BYE-BYE BIG GULP? NEW YORK CITY'S ATTEMPT TO LIMIT THE SALE OF SODA

Amy Ray*

Casenote: *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene*, 970 N.Y.S.2d 200 (N.Y. App. Div. 1st Dept. 2013)

I. INTRODUCTION

New York City: "an incubator for often controversial public health experiments."[1] New York City's Department of Health and Mental Hygiene (DOHMH): "a hotbed of research and ambitiously gathered data."[2] New York City Mayor, Michael Bloomberg, began his reign over the realm of public health innovation with a crusade to curb tobacco-related illnesses and deaths with widespread tax increases and a ban on indoor smoking.[3] While reducing smoking was arguably Mayor Bloomberg's pinnacle achievement, he later turned to curtailing obesity rates.[4] While his efforts were initially successful among children, obesity rates and the prevalence of diabetes increased among adults.[5] The initiative that raised the most controversy was not the widespread collection of private health data—as in the mandatory diabetes registry—but rather, it was the Portion Cap Rule, or

 Notes & Comments Editor, *Stetson Law Review*. J.D. candidate, Stetson University College of Law, 2014; M.P.H., Nova Southeastern University, 2012; M.S., Criminal Justice, Northern Michigan University, 2005; B.A., Northern Michigan University, 2003.

1. Fred Mogul, *New York City's Bloomberg Leaves Mixed Results on Health*, NPR (Dec. 23, 2013, 7:36 PM EDT), http://www.npr.org/blogs/health/2013/12/27/257646680/new-york-citys-bloomberg-leaves-mixed-results-on-health.

2. *Id.*

3. *Id.*

4. *Id.* Bloomberg's campaign included banning trans fats, requiring restaurants to post menu-item calorie counts, encouraging the development of fresh markets, and "the country's first large-scale registry of people with diabetes." *Id.*

5. *Id.*

what opponents labeled as the "Soda Ban."[6] While the new mayor, Bill DeBlasio, openly favors Bloomberg's soda-limit initiative, "[p]ublic health experts aren't sure what to expect, but they doubt that anytime soon they'll have another ally like Bloomberg, an activist policy wonk with a fat checkbook and a willingness to take unpopular political risks."[7]

A. Summary of the Facts

A coalition of interest groups brought a declaratory judgment proceeding against the DOHMH and the New York City Board of Health (Board),[8] challenging the constitutionality of the Sugary Drinks Portion Cap Rule, also known as the Soda Ban.[9] The ban prohibited New York food service establishments (FSEs) from serving sugary drinks in sizes larger than sixteen ounces.[10] A Memorandum of Understanding (MOU) between the DOHMH and the Department of Agriculture clarified that only FSEs that generated fifty percent or more of their income from the sale of food for consumption on the premises or ready-to-eat for off-the-premises consumption would be affected by the ban.[11] The Mayor's

6. *Id.* Opponents coined this catchy and pejorative term because the Portion Cap Rule sought to restrict the quantities of sugary beverages purchased in one sitting. *Id.* Bloomberg argued the Portion Cap Rule was not a ban because people could buy as much soda as they wanted; the Rule was merely a reset on the default sizes of soda, reducing the maximum container volume to sixteen ounces. *Id.* Prior to the 1950s, the standard size of soda containers was 6.5 ounces. *Fact Sheet: Sugary Drinks Supersizing and the Obesity Epidemic*, HARV. SCH. OF PUB. HEALTH (June 2012), http://www.hsph.harvard.edu/wp-content/uploads/sites/30/2012/10/sugary-drinks-and-obesity-fact-sheet-june-2012-the-nutrition-source.pdf (citing *History of Bottling*, COCA-COLA CO., http://www.coca-colacompany.com/ourcompany/historybottling.html (last visited Feb. 17, 2015)). Larger sizes, including a twelve-ounce can, became available in the 1960s. *Id.* The twenty-ounce bottles became the norm in the 1990s. *Id.* The thought behind Mayor Bloomberg's initiative was that the decrease in default size would cause most purchasers to think before "gulping down hundreds of calories from a single cup." Mogul, *supra* note 1.

7. Mogul, *supra* note 1.

8. The Board was comprised of eleven individuals with relevant expertise appointed by Mayor Bloomberg. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S. 2d 200, 204 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*) (explaining the Board had the authority to amend the Health Code on behalf of the DOHMH).

9. *Id.*

10. *Id.* FSEs affected by the Portion Cap Rule included restaurants, both fast-food and sit-down, theatres, stadiums, delis, and street vendors. *Id.* at 205.

11. *Id.* This MOU effectively exempted groceries, markets, and bodegas from the ban. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *8 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 11, 2013) (*Hispanic Chambers I*). The petitioners' concern was that due to the exemptions

stated purpose of the ban was to address rising obesity rates in the City.[12] Public hearings showed New Yorkers supported the amendment to the health code.[13] The DOHMH was careful to point out the scientific evidence supporting the ban's compelling connection to reducing the negative consequences of sugary drink consumption and obesity.[14] The ban went into effect March 12, 2013.[15] HELD: The ban on large-sized sugary drinks was invalid because, in attempting to balance social, economic, and private hardships with the size restriction, the DOHMH went beyond the limits of its authority by enacting "legislation."[16]

B. Statement of the Case Significance

The DOHMH proposed an amendment to the New York City Health Code Section 81, on June 12, 2012, seeking to limit the

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for sugary beverages purchased for off-the-premises consumption, an individual could buy a drink larger than sixteen ounces at a supermarket but not at the street vendor right next door. *Id.* at *6. The lower court was concerned with the application of the exemptions to "hybrid" FSEs like 7-11 stores, where food may be purchased for on-site consumption, as in the infamous "Big Gulp," or for off-site consumption. *Id.* at *9. Under the definitions articulated in the N.Y. Codes, Rules, and Regulations, a 7-11 qualifies as a FSE but the MOU essentially exempted convenience stores like the 7-11. *Id.* at *8–9. The lower court disfavored the DOHMH weighing these economic concerns. *Id.* at *9; *infra* Part IV(A).

12. *Hispanic Chambers I*, 2013 WL 1343607, at *9.

13. *Hispanic Chambers II*, 970 N.Y.S. 2d at 205 (citing eighty-four percent approval ratings, sixteen percent in opposition).

14. *Id.* The "DOHMH pointed out, among other things, that '[t]he scientific evidence supporting associations between sugary drinks, obesity, and other negative health consequences is compelling.'" *Id.* (quoting internal source). A longitudinal study of 120,000 participants concluded that those with a mere twelve-ounce-per-day increase in sugary-beverage consumption gained more weight over time than those who did not change sugary-beverage intake. *Fact Sheet, supra* note 6 (citing D. Mozaffarian et al., *Changes in Diet and Lifestyle and Long-Term Weight Gain in Women and Men*, 364 NEW ENG. J. MED. 2392 (2011)). People consuming even one to two cans of soda regularly have a "[twenty-six percent] greater risk of developing type 2 diabetes than people who rarely have such drinks." *Id.* (citing V.S. Malik et al., *Sugar-Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes: A Meta-Analysis*, 33 DIABETES CARE 2477 (2010)). Sugary beverage intake is also a risk factor for heart disease. *Id.* (citing L. de Koning et al., *Sweetened Beverage Consumption, Incident Coronary Heart Disease, and Biomarkers of Risk in Men*, 125 CIRCULATION 1735 (2012)). Interestingly, the Petitioners did "not dispute the seriousness of obesity and the myriad of effects on society." *Hispanic Chambers I*, 2013 WL 1343607, at *5. The petitioners did not think the link between sugary beverage consumption and obesity was clear. *Id.* The DOHMH submitted that "the proposed rule would have a 'material impact' on consumption of sugary drinks because '[p]atterns of human behavior indicate that consumers gravitate toward the default option.'" *Hispanic Chambers II*, 970 N.Y.S.2d at 205.

15. *Hispanic Chambers II*, 970 N.Y.S.2d at 205. The lawsuit commenced October 12, 2012. *Hispanic Chambers I*, 2013 WL 1343607, at *4.

16. *Hispanic Chambers II*, 970 N.Y.S.2d at 206.

sale of "sugary drinks" to containers under sixteen ounces.[17] Section 81.53 was adopted on September 12, 2012, after a notice of public hearing, with the expressed aim to help curb the obesity epidemic in New York City.[18] There is a positive correlation between obesity and other chronic diseases.[19] The Centers for Disease Control and Prevention "recommended establishing and supporting state and local policies for individuals to make healthy food and beverage choices" including reducing or discouraging the consumption of sugary beverages.[20] Public health departments, like most administrative agencies, have wide latitude to regulate matters affecting the health of the general population and resolve difficult social problems.[21] New York is not unique in its ban of sugary drinks; the city of Boston enacted a ban on the sale and marketing of sugary drinks on city property before New York.[22] The first line of Boston's order also explicitly states that the aim is to reduce obesity.[23] Like many cities have done with smoking bans, both Boston and New York have attempted to curb the epidemic of obesity through their public health regulatory schema.[24] Large cities, like New York, are at the forefront of public

17. *Hispanic Chambers I*, 2013 WL 134360 at *3.

18. *Id.* at *4 (explaining that over fifty percent of adult New Yorkers are overweight or obese and nearly forty percent of New York children are overweight or obese).

19. *Id.* at *5 (citing M.B. Schulze et al., *Sugar Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women*, 292 J. AMER. MED. ASS'N, 927, 927–34 (2004)); *see supra* note 14 (outlining other studies linking sugary beverages to a cascade of health risks).

20. *Hispanic Chambers I*, 2013 WL 1343607, at *5.

21. Boreali v. Axelrod, 517 N.E.2d 1350, 1355 (N.Y. 1987); *see infra* Part II (explaining the role of public health departments).

22. An Order Relative to Health Beverage Options, Bos. Exec. Order, (Apr. 7, 2011), *available at* http://www.cityofboston.gov/news/uploads/5742_40_7_25.pdf.

23. *Id. at* 1. Americans consume more than two hundred calories from sugary drinks each day, a significant increase from consumption patterns fifty years ago. *Fact Sheet*, *supra* note 6. Speaking for the Harvard School of Public Health, Professor Walter Willett, Chair of the Department of Nutrition, supported Mayor Thomas Menino's Executive Order and stated "There is abundant evidence that the huge increase in soda consumption in the past [forty] years is the most important single factor behind America's obesity epidemic. These steps will greatly assist in creating a new social norm, in which healthier beverages are the preferred choice." *HSPH's Walter Willett Endorses Sugary Drinks Ban on Boston City Property*, HARV. SCH. PUB. HEALTH, http://www.hsph.harvard.edu/news/hsph-in-the-news/sugary-beverages-boston-ban/ (last visited Feb. 17, 2015).

24. Other cities' programs, like San Francisco, San Antonio, and Los Angeles, are also at the forefront of progressive public health measures aimed to restrict or, in some cases, prohibit "the sale or distribution of unhealthy foods, including sugar-sweetened beverages." *Mayor Menino Issues Order to End Sugary Drink Sales on City Property*, CITY OF BOS. (Apr. 7, 2011), http://www.cityofboston.gov/news/default.aspx?id=5051.

health policy-making, paving the way for smaller cities to do the same. There will continue to be more aggressive measures designed to address behavioral change in the name of public health and general welfare. The question is: When does government action go too far and infringe upon the individual? This is not a new debate nor will it be the last word on the issue. Greater leeway is necessary for public health departments to have the ability to effectuate real change. And, in the future, we will see more creative methods employed in public health interventions, especially from the New York DOHMH.[25] For New York in particular, this case has the potential to challenge other public health actions taken without direct authorization by the city council such as the controversial but to-date unchallenged mandatory diabetes registry.[26]

C. Scope Statement

The court in *Hispanic Chambers of Commerce* incorrectly found Mayor Bloomberg's "ban" on large sugary drinks invalid.[27] The public health department's abilities to regulate should not be curbed simply because the court found the ban too legislative. Far more sweeping public health regulations, like mandatory diabetes registries, have been enacted in cities like New York City.[28] This Casenote will explain how the court erred in its reasoning and

25. David Levine, *Inside the New York Digital Health Accelerator*, GOV'T TECH. (May 24, 2012), http://www.govtech.com/health/Inside-the-New-York-Digital-Health-Accelerator.html (describing a public-private initiative for improved health information technology that "puts New York at the forefront" of electronic health care); *supra* notes 1, 3 and accompanying text (describing New York as an "incubator" for public health innovation and discussing Mayor Bloomberg's initiatives banning trans fat, encouraging fresh markets, and implementing a mandatory diabetes registry).

26. Wendy K. Mariner & George J. Annas, *Limiting "Sugary Drinks" to Reduce Obesity—Who Decides?*, 368 NEW ENG. J. MED. 1763, 1764 (2013)

27. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 213 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*).

28. *Infra* Part II. The mandatory diabetes registry of New York collects data from individuals with A1C levels above seven percent. The DOHMH maintains "a roster of patients . . . highlighting patients under poor control (e.g., A1C > [nine percent]) who may need intensified follow-up and therapy." The DOHMH communicates directly with the individual's medical providers, regarding follow-up care and best practices, and communicates with the individual to help coordinate care. Notice of Adoption to Amend Article 13 of the New York City Health Code, Notice of Adoption (DOHMH amended Dec. 14, 2005), *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-a1c.pdf [hereinafter Notice of Adoption to Amend Article 13].

application of the four-factored *Boreali* test. For example, the court found the exceptions to the ban, which attempted to balance social, economic, and private hardships to individual businesses, as running counter to the Portion Cap Rule's goal of lowering obesity and incidence rates of diabetes.[29] The court's finding that the agency's action went beyond the limits of its authority too narrowly interprets the stated aim and effectively stifles the efficacy of innovative public health interventions.

II. HISTORICAL CONTEXT

Public health historically has been a mechanism of curtailing infectious disease.[30] Public health law was, at its inception in the United States, the law of "sanitation."[31] Public health regulation is a "legitimate exercise of the police powers," keeping proportionality and harm avoidance as its balancing factors.[32] The federal United States Public Health Service appropriates funds to the states for public health activities.[33] Because of the diverse nature of the activities conducted by state public health departments, there is wide latitude to enact regulations to cover the diverse spectrum of public health activities.[34] Most states' constitutions are silent on the subject of public health, but New York is one of the few exceptions.[35] Thus, there is an inherent

29. *Hispanic Chambers II*, 970 N.Y.S.2d at 208.

30. *See, e.g.*, Anthony D. Moulton et al., *Perspective: Law and Great Public Health Achievements*, *in* LAW IN PUBLIC HEALTH PRACTICE 3, 4 (Richard A. Goodman et al. eds., 2d ed. 2007) (describing the efforts to eradicate smallpox, yellow fever, and malaria in the 1800s). Since then, important public health initiatives include seat belt use, fluoridation of water, recognition of tobacco as a health hazard, vaccination, healthy food initiatives, maternal health improvements, and occupational safety improvements. *Id.*

31. *Id.* at 7.

32. *Id.* at 8 (quoting Wendy E. Parmet et al., *Plenary Program:* Jacobson v. Massachusetts, 33 J.L. MED. & ETHICS 24, 26 (2005)).

33. Richard A. Goodman et al., *The Structure of Law in Public Health Systems and Practice*, *in* LAW IN PUBLIC HEALTH PRACTICE, *supra* note 30, at 45, 46.

34. *Id.* at 53. Public health activities include quarantine, disease outbreak investigations, disease surveillance, research in disease prevalence, and specific interventions such as vaccination campaigns, clean water initiatives, etc. *Infra* Part IV(b). Mayor Bloomberg has vociferously called for "the . . . forceful application of law . . . as the principal instrument of our public health policy." Wendy K. Mariner, *Medicine And Public Health: Crossing Legal Boundaries*, 10 J. HEALTH CARE L. & POL'Y 121, 147 (2007).

35. Goodman, *supra* note 33, at 57; N.Y. CONST. Art. XVII § 3. "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state . . . ." N.Y. CONST. Art. XVII § 3.

authority, but not an obligation, to create public health legislation.[36]

While historical public health initiatives were based upon controlling communicable diseases and epidemics such as tuberculosis, diphtheria, typhoid, smallpox, and more recently HIV/AIDs,[37] the latest trend has been toward controlling non-communicable diseases for two reasons. First, communicable diseases, outbreaks, and epidemics in the United States are largely under control, and second, chronic diseases such as obesity and diabetes are now being labeled as epidemics.[38] While the necessity of controlling both types of diseases may not be inherently different, the mechanisms for surveillance and control differ widely.[39]

Public health authority is also found in the "general welfare" or "police powers" provisions of other states' constitutions.[40] Challenges to public health regulations typically occur when the regulation intrudes on individuals' liberty interests.[41] Groups opposed to the regulation may challenge the regulation for being outside the scope of the agency's authority.[42] The issue at hand was not whether curbing consumption of sugary drinks would indeed lower obesity rates but whether the DOHMH exceeded its authority by

36. Goodman, *supra* note 33, at 57.

37. *See, e.g.*, Notice of Adoption to Amend Article 13 of the New York City Health Code, Notice of Adoption at 1.

38. The concern is that treating a chronic disease similarly to a communicable disease, particularly labeling a chronic disease as an "epidemic," may have may have serious repercussions in the form of setting the precedent for governmental control over a host of other conditions and behaviors, justifying government actions through the use of that label. Clarissa G. Barnes et al., *Mandatory Reporting of Noncommunicable Diseases: The Example of the New York A1c Registry (NYCAR)*, 9 AM. MED. ASS'N J. OF ETHICS 827, 828 (2007). Communicable versus non-communicable diseases may not be where the line is drawn—this distinction may prove too simple. It is within public health's purview to track emerging epidemics. *Id.* Even obesity, a predisposing condition to adult onset diabetes, may be considered a communicable disease as it can be "transmitted" through social interactions among friends and societies. *Id.* at 829. If so, then diabetes can also be "transmitted." Furthermore, "[e]pidemics require bold public health action." *Id.*

39. *Compare* Moulton, *supra* note 30, at 4 (discussing communicable disease prevention), *with* SOCIAL AND BEHAVIORAL FOUNDATIONS OF PUB. HEALTH 329–42 (Jeannine Coreil ed., 2d. ed. 2010) (discussing obesity, a non-communicable disease, prevention).

40. Goodman, *supra* note 33, at 58.

41. *Id.* at 74 (explaining that opposition to public health regulations are typically brought under the Fourteenth Amendment and courts attempt to balance the individual's liberty interest against the legitimate state interest of protecting the public's health).

42. *E.g.*, *id.* at 78. For example, tobacco lobbyists may challenge a regulation prohibiting smoking particular areas.

acting too legislatively.[43] The lower court, and the appellate court in its affirmation of the lower court's opinion, relied heavily on the four-factored test established in *Boreali v. Axelrod*,[44] the seminal case establishing the boundaries of quasi-legislative functions of administrative agencies.[45] *Boreali* involved a challenge to an administrative anti-smoking regulation, which banned indoor smoking in certain establishments, after legislation failed on the issue.[46] The New York Court of Appeals found the Public Health Council (the Council), an agent of the DOHMH, exceeded its administrative authority by acting legislatively.[47] *Boreali* clarified the quasi-legislative function of administrative agencies, delineating the factors to assess whether the DOHMH's action was too legislative and cautioning that "an administrative agency may not use its authority as a license to correct whatever societal evil it perceives."[48] The Court explained that even under "the broadest and most open-ended of statutory mandates,"[49] the separation of powers doctrine must have limits.

Boreali gives four factors to consider in the separation of powers analysis: (1) whether the regulation is based upon factors unrelated to the stated purpose;[50] (2) whether the regulation was drafted "on a clean slate" apart from any legislative guidance;[51] (3) whether the regulation intruded on an ongoing legislative issue;[52] and (4) whether the regulation required expertise on behalf of the body passing it.[53] In *Hispanic Chambers*, like in *Boreali*, the lower court found that (1) the regulation was improperly based on economic and political considerations[54]; (2) the regu-

43. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *6 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 11, 2013) (*Hispanic Chambers I*).

44. Boreali v. Axelrod, 517 N.E.2d 1350, 1351 (N.Y. 1987). It is prudent to note that *Boreali* was decided in New York's Court of Appeals, New York's highest court. *Id. Hispanic Chambers I* was before New York's Supreme Court, the intermediate appellate court. *Hispanic Chambers I*, 2013 WL 1343607.

45. *Boreali*, 517 N.E.2d at 1351.

46. *Id.* at 1351–52.

47. *Id.* at 1357.

48. *Id.* at 1353.

49. *Id.*

50. *Id.* at 1355–56.

51. *Id.* at 1356.

52. *Id.*

53. *Id.*

54. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *9 (N.Y. Sup. Ct. N.Y.

lation did not gap-fill existing legislation[55]; (3) the regulation regulated an area of ongoing legislative debate[56]; and (4) the Board had requisite expertise.[57] The lower court also found the ban was arbitrary and capricious.[58]

III. COURT'S ANALYSIS

The intermediate court was called to decide the constitutionality of the New York City Board of Health's Sugary Drink Portion Cap Rule, which prohibits food service establishments from serving sugary drinks in sizes larger than sixteen ounces.[59] The court began with an analysis of whether the regulation violated the separation of powers doctrine, as described in *Boreali*.[60] The DOHMH submitted that *Boreali* did not apply "because the Board of Health has been vested with the power to act on any health related [matter]."[61] The court, however, described this position as a "fundamental misunderstanding of the power of administrative agencies [vis-à-vis] the legislature."[62] The Court explained that the Board of Health can be delegated broad powers, which are essentially legislative, but there is no inherent legislative power.[63] Like federal law, the state's constitution established boundaries between actions of the legislature and an administrative agency, explaining that as "an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations."[64] As in this case, the legislature in *Boreali* gave the Public Health Council the authority, but the court held that the scope of the Council's authority was limited by

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Cnty. Mar. 11, 2013) (*Hispanic Chambers I*) (basing the regulation, at least in part, on economic impact of obesity).

55. *Id.* (explaining that the DOHMH essentially created its own legislation).

56. *Id.* at *18 (citing to previous tax initiatives on sugary items).

57. *Id.* (explaining the expertise factor was the only factor met).

58. *Id.* at *20.

59. N.Y Statewide Coal. Of Hispanic Chambers of Commerce v. N.Y. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 205 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*).

60. *Id.* at 206.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 206–07 (quoting Rent Stabilization Ass'n of N.Y. City v. Higgins, 630 N.E.2d 626, 631 (N.Y. 1993) (explaining that administrative agencies cannot create whatever rules they deem necessary; they must, instead, regulate based on statutes)).

its role as an administrative, not legislative, body.[65] The *Boreali* court described four factors to determine when the line between administrative and legislative functions is blurred: (1) cost–benefit or economic assessments balanced against public health concerns are indicative of the administrative body acting on its own public policy ideas; (2) an administrative body failing to engage in interstitial rule-making[66] and instead writing on a "clean slate" is indicative of legislative action; (3) when administrative agencies regulate areas that legislature had tried but failed to reach agreement indicates that decision should be left to the legislature; and (4) when the regulations do not require health-related expertise, those regulations are also for the legislature.[67]

In this case, the court found all four *Boreali* factors present to indicate a usurpation of legislative power.[68] First, in consideration of the cost-benefit analysis, the court found that the Board of Health did not act solely with public health in mind.[69] Instead, the Board weighed public health benefits against the economic impact of the Rule by stating that the ban's purpose was not only to promote health but also to "ameliorate obesity-related health care expenditures."[70] The court added that the stated aim alone did not satisfy factor one, but the regulation's numerous exemptions illustrated that private interests and economic concerns were incorporated into the regulation.[71] Moreover, the list of ex-

65. *Id.* at 207 (citing Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987)).

66. Interstitial rule-making, a hallmark of administrative agencies, involves interpreting statutes or policy promulgated by the legislature. *Id.* at 210. When the agency creates its own policy, what this court calls "writing on a 'clean slate,'" it is effectively legislating and outside its authority. *Id.*

67. *Id.* at 207. None of the four factors, alone, is sufficient to determine that an agency has violated the separation of powers, but the four factors are indicative of a "usurpation of the legislature." *Id.* at 207–08. As long as the agency's decisions are consistent with the legislature's policies, the agency's actions will survive a separation of powers analysis. *Id.* at 208 (citing *Higgins*, 630 N.E.2d 626; N.Y. State Health Facilities Ass'n. v. Axelrod, 569 N.E.2d 860, 861 (N.Y. 1991) (upholding Medicaid patient access regulations, which required nursing homes to agree to take a "reasonable percentage of Medicaid patients" because the regulation was an appropriate means to the statutory ends)).

68. *Id.* at 208.

69. *Id.*

70. *Id.* at 208–09 (finding this policy goal social and economic—not healthcare related—in nature).

71. *Id.* (suggesting that, had the ban been a blanket ban, rather than containing exemptions, it might have passed this factor of the *Boreali* test). The court added that the Board never categorized sugary drinks as inherently unhealthy and prescribing a maximum portion size looks beyond health concerns and "manipulates choices to try to change

emptions for certain types of FSEs, such as groceries, markets, and bodegas, illustrated that the exemptions were not health-related but instead favored some businesses at the expense of others.[72] The court concluded that the Board made its own policy considerations based upon cost–benefit analyses.[73]

In consideration of the second *Boreali* factor—the "clean slate" or lack of interstitial rule-making factor—the court stated that the Board went beyond the typical gap-filling duty of an administrative agency.[74] Thus, the agency exceeded its authority.[75] The court added that the State legislature and even the city council had "[never] promulgated a statute defining [a] policy with" regard to excessive sugary drink consumption.[76] The DOHMH submitted that it had authority because it can regulate all matters affecting public health and that the ban was squarely within this delegation of power.[77] The court determined that the generality of the language did not empower the Board to promulgate regulations that involved the *conduct* of the people.[78] The court further explained that the agency was designed to supervise and regulate water and food safety and control diseases.[79] Thus, the Court concluded that rules to curtail soda consumption were not an interstitial rulemaking intended by the legislature.[80]

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consumer norms." *Id.* at 209 (suggesting a classification announcing that sugary drinks as inherently unhealthy would help the Board support the ban). "Instead of offering information and letting the consumer decide, the Board's decision effectively relies upon the behavioral economics concept that consumers are pushed into better behavior when certain choices are made less convenient." *Id.*

72. *Id.* at 209–10.

73. *Id.* at 210–11.

74. *Id.* (explaining that writing on a "clean slate" as opposed to filling in details of statutes is in excess of the agency's authority).

75. *Id.*

76. *Id.* (hinting that if there was some sort of legislation regarding excessive consumption of sugary beverages, this factor would not be an issue).

77. *Id.*

78. *Id.* at 211. *Boreali* further explained that "conferring authority on administrative agencies in broad or general terms must be interpreted in light of the limitations that the Constitution imposes. *Id.* However facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits." *Id.* (quoting Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987)).

79. *Id.* at 211 (citing N.Y. CITY CHARTER § 556(c)(2), (7), (9)).

80. *Id.* at 210 (calling the Council's actions a "far cry from the 'interstitial' rule making").

The third *Boreali* factor is consideration of prior or current legislation on the subject.[81] The court indicated that in the past few years, the City and State had unsuccessfully tried to pass legislation regarding sugary drinks with warning labels and taxes, among other things.[82] The court distinguished the Portion Cap Rule as a different means for targeting the beverages but with the same purpose or ends as those statutes or ordinances contemplated by the State and City.[83] The fact that neither the City nor State had been successful was indication that there was no legislative policy consensus on the issue.[84]

Finally, the court addressed the fourth *Boreali* factor—expertise. In *Boreali*, the agency attempted to enact a "simple code" banning indoor smoking, a code which required no agency expertise.[85] With the Portion Cap Rule, the court found that the Board did not exercise any special expertise in developing this ban either.[86] The court concluded that the Board overstepped its bounds in promulgating the Portion Cap Rule, affirming the lower court's ruling and declaring the regulation in violation of the separation of powers principle.[87]

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81. *Id.* at 211.

82. *Id.* at 212.

83. *Id.* (calling the DOHMH's Portion Cap Rule the "agency's attempt to 'take it upon itself to fill the vacuum and impose a solution of its own'").

84. *Id.* (analogizing to *Boreali* where the legislature could not agree on the proper method for implementing an indoor smoking ban). The court used the City's rejection of several solutions to reduce the purchase of sugary beverages such as "warning labels, prohibiting food stamp use for purchase, and taxes on such beverages" and the State legislature's proposed bills prohibiting check-out-counter sales of sugary drinks and restrictions on sales on government property as indicative of ongoing legislation. *Id.*

85. *Id.* (calling this code "unauthorized policy-making").

86. *Id.* (citing to the "well-known" fact that obesity is associated with excessive sugar consumption). Because this fact was purportedly so well-known, the Court found no scientific expertise necessary to draft this rule. *Id.* at 212–13.

87. The court in *Hispanic Chambers II* upheld the decision of the lower court holding that the Board of Health exceeded its authority when promulgating the ban on sugary drinks. *Id.* at 213. The DOHMH petitioned the Court of Appeals, but the court will not take the case until 2014; thus, the decision to pursue the case lies in the hands of Mayor Bloomberg's successor. Michael M. Grynbaum, *New York Soda Ban to Go Before State's Top Court*, N.Y. TIMES, Oct. 17, 2013, at A23, *available at* http://www.nytimes.com/2013/10/18/nyregion/new-york-soda-ban-to-go-before-states-top-court.html?_r=0. The DOHMH still asserts that this ban is "an important part of any public health agenda." *Id.*

IV. WRITER'S CRITICAL ANALYSIS

The intermediate appellate court began its discussion by stating, "This argument rests on a fundamental misunderstanding of the power of administrative agencies vis-à-vis the legislature."[88] Yet the separation of powers doctrine gives the legislature broad discretion to delegate its regulatory powers.[89] This power is balanced against the limitations on the administrative agency to "not use its authority as a license to correct whatever societal evils it perceives."[90] The court then proceeded with its *Boreali* analysis.[91] But the Court misinterpreted the *Boreali* analysis because *Boreali* is factually distinguishable from the case at hand. The decision in *Boreali* involved the boundaries of the Public Health Council's (Council) actions regarding its promulgation of a comprehensive code governing smoking areas open to the public.[92] In *Boreali*, the Council promulgated these regulations after the legislature was unable to achieve a balance on the issue. The Council weighed the concerns of all parties without legislative guidance.[93] The court was concerned with the fact that the Council weighed the political, social, and economic interests as opposed to relying on its inherent technical expertise to pass regulations.[94] Furthermore, the *Boreali* analysis is incredibly fact dependent, and the facts of *Hispanic Chambers of Commerce* do not fit squarely within the unique set of facts outlined in

88. *Hispanic Chambers II*, 970 N.Y.S. 2d at 206.

89. Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987).

90. *Id.* (citing Council for Owner Occupied Hous. v. Abrams, 125 A.D.2d 10 (1987)). The state constitution provides that "the legislative power of this State shall be vested in the Senate and the Assembly" and cannot pass on its duties to other branches of government; however, there is no prohibition on delegation of power with reasonable safeguards, which have been interpreted to mean policy directives or guidelines for the agency's decision-making process. *Boreali*, 517 N.E.2d at 1354 (quoting N.Y. CONST. art. III, § 1). The concept of delegation is also demonstrated when the agency provides the means but the legislature provides the ends. *Id.*

91. *Supra* Part II (discussing the historical context of *Boreali*).

92. *Boreali*, 517 N.E.2d at 1351.

93. *Id.* While there are inherent factual differences between regulation of smoking and regulation of food stuffs, the Council in *Boreali*, much like the Board in the instant case, weighed the concerns of not only smokers and non-smokers but businesses and the public as a whole. *Id.* The Council did this without any broad-based or vague legislation it was meant to gap-fill. *Id.*

94. *Id.*

Boreali, apart from the fact both cases involve public-health regulation.[95]

A. Factor 1—Balancing Economic Factors

While there were economic interests involved in the regulations in *Hispanic Chambers of Commerce*, the economic interests were consequential derivatives of the public health interest being regulated. The court stated that the exemptions listed in the *Boreali* regulation were "particularly telling" of ulterior motives because exemptions counter the stated goals of the regulation.[96] This suggests that the exemptions promulgated in the Portion Cap Rule run counter to the public health goal. But it is no surprise that the DOHMH balanced the economic interests of the businesses affected and attempted to find the least restrictive alternative[97] of enacting such change.[98] The DOHMH should not be punished for trying to ease the impact of such a regulation. But the *Boreali* analysis was factually distinguishable from the case at hand. In *Boreali*, the court stated that the Council was balancing "between safeguarding citizens from involuntary exposure to secondhand smoke . . . and minimizing governmental intrusion into the affairs of its citizens."[99] The *Boreali* court was concerned that the Council used not only health concerns but cost

95. Arguably, all public-health rulemaking and policy decisions are socially contentious because the safety of the public must be balanced against the rights of the individual. Harold J. Krent et al., *Whose Business Is Your Pancreas?: Potential Privacy Problems in New York City's Mandatory Diabetes Registry*, 17 ANNALS HEALTH L. 1 (2008). Anytime that balance is contemplated, there will be advocates and opponents. Such is the nature of public health.

96. Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S. 2d 200, 208 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*). In *Boreali*, the Public Health Council exempted certain establishments, restaurants and bars, from the indoor smoking bans. *Id.*

97. The least restrictive method is a constitutional law principle that requires both a compelling governmental interest and use of the least restrictive or intrusive methodology, which, in the context of public health law, attempts to provide some balance between individual rights and the necessity for public health. Paula M Trief & Richard A. Ellison, *Mandated Diabetes Registries Will Not Benefit Persons with Diabetes*, 168 ARCH. INT. MED. 799, 799–802 (2008).

98. *Hispanic Chambers II*, 970 N.Y.S.2d at 208–09. Argument that the least restrictive methods engaged by the DOHMH, i.e., limiting which FSEs were affected and not enacting a total ban, helped to prevent the rules from being too encroaching on the individuals and businesses.

99. *Boreali*, 517 N.E.2d at 1355.

and privacy interests—a uniquely legislative function.[100] In the instant case, the agency did not balance the public's *involuntary* exposure to a health hazard—soda consumption—but rather the public's own *voluntary* exposure to the hazard. In so balancing, the Board realized the hazard rested in excess consumption, not mere consumption or involuntary exposure as with smoking, and borrowed from the frequently used-in-public-health concept of behavioral economics to regulate the hazard of excess.

The markets and bodegas exemptions that the Board implemented were not necessarily economic but were exemptions that illustrated that the ban was designed to eliminate impulsive purchases of excessive quantity based on the theory of default availability that says "if the large size is available, why not get it?" With these exemptions, the Board strategically regulated the hazard of excess.[101] The court seemingly suggested that a blanket ban would be acceptable, if not preferred,[102] which would produce a stranger policy outcome.[103] Moreover, the court added that the Board never categorized sugary drinks as inherently unhealthy and that prescribing a maximum portion size looked beyond health concerns and "manipulate[d] choices to try to change consumer norms."[104] This suggests that if the Board had made an announcement stating "Dear New Yorkers, we would like to formally inform you (because you hadn't figured that out already) that sugary drinks are inherently unhealthy," rather than relying upon science and the expertise that administrative agencies are supposed to rely upon, the Board would have been in a better

100. *Id.* "While it is true that many regulatory decisions involve weighing economic and social concerns against the specific values that the regulatory agency is mandated to promote [i.e., public health], the agency in this case has not been authorized to structure its decision making in a 'cost-benefit' model." *Id.*

101. *Hispanic Chambers II*, 970 N.Y.S.2d at 211. Further distinguishing the regulation based on a theory of excess as opposed to mere consumption as in regulation with smoking.

102. *Id.* at 210.

103. A blanket ban would arguably create an instant economic burden on FSEs in New York City. For example, a blanket ban would not permit supermarket purchases of soda for home consumption. What the court fails to understand is that the "ban" is not designed to eliminate soda consumption but to reduce impulse purchases of super sizes so as to reduce excess consumption.

104. *Id.* at 209. The ban absolutely tries to manipulate the norm, but this is only a bad thing if one does not understand the power of behavioral economics in enacting lifestyle change—a tactic frequently used in public health interventions designed to target social and behavioral change. SOCIAL AND BEHAVIORAL FOUNDATIONS OF PUBLIC HEALTH, *supra* note 39, at 339–42 (discussing food marketing and policies).

position to support the ban, and the court would likely have been unable to find that this factor was met. Furthermore, the court stated that "[i]nstead of offering information and letting the consumer decide, the Board's decision effectively relie[d] upon the behavioral economics concept that consumers are pushed into better behavior when certain choices are made less convenient."[105] This statement alone indicates the court's complete misunderstanding of the social and behavioral aspects of public health. Public health interventions rely upon behavioral factors, including behavioral economics, to inspire or promote healthier behavior.[106] To use a core tenet of public health interventions against the Board obviates the efficacy and necessity for strong public health laws and places too much of the burden for better health on the individual.

B. Factor 2—Clean Slate or Gap Filling

In *Boreali*, the agency's actions were described as a "far cry from the 'interstitial' rulemaking that typifies administrative regulatory activity,"[107] and the agency was criticized because, by creating this rule, it had created a regulatory scheme *sua sponte*. In the instant case, the regulation did not gap fill any particular piece of legislation; this factor could almost be conceded save for the history of public health measures affirmatively acting to ameliorate public health crises and the growing trend for public

105. *Hispanic Chambers II*, 970 N.Y.S.2d at 209. Larger default portions cause increased consumption. Susan Kansagra, Assistant Comm'r, N.Y. City Dep't of Health and Mental Hygiene, *Maximum Size for Sugary Drinks: Proposed Amendment of Article 81* (June 12, 2012), *available at* http://www.nyc.gov/html/doh/downloads/pdf/boh/max_size_sugary_drinks_BOH.pdf (citing J.H. Ledikwe, J.A. Ello-Martin & B.J. Rolls, *Portion Sizes and the Obesity Epidemic*, 135 J. NUTR. 905 (2005); B. Wansink, J.E. Painter & J. North, *Bottomless Bowls: Why Visual Cues of Portion Size May Influence Intake*, 13 OBES. RES. 93 (2005)). Increased consumption with larger portions is also associated without an increased sense of satiety. For example, a study of people eating from self-refilling bowls ate seventy-three percent more. This result was without feeling more full. *Id.* (citing Wasink et al., *supra*). When more fluid ounces of a beverage are served, people drink more without decreasing other caloric consumption and without a difference in fullness. *Id.* (citing Rolls et al., *supra*).

106. Examples include requiring food packaging labels, displaying nutrition information on menus, limiting "bad" food advertising during times when children are statistically likely to be watching the television, increasing taxes on bad-for-you products, and even providing Women Infants and Children (WIC) subsidies for fruits and vegetables but not "junk" food like chips and candy. SOCIAL AND BEHAVIORAL FOUNDATIONS OF PUBLIC HEALTH, *supra* note 39, at 341–42.

107. Boreali v. Axelrod, 517 N.E.2d 1350, 1356 (N.Y. 1987).

health to address chronic disease.[108] Historically, public health departments were given greater latitude when combating communicable diseases as opposed to chronic diseases, especially with quarantines in the early twentieth century and the AIDS epidemic in the 1980s.[109] But more recently, progressive public health departments, like New York's DOHMH, have expanded power to control not just communicable diseases that affect the population at large, but also chronic diseases that affect the population at the level of the individual[110] because of the eminent danger of the disease.[111] The court even acknowledged the "broadly worded legislation[ ] that sets out general policy goals and program parameters"[112] but, without rationale, cursorily held that the Board exceeded its authority. Limiting public health departments to gap fill existing legislation is too narrow of an interpretation of the public health department's role and too risky for the department's ability to swiftly respond to imminent threats.[113] Moreover, public health was historically focused on the environment, whereas today's public health is much more focused on the individual.[114] While public health measures designed to regulate lifestyle factors of the individual are controversial,[115] this is the trend of modern public health laws and interventions.[116]

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108. *Id.*

109. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *16 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 11, 2013) (*Hispanic Chambers I*).

110. *See, e.g.*, Krent, *supra* note 95, at 17; Michelle M. Mello & Lawrence O. Gostin, *Commentary: A Legal Perspective on Diabetes Surveillance—Privacy and the Police Power*, 87 MILBANK Q.575 (2009). The implementation of the Mandatory Diabetes Registries is where anyone with a Hemoglobin A1c level above seven percent is automatically enrolled in the DOHMH Diabetes Registry. *Id.* Not only is the Registry enrollment mandatory, the DOHMH also communicates best practices with providers and counsels the patient to follow up with scheduled treatment and preventive examinations (screenings for diabetic retinopathy and neuropathy). *Id.*

111. *Hispanic Chambers I*, WL 1343607, at *16.

112. Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S. 2d 200, 210 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*).

113. *See* Grossman v. Baumgartner, 218 N.E.2d 259 (N.Y. 1966) (upholding a regulation restricting the tattooing of any individual except for a medical purpose as a legitimate response to an imminent public health concern).

114. Amy L. Fairchild, *Half Empty or Half Full? New York's Soda Rule in Historical Perspective*, 368 NEW ENG. J. MED. 1765, 1766 (2013).

115. Matthew B. Stanbrook, *Rationing Drink Size to Help Rationalize Our Sugar Intake*, 185 CANADIAN MED. ASS'N J. 9, 9 (2013).

116. Food labeling requirements, limits on advertising to children, the National School Lunch Program, controlling vending contracts, etc. are examples of regulation designed to target the individual. Cheryl L. Hayne, Patricia A. Moran & Mary M. Ford, *Regulating*

The court states that the administrative agency is given powers "to protect the public from inherently harmful and inimical matters affecting the health of the City."[117] If protection is the justification of those powers, how does the Soda Ban fail to protect the public from health hazards? The court in *Campagna v. Shaffer*[118] noted that "[w]here an agency has been endowed with broad power to regulate in the public interest, we have not hesitated to uphold reasonable acts on its part designed to further the regulatory scheme."[119] Moreover, the court in *Hispanic Chambers* goes on to explain that the agency is designed to supervise and regulate water and food safety and control diseases,[120] wholly ignoring these recent trends in public health. If the agency is supposed to control diseases, how is the regulation of a significant contributor to diabetes and obesity (which is now labeled as an epidemic[121]) not a legitimate regulatory response to control diseases? The court explicitly stated that "[i]f soda consumption represented such a health hazard, then the Sugary Drink Portion Cap Rule would be exactly the kind of interstitial rule making intended by the legislature and engaged in by the Board of Health in the past."[122] While the appellate court indicated that this link was not clear, the lower court stated that "the petitioners [Hispanic Chambers] [did] not dispute the seriousness of obesity and the myriad of effects on society . . . . [They] argue[d] the link between sugary drinks and obesity [was] not as clear."[123] Yet the *Hispanic Chambers I* court addressed the Center for Disease Control and Prevention's recommendation for state and local policies to discourage consumption of sugary bever-

Environments to Reduce Obesity, 25 J. PUB. HEALTH POL'Y 391, 394–401 (2004); *see also* Nicholas Freudenberg, John McDonough & Emma Tsui, *Can a Food Justice Movement Improve Nutrition and Health? A Case Study of the Emerging Food Movement in New York City*, 88 J. URB. HEALTH: BULL. OF THE N.Y. ACAD. OF MED. 623 (2011) (explaining New York's innovative strategies to solve public health and social problems).

117. *Hispanic Chambers II*, 970 N.Y.S.2d at 211 (citing to *Grossman*, 218 N.E.2d 259).

118. 536 N.E.2d 368 (N.Y. 1989).

119. *Id. at* 370 (finding a non-solicitation order for realtors unconstitutional) (quoting City of N.Y. v. State of N.Y. Comm. on Cable Tel., 390 N.E.2d 293 (1979)).

120. *Hispanic Chambers II*, 970 N.Y. 2d. at 211.

121. Lisa R. Young & Marion Nestle, *The Contribution of Expanding Portion Sizes to the US Obesity Epidemic*, 92 AM. J. OF PUB. HEALTH 246, 246 (2002).

122. *Hispanic Chambers II*, 970 N.Y.S.2d. at 211.

123. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *5 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 11, 2013) (*Hispanic Chambers I*).

ages.[124] Furthermore, the lower court added an entire paragraph citing longitudinal studies linking excess sugar consumption to a "myriad" of adverse health consequences.[125] For whatever reason, the appellate court chose to ignore the trial court's findings of fact. And, strangely, as the court suggested in its analysis of Factor One, the Court relied upon the fact that if the Board were to properly classify excess soda as unhealthy, the classification would be a legitimate rule.[126]

C. Factor 3—Ongoing Legislation

Boreali involved a public health regulation enacted *after* legislation failed.[127] In *Boreali*, the legislature attempted to pass a bill restricting the areas where smoking was permissible.[128] But this bill was unsuccessful.[129] There were also subsequent legislative attempts to prohibit smoking in public locations.[130] The *Boreali* court was concerned that because the legislature attempted to issue a policy decision on the subject of smoking and failed, public health should leave policy-making decisions on that issue to the legislature.[131] The case at hand had no analogous legislation on point[132] that had either failed or was pending. Yet, in contradiction to *Boreali*, the same court in *Campagna* stated that "an administrative [agency] has no power to declare through adminis-

124. *Id.*

125. *Id.*

126. The court reasons that the hazard only arises from *excess* consumption of soda and thus, soda itself cannot be classified as a hazard to those who drink in moderation and those who do not drink it. *Hispanic Chambers II*, 970 N.Y.S.2d. at 211. My question though is that if public health can regulate the consumption of alcohol and tobacco, why not soda?

127. Boreali v. Axelrod, 517 N.E.2d 1350, 1356 (N.Y. 1987) (indicating "the [Council] exceeded the scope of the authority properly delegated to it by the Legislature is the fact that the agency acted in an area in which the Legislature had repeatedly tried-and-failed to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions").

128. *Id.* at 1352.

129. *Id.*

130. *Id.* In fact, there were forty or so bills on this subject, none of which passed. *Id.*

131. *Id.* at 1356 (stating that "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends").

132. The court notes that the state had introduced bills prohibiting the sale of sugary drinks on government property and the display of sugary drinks at the check-out counters of stores, but these bills were not passed and are not on point. Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S. 2d 200, 212 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*).

trative fiat that which was never contemplated . . . by the Legislature."[133] So, with a bit of cognitive dissonance here, if the legislature has considered the issue, as in *Boreali*, DOHMH cannot regulate *but* the DOHMH cannot regulate unless legislature has contemplated the issue? The question, then, is whether the Court in *Hispanic Chambers II* needed to have prior legislation on point. Why is it that the legislation providing the DOHMH the authority to regulate matters related to the protection of the public health and well-being is not enough? *Boreali* suggests that although the legislature never articulated policy regarding excess sugary beverage consumption, the fact that it *contemplated* it was enough to fulfill this factor.[134] This court, in finding this factor met, has no factual basis for its findings.

D. Factor 4—Expertise

In *Boreali*, the court found that even though "indoor smoking [was] unquestionably a health issue," the Council did not need any expertise in health or any relevant technical skill to develop the antismoking regulations.[135] The *Boreali* Court suggested that because the hazards and effects of indoor smoking were well known, no special expertise was required in formulating an indoor smoking prohibition.[136] The deleterious effects of smoking have been widely known since the mid-1970s.[137] In contrast, as in the instant case, the health hazards associated with sugary beverages have not been as facially clear until lately.[138] A level of extrapolation of the data and assessment of recent studies is necessary to arrive at the conclusion that drinking excess quantities of sugary beverages can lead to a myriad of health conditions that include diabetes and obesity, which are inextricably linked to other diseases like cardiovascular disease and cancer.[139]

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133. Campagna v. Shaffer, 536 N.E.2d at 368, 370 (N.Y. 1989).

134. *Id.*

135. *Boreali*, 517 N.E.2d at 1356. I would submit that the court misunderstands the very nature of public health interventions, but I will spare that argument because it is solely policy-based.

136. *Id.*

137. *Id.* at 1351.

138. Kansagra, *supra* note 105 (explaining recent studies linking chronic diseases such as diabetes and obesity to excess sugar consumption).

139. *See* Grossman v. Baumgartner, 218 N.E.2d 259, 261 (1966) (involving a regulation pertaining to the methods of sanitation used in tattoo parlors when it became evident that

Moreover, the Court of Appeals held that when a regulatory measure by the DOHMH is based upon a statistical analysis,[140] even if the link between the hazard and the illness is unclear, the regulation that "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."[141] Not only has the link between the hazard and the illness or injury been established by science, the police power of administrative agencies such as the DOHMH is broad, and "courts [can] not substitute their judgment of a public health problem for that of eminently qualified physicians in the field of public health."[142] The court found that the Board did not exercise any special expertise in developing this Rule,[143] yet the Board was composed of scientists, researchers, and public policy

there was some link between hepatitis and needles, although at the that time in history the link was unclear).

140. *Id.*

141. *Id.* at 262. With communicable diseases, the American Medical Association's code of ethics regarding confidentiality is weighed against the duty to warn the public of danger—this is generally accepted. Krent, *supra* note 95, at 10–11. With non-communicable diseases there is not a counter-weight of duty-to-warn to offset the intrusion. *Id.* Nonetheless, the registries can be viewed as a form of "soft paternalism" where the government is trying to help those who cannot or will not help themselves. *Id.* at 7. The United States Supreme Court has upheld the creation of public health registries using the rational basis test, which provides that the intrusion caused by the registry must have a rational relationship to the goal it intends to address, and the registry must advance legitimate state interests. Whalen v. Roe, 429 U.S. 589, 602 (1977). "Because the immediate harm to society from a chronic disease may not be apparent, public health actions taken by governments may not appear to meet the legal burden of proof required for infectious diseases." Angela K. McGowan et al., *Prevention and Control of Chronic Disease*, *in* LAW IN PUBLIC HEALTH PRACTICE, *supra* note 30, at 402, 404. The state, however, "has a compelling interest in controlling the staggering human, social, and economic burdens of diabetes, particularly among the most vulnerable patients." Mello & Gostin, *supra* note 110, at 577. The only other chronic disease that also has a registry is cancer; however, the cancer registry aims to address causation of the disease and does not recommend treatment. Krent, *supra* note 95, at 9–10. "New York City's diabetes registry is the first noninfectious disease registry in the [United States] to mandate collection of individual testing data in order to study the effectiveness of current treatment." *Id.* at 11. But there is a solid rational relationship between compulsory reporting and reducing rates of disease, and the state has a legitimate interest in reducing the social and economic costs associated with chronic disease. Mello & Gostin, *supra* note 110, at 577.

142. *Grossman*, 218 N.E.2d at 262.

143. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200 at 212 (N.Y. App. Div. 1st Dep't 2013) (*Hispanic Chambers II*). The court further discussed that the "deleterious effects (e.g., obesity) associated with excessive soda consumption are well-known," *id.*, yet in its earlier analysis, the court suggested that the Board should have publicly announced that soda is a health hazard, which implies that that is not well known. *Id.* at 209.

experts with degrees such as M.D., Ph.D., M.P.H., and Dr.PH.[144] The Board is, by its very definition, a body of experts, empowered and expected to effectuate public health regulation.[145] The effects of sugary sodas are not as clear as the effects of smoking, yet the court says no scientific expertise is required to understand the literature and connection.[146] The slideshow from the public comment presentation was presented by Susan Kansagra, M.D., M.B.A. Each of Dr. Kansagra's statistics about the status of obesity in New York, the consumption rates of sugary drinks, the link between sugary drinks and obesity and diabetes, and the information about portion size default behaviors were all supported by studies and ample citations.[147] It must be that only a panel of experts is able to aptly digest the statistics, studies, and data to support the correlation between sugary beverages and health concerns such as diabetes and obesity; if it were as clear on its face, as the smoking link was, the court would have ruled differently. Furthermore, the court also made the nuanced distinction that the consumption of sugary sodas was not a health hazard because only the consumption of them *in excess* was a hazard.[148] The court made this finding, despite scientific evidence to the contrary and despite the findings of a panel of experts tasked to address this issue.

V. CONCLUSION

The court erred in holding the Portion Cap Rule unconstitutional because the court misapplied the incredibly fact-dependent analysis in *Boreali*.[149] Although there was a weighing of the economic impact of the regulation, the DOHMH should not have been punished for attempting to make the ban easier to comply

144. N.Y. City Dep't of Health and Mental Hygiene, *New York City Board of Health*, NYC HEALTH, http://www.nyc.gov/html/doh/html/about/boh.shtml (updated Mar. 5, 2013). "Each Board member is a recognized expert, and the group represents a broad range of health and medical disciplines." *Id.*

145. *Id.*

146. *Hispanic Chambers II*, 970 N.Y.S.2d at 212.

147. Kansagra, *supra* note 105.

148. *Hispanic Chambers II*, 970 N.Y.S.2d at 211 ("[S]oda consumption cannot be classified as a health hazard per se.").

149. I submit that this is because the court failed to understand public health interventions based upon social and behavioral change. But this should be the very reason society employs the expertise of administrative agencies to make these highly technical decisions.

with upon its enactment. Additionally, the aim of this public health initiative was to curb impulsive over-consumption at point-of-sale FSEs. This aim is rationally related to the exemptions for larger-quantity vendors, such as groceries and bodegas, and not arbitrary and capricious in the least. The Rule is factually supported by science, and behavioral economics is a reliable methodology in which public health interventions are based. As to factor two, the DOHMH has not created policy from a clean slate because it merely fulfilled its statutory obligation to protect the public from health hazards. This is especially salient in light of the fact that public health has been moving toward more individual-based lifestyle interventions to protect the health of the public as a whole. In factor three, the court completely overlooked the fact that—unlike in *Boreali*—there was, and is, no legislation on point. And, finally, to address factor four, the Board was comprised of experts who have the training and experience to weigh the science and set regulations that respond to ongoing public health crises. When this case comes before the New York Court of Appeals in 2014, these four *Boreali* factors and analyses will again be addressed and hopefully the errors of the intermediate court will be corrected.

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Bradley Muhs, Nick Sellars, and Melaina Tryon
Semifinalists

THE FLORIDA BAR INTERNATIONAL LAW SECTION
WILLEM C. VIS PRE-MOOT
MIAMI, FLORIDA
Jeremy Bailie, Paul Crochet, Alisa French, Yessica Liposky,
Carmen Herrera Valverde,
Raquel Lopez, and Davis Watson III
Second Place

ABA LAW STUDENT DIVISION
NATIONAL APPELLATE ADVOCACY COMPETITION, REGIONAL
WASHINGTON, D.C.
Kayla Cash, Yaffi Hilili, Madison Kebler, and David Wright
Co-Champions
(team advanced to the National Finals)

Adriana Corso, Michael Rothfeldt, and Scott Tolliver
Finalists

22ND ANNUAL CHIEF JUDGE CONRAD B. DUBERSTEIN
NATIONAL BANKRUPTCY MEMORIAL MOOT COURT COMPETITION
NEW YORK, NEW YORK
Kevin Crews, Jonathan Hart, and Tommy Burgess
Quarterfinalists

2014 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT
COMPETITION, SOUTHERN REGIONAL
NEW ORLEANS, LOUISIANA
Alyssa Cory, Sunai Edwards, and Bradley Muhs
Semifinalists
Third Place Memorial Award

THIRD ANNUAL NATIONAL PROFESSIONAL RESPONSIBILITY
MOOT COURT COMPETITION
INDIANAPOLIS, INDIANA
Tyler Egbert, Ashley Panaggio, and Nick Sellars
Nick Sellars, *Best Oralist in the Preliminary Rounds*

ACCOMPLISHMENTS—2014

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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG
JEREMY BAILIE, PAUL CROCHET, ALISA FRENCH, YESSICA LIPOSKY,
CARMEN HERRERA VALVERDE,
RAQUEL LOPEZ, AND DAVIS WATSON III
Top 32 (out of 99 teams)
Honorable Mention Claimant's Memorandum
Honorable Mention Respondent's Memorandum
Paul Crochet, *Honorable Mention for Individual Best Oralist*

ABA LAW STUDENT DIVISION
NATIONAL APPELLATE ADVOCACY COMPETITION, NATIONAL FINALS
CHICAGO, ILLINOIS
Kayla Cash, Yaffi Hilili, Madison Kebler, and David Wright
Octofinalists

2014 ROBERT ORSECK MEMORIAL MOOT COURT COMPETITION
ORLANDO, FLORIDA
Jeremy Bailie, Anisha Patel, and Nick Sellars
Finalists
Best Brief Award

2014 E. EARLE ZEHMER WORKER'S COMPENSATION
MOOT COURT COMPETITION
ORLANDO, FLORIDA
Yaffi Hilili, Yesica Liposky, and Kristy Rowsey
Quarterfinalists
Second-Best Brief Award
Yesica Liposky, *Best Individual Oralist Award*

33RD ANNUAL JOHN MARSHALL LAW SCHOOL INTERNATIONAL
MOOT COURT COMPETITION IN
INFORMATION TECHNOLOGY AND PRIVACY LAW
CHICAGO, ILLINOIS
Erin Brennan, Melaina Tryon, and Nick Sellars
Finalists

NATIONAL VETERANS LAW MOOT COURT COMPETITION
WASHINGTON, D.C.
Jeremy Bailie and Yesica Liposky
Quarterfinalists

ACCOMPLISHMENTS—2014

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NEW YORK CITY BAR'S 65TH ANNUAL NATIONAL MOOT COURT COMPETITION, REGION V
GAINESVILLE, FLORIDA
Alyssa Cory, Ryan Hedstrom, and Ashley Panaggio
Regional Champions
Best Brief Award
L. Ashley Panaggio, *Best Oralist Award*
(team advancing to the National Finals)

Madison Kebler, Paige Lacy, and Jeremy Rill
Quarterfinalists

MERCER MOOT COURT COMPETITION ON LEGAL ETHICS AND PROFESSIONALISM
MACON, GEORGIA
Brittany Cover, Yaffi Hilili, and Anisha Patel
Semifinalists
Anisha Patel, *Best Oralist Award*