SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE; THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION; SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; THE NATIONAL RESTAURANT ASSOCIATION; THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE; and THE AMERICAN BEVERAGE ASSOCIATION, Petitioners-Appellees, For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules, - against - THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. THOMAS FARLEY, in his Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene, Respondents-Appellants.	**NEW YORK COUNTY** **Index No. 653584/12** **NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

PLEASE TAKE NOTICE THAT, upon the annexed affirmation of Kim E. Richman, dated March 25, 2013, and the materials attached thereto, The National Alliance for Hispanic Health; The National Congress of Black Women, Inc.; The New York Chapter of the National Association of

Hispanic Nurses; Maya Rockeymoore, Ph.D.; Montefiore Medical Center; The Mount Sinai Medical Center; New York State American Academy of Pediatrics, District II; The Children's Aid Society; Prevention Institute; The California Endowment; Shape Up America!™; Dr. Walter Willett, M.D., M.P.H., Dr.P.H.; Comunilife; United Puerto Rican Organization of Sunset Park; The Harlem Health Promotion Center; and The Association of Black Cardiologists, Inc. (collectively, the "Obesity Prevention and Health Equity Experts") will move this Court at the Supreme Court Appellate Division, First Department, located at 27 Madison Avenue, New York, New York 10010, on the 4th day of April, 2013, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting the above-named organizations and individuals leave to file the attached *amicus curiae* brief in the above-captioned matter, on the grounds that the Obesity Prevention and Health Equity Experts would invite the Court's attention to arguments that might otherwise escape its consideration and would otherwise be of special assistance to the Court.

The Obesity Prevention and Health Equity Experts are dedicated to maintaining public health and to advancing the health of their members, clients, and patients from underserved and racial and ethnic communities, who suffer disproportionately from the diseases associated with the obesity-

related health crisis. They respectfully request that the Court grant their motion for leave to file the brief attached hereto as Exhibit A and weigh the merits of the case in light of the gravity of the public health challenge facing New York City and our nation. Attached hereto as Exhibit B is the Order of the New York State Supreme Court for New York County from which the respondents-appellants appealed.

Dated: New York, New York
March 25, 2013

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County of New York

SUPREME COURT OF THE STATE OF NEW YORK
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NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE; THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION; SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; THE NATIONAL RESTAURANT ASSOCIATION; THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE; and THE AMERICAN BEVERAGE ASSOCIATION, Petitioners-Appellees, For a Judgment Pursuant to Articles 78 and 30 of the Civil Practice Law and Rules, - against - THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE NEW YORK CITY BOARD OF HEALTH; and DR. THOMAS FARLEY, in his Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene, Respondents-Appellants.	**NEW YORK COUNTY** **Index No. 653584/12** **AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE***

KIM E. RICHMAN, an attorney duly licensed to practice law before the courts of the State of New York, affirms the following under penalty of perjury:

1. I am a principal of Reese Richman LLP. I represent the proposed *amici curiae* in this matter.

2. Proposed *amici,* The National Alliance for Hispanic Health; The National Congress of Black Women, Inc.; The New York Chapter of the

National Association of Hispanic Nurses; Maya Rockeymoore Ph.D.; Montefiore Medical Center; New York State American Academy of Pediatrics, District II; The Children's Aid Society; Prevention Institute; The California Endowment; Shape Up America!™; Dr. Walter Willett, M.D., M.P.H., Dr.P.H.; Comunilife; United Puerto Rican Organization of Sunset Park; The Harlem Health Promotion Center; and The Association of Black Cardiologists, Inc. (collectively, the "Obesity Prevention and Health Equity Experts") are dedicated to serving the communities most disproportionately impacted by the obesity-related health crisis and respectfully request that this Court grant them leave to file as *amici curiae* in support of Respondents-Appellants.

3. In support of this motion, affirmant states that the purpose of the Obesity Prevention and Health Equity Experts' *amicus* brief is to aid the court in understanding both the need for obesity prevention measures regulating commercial practices and the existence and consequences of health disparities based on race and socioeconomic status. Proposed *amici* have extensive professional expertise and personal experience with the serious implications of the obesity-related health crisis. Their members, clients, and patients see every day the dire consequences of that health crisis for underserved communities and for members of racial and ethnic groups

that are disproportionately impacted by the diseases associated with obesity. As a result, they recognize the importance of government action to reduce the incidence of obesity and chronic disease, and they support the New York City Board of Health's rule creating a cap on the portion size of sugary drinks sold in restaurants.

4. Proposed *amici* urge the Court to recognize the seriousness and significance of the challenge to Section 81.53 of the New York City Health Code (the "Portion Cap Rule"). The Rule is modest in scope; it restricts the portion size for sugary beverages sold at restaurants. That makes it easy to make light of it in social conversation or in the press. But the Rule is substantial in import and in effect.

5. As proposed *amici* demonstrate, the scientific evidence strongly supports the Board of Health's determination that the Portion Cap Rule will reduce consumption of sugary beverages. That alone will protect the communities proposed *amici* serve, both by increasing portion awareness and by decreasing default consumption. More broadly, however, proposed *amici* offer the Court a deeper understanding of the value of the Rule—a first-in-the-nation effort at portion-size regulation—in beginning the larger task of restricting business practices that encourage overconsumption of sugar-sweetened beverages. That task is critical to address the obesity-

related health crisis and is of particular importance to the communities served by proposed *amici.*

6. The National Alliance for Hispanic Health (the Alliance) is the nation's foremost science-based source of information and trusted advocate for the health of Hispanics in the United States. The Alliance's mission is to improve the health of Hispanics and work with others to secure health for all. The Alliance conducts research, demonstration programs, and provides health services through its member organizations, which include community-based groups, national organizations, universities, government agencies, foundations, and corporations. The Alliance represents thousands of Hispanic health providers across the nation providing services to millions each year, making a daily difference in the lives of Hispanic communities and families. The work of the Alliance has demonstrated the critical role of policy in supporting healthy environments, including access to healthy foods and opportunity for physical activity, which can transform the well-being of communities. The Alliance is dedicated to community-based solutions and the principle that good corporate citizenship means policies and corporate actions that benefit the well-being of all consumers.

7. The National Congress of Black Women, Inc. (NCBW) is a 501(c)(3) non-profit organization dedicated to the educational, political,

economic, and cultural development of African American Women and their families. NCBW also serves as a nonpartisan voice and instrument on issues pertaining to the appointment of African American Women at all levels of government, and to increase African American women's participation in the educational, political, economic and social arenas. Currently, NCBW provides opportunities for women for leadership and decision-making positions in government, nonprofit organizations and the private sector. NCBW understands the urgency of working to alleviate the high chronic disease rates in the African-American community, diseases that could be prevented by stronger education and policy to address how sugary drinks, among other things, are negatively impacting our health. African-American women and children have very high rates of obesity, diabetes and high blood pressure. It is our duty to do what we can to prevent the health problems our community is facing. Everyone will not heed the advice, but we must provide it to those community members willing to listen and we must step forward as citizens to change the way businesses operate when they are expanding their profits at our expense. Mayor Bloomberg is right to appeal to people in the community and to businesses to do the right thing.

8. The New York Chapter of the National Association of Hispanic Nurses is the voice of Hispanic nurses in New York and dedicated to the

improvement of the quality of health and nursing care of Hispanic consumers. The organization is committed to advancing health in Hispanic communities and to lead, promote, and advocate the educational, professional, and leadership opportunities for Hispanic nurses. Working with health professional and community partners throughout New York the work of the organization promotes culturally proficient services to Hispanic communities, including policy to improve the health and well being of Hispanic communities. Promoting healthy environments, physical activity, and good nutrition is central to the work of the New York Chapter of NAHN.

9. Maya Rockeymoore Ph.D. is a respected policy analyst, researcher, and advocate with expertise in an array of public policy issues. She is the CEO of Global Policy Solutions (GPS), a Washington D.C.-based consulting firm. Prior to launching GPS, Dr. Rockeymoore served as Vice President for Research and Programs at the Congressional Black Caucus Foundation where she managed a portfolio of programs in the areas of economic development, education, public health and international affairs. Before joining CBCF, Dr. Rockeymoore served as the Senior Resident Scholar for Health and Income Security at the National Urban League's policy think tank. She is the author of *The Political Action Handbook: A*

How To Guide for the Hip Hop Generation and co-editor of *Strengthening Community: Social Insurance in a Diverse America*.

10. Montefiore Medical Center, the academic medical center and University Hospital for Albert Einstein College of Medicine, is centered in the heart of one of the nation's most economically and health-challenged communities and is nationally renowned for clinical excellence—breaking new ground in research, training the next generation of healthcare leaders, and delivering science-driven, patient-centered care. Recognized among the top hospitals nationally and regionally by U.S. News & World Report, Montefiore provides primary and specialty care through a network of more than 130 locations across the region, including 90,000 admissions, 500,000 home care visits and 2.6 million ambulatory visits a year.

11. The Mount Sinai Medical Center, which encompasses both The Mount Sinai Hospital and the Icahn School of Medicine at Mount Sinai, serves one of the most diverse patient populations in the United States. Its main campus is situated between Manhattan's Upper East Side and East Harlem, and it includes clinical facilities in all five boroughs, including Mount Sinai Queens hospital. Established in 1968, the Icahn School of Medicine is one of the nation's top medical schools, noted for innovation in education, biomedical research, clinical care delivery, and local and global

community service. The Mount Sinai Hospital, founded in 1852, is a 1,171-bed tertiary- and quaternary-care teaching facility and one of the nation's oldest, largest, and most-respected voluntary hospitals. Of the top 20 hospitals in the United States, Mount Sinai is one of 12 integrated academic medical centers whose medical school ranks among the top 20 in National Institutes of Health funding and U.S. News & World Report rankings, with a hospital that is on the elite U.S. News & World Report Honor Roll. Nearly 60,000 people were treated at Mount Sinai as inpatients last year, and approximately 560,000 outpatient visits took place.

12. The New York State American Academy of Pediatrics, District II is an endorsed District Affiliate of the national organization and represents more than 5,000 pediatricians in offices, clinics and academic medicine across the state. We work to attain optimal physical, mental and social health and well-being for all children in New York. Our national organization, the American Academy of Pediatrics, is composed of over 55,000 pediatricians.

13. The Children's Aid Society is an independent, not-for-profit organization established to serve the children of New York City. The mission of Children's Aid is to help children in poverty to succeed and thrive. Founded in 1853, it is one of the nation's largest and most innovative non-sectarian agencies. Today Children's Aid serves New York's neediest

children and their families at more than 45 locations in the five boroughs and Westchester County. All aspects of a child's development are addressed as he or she grows, from health care to academics to sports and the arts. And because stable children live in stable families, a host of services are available to parents, including housing assistance, domestic violence counseling and health care access. Services are provided in community schools, neighborhood centers, health clinics and camps.

14. Prevention Institute brings cutting-edge research, practice, and analysis to today's pressing health and safety concerns. Determined to achieve health and safety for all, to improve community environments equitably, and to serve as a focal point for primary prevention practice, the Institute asks what can be done in the first place, before people get sick or injured. Prevention Institute has inspired a broad comprehensive approach to systematizing prevention as a distinct discipline – not simply an education message. It infuses a community and policy orientation into prevention practices and it emphasizes the importance of quality prevention strategies – ones that are well designed and achieve far-reaching outcomes. Obesity is an epidemic in our nation and disproportionately impacts underserved communities. Based on our decades of experience working on public health issues, we believe that New York City's portion cap regulation has the

potential to be an effective intervention as part of a larger strategy to encourage healthy eating.

15. The California Endowment is a private, statewide health foundation, which was established in 1996 to expand access to affordable, quality health care for underserved individuals and communities, and to promote fundamental improvements in the health status of all Californians. The Endowment challenges the conventional wisdom that medical settings and individual choices are solely responsible for people's health. The Endowment believes that health happens in neighborhoods, schools, and with prevention.

16. Shape Up America!™ is a non-profit organization founded in 1994 by former U.S. Surgeon General C. Everett Koop to raise awareness of obesity as a health issue. Shape Up America!™ delivers research and consumer information on the linkages between obesity and chronic diseases that are now the leading causes of death and disability in the U.S. Shape Up America!™ provides responsible information about weight management and delivers tools and resources encouraging physical activity and healthy eating for all Americans.

17. Dr. Walter Willett, MD, MPH, DrPH, is Professor of Epidemiology and Nutrition and Chair of the Department of Nutrition at

Harvard School of Public Health, and Professor of Medicine at Harvard Medical School. He leads several major studies on diet and risk of non-communicable disease, has published over 1,500 papers mainly addressing nutrition and health, and is author of the textbook, Nutritional Epidemiology. He is a member of the Institute of Medicine of the National Academy of Science and has served as a member of its Food and Nutrition Board.

18. Comunilife's mission is to improve the quality of life and create a healthier tomorrow for New Yorkers with special needs in the Hispanic and broader communities – by providing culturally competent health and human services and a continuum of affordable and supportive housing. Through our 1,502 units of supportive housing for persons living with HIV/AIDS and/or mental illness and our outpatient mental health clinic we serve more than 2,800 at-need New Yorkers annually.

19. United Puerto Rican Organization of Sunset Park (UPROSE) is dedicated to the development of Southwest Brooklyn and the empowerment of its residents primarily through broad and converging environmental, sustainable development, and youth justice campaigns. Founded in 1966, UPROSE is Brooklyn's oldest Latino community-based organization. In 1996 UPROSE's mission refocused on organizing, advocacy and developing intergenerational, indigenous leadership through activism around a host of

environmental justice issues, including access to healthy food options. We aim to ensure and heighten community awareness and involvement, develop participatory community planning practices, and promote sustainable development with justice and governmental accountability. Sales practices that promote unhealthy food and beverage consumption often target low-income communities with a history of health disparities. Restriction of these practices improves health by reducing unhealthy eating and increases the opportunities and pressures for greater access to healthy food.

20. The Harlem Health Promotion Center (HHPC) is one of 37 Prevention Research Centers funded by the Centers for Disease Control and Prevention to address health disparities within vulnerable communities. Sugar-sweetened beverages are a key factor contributing to obesity, which, in turn is associated with hypertension, diabetes and cardiovascular disease. These health issues take a heavy toll on the health status of all Americans and disproportionately affect people of color in communities like Harlem. The HHPC works to raise awareness and provide support for behavior change and advocacy efforts.

21. The Association of Black Cardiologists, Inc. (ABC) is a nonprofit organization with an international membership of 2,500 health professionals, lay members of the community (Community Health

Advocates), corporate members, and institutional members, dedicated to eliminating the disparities related to cardiovascular disease in all people of color. Founded in 1974 by 17 dedicated medical professionals, ABC's members are united by the need to bring special attention to the adverse impact of cardiovascular disease on the African American community. The correlation between excessive consumption of sugar-sweetened beverages and heightened risk of cardiovascular disease is well established, as is the disproportionate epidemiological impact on African Americans.

22. Attached hereto as Exhibit A is a true and correct copy of the proposed brief of the Obesity Prevention and Health Equity Experts.

23. Attached hereto as Exhibit B is a true and correct copy of the Order of the New York Supreme Court for New York County from which the respondents-appellants appealed.

WHEREFORE, for the reasons set forth above, I respectfully request that the Obesity Prevention and Health Equity Experts' motion for leave to file a brief as *amici curiae* be granted.

Dated: New York, New York
March 25, 2013

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EXHIBIT A

New York State Supreme Court

Appellate Division — First Department

New York County Clerk's Index No. 653584/2012

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

Petitioners-Respondents,

– against –

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

Respondents-Appellants.

BRIEF OF *AMICI CURIAE*
THE NATIONAL ALLIANCE FOR HISPANIC HEALTH, THE NATIONAL CONGRESS OF BLACK WOMEN, INC., THE NEW YORK CHAPTER OF THE NATIONAL ASSOCIATION OF HISPANIC NURSES, MAYA ROCKEYMOORE, PHD, THE MONTEFIORE MEDICAL CENTER, THE MOUNT SINAI MEDICAL CENTER, NEW YORK STATE AMERICAN ACADEMY OF PEDIATRICS, DISTRICT II, THE CHILDREN'S AID SOCIETY, PREVENTION INSTITUTE, THE CALIFORNIA ENDOWMENT, SHAPE UP AMERICA!, DR. WALTER WILLETT, COMUNILIFE, UNITED PUERTO RICAN ORGANIZATION OF SUNSET PARK, THE HARLEM HEALTH PROMOTION CENTER, AND THE ASSOCIATION OF BLACK CARDIOLOGISTS, INC.
IN SUPPORT OF RESPONDENTS-APPELLANTS

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Attorneys for Amici Curiae

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OTHER AUTHORITIES

Amici curiae, organizations and individuals dedicated to maintaining public health – particularly the health of underserved racial and ethnic communities – respectfully submit this brief in support of Respondents Board of Health et al. in order to emphasize the gravity of the health crisis that the Board has sought to address, the solid evidence base justifying the Board's decision to focus on sugary drinks, and the conclusion that the Board acted not arbitrarily or capriciously but rather reasonably and judiciously in adopting Section 81.53.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici curiae are organizations and individuals dedicated to serving the communities that have been most disproportionately impacted by the obesity-related health crisis. *Amici* know first-hand the severe implications of this crisis for public health generally, and for underserved racial and ethnic communities in particular. We recognize the importance of taking action to stem the tide of obesity and chronic disease, as New York City's Board of Health has done by adopting the rule limiting sugary drink portion sizes. Because that rule is a reasonable and measured attempt to ameliorate a dire crisis, *amici* submit this brief in support of Respondents' appeal.

The National Alliance for Hispanic Health (the Alliance) is the nation's foremost science-based source of information and trusted advocate

for the health of Hispanics in the United States. The Alliance's mission is to improve the health of Hispanics and work with others to secure health for all. The Alliance conducts research, demonstration programs, and provides health services through its member organizations, which include community-based groups, national organizations, universities, government agencies, foundations, and corporations. The Alliance represents thousands of Hispanic health providers across the nation providing services to millions each year, making a daily difference in the lives of Hispanic communities and families. The work of the Alliance has demonstrated the critical role of policy in supporting healthy environments, including access to healthy foods and opportunity for physical activity, that can transform the well-being of communities. The Alliance is dedicated to community-based solutions and the principle that good corporate citizenship means policies and corporate actions that benefit the well-being of all consumers.

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Prevention Institute brings cutting-edge research, practice, and analysis to today's pressing health and safety concerns. Determined to achieve health and safety for all, to improve community environments equitably, and to serve as a focal point for primary prevention practice, the Institute asks what can be done in the first place, before people get sick or injured. Prevention Institute has inspired a broad comprehensive approach to systematizing prevention as a distinct discipline – not simply an education message. It infuses a community and policy orientation into prevention practices and it emphasizes the importance of quality prevention strategies – ones that are well designed and achieve far-reaching outcomes. Obesity is an epidemic in our nation and disproportionately impacts underserved communities. Based on our decades of experience working on public health issues, we believe that New York City's portion cap regulation has the potential to be an effective intervention as part of a larger strategy to encourage healthy eating.

The California Endowment is a private, statewide health foundation, which was established in 1996 to expand access to affordable, quality health care for underserved individuals and communities, and to promote fundamental improvements in the health status of all Californians. The Endowment challenges the conventional wisdom that medical settings and individual choices are solely responsible for people's health. The Endowment believes that health happens in neighborhoods, schools, and with prevention.

Shape Up America!™ is a non-profit organization founded in 1994 by former U.S. Surgeon General C. Everett Koop to raise awareness of obesity as a health issue. Shape Up America!™ delivers research and consumer information on the linkages between obesity and chronic diseases that are now the leading causes of death and disability in the U.S. Shape Up America!™ provides responsible information about weight management and delivers tools and resources encouraging physical activity and healthy eating for all Americans.

Dr. Walter Willett, MD, MPH, DrPH, is Professor of Epidemiology and Nutrition and Chair of the Department of Nutrition at Harvard School of Public Health, and Professor of Medicine at Harvard Medical School. He leads several major studies on diet and risk of non-communicable disease,

has published over 1,500 papers mainly addressing nutrition and health, and is author of the textbook, Nutritional Epidemiology. He is a member of the Institute of Medicine of the National Academy of Science and has served as a member of its Food and Nutrition Board.

Comunilife's mission is to improve the quality of life and create a healthier tomorrow for New Yorkers with special needs in the Hispanic and broader communities – by providing culturally competent health and human services and a continuum of affordable and supportive housing. Through our 1,502 units of supportive housing for persons living with HIV/AIDS and/or mental illness and our outpatient mental health clinic we serve more than 2,800 at-need New Yorkers annually.

United Puerto Rican Organization of Sunset Park (UPROSE) is dedicated to the development of Southwest Brooklyn and the empowerment of its residents primarily through broad and converging environmental, sustainable development, and youth justice campaigns. Founded in 1966, UPROSE is Brooklyn's oldest Latino community-based organization. In 1996 UPROSE's mission refocused on organizing, advocacy and developing intergenerational, indigenous leadership through activism around a host of environmental justice issues, including access to healthy food options. We aim to ensure and heighten community awareness and involvement, develop

participatory community planning practices, and promote sustainable development with justice and governmental accountability. Sales practices that promote unhealthy food and beverage consumption often target low-income communities with a history of health disparities. Restriction of these practices improves health by reducing unhealthy eating and increases the opportunities and pressures for greater access to healthy food.

The Harlem Health Promotion Center (HHPC) is one of 37 Prevention Research Centers funded by the Centers for Disease Control and Prevention to address health disparities within vulnerable communities. Sugar-sweetened beverages are a key factor contributing to obesity, which, in turn is associated with hypertension, diabetes and cardiovascular disease. These health issues take a heavy toll on the health status of all Americans and disproportionately affect people of color in communities like Harlem. The HHPC works to raise awareness and provide support for behavior change and advocacy efforts.

The Association of Black Cardiologists, Inc. (ABC) is a nonprofit organization with an international membership of 2,500 health professionals, lay members of the community (Community Health Advocates), corporate members, and institutional members, dedicated to eliminating the disparities related to cardiovascular disease in all people of color. Founded in 1974 by

17 dedicated medical professionals, ABC's members are united by the need to bring special attention to the adverse impact of cardiovascular disease on the African American community. The correlation between excessive consumption of sugar-sweetened beverages and heightened risk of cardiovascular disease is well established, as is the disproportionate epidemiological impact on African Americans.

PRELIMINARY STATEMENT

The United States, and New York City, face a crisis of obesity and chronic disease. The crisis affects millions of New Yorkers, including a disproportionate number who are members of the underserved communities with which *amici* are particularly concerned. Recognizing the urgency of the problem, and the insufficiency of the many other measures already in place, the Board of Health acted to address the overconsumption of sugar-sweetened beverages, an activity linked to obesity, diabetes, and a variety of other debilitating health conditions. Despite the bluster over its adoption, Section 81.53 of the New York City Health Code ("the Rule") is a modest measure. It does not ban sugary drinks or even cap the amount of a sugar-sweetened beverage that a customer may purchase. All the Rule does is limit the size of the cup in which the beverage is served. Given the urgency and severity of the obesity crisis, and the connection between consumption of sugary beverages and obesity, the Board plainly had a rational basis for its decision to adopt the measure.

As organizations and individuals deeply involved with the communities most affected by the crisis of obesity and associated chronic disease, *amici* strongly support the Rule. But we also recognize that there are broad differences of opinion about the wisdom of the Rule and its likely

effect. Those differences of opinion were aired, as they should have been, during the rulemaking process when the Board sought and received some 38,000 comments about the Rule – four-fifths of them in favor. Respondents' Memorandum in Opposition (Supreme Court), at 11. But the Rule has now been adopted. It rests on a solid base of evidence. The only way to determine if it will work in practice is to let it go into effect and evaluate the results.

In determining whether the Board acted arbitrarily or capriciously in adopting the Rule, *see* CPLR § 7803(3), this Court has a limited role. The only relevant question is whether the Board had a rational basis for its action. The only reasonable answer is that it did. An agency acting rationally might well conclude that the obesity crisis requires a response from the office charged with safeguarding the public's health; that sugary drinks are strongly linked to obesity, diabetes, and other adverse health consequences; that incremental regulation is justified and expected; and that defining the boundaries of a rule in accordance with federal standards and municipal jurisdiction makes a lot of sense.

That is all that the law requires.

ARGUMENT

I. OBESITY IS A CRITICAL PROBLEM FACING THE NATION AND NEW YORK CITY.

The past three decades have witnessed a surge in the prevalence of obesity. Vasanti S. Malik et al., *Sugar-Sweetened Beverages, Obesity, Type 2 Diabetes Mellitus, and Cardiovascular Disease Risk*, 121 CIRCULATION 1356 (2010).[1] That dramatically increased prevalence is a national concern because obesity is a risk factor for cancer and a host of other debilitating and potentially deadly diseases including liver disease, stroke, diabetes and arthritis. *See id.*; Ivana Vucenik & Joseph P. Stains, *Obesity and Cancer Risk: Evidence, Mechanisms, and Recommendations*, 1271 ANN. N.Y. ACAD. SCI. 37, 38 (2012)[2]; Daphne P. Guh et al., *The Incidence of Co-Morbidities Related to Obesity and Overweight: A Systematic Review and Meta-Analysis*, 9 BMC PUBLIC HEALTH 88 (2009).[3] As the Surgeon General has observed, obesity "may soon cause as much preventable disease and death as cigarette smoking."[4]

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[1] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862465/pdf/nihms-189965.pdf.
[2] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3476838/pdf/nyas1271-0037.pdf.
[3] *Available at* http://www.biomedcentral.com/content/pdf/1471-2458-9-88.pdf.
[4] U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *The Surgeon General's Call to Action to Prevent Overweight and Obesity* (2001), Foreword, XII, *available at* http://www.surgeongeneral.gov/library/calls/obesity/CalltoAction.pdf.pdf.

A. The Country Faces a Crisis of Obesity and Related Chronic Disease.

More than a third of adults in the United States are now obese; another third are overweight. Katherine M. Flegal, *Prevalence of Obesity and Trends in the Distribution of Body Mass Index Among US Adults, 1999-2010.* 307 J. AM. MED. ASS'N (2012) 491.[5] In 2009–2010, over 78 million U.S. adults – some 41 million women and 37 million men – were obese. Cynthia L. Ogden et al., *Prevalence of Obesity in the United States, 2009–2010*. NAT. CTR. HEALTH STATS, NCHS Data Brief No. 82, Jan. 2012, at 3.[6]

Still, the most devastating effect may be on children. In the last thirty years, the obesity rate among young children, like that among adolescents, has more than tripled. Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963–1965 Through 2007–2008*, NCHS HEALTH E-STAT, June 4, 2010, at 5.[7] Almost a sixth of American youth – some 12.5 million American children and adolescents – are now obese. *See* Ogden, *Prevalence of Obesity in the U.S. (2009-10)*, *supra*, at 3.

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[5] *Available at* http://www.foodpolitics.com/wp-content/uploads/ObesityRates_JAMA_12.pdf.
[6] *Available at* http://www.cdc.gov/nchs/data/databriefs/db82.pdf.
[7] *Available at* http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf.

Obese children are more likely to have asthma, diabetes, joint problems, and even early signs of heart disease. Centers for Disease Control and Prevention, Basics About Childhood Obesity, April 27, 2012.[8] They are also more likely to be obese adults and have shortened life expectancy. *Id*; Rob M. van Dam et al., *The Relationship Between Overweight in Adolescence and Premature Death in Women*, 145 ANN. INTERN. MED. 91 (2006).[9] Overweight children are at increased risk for serious health problems in adulthood. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* (2007)[10] at 8; *see also* COMMITTEE ON PREVENTION OF OBESITY IN CHILDREN AND YOUTH, PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE (Jeffrey P. Koplan et al., eds., 2005).[11] The CDC has found that 50 percent of overweight adolescents, 60 percent of obese adolescents, and 37 percent of normal-weight adolescents have at least one cardiovascular disease risk factor. Ashleigh L. May et al., *Prevalence of Cardiovascular Disease Risk Factors Among US Adolescents, 1999−2008*, 129 PEDIATRICS 1035, 1039 (2012).[12] As one well-known assessment starkly sums up the

[8] *Available at* http://www.cdc.gov/obesity/childhood/basics.html.
[9] *Available at* http://www.ncbi.nlm.nih.gov/pubmed/16847291.
[10] *Available at* http://surgeongeneral.gov/topics/obesity/calltoaction/fact_adolescents.htm.
[11] *Available at* http://books.nap.edu/openbook.php?record_id=11015&page=332.
[12] *Available at* http://pediatrics.aappublications.org/content/early/2012/05/15/peds.2011-1082.full.pdf+html.

data, today's young people may be the first generation in the history of the United States to live sicker and die younger than their parents' generation. S. Jay Olshansky et al, *A Potential Decline in Life Expectancy in the United States in the 21st Century*, 352 NEW ENG. J. MED. 1138, 1141 (2005).[13]

Preventing the current generation of young people from developing these health conditions would not only improve Americans' quality of life but also save federal, state, and local governments billions of dollars in health care costs and lost productivity. The costs of obesity are rising rapidly and are estimated to be as high as $147 billion per year. Eric A. Finkelstein et al, *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFFAIRS w822 (2009).[14]

Using a simulation model to project the probable health and economic consequences over the next two decades from a continued rise in obesity in the United States, researchers have projected 65 million more obese adults by 2030, with a consequent additional 6-8.5 million cases of diabetes, 5.7-7.3 million cases of heart disease and stroke, and 492,000-669,000 additional cases of cancer. Claire Y. Wang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and the UK*, 378 LANCET 815 (2011). By 2030, just the *increase* in medical costs associated with

[13] *Available* at http://www.nejm.org/doi/pdf/10.1056/NEJMsr043743.
[14] *Available at* http://content.healthaffairs.org/content/28/5/w822.full.pdf.

treatment of these preventable diseases is estimated to be $48-66 billion a year. *Id.*

B. The Crisis Profoundly Affects New York City.

In the early years of the 21st century, the crisis of obesity and related chronic disease hit New York City particularly hard, with prevalence rates for obesity and diabetes rising significantly faster among the City's population than in the rest of the nation. *See* Gretchen Van Wye et al., *Obesity and Diabetes in New York City, 2002 and 2004*, 5 PREV. CHRONIC DISEASE 2 (2008).[15]

The costs of the crisis to the City have been enormous. The Department of Health and Mental Hygiene, extrapolating from statewide data, has estimated obesity-related healthcare expenditures in the City to exceed $4.7 billion annually – an additional average yearly burden of $1,500 for every household in the City. *See* Respondents' Verified Answer, Exh. H; Justin G. Trogdon et al., *State- and Payer-Specific Estimates of Annual Medical Expenditures Attributable to Obesity*, 20 OBESITY 214 (2012).

On the other hand, there is some indication that the various measures New York has implemented to confront the crisis, *see infra* n.36, may have begun to have an effect: the prevalence of obesity among elementary public

[15] *Available at* http://www.cdc.gov/pcd/issues/2008/apr/pdf/07_0053.pdf.

school children fell slightly between 2006-07 and 2010-11. Berger, M et al, *Obesity in K–8 Students - New York City, 2006–07 to 2010–11 School Years,* MORB. AND MORT. WEEKLY REP, Dec. 16, 2011.[16] There still remains, however, an enormous amount to be done.

C. Underserved Communities Are Particularly Vulnerable.

Obesity rates in underserved communities, and particularly among African-American and Hispanic populations, have not decreased, and remain significantly higher than rates among the remainder of the population. *See* Youfa Wang & May A. Beydoun, *The Obesity Epidemic in the United States – Gender, Age, Socioeconomic, Racial/Ethnic, and Geographic Characteristics,* 29 EPIDEMIOL. REV. 6, 11 (2007).[17] The rates of overweight and obesity for Hispanic and African-American children and adolescents are more than 1.5 times those for their Caucasian counterparts. *Id.* at 16. In 2007-08, for example, "the prevalence of obesity was significantly higher among Mexican-American adolescent boys (26.8%) than among non-Hispanic white adolescent boys (16.7%)." Ogden & Carroll, *Prevalence of Obesity, supra*, at 5.[18] In 2009-10, "21.2% of Hispanic children and adolescents and 24.3% of non-Hispanic black children and adolescents were

[16] *Available at* http://www.cdc.gov/mmwr/pdf/wk/mm6049.pdf.
[17] *Available at* http://epirev.oxfordjournals.org/content/29/1/6.full.pdf+html.
[18] *Available at* http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf.

obese, compared with 14.0% of non-Hispanic white children and adolescents." Cynthia L. Ogden et al., *Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents*, *1999-2010*, 307 J. AM. MED. ASS'N 483, 485 (2012) (noting "significant differences in obesity prevalence by race/ethnicity").[19] The trends carry forward into adulthood. *See* Wang & Beydoun, *The Obesity Epidemic in the United States*, *supra*, at 6 ("Minority and low-socioeconomic-status groups are disproportionately affected at all ages").[20] And the disparities are particularly prevalent in New York City. N.Y.C. DEP'T OF HEALTH AND MENTAL HYGIENE, *Epiquery: NYC Interactive Health Data System - Community Health Survey 2011* (2011) (showing obesity rates of 18.7% for "White Non-Hispanic," 29.5% for "Hispanic," and 33.3% for "Black Non-Hispanic").[21]

II. CONSUMPTION OF SUGARY DRINKS CONTRIBUTES SIGNIFICANTLY TO OBESITY AND OTHER CHRONIC DISEASE.

There is robust evidence of a link between consumption of sugary drinks and chronic disease, and increasing confirmation that the relationship is causal. As the author of a recent meta-study observed.

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[19] *Available at* http://jama.jamanetwork.com/article.aspx?articleid=1104932.
[20] *Available at* http://epirev.oxfordjournals.org/content/29/1/6.full.pdf+html.
[21] *Available at* http://nyc.gov/health/epiquery (Community Health Survey 2011/Overweight and Obesity/Race/Ethnicity) (accessed Mar. 22, 2013).

> All lines of evidence consistently support the conclusion that the consumption of sweetened beverages has contributed to the obesity epidemic. It is estimated that sweetened beverages account for at least one-fifth of the weight gained between 1977 and 2007 in the US population. Actions that are successful in reducing sweetened beverage consumption are likely to have a measurable impact on obesity.

Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?* 14 PUB. HEALTH NUTRITION 499 (2010) (concluding that the association between sugary beverage consumption and weight gain is stronger than for any other food or beverage).[22] The Institute of Medicine has identified sugary drinks as "the single largest contributor of calories and added sugars to the American diet." INST. OF MED., ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION 167 (Dan Glickman et al., eds., National Academies Press 2012).

Studies have increasingly established the connection between sugar-sweetened beverages and increased rates of chronic disease. *See, e.g.,* Matthias B. Schulze et al., *Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women*, 292 J. AM. MED. ASS'N. 927 (2004);[23] Teresa T. Fung et al., *Sweetened Beverage Consumption and Risk of Coronary Heart Disease in Women*, 89 AM. J.

[22] *Available at* http://banpac.org/pdfs/sfs/2011/sodas_cont_obesity_2_01_11.pdf.
[23] *Available at* http://www.commercialalert.org/schultzesoda.pdf.

CLINICAL NUTRITION 1037 (2009).[24] New data show that consumption of sugar-sweetened beverages may influence the development of obesity in particular among children, adolescents, and adults. *See* Sonia Caprio, *Calories from Soft Drinks – Do They Matter?* 367 N. ENGL. J. MED. 1462 (2012).[25] Meta-analyses confirm the link. *See* Vasanti S. Malik et al., *Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review,* 84 AM. J. CLINICAL NUTRITION 274 (2006) ("The weight of epidemiologic and experimental evidence indicates that a greater consumption of SSBs is associated with weight gain and obesity").[26]

There are ample explanations for the link. For one, consumers of sugary drinks "do not compensate for the added energy they consume in soft drinks by reducing their intake of other foods," which results in "increased total energy intakes." Lenny R. Vartanian et al., *Effects of Soft Drink Consumption on Nutrition and Health: A Systematic Review and Meta-Analysis*, 97 AM. J. PUB. HEALTH 667, 669 (2007);[27] Vasanti S. Malik et al., *Sugar-Sweetened Beverages, supra,* at 1362 (2010) ("SSBs are the greatest contributor to added sugar-intake in the United States and are thought to promote weight gain in part because of incomplete compensation for liquid

[24] *Available at* http://ajcn.nutrition.org/content/89/4/1037.full.pdf+html.
[25] *Available at* http://myeloma.org/pdfs/NEJM-Calories-From-Soft-Drinks.pdf.
[26] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3210834/pdf/nihms332953.pdf.
[27] *Available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2005.083782.

calories at subsequent meals")[28]; Claire Y. Wang, et al., *Estimating the Energy Gap Among US Children: A Counterfactual Approach.* 118 PEDIATRICS e1721 (2006) (noting sugar-sweetened beverages are associated with overweight in both observational and experimental studies, and that studies suggest that calories from these beverages are often not offset by reduction of intake elsewhere).[29]

Recent data establish that, in New York City in particular, the connection between sugary drink consumption and obesity and chronic disease is stark and direct. *See* Press Release, Health Commissioner Thomas Farley, The City of New York, *New Data Highlighting Strong Relationship Between Sugary Drink Consumption And Obesity* (Mar. 11, 2013) ("This analysis suggests that sugary drink consumption is contributing to obesity not just in national research studies, but also in our local neighborhoods").[30]

III. REDUCING CONSUMPTION OF SUGARY DRINKS MAY EFFECTIVELY HELP TO CURB OBESITY.

Just as increased SSB consumption contributes to weight gain, *see* Catherine S. Berkey et al., *Sugar-Added Beverages and Adolescent Weight Change*, 12 OBESITY RESEARCH 778 (2004), so reducing sugary drink

[28] *Available at* http://circ.ahajournals.org/content/121/11/1356.full.pdf.
[29] *Available at* http://pediatrics.aappublications.org/content/118/6/e1721.full.pdf.
[30] *Available at* http://www.nyc.gov/cgi-bin/misc/pfprinter.cgi?action=print&sitename=OM&p=1363977740000.

consumption is a useful way to combat obesity and associated chronic disease. Woodward-Lopez et al., *supra*, at 499 (estimating that sweetened beverages account for at least one-fifth of the weight gained between 1977 and 2007 in the U.S. population and concluding that actions successful in reducing sweetened beverage consumption are likely to have a measurable impact on obesity).

This insight is particularly relevant with respect to underserved communities, where sugary drinks are consumed at a disproportionate rate. *See* Cynthia L. Ogden et al., *Consumption of Sugar Drinks in the United States*, *2005–2008*, NAT. CTR. HEALTH STAT., NCHS Data Brief No. 71, Aug. 2011, at 3 (consumption rate among Mexican-American and African-American adults more than 50% higher than non-Hispanic whites)[31]; Elsie M. Taveras et al., *Racial/Ethnic Differences in Early-Life Risk Factors for Childhood Obesity*, 125 Pediatrics 686 (2010)[32] (finding black and Hispanic children after age 2 had higher consumption of sugar-sweetened beverages). In New York City, the disparities are at least as sharp. *See* Colin D. Rehm et al., *Demographic and Behavioral Factors Associated with Daily Sugar-Sweetened Soda Consumption in New York City Adults*, 85 J. URBAN HEALTH 375 (2008) (finding, using whites as the reference group, that the

[31] *Available at* http://www.cdc.gov/nchs/data/databriefs/db71.pdf.
[32] *Available at* http://pediatrics.aappublications.org/content/125/4/686.full.pdf.

odds of consuming soda were 3.1 times higher for U.S.-born blacks, 2.4 times higher for Puerto Ricans, and 2.9 times higher for Mexicans/Mexican-Americans).[33]

In the New York City neighborhoods with the highest levels of obesity, residents were *four times* as likely to drink 4 or more sugary drinks a day as residents of neighborhoods with the lowest obesity rates. BRONX, BROOKLYN AND HARLEM DISTRICT PUBLIC HEALTH OFFICES, *Sugary Drinks: How Much Do We Consume? A Neighborhood Report*.[34]

As those who live and work in New York's underserved neighborhoods observed in their comments to the Board about the proposed Rule, "the argument advanced by opponents that the restriction of beverage size unfairly stigmatizes the poor is hollow. In fact, it will ease an unfair burden on the poor of being the helpless victims of an industry where profits trump good health." Comment of Pastor Brian L. Carter, President, Borough of Brooklyn Ecumenical Advisory Group.[35]

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[33] *Available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2329746/pdf/11524_2008_Article_9269.pdf.

[34] *Available at* http://www.nyam.org/dash-ny/ssb/ssbdocuments/dpho-sugary-drinks-report.pdf.

[35] *Available at* http://www.nyc.gov/html/doh/downloads/pdf/comment/comment_00081a.pdf at 397.

IV. THE RULE IS NEITHER ARBITRARY NOR CAPRICIOUS.

As the previous sections make clear, the Board adopted the Rule in response to a public health crisis, and the issue it chose to address – the impact of sugary drinks in contributing to obesity and related chronic diseases – is one for which there is considerable scientific evidence. The Rule is one part of an overall effort by the Board, along with other agencies of the City, to stem the tide of the crisis. It is a measured, modest, evidence-based – and innovative – approach, well within the bounds of the Board's expertise and experience. The lines it draws are based on accepted distinctions and rest well within the limits of the Board's authority. Nonetheless, petitioners assert, and the trial court concluded, that the Rule violates Article 78, which prohibits agency action that is "arbitrary and capricious or an abuse of discretion." CPLR § 7803(3) . That assertion, and that conclusion, reflect a profound misreading of the standard under which agency rulemaking actions are reviewed and of the respective roles of administrative bodies and of reviewing courts. The Board may address a problem incrementally, *New York State Health Facilities Ass'n, Inc. v. Axelrod*, 77 N.Y.2d 340, 350 (1991), and need not have more than a rational basis for the Rule. *Id*. The Rule plainly satisfies that minimal standard. Whether it is the most effective method of accomplishing the Board's goals,

or the wisest policy option, or the choice the beverage industry would prefer is beyond the inquiry called for by Article 78 and is outside the proper bounds of this proceeding.

A. The Role of a Court Reviewing a Regulation of the Board of Health Is Limited, and the Standard the Rule Needs to Meet Is Lenient.

Article 78 sets a low hurdle. "The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious." *Consolation Nursing Home, Inc. v. Comm'r of New York State Dept. of Health*, 85 N.Y.2d 326, 331 (1995); *accord New York State Assn. of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). "An administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when" – as here – "the agency acts in the area of its particular expertise." *Consolation Nursing Home*, 85 N.Y.2d. at 331 (citing 5 Davis, Administrative Law § 29:3, at 343 [2d ed.]). The party challenging the regulation bears "the heavy burden of showing that the regulation is unreasonable and unsupported by *any* evidence." *Consolation Nursing Home*, 85 N.Y.2d. at 331-32 (emphasis added); *accord New York State Health Facilities Assn.*, 77 N.Y.2d at 349-50.

The Court of Appeals has established that "[t]he rational basis test is indeed undemanding." *Montgomery v. Daniels*, 38 N.Y.2d 41, 71 (1975).

"A statute—or an administrative regulation which is legislative in nature—will be upheld as valid if it has a rational basis, that is, if it is not unreasonable, arbitrary or capricious." *Grossman v. Baumgartner*, 17 N.Y.2d 345, 349 (1966). The cases cited in *Grossman* for this proposition illustrate the breadth and effect of the Court of Appeals' pronouncement. *See United States v. Carolene Prods. Co*., 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) ("subject only to constitutional restraint the private right must yield to the public need"); *Chiropractic Ass'n of New York v. Hilleboe*, 12 N.Y.2d 109, 115 (1962) ("When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property. These principles are so well established as to require no discussion….") (internal quotation marks omitted); *Stracquadanio v. Department of Health*, 285 N.Y. 93, 97 (1941) (in an Article 78 action, if a challenged regulation has "a reasonable relation to a bona fide purpose by the Board of Health . . .

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").[36]

In the field of public health, the inquiry is even more modest. "The police power 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." *Grossman*, 17 N.Y.2d at 350. No one would dispute that the physicians and scientists who compose the Board of Health are "eminently qualified." N.Y. City Charter § 553.

In short, the role of a court in reviewing an agency regulation, particularly a public health measure, is limited. "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result" are questions beyond the scope of the court's conscribed review. *Montgomery* 38 N.Y.2d at 53. "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense."

[36] When an administrative agency acts in its quasi-legislative capacity, cases interpreting the "rational basis" standard under constitutional equal protection and due process principles inform the analysis. *See Schneider v. Ambach*, 135 A.D.2d 284, 288 (1988) (deciding case on equal protection grounds and noting "a similar rational basis standard is applicable to a statutory challenge to an administrative regulation as arbitrary and capricious").

Grossman, 17 N.Y.2d at 350 (1966) (quoting *Williams v. Baltimore*, 289 U.S. 36, 42 (1933)).

B. The Rule Readily Meets the Rational Basis Standard.

Section 81.53 easily passes the lenient review provided by Article 78. Given the urgency of the obesity crisis in New York City, as detailed in Section I above, the Board surely had a more-than-valid purpose for enacting the measure. Further, as noted in Section II above, the Board had ample reason to believe that enacting the Rule would further that purpose by reducing the consumption of sugary drinks. It is petitioners' burden to show that the Rule is "unsupported by *any* evidence." *Consolation Nursing Home*, 85 N.Y.2d. at 331-32 (emphasis added). This they cannot do. Their attempts to attack the Rule on other grounds are inappropriate in the context of rational basis review.

1. The Board may engage in incremental measures to address complex public health issues.

The Court of Appeals has confirmed that Article 78 does not require that administrative agencies tailor their efforts to try to eradicate an entire problem all at once. *See New York State Health Facilities Ass'n,*, 77 N.Y.2d at 350 ("Merely because respondent has attempted to address part of a perceived concern, however, provides no basis for invalidating the regulations.")

Obesity and related chronic disease are complex problems for which there is no one simple solution. Appropriately, under the rational basis standard, the Board has the leeway to proceed incrementally, adopting rules that may address only one component of the obesity crisis at a time and "addressing itself to the phase of the problem which seems most acute…." *Montgomery*, 38 N.Y.2d at 62. *See also Sisario v. Amsterdam Mem'l Hosp*., 159 A.D.2d 843, 552 N.Y.S.2d 989, 991 (1990) ("This le[aves] open the possibility of additional steps being taken…."). The Rule is but one piece of a multifaceted effort by the Board – and the City as a whole – to address the health crisis posed by widespread obesity.[37]

[37] The City has adopted a wide range of obesity-prevention activities, including (1) community efforts such as coupons that can be used to purchase fruits and vegetables at the city's farmers' markets, free nutrition workshops and cooking demonstrations, and zoning and financial incentives to promote grocery stores in underserved communities; (2) school- and daycare-based initiatives like salad bars and water jets, physical activity programs, and limits on high-calorie beverages; and (3) citywide efforts like healthy vending machine standards for city agencies, an education campaign about the health consequences of sugar-sweetened beverage consumption, calorie labeling on chain restaurant menus, and free or low-cost fitness activities all over the city. *See Reversing the Epidemic: The New York City Obesity Task Force Plan to Prevent and Control Obesity* (2012), *available at* http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf ("In December 2011, Mayor Bloomberg announced a significant victory in the battle against obesity…New York City experienced a small but statistically significant drop in rates of childhood obesity." Among public school kindergartners through eighth graders obesity declined by 5.5%. Despite this success, rates of obesity remain alarming high for both children (20.7%) and adults (23%).).

2. Both the evidence before the Board and its expertise and experience establish the validity of the Rule.

Though the Board had ample evidence before it of the need and justification for the Rule, *see. e.g.,* Aff. of Dr. Thomas Farley and Exhs. H and K to Respondents' Verified Answer, it was not required to rely solely on empirical evidence. Rather, the Board was free to rely on its own expertise and experience as well. *Stein v. Rent Guidelines Bd. for City of New York*, 127 A.D.2d 189, 198 (1987) ("When an agency, such as the Board, is engaged in making a quasi-legislative determination, it is not confined to factual data alone but also may apply broader judgmental considerations based upon [its] expertise.")

Therefore, not every feature of the Rule need have been derived from randomized controlled trials or other studies. "Although documented studies often provide support for an agency's rule making, such studies are not the *sine qua non* of a rational determination." *Consolation Nursing Home,* 85 N.Y.2d at 332. If aspects of the first-in-the-nation Rule rest, of necessity, not on conclusive studies but rather on the best estimates of expert physicians and scientists, that would not invalidate the measure. To the contrary, it would show that the Board was properly calling upon "the expertise and experience of the agency." *Id*.

For example, there is considerable evidence linking portion size with the amount of beverage consumed. *See* Julie E. Flood et al., *The Effect of Increased Beverage Portion Size on Energy Intake at A Meal*, 106 J. AM. DIETETIC ASS'N 1984 (2006); Barbara J. Rolls et al., *The Effect of Large Portion Sizes on Energy Intake Is Sustained For 11 Days*, 15 OBESITY 1535 (2007). Still, an agency adopting a particular regulation could not be certain what the effect of that specific policy might be – a great deal would depend on the response of consumers. *See* Brian Elbel et al., *Potential Effect of the New York City Policy Regarding Sugared Beverages*, 367 NEW ENGLAND J. MED. 680 (2012) (positing different outcomes based on possible customer responses).[38] What is clear, however, is that an agency *could* reasonably believe, in the exercise of its professional judgment and the presence of a solid evidence base, that reducing portion size will lead to decreased consumption.[39] And it is equally clear that what the Rule seeks to accomplish is to make it easier for customers to control the amount they consume by countering, in one small respect, the food and beverage industry's longstanding campaign to increase portion size. Michael Mudd,

[38] *Available at* http://www.nejm.org/doi/pdf/10.1056/NEJMc1208318.

[39] Further, relatively small decreases may have a large cumulative effect. Just as a small, persistent imbalance of as little as 50 calories per day may result in up to a 5-pound weight gain every year, Shiriki K. Kumanyika et al., *Population-Based Prevention of Obesity*, 118 CIRCULATION 428, 435 (2008), *available at* http://circ.ahajournals.org/content/118/4/428.full.pdf, so the reverse is true for a reduction in calories.

How to Force Ethics on the Food Industry, N.Y. TIMES (Mar. 16, 2013) (former food-company executive noting industry "aggressively promoted larger portion sizes, one of the few ways left to increase overall consumption in an otherwise slow-growth market")[40]; Michael Moss, SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US 110 (2013) (quoting former Coca-Cola executive stating "the marketing division's efforts boiled down to one question: 'How can we drive more ounces into more bodies more often?'")

Finally, if there is a disagreement about the evidence justifying the Rule or establishing its potential effectiveness, that dispute should be decided not by a court but by the Board. *See Chiropractic Ass'n of New York*, 12 N.Y.2d at 114 (holding, in review of public health measure, "[i]t is not for the courts to determine which scientific view is correct in ruling upon whether the police power has been properly exercised").

The beverage industry and its supporters would have this court take the standards appropriate for heightened scrutiny – that is, for threats to fundamental rights – and apply them to a city's effort to do something about what may be the most serious public health threat facing its populace. *See, e.g.,* Petitioners' Mem. in Support of Petition (Sup. Ct.) at 56 (citing *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 489 (1995), a First Amendment case).

[40] *Available at* http://www.nytimes.com/2013/03/17/opinion/sunday/how-to-force-ethics-on-the-food-industry.html?pagewanted=1&_r=0&ref=opinion.

Absent heightened scrutiny, there is simply no requirement that government refrain from acting until it has executed empirical studies.

3. Informed line-drawing is a necessary part of administrative rulemaking.

In order to establish a rule, a legislative (or quasi-legislative) body must establish distinctions. "Whenever the legislature draws such a line some must be included, some excluded. As long as the line drawn is reasonable, the decision as to where to draw it is left to the legislature" – or the agency as the legislature's designee – "and not the judiciary." *Hymowitz v. Eli Lilly & Co.*, 136 Misc. 2d 482, 489 (1987) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

Petitioners' argument fails because, at base, it does no more than take issue with a necessary and fundamental feature of rulemaking: the drawing of lines. Each aspect of petitioners' critique boils down to the same demand: that lines not be drawn in a way that disadvantages their business interests. They contend that it is arbitrary to exclude from the Rule all products that consist of at least 50% milk, *see* Petrs' Mem. (Sup. Ct.) at 51, but where could that line be drawn without affecting someone's business interest? Even 100% milk is high in sugar, but the Rule reflects a determination by

the Board that other benefits from drinking milk justify its exclusion.[41] Petitioners contend that there is no rational basis for applying the Rule to restaurants while refraining from regulating convenience stores, *see id*. at 48, but the Board determined that the Rule would be best enforced through the City's regular restaurant inspection process, and that does not include convenience stores or grocery stores. Finally, the remarkable increase in recent years in both the number of meals eaten outside the home and the portion sizes of those meals – especially the explosive growth in the size of soft drink portions – forms a separate, rational basis for the Rule's focus on restaurants and similar food service establishments. *See* 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);[42] Lisa R. Young & Marion Nestle, *The Contribution of Expanding Portion Sizes to the U.S. Obesity Epidemic*, 92 AM. J. PUB. HEALTH 246 (2002).

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[41] That determination has a rational basis. *See, e.g*., Kiyah J. Duffey et al., *Drinking Caloric Beverages Increases the Risk of Adverse Cardiometabolic Outcomes in the Coronary Artery Risk Development in Young Adults (CARDIA) Study*, 92 AM. J. CLINICAL NUTRITION 954 (2010), *available at* http://ajcn.nutrition.org/content /92/4/954.full.pdf (finding higher SSB consumption associated with higher risk of high waist circumference, high LDL cholesterol, high triglycerides and hypertension, but whole-fat milk consumption associated with lower risk of high triglycerides).

[42] *Available at* http://www.ers.usda.gov/amber-waves/2012-june/data-feature-food-and-nutrient-intake-data.aspx.

The lines need not be drawn with "mathematical nicety" *Montgomery*, 38 N.Y.2d 66 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). The Court of Appeals has approvingly quoted Justice Holmes on this point:

> 'When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark.'

Montgomery, 38 N.Y.2d at 65 (*quoting Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41(1928) (Holmes, J.)). *See also Montgomery*, 38 N.Y. 2d at 64 ("True it may be that certain injuries not listed might well have been included within the class of serious injuries or that the threshold amount might more wisely have been set at $400 or $600. But such decisions are not of determinative concern to this court."). The numerical definitions derived by the Board need only be reasonable; they need not reflect "absolute mathematical precision." *New York State Health Facilities Ass'n*, at 349-50 (noting, of regulations' selection of a particular number, that "[r]easonableness is the test and it is met here"); *see also Figueroa v.*

Bronstein, 38 N.Y.2d 533, 535-36 (1976) ("it was not irrational either to establish an age requirement or to fix that age at 32 years. It is no infirmity that another age might also have rationally been selected").

C. The Lines Drawn By the Board Have a Reasonable Basis.

The particular distinctions drawn by Section 81.53 and challenged by petitioners as arbitrary, *see* Petrs' Mem. (Sup. Ct.) at 49-53, are in fact a product of perfectly rational decisionmaking.

1. The product categories reflected in the Rule follow established federal government standards.

The product category distinctions that the Rule employs not only rest on rational scientific bases but also reflect nearly identical distinctions drawn by the federal government. The National Center for Health Statistics at the CDC, for example, defines "sugar drinks" as "fruit drinks, sodas, energy drinks, sports drinks, and sweetened bottled waters, consistent with definitions reported by the National Cancer Institute. *Sugar drinks do not include diet drinks, 100% fruit juice, sweetened teas, and flavored milks*." Cynthia L. Ogden et al., *Consumption of Sugar Drinks, supra,* at 5 (emphasis added).[43] *See also* African American Collaborative Obesity Research Network (AACORN), *Impact of Sugar-Sweetened Beverage*

[43] *Available at* http://www.cdc.gov/nchs/data/databriefs/db71.pdf.

Consumption on Black Americans' Health (Jan. 2011)[44] (drawing on U.S. Department of Agriculture data defining "sugar-sweetened beverages" as "soft drinks, fruit juice drinks, fruit punch, fruit flavored drinks, energy drinks, and sports drinks that contain caloric sweeteners. *Water, 100% fruit juice, milk and milk-based beverages, soy-based beverages, tea, coffee, alcoholic beverages, and beverages containing non-caloric sweeteners are not included*") (emphasis added).

2. It is not arbitrary or capricious for an agency to act only to the extent of its own authority.

Several of petitioners' challenges involve assertions that the Board should have included products or establishments over which it does not exercise direct jurisdiction. To claim that it is not rational for an agency to stop at the boundaries of its own authority is not a tenable argument. "Certainly the Legislature cannot be faulted for not extending the requirement of coverage to those over whom the Legislature had no power to act. Rather than representing an arbitrary and capricious exercise of legislative power, this exclusion merely recognizes the realities of the situation." *Montgomery*, 38 N.Y.2d at 63. The same could be said of the Rule. *See Grossman*, 17 N.Y.2d at 349 (noting rational basis test applies to "[a] statute – or an administrative regulation which is legislative in nature").

[44] *Available at* http://www.aacorn.org/uploads/files/AACORNSSBBrief2011.pdf.

The City does not directly regulate alcoholic beverages. The Health Department inspects restaurants, but not convenience stores. Accordingly, the Board did not include alcoholic beverages or convenience stores within the scope of the Rule. That was, to put it plainly, a rational decision.[45]

In sum, an Article 78 challenge requires the parties challenging a regulation to carry "the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence." *Consolation Nursing Home*, 85 N.Y.2d. at 331-32. That is manifestly not a standard that petitioners in this case can meet. To the contrary:

> The proposed amendment to the Health Code is an intelligent, measured and appropriate response.... In short, this is a common sense proposal that unquestionably will improve the health of tens of thousands New York City residents, particularly in underserved communities, and we strongly support its adoption.

Comment, Executive Director, Union Settlement Association (largest social services agency in East Harlem).[46]

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[45] Petitioners make the additional claim that it is arbitrary and capricious to permit customers to purchase refills, buy more than one 16-ounce beverage, or add as much sweetener to their drinks as they choose. Petrs' Mem. (Sup. Ct.) at 56. This claim merits only the observation that petitioners would presumably have made the same claim – this time, with some justification – if those activities were *not* permitted.

[46] *Available at* http://www.nyc.gov/html/doh/downloads/pdf/comment/comment_00081a.pdf at 78.

CONCLUSION

The obesity crisis facing the nation, and the City, requires those charged with safeguarding the public's health to take action. The Board, in adopting Section 81.53, has acted in furtherance of its duty to the people of New York, and on the basis of solid evidence. It has taken a rational step to try to rein in perhaps the gravest public health issue of our time.

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EXHIBIT B