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The Soda Ban or the Portion Cap Rule? Litigation Over the Size of Sugary Drink Containers as an Exercise in Framing

By Rodger Citron and Paige Bartholomew

Among the most controversial actions taken by a municipality in recent years was New York City's (the City) efforts to restrict restaurants, movie theaters, and other food-service establishments from serving sugary drinks in sizes larger than sixteen ounces. The City adopted the rule as part of its efforts to address rising rates of obesity. The measure received extensive news coverage, drew dueling newspaper editorials, and thus far has been blocked by litigation.[1]

Rodger Citron

The rule in question has been referred to as the "Soda Ban."[2] In fact, it does not ban soda. It only regulates the size of the container in which soda or other sugary drinks may be served. The "Portion Cap Rule," as it has been labeled by the City, was adopted by the New York City Board of Health (Board of Health) in September 2012 and was scheduled to go into effect in March 2013.

Before that occurred, however, the rule was challenged in court. In 2013, the New York County Supreme Court held that the rule was not valid, and this decision was affirmed by the First Department of the Appellate Division.[3] As detailed below, both courts essentially held that the Board of Health did not have the authority to adopt the rule and therefore violated separation of powers doctrine in doing so.

As this article went to press, the City was pursuing an appeal of the First Department's decision in the Court of Appeals.[4] This article discusses the litigation over the City's efforts to restrict the size of sugary drink containers. It provides a history of the rule, from its promulgation by the Board of Health to the Appellate Division's decision invalidating the rule.

The article also comments on the dispute between the parties over how to frame the rule. Opponents of the rule, including the parties who filed suit to block the rule, characterize the measure as an unwarranted and unprecedented incursion of consumer choice and personal freedom. They decry the "Soda Ban." On the other hand, proponents of the "Portion Cap Rule," including the City, view the rule as a modest measure intended to address obesity, a significant—even alarming—public health issue. (For the rest of this article, we will refer to the rule in question as the "soda container rule.")

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As will be discussed, the disagreement over how to frame this dispute illustrates the nature of the judgment the courts have made thus far. In determining whether the Board of Health has the authority to promulgate the soda container rule, the courts have applied the four-factor test set out by the Court of Appeals in *Boreali v. Axelrod* in order to draw the "difficult-to-demarcate line" between permissible agency rulemaking and impermissible legislating.[5] In making this determination, the courts engage in something akin to a gestalt judgment—not only is the application of the *Boreali* factors discretionary, but some factors require nothing more than an exercise of classification or judgment. Thus far, the petitioners have been more successful than the City in persuading the courts that their view of the soda container rule—and of the governing separation of powers principles—is correct.

Promulgation of the Rule

The soda container rule was developed by two City agencies: the Board of Health and the New York City Department of Health and Mental Hygiene (DOHMH). To understand the authority of the Board of Health, it is necessary to first understand the authority of DOHMH. As the First Department summarized: "DOHMH is an administrative agency that is charged with regulating and supervising all matters affecting health in the city, including conditions hazardous to life and health, by regulating the food and drug supply of the City, and enforcing provisions of the New York City Health Code."[6]

The Board of Health "is empowered to amend the Health Code with respect to all matters to which the power and authority of DOHMH extend."[7] This includes Article 81 of the Health Code, which sets out the rules regulating City food service establishments (FSEs).[8]

On May 30, 2012, Mayor Michael Bloomberg announced the soda container rule, a proposed amendment to Article 81 that would require FSEs to cap at sixteen ounces the size of cups and containers used

to serve sugary beverages. The stated purpose of the rule was to address rising obesity rates in the City. In a news article about the announcement, Mayor Bloomberg said, "Obesity is a nationwide problem, and all over the United States, public health officials are wringing their hands saying, 'Oh, this is terrible.'" He added, "New York City is not about wringing your hands; it's about doing something."[9]

A day later, "14 members of the City Council wrote to the Mayor opposing the [proposed rule] and insisting that, at the very least, it should be put before the Council for a vote."[10] However, the proposed soda container rule never was put before the City Council for a vote.

Instead, DOHMH presented the proposed amendment to the Board of Health in June 2012 and a public hearing on the soda container rule was held on July 24, 2012. According to the First Department: "Of more than 38,000 written comments received prior to the public hearing, approximately 32,000 (84 percent) supported the proposal and approximately 6,000 (16 percent) opposed it. In addition, New Yorkers for Beverage Choice submitted a petition opposing the proposal, signed by more than 90,000 people."[11]

The DOHMH made no changes to the initial proposal submitted to the public. Instead, the DOHMH provided the Board with a memorandum summarizing and responding to the written comments. In the memorandum, the DOHMH pointed out that "the scientific evidence supporting associations between sugary drinks, obesity, and other negative health consequences is compelling."[12]

The DOHMH also noted that the proposed rule would have a "material impact" on consumption of sugary drinks because "patterns of human behavior indicate that consumers gravitate toward the default option." Thus, the DOHMH concluded, "if the proposal is adopted, customers intent upon consuming more than 16 ounces would have to make a conscious decision to do so."[13] In response "to the critics' assertion that the rule would result in economic hardship for certain businesses, the agency responded that the freedom to sell large sugary drinks 'means little compared to the necessity to protect New Yorkers from the obesity epidemic.'"[14]

On September 13, 2012, the Board of Health voted to adopt the rule, and a "Notice of Adoption of Amendment (§ 81.53) to Article 81 of the Health Code" was published in the City Record. The rule was scheduled to go into effect on March 12, 2013.[15]

Litigation in the Supreme Court

Before the rule went into effect, it was challenged by a number of groups who brought an action in the Supreme Court of New York County seeking to invalidate the soda container rule.[16] The petitioners claimed that the Board's adoption of the Portion Cap Rule usurped the role of the City Council and imposed social policy by executive fiat, contending that the Board "may not bypass the legislature, under the guise of public health, and make fundamental policy choices and establish far-reaching new policy programs all by themselves, no matter how well-intentioned they may be."[17]

The Supreme Court declared the regulation invalid, primarily on the ground that the Board of Health exceeded its authority and violated the separation of powers doctrine set out in *Boreali v. Axelrod*.[18] It also found that the rule itself was arbitrary and capricious.[19]

The First Department's Decision—*Boreali* as a Controlling Case

The principal issue on appeal was whether the Board of Health exceeded the bounds of its authority as an administrative agency when it promulgated the soda container rule. The First Department held that the Board of Health exceeded the bounds of its lawfully delegated authority as an administrative agency when it promulgated the rule and therefore affirmed the Supreme Court decision.[20]

The court first pointed out that the starting point for analyzing whether the rule violates the separation of powers doctrine is the New York State Court of Appeals' landmark decision in *Boreali v. Axelrod*.[21] *Boreali* depended upon and articulated a type of delegation doctrine. A state administrative agency not only is a creature of the legislature, it also "may not, in the exercise of rulemaking authority, engage in broad-based policy determinations."[22] The court acknowledged that the line between permissible rulemaking authority and impermissible policy determination is "difficult to demarcate."[23]

In *Boreali*, which involved regulations promulgated by the Public Health Council (PHC), the Court relied on four factors to determine whether an agency acted beyond the bounds of its delegated authority and engaged in impermissible legislative policymaking:

> First, the Court found that the PHC had engaged in the balancing of competing concerns of public health and economic costs, "acting solely on its own ideas of sound public policy." Second, the PHC did not engage in the "interstitial" rule making typical of administrative agencies, but had instead written "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." Third, the PHC's regulations concerned "an area in which the legislature had repeatedly tried—and

failed—to reach an agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions." The separation of powers principles mandate that elected legislators, rather than appointed administrators "resolve difficult social problems by making choices among competing ends." Fourth, the PHC had overstepped its bounds because the development of the regulations did not require expertise in the field of health.[24]

The First Department also relied on *Matter of Campagna v. Shaffer,* in which the Court of Appeals explained that "[a] key feature of the *Boreali* case…was that the Legislature had never articulated a policy regarding public smoking."[25] According to the First Department, subsequent to *Boreali*, "courts have consistently held that so long as an action taken by an administrative agency is consistent with the policies contemplated by the Legislature, the action taken will survive constitutional scrutiny under the doctrine of separation of powers."[26]

The First Department's Decision—Applying *Boreali*

The First Department noted that the Board of Health, although delegated a broad range of powers that are essentially legislative in nature, has no inherent legislative power.[27] Accordingly, the court stated, the Board derives its power to establish rules and regulations directly and solely from the City Council. The court then went on to assess the factors enunciated in *Boreali.* In doing so, it found that all four *Boreali* factors indicative of the usurpation of legitimate legislative functions are present in this case.[28] A brief summary of the analysis of each factor follows.

The first *Boreali* factor is whether the agency has balanced competing concerns of public health and economic costs. In *Boreali,* the court found that the PHC's inclusion of exceptions and exemptions that reflected the agency's own balancing of economic and social implications of the regulations was clear evidence that the regulatory scheme was inconsistent with the agency's legislative authority.[29] The PHC had exempted certain establishments, such as bars and certain restaurants, from the indoor smoking bans. According to the court, this effort to "strike the proper balance among health concerns, costs and privacy interests…is a uniquely legislative function."[30] In *Boreali,* the presence of exemptions was telling because such exemptions did not reflect the agency's charge to protect public health but instead reflected the agency's own policy decisions with respect to the balance between protecting public health and ensuring economic viability of certain industries.[31]

The First Department found that the first *Boreali* factor was satisfied in this case. The DOHMH and the Board members themselves indicated that they weighed the potential benefits against economic factors during the public comment period and public hearings.[32] Just as in *Boreali,* the exemptions and exceptions to the soda container rule also evince a compromise of social and economic concerns as well as private interests, the First Department held.[33] The rule does not apply to all FSEs, nor does it apply to all sugary beverages.[34]

The court also found that the soda container rule "looks beyond health concerns, in that it manipulates choices to try to change consumer norms."[35] In essence, the rule was inherently a policy decision that reflected a balance between health concerns, an individual consumer's choice of diet, and business financial interests in providing the targeted sugary drinks.[36] Such a policy decision is suited for legislative determinations, the court stated, because it involves "difficult social problems" that must be resolved by "making choices among competing ends."[37] In sum, the court held that the first *Boreali* factor was met because the selective restrictions enacted by the Board of Health reveal that the health of New York City residents was not its sole concern.[38]

The second *Boreali* factor—whether the Board of Health exceeded its authority by writing on "a clean slate" rather than using its regulatory power to fill in the details of a legislative scheme—was also met in the soda container case. Administrative agencies may engage in what is known at "interstitial rule making," or the process of filling in the details of a broad legislative mandate and making that legislation operational.[39] An agency exceeds the limits of its authority when the agency's action goes beyond filling in the details of a broad legislative scheme.[40]

In *Boreali,* there was no legislation authorizing the PHC to regulate smoking in public places. Thus, the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance."[41] Similarly, the First Department found that in the soda container case the Board's actions did not constitute the type of interstitial rule making described in *Boreali.* Here, the Board of Health did not fill in the gaps of an already existing legislative scheme, but instead wrote on a clean slate. In the First Department's view, the Board's actions were not the sort of interstitial rule making that typifies administrative regulatory activity.[42]

The Board of Health insisted that it possessed the authority to act, citing the City Charter's grant of broad authority to regulate "all matters affecting health in the City."[43] The court held that although the Board's power is broad in scope, the City Charter did not authorize the Board's actions.[44] Such an exercise of power

would be an "unfettered delegation of legislative power."[45] In addition, the First Department stated the City Charter provides that the Board of Health may exercise its power to modify the health code as long as it is "not inconsistent with the constitution," or with the laws of the state and the City Charter.[46] The court held that the City Charter's Enabling Act, granting the Board of Health explicit power to establish, amend, and repeal the Health Code, was clearly intended by the legislature to provide the agency with the discretion to engage in interstitial rule making designed to protect the public from health hazards.[47] Thus, the court found that because Board of Health did not designate soda consumption as a health hazard per se, the Board of Health's action in curtailing its consumption was not the type of interstitial rule making intended by the legislature.[48]

The third *Boreali* factor focused on the fact that the legislature had repeatedly tried to pass legislation implementing indoor smoking bans, yet had failed to do so.[49] In the *Boreali* court's view, this reflected the legislature's inability to agree on the "goals and methods that should govern in resolving" the issue.[50] There, the agency's attempt to impose a solution of its own was improper. The court also distinguished the case of failed legislative action from mere inaction, holding that mere legislative inaction on a particular issue should not satisfy this factor.[51]

With respect to the soda container rule, the First Department noted that both the City and State legislatures have unsuccessfully attempted "to target sugar-sweetened beverages."[52] The City Council rejected several resolutions such as warning labels, prohibiting food stamp use for purchase, and taxes on such beverages.[53] The State Assembly has introduced, but not yet passed, bills prohibiting the sale of sugary drinks on government property and prohibiting stores with ten or more employees from displaying candy or sugary drinks at the check-out counter or aisle.[54] The court found that although the rule employed different means of targeting sugary beverages, it nevertheless pursued the same end and thus addressed the same policy area in which measures had been rejected by both the State and City legislatures.[55] According to the Court this was a strong indication that the legislature remains unsure of how best to approach the issue of sugary beverage consumption.[56] The First Department concluded that the legislature's inaction demonstrated that the legislature had been unable to reach an agreement on the goals and methods that should govern in resolving a society-wide health problem.[57]

The final *Boreali* factor in determining whether an administrative agency has exceeded the bounds of its legislative authority is whether any special expertise or technical competence was involved in the development of the regulation. In *Boreali,* the PHC used its broad legislative grant of authority to develop a "simple code" that banned indoor smoking and exempted certain groups.[58] The *Boreali* court found that no technical competence or agency expertise was necessary to develop this code.[59] This indicated to the court that the agency had engaged in unauthorized policy-making rather than interstitial rulemaking.[60]

In the soda container case, the court found that the Board of Health did not exercise any special expertise or technical competence in developing the soda container rule.[61] Rather, the rule was drafted and proposed by the Office of the Mayor and submitted to the Board, which enacted it without making any substantive changes.[62] This factor, although less compelling than the others, also weighed in favor of invalidating the rule, according to the First Department.[63]

After applying the four-factor test set forth in *Boreali,* the court concluded that the Board of Health had overstepped the boundaries of its authority by violating the state principle of separation of powers. The court did not address the argument that the regulation was arbitrary and capricious.[64]

Framing the Dispute in the Appellate Division

The litigation over the soda container rule has involved a number of disputes over how to frame the controversy. As an initial matter, as noted earlier, the petitioners referred to the rule in their brief before the First Department as "the Ban"[65]—a term that suggests an authoritarian edict that deprives consumers of certain beverages. It frames the dispute as a zero-sum contest in which the Board of Health undeniably denies consumers the opportunity to purchase soda. The City, by contrast, defends what it calls "the Portion Cap Rule"—a phrase that is meant to be neutral and scientific and indicates an effort to clothe the rule in the garb of scientific expertise. There is no explicit mention of soda or sugar and no suggestion that consumers are being deprived of choices. In determining whether the Board has engaged in the broader task of policymaking or the more limited act of interstitial rulemaking, it surely makes a difference in how the Board's rule is defined and described. The Soda Ban suggests the former while the Portion Cap Rule connotes the latter.

In their briefs before the First Department, the parties also engaged in a framing dispute over the extent to which the case involved an abstract question of law or a practical matter of policymaking. The petitioners adopted a formalistic approach, insisting that there should be no discussion of science or policy unless the Board of Health, as a threshold matter, possesses the authority to adopt the soda container rule. The preliminary statement of their brief begins: "This case is not about obesity in New York City of soft drinks. It is about whether the Mayor and his Board of Health can usurp the authority of the City Council and decide for

themselves what the law should be."[66] For the petitioners, the dispute was one that should be resolved within the confines of black letter law.

The City, by contrast, sought to persuade the court that obesity is a crisis that demands governmental action. The preliminary statement of the City's brief states: "The Portion Cap Rule regulates how businesses serve a product whose overconsumption is driving an epidemic."[67] Before addressing the legal issues raised by the petitioners, the City devoted nearly two pages of its preliminary statement to describing the extent of the obesity "health crisis" and the role of sugar and soda in causing obesity; it then explained how the soda container rule "is a measured response" to that crisis.[68] Confronted with such an alarming health concern, the brief suggests, surely the Board of Health has the authority to act—especially when its actions are modest and supported by sufficient data.

The last framing dispute has been, thus far, the most consequential. And that dispute is over the authority invested in the Board of Health. Is the Board wrongly claiming, as the petitioners insist, that it is "unique among all State and City agencies" and therefore "not bound by constitutional limitations imposed by the separation of powers"?[69] Or is the City correct in asserting that the Board is not "typical" and in fact "is empowered to issue substantive rules and standards in public health matters," with the authority to protect "the health of New Yorkers from chronic and preventable diseases and conditions"?[70] Thus far, the petitioners have persuaded the courts to accept their view of the Board's authority.

The First Department acknowledged that the New York City Charter "explicitly grants" the Board of Health "the power to supervise and regulate the safety of the water and food supplies" in order to address "inherently harmful matters," but found that mere "soda consumption" did not constitute such a "health hazard."[71] Rather, the court stated, "the hazard arises from the consumption of sugary soda in 'excess quantity.'"[72] Therefore, the First Department reasoned, the Board's "action in curtailing its consumption was not the kind of interstitial rulemaking" permitted under *Boreali.* This discussion accords with how the petitioners have framed the dispute.

However, if it is accepted that obesity is a crisis that results, in large part, from the consumption of sugary soda in excess quantities—that is, if excessive soda consumption is found to be a "health hazard"—and it is accepted that the soda container rule does not ban the consumption of soda but only regulates how it may be sold to consumers, then isn't the soda container rule the sort of interstitial rulemaking allowed under *Boreali*? The answer depends, it would seem, on how the rule is framed by the parties and, ultimately, by the Court of Appeals.

Endnotes

1. *See* Robert H. Frank, *Mixing Freedoms in a 32-Ounce Soda,* N.Y. Times, March 24, 2013, at BU6; William Glaberson, *Legal Battle Over Limits on Sugary Drinks May Outlast Bloomberg's Tenure,* N.Y. Times, Mar. 13, 2013, at A20; E.C. Gogolak, *Another State Court Rejects Limits on Sugary Drinks,* N.Y. Times, July 31, 2013, at A17; Michael M. Grynbaum, *City Argues to Overturn Ruling That Prevented Sugary Drinks Limits,* N.Y. Times, Junes 12, 2013, at A21; Anemona Hartocollis, *To Gulp or to Sip? Debating a Crackdown on Big Sugary Drinks,* N.Y. Times, June 1, 2012, at A22. *Compare* Editorial, *A Ban Too Far,* N.Y. Times, June 1, 2012, at A26 (opposing the City's measure), *with* Op-Ed., *Bring back the soda ban,* N.Y. Daily News, Apr. 26, 2013, http://www.nydailynews.com/opinion/bring-back-soda-ban-article-1.1327732 (supporting the portion cap rule).
2. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 204 (1st Dep't 2013).
3. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *16 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd,* 970 N.Y.S.2d 200 (App. Div. 1st Dep't 2013).
4. *See* Joel Stashenko, *Court of Appeals to Weigh Ban on Big Drink Containers,* 250 N.Y. L.J., 1, 4 (Oct. 18, 2013), *available at http://www.newyorklawjournal.com/pdfwrapper.jsp?sel=NYLJfridayA* (discussing the New York State Court of Appeals decision to review the First Department's holding that the Board of Health did not have the authority to adopt the portion cap rule).
5. Boreali v. Axelrod, 71 N.Y.2d 1, 11 (1987).
6. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 204.
7. *Id.*
8. *Id; see also* N.Y. City R. & Regs. tit. 24, § 81.03(s) (2012) (defining an FSE as a "place where food is provided for individual portion service directly to the consumer, whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle.").
9. Michael M. Grymbaum, *Mayor Planning A Ban on Big Sizes of Sugary Drinks,* N.Y. Times, May 31, 2012, at A1.
10. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 204.
11. *Id.* at 205.
12. *Id.*
13. *Id.*
14. *Id.*
15. The First Department provided the following summary of the rule: The "Portion Cap Rule limited the maximum self-service cup or container size for sugary drinks to 16 fluid ounces for all FSEs within New York City, and defined 'sugary drink' as a non-alcoholic carbonated or non carbonated beverage that is sweetened by the manufacturer or establishment with sugar or another caloric sweetener, has greater than 25 calories per 8 fluid ounces of beverage, and does not contain more than 50 percent of milk or milk substitute by volume as an ingredient." *Id.* The court elaborated: "The rule targeted non-diet soft drinks, sweetened teas, sweetened black coffee, hot chocolate, energy drinks, sports drinks, and sweetened juices, but contained carve-outs for alcoholic beverages, milkshakes, fruit smoothies and mixed coffee drinks, mochas, lattes, and 100% fruit juices." Furthermore, the rule "applies only to those FSEs that are subject to the agency's inspections. As a result, the ban applies to restaurants, delis, fast-food franchises, movies theaters, stadiums, and street carts, but not to grocery stores, convenience stores, corner markets, gas stations and other similar businesses." *Id.*

16. The petitioners included 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.
17. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce,* 970 N.Y.S.2d at 206.
18. Boreali v. Axelrod, 71 N.Y.2d 1,(1987), *discussed in* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *8–18 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd,* 970 N.Y.S.2d 200 (App. Div. 1st Dep't 2013).
19. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce,* at *20.
20. The decision was written by the Hon. Dianne T. Renwick. The other judges on the panel were David Friedman, Rosalyn H. Richter, and Paul G. Feinman. The decision was unanimous; there was no dissent.
21. *See Boreali,* 71 N.Y.2d at 6 (holding that although the State Legislature "gave the Public Health Council (PHC) broad authority to promulgate regulations on matters concerning public health" it nevertheless held that "the scope of the PHC's authority…was limited by its role as an administrative, rather than a legislative body."); *see also* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 207 (2013) ("In *Boreali,* the PHC promulgated regulations prohibiting smoking in a wide variety of public facilities following several years of failed attempts by members of the state legislature to further restrict smoking through new legislation."). *Id.* The regulations at issue in *Boreali* were invalid "because, although the PHC was authorized to regulate matters affecting public health, the agency 'stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.'" *Id.* (quoting *Boreali*, 71 N.Y.2d at 9).
22. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 206-07 (quoting Rent Stablization Ass'n v. Higgins, 83 N.Y.2d 156, 169 (1993), *cert. denied,* 512 U.S. 1213 (1993)).
23. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 207.
24. *Boreali v. Axelrod*, 71 N.Y.2d 1, 14 (1987) (alteration in original) (citation omitted).
25. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 208 (citing and discussing Matter of Campagna v. Shaffer, 73 N.Y.2d 237, 243 (1979)).
26. *Id.* at 208.
27. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce* ,970 N.Y.S.2d at 206 (citing *People v. Blanchard,* 288 N.Y. 145 (1942)).
28. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 208.
29. *Id.* (quoting *Boreali,* 71 N.Y.2d at 12).
30. *Id.*
31. *Id.*
32. *Id.*
33. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 209.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (quoting *Boreali*, 71 N.Y.2d at 13).
38. *Boreali*, 71 N.Y.2d at 10.
39. *Id.* (quoting *Boreali*, 71 N.Y.2d at 13).
40. *Id.*
41. *Boreali*, 71 N.Y.2d at 13-14.
42. *Id.* at 13.
43. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 210.
44. *Id.* at 211.
45. *Id.*
46. *Id.*
47. *Id.*
48. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 211.
49. *Id.*
50. *Boreali,* 71 N.Y.2d at 8.
51. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 212.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 212.
57. *Boreali,* 71 N.Y.2d at 13.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 213.
62. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 213.
63. *Id.*
64. *Id.*
65. Brief for Respondents at 2, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12 (App. Div. 1st Dep't Apr. 24, 2013).
66. Brief for Respondents at 1, N.Y. Statewide Coal. of Hispanic Chambers of Commerce, No. 653584/12 (App. Div. 1st Dep't Apr. 24, 2013).
67. Brief for Petitioner at 1, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12 (App. Div. 1st Dep't Mar. 25, 2013).
68. Brief for Petitioner, *supra* note 67, at 2-4.
69. Brief for Respondents, *supra* note 65, at 3.
70. Brief for Petitioner, *supra* note 67, at 3-4.
71. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 211.
72. *Id.*

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