷ Rather than recklessly opting for a coercive, top-down regulation, the Board would have done well to consider the substantial experience of the business community in addressing social problems.

B. Private Initiatives And Public-Private Partnerships Have Been A Valuable Tool In Addressing Obesity

Private-sector initiatives and public-private partnerships have proliferated in the public health context,¹⁸ and in particular, in campaigns to promote individual wellness and nutrition and to combat obesity. Indeed, the list of public-private

¹⁵ See Bridget Moriarity, *Adrian Benepe and the Legacy of Public-Private Partnerships in NYC*, Next City (July 3, 2012), <http://nextcity.org/daily/entry/adrian-benepe-and-the-legacy-of-public-private-partnerships-in-nyc>.

¹⁶ See Citi Bike, *About Citi Bike*, <http://citibikenyc.com/about>.

¹⁷ See Center for Active Design, *About*, <http://centerforactivedesign.org/about/>.

¹⁸ See Nan D. Hunter, 'Public-Private' Health Law: *Multiple Directions in Public Health*, 10 J. Health Care L. & Pol. 89, 103–05 (2007). See also U.S. Chamber of Commerce, Comments to Proposed Rule on Incentives for nondiscriminatory Wellness Programs in Group Health Plans, Jan. 25, 2013, available at <http://www.uschamber.com/sites/default/files/comments/Workplace%20Wellness%20Programs%20Proposed%20Rule%20-%20US%20Chamber%20of%20Commerce%20Comments.pdf> (“With health care costs continuing to rise and rates of obesity and other chronic diseases and conditions on the rise, wellness programs have provided a meaningful mechanism to reward positive behavior and healthy life-style choices.”).

partnerships in the health and wellness arena is long,¹⁹ and makes the Board's failure to engage the business community on this issue, and decision instead to proceed with a misguided and deeply flawed approach, particularly disappointing.

One of the most prominent partnerships is the Partnership for a Healthier America, through which many of *Amici*'s members work in conjunction with the federal government's successful Let's Move! campaign to develop strategies to end childhood obesity. The Partnership for a Healthier America also launched a "Drink Up" initiative encouraging Americans to "drink more water more often."²⁰ Indeed, First Lady Michelle Obama has publicly praised corporate participation in the joint venture: "Every day, great American companies are achieving greater and greater success by creating and selling healthy products. In doing so, they are showing that what's good for kids and good for family budgets can also be good for business."²¹

¹⁹ See Association of State and Territorial Health Officials, *Childhood Obesity: Harnessing the Power of Public and Private Partnerships* 1–2 (2007), available at http://www.nihcm.org/pdf/FINAL_report_CDC_CO.pdf (collecting numerous case studies of public-private partnerships addressing childhood obesity).

²⁰ See *Drink Up*, <http://www.youarewhatyoudrink.org/>.

²¹ Michelle Obama, *The Business Case for Healthier Food Options*, Wall St. J. (Feb. 27, 2013), <http://online.wsj.com/article/SB10001424127887323884304578328682206937380.html>; Rebecca Friendly & Araceli Ruano, *Public-Private Partnership in California Tackles Obesity, Hunger Epidemics*, ThinkProgress (Feb. 1, 2012), <http://thinkprogress.org/health/2012/02/14/425453/california-obesity-freshworks/?mobile=nc>.

In addition to public-private partnerships in this area, many businesses are collaborating to promote private-led innovative responses to the obesity trends. For example, the U.S. Chamber's Business Civic Leadership Council has created a "Nutrition and Obesity Prevention Issue Network" that "provides companies and stakeholders a high level of coordination, connections, and relevant information in order to tackle this challenging [obesity] problem."²² The food and beverage industry, in particular, has demonstrated a commitment to voluntarily fighting obesity, often in conjunction with government entities and other non-profit organizations. Indeed, leading beverage manufacturers who are members of the American Beverage Association ("ABA") market and sell a full range of beverage offerings, including sugar-sweetened, diet and zero calorie soft drinks, bottled water (still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in an assortment of sizes with clear labels that provide nutritional and caloric information so that consumers can make informed choices concerning the beverages that best suit their needs and preferences.²³ As a result, the average

²² See U.S. Chamber of Commerce Foundation, *Nutrition and Obesity Prevention*, <http://ccc.uschamber.com/issue/nutrition-and-obesity-prevention>.

²³ R. 56, 265–66.

calorie amount per beverage serving has dropped approximately 23% between 1998 and 2010.²⁴

The beverage industry focuses on increasing consumer awareness of nutritional information and empowering consumers to make informed choices for themselves. In February 2010, major beverage manufacturers and distributors, through the ABA, voluntarily launched the “Clear on Calories” program, under which every can, bottle, pack, and company-controlled vending or fountain machine now includes an additional and more prominent nutritional label displaying the calorie count of each beverage.²⁵ The uniform and readily noticeable label was designed after significant consumer research and coordination with the Food and Drug Administration, with the objective of providing easy-to-understand nutritional information to consumers. The food and beverage industry, through the Grocery Manufacturers Association and the Food Marketing Institute, implemented a similar plan, called the “Nutrition Keys” initiative, which commits

²⁴ See American Beverage Association, *Beverage Industry Responds to Latest Rudd Report* (Oct. 31, 2011), <http://www.ameribev.org/news--media/news-releases--statements/more/253/>; see also R. 344 (finding a 20% decrease between 2001 and 2010).

²⁵ See American Beverage Association, *New Calorie Labels on Front of Beverages Arrive in Stores* (Feb. 8, 2011), <http://www.ameribev.org/nutrition--science/clear-on-calories/news-releases/more/235/>.

member companies to a front-of-the pack label displaying calorie, saturated fat, sodium, and sugar amounts per serving.²⁶

Similarly, the ABA recently unveiled the “Calories Count™ Vending Program” in Chicago, San Antonio, and Washington, D.C. This program increases the availability of lower-calorie beverages in many vending machines and ensures that those machines prominently display the calorie amounts for each beverage choice.²⁷ Under the program, all vending machines in city buildings or controlled by an ABA member will contain a prominent label on the front of the machine with the words “Calories Count. Check then Choose” or “Try a Low-Calorie Beverage,” encouraging consumption of lower-calorie drinks.²⁸ In addition, the American Beverage Foundation for a Healthy America gave a five million dollar grant to Chicago and San Antonio to fund an “employee wellness challenge” to

²⁶ See Grocery Manufacturers Association, Nutrition Keys *Front-of-Package Nutrition Labeling Initiative Fact sheet*, http://www.gmaonline.org/file-manager/Health_Nutrition/nutritionkeys-factsheet.pdf.

²⁷ See American Beverage Association, *America’s Beverage Companies Are Delivering for the Cities of Chicago and San Antonio*, http://www.ameribev.org/files/343_final%20vending%20backgrounder%20with%20label.pdf; American Beverage Association, *Calories Count*, <http://www.ameribev.org/nutrition-science/calories-count/>. Although this program, as of now, has been rolled out only in these cities, the ABA is working with mayors throughout the country and anticipate expanding the program to various cities nationwide and to all vending machines in public spaces. See *America’s Beverage Companies*, *supra*.

²⁸ See American Beverage Association, *Calories Count: America’s Beverage Companies Launch New Vending Program* (Oct. 8, 2012), available at <http://www.deliveringchoices.org/?p=547>.

increase participation among city employees and family members in various wellness programs.²⁹ Moreover, the beverage industry has promoted a comprehensive approach to obesity prevention and reduction, implementing programs, among others, to increase physical fitness in schools and local communities,³⁰ creating “Healthy Living Hubs” to bring fresh fruits and vegetables into communities considered “food deserts,”³¹ and partnering with the U.S. Conference of Mayors to reward cities promoting a balanced diet and physical activity.³²

Furthermore, unlike government-mandated regulation, industry-led approaches to social issues can be tailored to different consumer audiences, as opposed to a one-size-fits all, top-down approach for all consumers. They can

²⁹ City of Chicago, *Mayor Emanuel, San Antonio Mayor Julian Castro and the American Beverage Foundation for a Healthy America Launch New Municipal Wellness Competition* (October 8, 2012), http://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2012/october_2012/mayor_emanuel_sanantoniomayorjuliancastroandtheamericanbeveragef.html.

³⁰ See *Coca-Cola Announces Its Steps to Nationally Address Obesity*, Chicago Defender, Jan. 13, 2013, at 15; American Beverage Association, *We’re Delivering Mississippi* (Apr. 19, 2012), available at <http://www.deliveringchoices.org/?p=419> (describing an initiative of the American Beverage Foundation for a Healthy America which provided a grant to increase physical fitness among Mississippi government employees and citizens).

³¹ See Bart Mills, *Soda Companies Chip in on Lima’s Health Program*, The Lima News (Feb. 15, 2012), http://www.limaohio.com/news/local_news/article_9b33fed1-5e10-5179-bb89-3725c0231623.html.

³² See American Beverage Association, *America’s Beverage Companies Team Up With U.S. Conference of Mayors to Announce Childhood Obesity Prevention Awards* (Feb. 20, 2012), available at <http://www.deliveringchoices.org/?p=382>.

provide different solutions depending on the age of consumers, such as the ABA's adoption of voluntary guidelines by which its member companies agree to provide only milk, juice, and water options in elementary and middle schools.³³ Similarly, private initiatives can adopt specific, geography-based approaches, e.g., by addressing consumers in food deserts differently from those who have broader access to a variety of food and beverage choices. In other words, they offer consumers additional information to make their choices more informed, while still respecting their right to make choices for themselves.

The beverage industry's voluntary and broad efforts to support informed consumer choice are just one example of the value of voluntary, industry-led programs and public-private partnerships designed to address complex social problems. In light of the robust experience with industry-led programs in the public health sphere, the Board's failure to directly engage the business community is a major disappointment. The Board ignored New York City's own substantial experience devising creative solutions with public-private partnerships in other areas. Indeed, the Board made no serious effort to engage the business community at all. It opted instead for a coercive, top-down approach without adequately

³³ See American Beverage Association, *Alliance School Beverage Guidelines Final Progress Report A-1* (Mar. 8, 2010), http://www.ameribev.org/files/240_School%20Beverage%20Guidelines%20Final%20Progress%20Report.pdf.

considering its limited expected benefits, its substantial costs, and the likely market distortions that it will create.

II. The Portion Cap Rule Violates Core Principles Of Responsible Regulation

Setting aside the Board's astonishing failure to even *consider* the threshold question of whether regulation was even necessary in light of private, market-based responses or public-private partnerships, the Board's final Portion Cap Rule is also unlawful, shortsighted, and counterproductive. As the First Department correctly held, in enacting the Portion Cap Rule, the Board unlawfully exceeded the scope of its authority and impermissibly acted in a legislative capacity. R. 1783-95; *see also* Plaintiffs-Respondents' Brief at 43–64. Yet, even if the Board had the authority to make the complex economic, health, and social policy choices implicated by the Rule—which it clearly did not—the Rule it promulgated would still fail because it is arbitrary and capricious. Indeed, it is a paradigmatic example of irresponsible regulation.

A. The Board Was Not Authorized To Engage In The Rigorous Cost-Benefit Analysis That This Kind of Complex Policy Solution Requires

A fundamental, threshold question when considering the validity of any agency regulation is whether a legislative body delegated policy-making authority to the agency in the first instance. As the First Department correctly concluded

and as Plaintiff-Respondents explain, basic New York separation of powers principles make clear that the only body with authority to evaluate a provision like the Portion Cap Rule is the City Council—which has plenary authority to undertake the requisite cost-benefit analysis and weighing of competing policy objectives. *See* Plaintiffs-Respondents’ Br. at 58–62; *see also Boreali v. Axelrod*, 71 N.Y.2d 1, 12 (1987) (observing that “[s]triking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function,” and holding that the agency at issue acted outside of the scope of its authority where it “ha[d] not been authorized to structure its decision making in a ‘cost-benefit’ model”). In other words, the Board’s attempt to regulate in this complex area of competing policy considerations, absent the statutory authority to do so, was per se irresponsible.

Nor can the Board’s failure to acknowledge and explain its weighing of competing social and economic policy objectives excuse its trespass into legislative policy-making. The flaws of the Portion Cap Rule—including its arbitrary line-drawing and meaningless cost-benefit analysis—are in part due to the failure of the Board to stay within its traditional area of authority and expertise. As Plaintiffs-Respondents explain, in enacting the Rule, the Board usurped legislative authority it did not possess or have the expertise to wield. *See* Plaintiffs-Respondents’ Br. at 43–64.

In addition, the Board chose to act despite its belief that it lacked the authority to regulate in a non-arbitrary way. The agency now claims that the Rule’s arbitrary exemptions for alcoholic beverages and certain FSEs are necessary because jurisdiction over alcohol and those exempt FSEs is vested in the State Liquor Authority and the State Department of Agriculture and Markets respectively. But rather than excusing the arbitrariness of the Portion Cap Rule, this jurisdictional morass indicates that the Board overreached in “going it alone.” If the agency was precluded from enacting a non-arbitrary portion cap regulation, that is powerful evidence it should have refrained from enacting any portion cap regulation on its own.

B. The Rule’s Prohibitions Are Not Sufficiently Connected To Its Stated Objective

Even assuming the Board had authority to regulate in this sphere—which it did not—the Board was obligated to identify a concrete objective, identify a policy that is sufficiently connected to that objective, and determine whether the proposed policy is actually capable of achieving the objective. The Board unreasonably failed to conduct such an inquiry. It never established a reasonable basis for its conclusion that sugary drink consumption is a primary driver of the growth in obesity rates. Nor did it establish that banning the sale of sugary drinks in containers larger than 16 ounces will reduce obesity rates in New York City.

The Rule regulates one perceived aspect of the obesity problem (consumption of sugary drinks) in a long, multi-factor chain of potentially contributing causes. As Plaintiffs-Respondents note, the Board failed to address numerous studies that cast doubt on the causal linkage between consumption of large-portioned SSBs and obesity.³⁴ The Board also failed to reasonably demonstrate that the intrusive ban would successfully address any of the other myriad causes of obesity, including consumption of calories from other sources, which far exceed consumption from SSBs, as well as calorie expenditure, including lack of physical activity and exercise.³⁵ Without addressing the problem more holistically, the Rule has little chance of success.

The Board also failed to confront evidence that the Rule might, in fact, *exacerbate* the problem by increasing overall calorie consumption. Indeed, the primary study the Board cited for the proposition that portion sizes and obesity rates are positively correlated is a Cornell University study³⁶ whose author, Dr. Brian Wansink, has since publicly explained that the study's conclusions do not support the Portion Cap Rule and that the Portion Cap Rule "will be an epic

³⁴ Plaintiffs-Respondents' Br. at 14; *see also* R. 372–73 (listing several studies that found no significant link between SSBs and weight gain in children and adolescents); R. 346, 349.

³⁵ *See* U.S. Dep't of Agriculture & U.S. Dep't of Health and Human Services, *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010* D1-3 (May 2010), *available at* <http://www.cnpp.usda.gov/dgas2010-dgacreport.htm>.

³⁶ *See* R. 132–133.

failure.”³⁷ The Board also ignored other studies that have shown that prohibitions similar to the Portion Cap Rule provoke “rebellion” among participants in various ways.³⁸ Most significantly, in such studies, participants who were forced to consume low-fat or low-calorie meals often chose to consume higher-calorie foods at later meals in response, leading to an overall increase in calorie consumption.³⁹ Accordingly, the Board failed to adequately demonstrate that the premise on which the Rule is based—that banning sugary drinks above a certain size will lower obesity rates—is reasonable.

C. Even Assuming The Board Had Authority To Promulgate The Rule, The Board’s Cost-Benefit Analysis Was Arbitrary And Irrational

The Board compounded its errors by attempting to justify the Portion Cap Rule—which it had no authority to promulgate and was otherwise substantively unreasonable—based on a half-hearted and half-baked cost-benefit analysis. It pointed to health benefits that are entirely speculative, *see supra* Part II.B, and

³⁷ See Brian Wansink & David Just, *How Bloomberg’s Soft Drink Portion Cap Rule Will Backfire on NYC Public Health*, The Atlantic (June 14, 2012), <http://www.theatlantic.com/health/archive/2012/06/how-bloombergs-soft-drink-ban-will-backfire-on-nyc-public-health/258501/>; See Anemona Hartocollis, *To Gulp or to Sip? Debating a Crackdown on Big Sugary Drinks*, N.Y. Times (May 31, 2012), <http://www.nytimes.com/2012/06/01/nyregion/to-gulp-or-to-sip-debating-a-crackdown-on-big-sugary-drinks.html?pagewanted=all>.

³⁸ Wansink & Just, *supra*.

³⁹ *Id.*; see also Sarah Kliff, *Will New York City’s large soda Portion Cap Rule backfire?*, Wash. Post (Apr. 14, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/14/will-new-york-citys-large-soda-ban-backfire/>.

made no findings as to the costs of compliance. Instead, it blithely asserted that though “there may be some associated costs” with adjusting to the Portion Cap Rule, “the potential health benefits [of the Portion Cap Rule] outweigh these costs.” R. 450. The truth is that FSEs, beverage manufacturers, and beverage distributors all face *substantial* costs in adjusting their supply chains and product offerings to comply with the Portion Cap Rule. Businesses will be forced to change menus, glasses, bottles, cans, bottle and can molds, bottling machines, packaging labels, advertisements, vending machines, and countless other related aspects of their supply chains to comply.⁴⁰ These costs may range from the hundreds of thousands to millions of dollars per business.⁴¹ In order to abide by the Portion Cap Rule, these manufacturers and distributors would have to create duplicative supply chains just for New York City. Moreover, the selected portion

⁴⁰ See R. 658–60 (outlining the vast number of processes that bottlers, distributors, and restaurants must alter under the Portion Cap Rule). The sheer complexity of the rules will create substantial confusion, exacting further costs, as many businesses will be forced to ascertain what percentage of their revenue comes from ready-made food, what percentage of milk certain beverages contain, and precisely how many lumps of sugar may be added to a beverage before it breaches the calorie threshold. See, e.g., Vivian Yee & Michael M. Grynbaum, *City’s New Drink Rules Add Wrinkle to Coffee Orders*, N.Y. Times (Mar. 6, 2013), http://www.nytimes.com/2013/03/07/nyregion/new-sugary-drink-rules-complicate-coffee-orders.html?ref=todayspaper&_r=0 (detailing the confusion among coffee shops about the new rules, and noting that some intend to hand out fliers at cash registers to explain the rules to perplexed consumers).

⁴¹ See, e.g., Seth Goldman, *Mayor Bloomberg and Our 16.9-Ounce Tea*, Wall St. J. (July 22, 2012), <http://online.wsj.com/article/SB10000872396390444873204577537303844223474.html>; R. 1696.

cap of 16 ounces is especially burdensome to beverage manufacturers and distributors, as many beverages are sold in 500 milliliters (or 16.9 ounces) and 20 ounce cans and bottles.⁴² The Board provided no meaningful justification for this cutoff, instead summarily stating that it “balances health impact and feasibility for FSEs.” R. 452.

The Board also failed to consider the costs and burdens its Rule would impose on businesses operating outside of New York City—indeed, throughout the country—by potentially forcing companies to adjust their entire national supply chains to comply with the Portion Cap Rule. New York City’s economy ranks among the top 15 in the world, higher than India’s, Mexico’s, and South Korea’s;⁴³ it is unreasonable for the Board to assume, without analysis, that its regulations would merely have “some” costs, and to refuse to consider the economic effects beyond the City’s borders. Moreover, the Rule sparked a patchwork of inconsistent state and local regulations. In addition to jurisdictions considering copycat bans,⁴⁴ Mississippi and Wisconsin have enacted “anti-Bloomberg” laws

⁴² See Goldman, *supra*.

⁴³ Richard Florida, The 25 Most Economically Powerful Cities in the World, The Atlantic Cities (Sep. 15, 2011), <http://www.theatlanticcities.com/jobs-and-economy/2011/09/25-most-economically-powerful-cities-world/109/#slide2>.

⁴⁴ See, e.g., Jennifer Mattson, *Los Angeles considers ban on large sodas at parks and libraries*, Global Post (June 20, 2012), <http://www.globalpost.com/dispatch/news/regions/americas/united-states/120620/los-angeles-considers-ban-large-sodas-at-parks-a#1>; Emily Leaman, *Mayor Nutter Hearts Bloomberg’s Big-Soda Ban*, Philadelphia Magazine (June 8, 2012),

that prohibit local governments from regulating food and drinks in restaurants.⁴⁵ If this Court were to reverse the judgment and allow the Portion Cap Rule to stand, it could drastically exacerbate the emerging inconsistent patchwork of state and municipal regulations governing the sale of SSBs. Businesses may be barred from selling certain SSBs in some states but not others. Or they may be free to sell SSBs in the vast majority of localities within a state, but not in one or more cities within that state. This kind of balkanized regulation would wreak havoc on finely tuned national distribution chains, imposing substantial compliance costs on businesses and consumers alike, and creating significant burdens on interstate commerce. *Cf. Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989) (patchwork of inconsistent beverage laws can “create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude”).

<http://blogs.phillymag.com/bewellphilly/2012/06/08/mayor-nutter-hearts-bloombergs-soda-ban/>; *D.C. councilmembers still support super-sized soda ban*, ABC7 News (Mar. 12, 2013), <http://www.wjla.com/articles/2013/03/d-c-councilmembers-still-support-super-sized-soda-ban-86150.html>; *Big soda ban proposed by mayor of Cambridge, Mass.*, CBS News (June 19, 2012), http://www.cbsnews.com/8301-504763_162-57456252-10391704/big-soda-ban-proposed-by-mayor-of-cambridge-mass/; see also Editorial, *San Jose was right to bury ban on sugary drinks*, San Jose Mercury News (Aug. 28, 2013), http://www.mercurynews.com/opinion/ci_23964902/mercury-news-editorial-san-jose-should-reject-proposed (discussing proposed ban on sugary drinks at San Jose government properties and events).

⁴⁵ See Kristen A. Lee, *Mississippi's so-called anti-Bloomberg bill signed into law*, NY Daily News (Mar. 21, 2013), <http://www.nydailynews.com/news/politics/mississippi-anti-bloomberg-bill-signed-law-article-1.1294848>; Patrick Marley, *Budget Committee Votes to Ban Limits on Soda Sizes*, Milwaukee Journal Sentinel (May 9, 2013), <http://www.jsonline.com/blogs/news/206802061.html>.

In short, the Board rushed to the uninformed, erroneous, and illegitimate judgment that the Portion Cap Rule’s benefits would outweigh its costs. In doing so, the Board strayed far beyond its statutory mission and offered a cursory cost-benefit “analysis” that it had no business conducting in the first place. If it thought it had authority to engage in this enterprise at all, it should have recognized that a complex measure like the Portion Cap Rule—which would impose tens of millions of dollars in direct costs on affected businesses and untold burdens on interstate commerce—required a rigorous cost-benefit analysis that only the City Council properly can conduct. The Board should have understood that, given the inherent limitations on its authority, it could not possibly adopt a smart, reasonable, and responsible regulation in this area.

D. The Rule Draws Arbitrary Lines And Creates Nonsensical Loopholes That Undercut The Objective Of The Rule And Are Unfair To Businesses

As the Supreme Court recognized, the Portion Cap Rule is littered with arbitrary lines and loopholes. R. 40. These arbitrary exceptions serve to discriminate against certain businesses and to undermine the justification for placing these burdens on businesses and consumers. First, the Rule carves out from the definition of sugary drinks a plethora of beverages, including all alcoholic beverages and beverages that contain more than 50% of milk or a soy-based milk substitute. N.Y.C.R.R. tit. 24, § 81.53(a)(1). The Rule also covers only some

FSEs—such as street carts, restaurants, and movie theaters—while excluding other FSEs that derive less than 50% of their revenue from food prepared in individual portions—such as supermarkets, certain bodegas, pharmacies, and gas stations. R. 452. Moreover, the Rule does nothing to affect various other activities or offerings, including selling sugary drinks in bundles, offering free refills, and offering self-serve sugar, which result in the consumption of just as many, if not more, calories.

These exceptions obliterate any purported effect that the Board claims the Rule would have. Consumers are free to purchase as many ounces as they wish of alcoholic beverages, milkshakes, or even sugary drinks from certain favored FSEs. Consumers can still get free refills or purchase sugary drinks in bundles. The Board claims it had no authority to regulate alcohol or the FSEs it exempted from the Rule, but even were that true, it would simply indicate that governing calorie consumption is too complex for one administrative agency with a limited regulatory mandate to attempt to regulate on its own. *See supra* p.22.

Equally troubling, the exceptions for certain beverages and FSEs will arbitrarily favor some businesses and punish others. For example, a food cart is barred from selling a 20-ounce soft drink, while a convenience store on the same block is not. An iced tea manufacturer will be barred from selling a 500 milliliter iced tea, while another business can sell a 30-ounce blended coffee and milk drink.

The Board gave only lip service to these concerns, asserting—without any evidence or serious analysis—that any feared market distortions were “unlikely” and “improbable.” R. 450. Moreover, it did not base these distinctions on reasons related to obesity reduction. The Portion Cap Rule thus arbitrarily picks winners and losers, placing some businesses at a competitive disadvantage while leaving others unaffected. As the Supreme Court correctly concluded, these classifications render the Rule arbitrary and capricious and, therefore, invalid. R. 40.

E. The Rule Was Not The Product Of Open And Transparent Rulemaking

The Rule is the result of a process that utterly failed to consider the concerns of affected businesses and consumers. Although the Board solicited public comments, it ignored scientific studies that contradicted its assumptions, disregarded concerns about its arbitrary line-drawing, and blindly assumed that the Portion Cap Rule would achieve its stated goals without substantially burdening businesses and consumers. Indeed, despite over 38,000 comments to the proposed rule and over 90,000 signatures opposing it, the Rule remains materially identical to the proposal first designed by Mayor Bloomberg.

Even if the Board had the authority it claims, the Portion Cap Rule has appeared to many from its inception to be more of a publicity stunt than a serious effort to tackle the problem of obesity through a reasoned rulemaking process. Just one day after first declaring his intention to ban certain SSBs to help fight obesity,

the mayor proclaimed an “NYC Doughnut Day” to celebrate a confection that contains “appreciably more fat calories than in many of the gargantuan beverages the mayor has targeted.” N.R. Kleinfield, *Looking at Bloomberg’s Soda Ban Through a Doughnut Hole*, N.Y. Times (June 1, 2012), <http://www.nytimes.com/2012/06/02/nyregion/on-national-donut-day-some-find-mixed-messages-from-bloomberg.html>. As richly ironic as it may be for the Mayor to celebrate the doughnut in the same 24 hour window that he announced a ban on sugary beverages, that jarring contrast only serves to highlight the irrationalities and inconsistencies that riddle the Portion Cap Rule itself.

* * *


There is a right way to tackle complex problems and a wrong way to do so. The Portion Cap Rule is the epitome of the wrong way.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the First Department permanently enjoining the Board from implementing or enforcing the Portion Cap Rule.

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Respectfully submitted,



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