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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEW YORK STATEWIDE COALITION OF
HISPANIC CHAMBERS OF COMMERCE, et al.

Plaintiffs-Petitioners-Respondents,

-against-

No. 134

THE NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, et al.

Defendants-Respondents-Appellants.

20 Eagle Street
Albany, New York 12207
June 4, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 134, Matter of Statewide Coalition of
3 Hispanic Chambers of Commerce v. the New York City
4 Department of Health.

5 Counselor, would you like any rebuttal
6 time?

7 MR. DEARING: Yes, may I reserve three
8 minutes for rebuttal, please?

9 CHIEF JUDGE LIPPMAN: Three minutes, sure,
10 go ahead. You're on.

11 MR. DEARING: May it please the court. I'm
12 Richard Dearing for the City Board of Health, the
13 Department of Health, and its commissioner.

14 The rule here does not ban sugary drinks
15 and it does not dictate consumption choices or
16 amounts of consumption - - -

17 CHIEF JUDGE LIPPMAN: Counsel, what - - -

18 MR. DEARING: - - - of sugar.

19 CHIEF JUDGE LIPPMAN: - - - what
20 "legislative" - - - and I put that in quotes - - -
21 powers do the Board - - - does the Board have?

22 MR. DEARING: The State has plenary
23 legislative powers in the area - - -

24 CHIEF JUDGE LIPPMAN: What - - -

25 MR. DEARING: - - - of public health.

1 CHIEF JUDGE LIPPMAN: What does that mean?
2 Do they replace the legislature, the City Council - -
3 -

4 MR. DEARING: What it means - - -

5 CHIEF JUDGE LIPPMAN: - - - in relation to
6 public health? What is - - - what is the
7 relationship between that plenary legislative power
8 and the powers of the City Council and the powers of
9 the New York State Legislature?

10 MR. DEARING: The - - - the Board is
11 subsidiary to the New York State Legislature, and the
12 New York State Legislature can overrule any measure
13 that the Board passes.

14 JUDGE READ: Could the City Council amend
15 the City Charter to narrow the Board's powers?

16 MR. DEARING: The City Council could not,
17 because it would raise a curtailment problem. There
18 are a variety of methods through which the - - - the
19 Charter could be amended, but it's - - - but a direct
20 City Council amendment - - -

21 CHIEF JUDGE LIPPMAN: Could they overrule
22 the Board of Health in the particular areas that
23 we're talking about today?

24 MR. DEARING: Our position is that they may
25 not. We recognize it's a question this court has not

1 yet had to confront. That question is not presented
2 in this case. The only question that's presented in
3 this case is whether a specific legislative
4 authorization from the City Council or the State
5 Legislature was required before the Board could pass
6 this rule.

7 JUDGE GRAFFEO: Do di - - -

8 MR. DEARING: That's - - -

9 JUDGE GRAFFEO: Do dietary choices fall
10 under the ambit of public health?

11 MR. DEARING: The - - - the presentation of
12 - - - of products that raise serious health risks
13 fall under the ambit of public health within the
14 restaurant system of New York, that has long been
15 regulated - - -

16 JUDGE SMITH: So they could - - -

17 MR. DEARING: - - - by the Board of Health.

18 JUDGE SMITH: - - - they could ban sugary
19 drinks if they wanted to?

20 MR. DEARING: On this record, I don't think
21 they could ban it, and that's a key point.

22 JUDGE SMITH: Because it would be arbitrary
23 and capricious?

24 MR. DEARING: Because it would be a re - -
25 - yes, Your Honor, because it would be a response

1 that - - - that's not appropriate for the nature of
2 the risk. And this is - - -

3 JUDGE SMITH: But if they made a record
4 that - - - to show that it was appropriate, they
5 could.

6 MR. DEARING: That's correct, Your Honor.

7 CHIEF JUDGE LIPPMAN: What's the nature of
8 the risk?

9 MR. DEARING: The nature of the risk stems
10 from over-consumption. That's what the scient - - -
11 the vast - - -

12 CHIEF JUDGE LIPPMAN: Is it a crisis of
13 epidemic proportions?

14 MR. DEARING: Obesity is certainly a crisis
15 of epidemic proportions, and - - - and there's a vast
16 - - -

17 CHIEF JUDGE LIPPMAN: New York City, is
18 there a crisis of epidemic proportions now, in
19 relation to obesity and the consumption of
20 non-nutritious sugary drinks?

21 MR. DEARING: There's a serious crisis as
22 to obesity in New York City, and there is a rich,
23 vast and growing body of literature that shows that
24 sugary drinks - - - over-consumption of sugary drinks
25 plays a unique role - - -

1 JUDGE PIGOTT: Do you see a limit on - - -
2 on what you can do? Where would you draw the line on
3 what you could not do?

4 MR. DEARING: The - - - the measure has to
5 be related to public health. It has to be - - -

6 JUDGE PIGOTT: Well, no, but I mean, there
7 - - - I think Burger King has triple burgers. Can
8 you say you can only have one?

9 MR. DEARING: Not on this record, and - - -

10 JUDGE PIGOTT: No, I'm just saying - - -
11 you say you're a legislative body and that you have
12 chronic - - - you have - - - you have jurisdiction
13 over all chronic diseases, and obesity is one. So
14 just like now you say, well, this drink's too big;
15 we're going to make them smaller, can you say these
16 hamburgers, there's too many - - - too many patties
17 in this - - - in this, so the Big Mac has to go?

18 MR. DEARING: I think that a - - - a
19 regulation like that would raise different questions
20 as to whether - - - whether it is arbitrary and
21 capricious. It was - - -

22 JUDGE PIGOTT: Forget that.

23 MR. DEARING: It depends - - -

24 JUDGE PIGOTT: I am saying could you. In
25 other words, you say these people are obese, the fast

1 food industry is doing it, we've got studies that say
2 three hamburgers are worse than two or one, and so
3 we're going to say that you can only put one
4 hamburger in a roll. You - - - you, at least in
5 theory, believe you have that power - - -

6 MR. DEARING: In - - -

7 JUDGE PIGOTT: - - - assuming you could - -
8 -

9 MR. DEARING: - - - theory, but it would
10 depend critically on the - - - on the record, the
11 scientific record that is compiled, and whether the
12 step taken is appropriate in light - - -

13 JUDGE SMITH: But you say - - -

14 MR. DEARING: - - - of the scientific rec -
15 - -

16 JUDGE SMITH: You say you could do
17 anything, subject - - - you could do anything a
18 legislature could do. The State Legislature can
19 overrule you, but you could do anything they could
20 do, as long as they haven't overruled you.

21 MR. DEARING: That's right, and as long as
22 it's not otherwise preempted, as long as it doesn't
23 range into matters that are specifically committed to
24 other bodies.

25 JUDGE GRAFFEO: So what was the scientific

1 record that led to the determination as to the size
2 and what types of products here would be restricted,
3 because certainly there's coffee drinks that are over
4 800 calories a drink.

5 MR. DEARING: Right, and we don't know, and
6 - - -

7 JUDGE GRAFFEO: There's all kinds of these
8 specialty coffee drinks that - - -

9 MR. DEARING: The rule is drawn - - -

10 JUDGE GRAFFEO: - - - would have as much,
11 if not more, calories than the types of sugar drinks
12 that you aim this at. So how is - - - how is this
13 not arbitrary?

14 MR. DEARING: Your Honor, we don't know, as
15 we sit here, where any particular coffee drink falls
16 with respect to this rule. This rule is drawn based
17 on the scientific record that - - -

18 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I
19 think what the judge is asking you, what's the
20 reasonableness of what you didn't address, and you
21 did address this particular - - -

22 MR. DEARING: Well - - -

23 CHIEF JUDGE LIPPMAN: - - - negative impact
24 on the health. What about coffee products, alcohol,
25 where this - - - these drinks are sold? What's

1 reasonable about the framework that you've put
2 together that - - - that is being, in effect,
3 abandoned in the - - -

4 MR. DEARING: Well, alcohol is preempted,
5 so we put that to one side. But let's talk about
6 three key elements of this - - -

7 JUDGE GRAFFEO: Why these choices? I guess
8 that's what we're asking.

9 MR. DEARING: That's right. Three key
10 elements. Number one, sugary drinks, the largest
11 source of added sugar in the American diet; forty
12 percent of added sugar comes from sugary drinks.
13 Two, they're empty calories, meaning, they don't
14 provide nutritional value. And three, they're not
15 filling, and what that means is that when you consume
16 calories via sugary drinks, you don't reduce other
17 caloric consumption.

18 CHIEF JUDGE LIPPMAN: Are those scientific
19 facts?

20 MR. DEARING: They are.

21 CHIEF JUDGE LIPPMAN: That it's not
22 filling?

23 MR. DEARING: They're well-established in
24 the literature - - -

25 CHIEF JUDGE LIPPMAN: That it's not

1 filling, yeah?

2 MR. DEARING: They have been proven in - -
3 - in multiple studies. These - - - all of the
4 science is laid out in Dr. Farley's affidavit - - -

5 CHIEF JUDGE LIPPMAN: So anything that you
6 could scientifically prove is not nutritious, the
7 Board - - - and again, I'm not leading you in any
8 direct - - - the Board could say not nutritious,
9 people get hurt because of it, we're going to ban it,
10 whatever it might be. If the - - - if the hamburger
11 analogy that Judge Pigott gave you, if - - - if
12 there's a study that says, you know, those hamburgers
13 are not only bad for you; there's not one good thing
14 we can think of that comes from them, you could ban
15 the triple deckers of all three patties, couldn't
16 you?

17 MR. DEARING: Well, we know hamburgers have
18 protein, we know they're filling, and it's not about
19 - - -

20 CHIEF JUDGE LIPPMAN: But let's say there
21 was a study or enough studies that show that they
22 really - - - whatever they do for you is way, way
23 counteracted by what's bad for you. Couldn't you ban
24 hamburgers altogether from New York City, or could
25 you?

1 MR. DEARING: I can't really address what
2 could be done on a hypothetical basis.

3 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I'm
4 asking - - -

5 MR. DEARING: If you use this record - - -

6 CHIEF JUDGE LIPPMAN: I'm asking you - - -

7 MR. DEARING: The rec - - -

8 CHIEF JUDGE LIPPMAN: - - - if you had the
9 scientific evidence that said, overwhelmingly, the
10 hamburgers, even if they have some protein in it,
11 overwhelmingly, they hurt you terribly, isn't there a
12 logi - - - a reasonable framework, that's within your
13 scope of your powers, that you could imagine that
14 would say no more hamburgers in New York City, or
15 they might be hotdogs, or whatever it might be. Why
16 - - - why can't you do that, in the hypothetical
17 situation where you had the scientific evidence to
18 back that up?

19 MR. DEARING: If we had the scientific
20 evidence to show that they were a unique and serious
21 - - -

22 JUDGE SMITH: Well, suppose - - -

23 MR. DEARING: - - - contributor to the - -

24 JUDGE SMITH: Suppose - - -

25 MR. DEARING: - - - we could take an

1 appropriate step.

2 JUDGE SMITH: Suppose you have scientific
3 evidence that says that beef is a lot worse for you
4 than chicken. I'll bet you could get a lot of
5 scientific evidence that says cholesterol is really
6 bad for you. Can you say, okay, all New York City
7 restaurants serve only chicken, no more beef?

8 MR. DEARING: No.

9 JUDGE SMITH: Why not?

10 MR. DEARING: And that's not - - - Your
11 Honor, because to ban a product - - - and this, I
12 think, is really where the Appellate Division - - -

13 JUDGE SMITH: And they're a lot of harm - -
14 - cholesterol does a lot of harm; there are a lot of
15 heart attacks in New York City.

16 MR. DEARING: This is not a ban. To ban a
17 product - - -

18 JUDGE SMITH: I understand - - - I
19 understand.

20 MR. DEARING: To ban a product - - - the
21 Appellate Division talked about things in terms of
22 health hazard, per se, or inherently harmful. To ban
23 a product, I'd submit, it's not enough to say
24 something else out there is better for you; you have
25 to show that the product itself is unsafe. And - - -

1 and that test wouldn't be met in that case.

2 CHIEF JUDGE LIPPMAN: Counselor, where do
3 you draw the line? These kind of hypotheticals that
4 we're giving to you, how is it distinguished from
5 this particular ban, or whatever you want to call it,
6 that's been put in place by the Department of Health?
7 Where do we say it's okay, as opposed to banning
8 hamburgers or meat or frankfurters or whatever it
9 might be? What's - - - how do we know what's okay -
10 - -

11 MR. DEARING: Here's the key. First of
12 all, bans go in a completely different category.
13 This is not a ban. What we're talking about - - -

14 CHIEF JUDGE LIPPMAN: What is it?

15 MR. DEARING: It's a limitation on
16 container size. Any - - - any individual can consume
17 as much as they want; it has to be presented to them
18 in sixteen-ounce containers, and it's designed to - -
19 - it's like a warning label.

20 CHIEF JUDGE LIPPMAN: So you're banning
21 that size. But go ahead.

22 MR. DEARING: It's like a warning label;
23 it's designed to prompt a conscious choice - - -

24 CHIEF JUDGE LIPPMAN: All right. Go ahead.

25 MR. DEARING: - - - by the consumer.

1 JUDGE SMITH: So can you limit portion size
2 of any other - - - so you could say that steaks
3 should be no more than twelve ounces?

4 MR. DEARING: Your Honor - - -

5 JUDGE GRAFFEO: Or French fries?

6 MR. DEARING: - - - it would depend on the
7 record. The thing that distinguishes sugary drinks
8 is the overwhelming scientific evidence.

9 JUDGE PIGOTT: I think the thing that
10 troubles, at least me, and I think the others, is we
11 don't know where this ends. It seems like, in your
12 brief and in the record, that you're arguing there's
13 a separate legislation - - - legislature in the City
14 of New York. It's not the elected one; it's the
15 appointed one, and it's us and we're smart and we get
16 to decide all of this, and the City Council has
17 nothing to say about it, the mayor has nothing to say
18 about it, and if we want to decide that M&Ms are bad
19 for you and that store's got to close down in Times
20 Square, we can do it.

21 MR. DEARING: It's not "nothing to say",
22 and I think that's the key point. The key point
23 about the Board, it is a body of experts dedicated to
24 public health, and it is able to act autonomously, as
25 this court has held again and again and again,

1 without particularized prior legislative
2 authorization.

3 CHIEF JUDGE LIPPMAN: Yeah, but again - - -
4 but again, where is the line? You have documentaries
5 recently - - - not to be hamburger-centric - - - that
6 say that supersizing - - - the supersize French fries
7 are a disaster for everybody. They - - - these
8 places - - - the fast food places are supersizing
9 everything and they're killing people. Can you - - -
10 can you - - - if there's some scientific evidence, a
11 lot of scientific evidence, a little scientific
12 evidence to back that up, and this documentary goes
13 viral and everyone sees it, does the Board of Health,
14 the next month or the next year say, you know what,
15 supersizing is killing people, there's an epidemic in
16 our city, we're banning that supersize. That's a
17 similar thing to banning a certain size container.
18 That's a good analogy, right, in your - - -

19 MR. DEARING: It has similarities; it would
20 depend on the strength of the record. And if the
21 record was - - - was - - - there was a record
22 comparable to the record here, that - - - that a
23 particularized and special and serious health risk
24 was presented, then a reduction in size of the
25 product, subject to an individual's ability to order

1 as many as they want - - -

2 JUDGE GRAFFEO: And then my - - -

3 JUDGE ABDUS-SALAAM: Counsel, that's the
4 rule, that we have to look at the record, as opposed
5 to what other - - - any other framework that we
6 should look at - - -

7 MR. DEARING: The framework is - - -

8 JUDGE ABDUS-SALAAM: - - - or the Boreali
9 framework, we shouldn't look at that at all?

10 MR. DEARING: The Boreali framework doesn't
11 - - - doesn't apply, because that's a State Leg - - -
12 State Legislature/State agency framework. The rule
13 is arbitrary and capriciousness; that would be the
14 standard. It does not mean that the Board operates
15 outside - - -

16 JUDGE SMITH: Wait a minute. Since when is
17 arbitrary and capricious the standard for a
18 legislature? I thought it was - - -

19 MR. DEARING: Well - - -

20 JUDGE SMITH: - - - rational basis.

21 MR. DEARING: - - - Your Honor, in the
22 Grossman case you said - - - you know, when you're
23 talking about this State, a legis - - - a statute or
24 an administrative regulation, legislative in nature,
25 needs to be rational and not arbitrary and

1 capricious. That's really where I'm drawing the - -
2 -

3 JUDGE GRAFFEO: So what's the rational
4 basis - - - I'm going to move to a different subject
5 now. What's the rational basis for the vendors that
6 are subject to this portion restriction? Because - -
7 -

8 MR. DEARING: They are the vendors - - -

9 JUDGE GRAFFEO: Because the Board didn't
10 decide that any entity that sells sugary drinks is
11 going to be subject to this.

12 MR. DEARING: The rule is written in those
13 terms, as the petitioners themselves acknowledge on
14 page 12 of their brief, as is the entirety of Article
15 81 of the Health Code. The Board has determined,
16 based on its interpretation of this memorandum of
17 understanding between two state agencies, that the
18 State has reserved for itself enforcement
19 jurisdiction as to marked groceries or similar
20 markets.

21 JUDGE GRAFFEO: And you can walk into a
22 grocery store and buy a two-liter bottle of some kind
23 of Cola drink - - -

24 MR. DEARING: That's right.

25 JUDGE GRAFFEO: - - - correct?

1 MR. DEARING: And the Board can't enforce
2 its rule against - - -

3 JUDGE GRAFFEO: But you can't do that if
4 you stop at a - - - at a fast food.

5 MR. DEARING: That's true, and it's because
6 of the memorandum of understanding that reserves to
7 the State enforcement as to those entities and gives
8 the City authority over - - -

9 JUDGE GRAFFEO: So what was the basis for
10 making those distinctions as vendor? Why is that not
11 irrational?

12 MR. DEARING: Because the distinction is
13 entirely based on an interpretation of that
14 memorandum of understanding entered into by State
15 agencies, including the Department of Health, that
16 has supervisory authority over - - -

17 JUDGE SMITH: Even though - - -

18 MR. DEARING: - - - the City Department of
19 Health.

20 JUDGE SMITH: Even though your light is on,
21 there's one question I want to - - - I want to get
22 you to address, if I can. You say you're a
23 legislature and that you're the same - - - let's
24 suppose we disagree with you on that. Suppose we say
25 you're an administrative agency, just like everybody

1 else, and the Boreali analysis does apply, do you
2 still win?

3 MR. DEARING: We still win - - -

4 JUDGE SMITH: Why - - -

5 MR. DEARING: - - - under the Boreali
6 analysis.

7 JUDGE SMITH: - - - in a minimum number of
8 words.

9 MR. DEARING: I'll do my best to do it
10 quickly. The - - - I'd still think you've got to go
11 to the case law of the Board of Health; it's been
12 upheld again and again and again, acting without
13 particularized legislative authorization.

14 But let's look at Boreali. The basic
15 question in Boreali is have you exercised - - - have
16 you usurped legislative power when you're acting as
17 an administrative agency. The question is what about
18 this is a usurpation of legislative power. We have -
19 - - the first question is what is the category of
20 products that we cover. That's based entirely on
21 scientific evidence, as we - - - as is documented in
22 Commissioner Farley's affidavit. It's clearly within
23 the domain of - - - of the Board of Health as an
24 expert body.

25 The second question is what is the measure

1 that is taken. It is a modest measure. It is a
2 limitation on container size, no hard limit on
3 consumption, no ban - - -

4 JUDGE SMITH: Have you ever - - -

5 MR. DEARING: - - - nothing comparable - -
6 -

7 JUDGE SMITH: Have you ever - - -

8 JUDGE GRAFFEO: Is that how you just - - -

9 JUDGE SMITH: - - - ever limited portion
10 size before in any - - - in any context?

11 MR. DEARING: I'm not aware of it, but
12 there's always a first time, and it - - - and it is
13 specifically based on a health risk that the - - -
14 that the scientific evidence has documented.

15 JUDGE GRAFFEO: So you're saying you have -
16 - -

17 MR. DEARING: It is pressing - - -

18 JUDGE GRAFFEO: - - - you have greater - -
19 - you have greater rule-making authority than the
20 State Department of Health, or do you distinguish
21 Boreali because that was more in the nature of a
22 total ban as opposed to what you did here?

23 MR. DEARING: Both are true.

24 JUDGE GRAFFEO: Explain to me how you
25 distinguish.

1 MR. DEARING: Both are true. We have - - -
2 the City Board of Health's powers, as recognized by -
3 - - there's no comparable record as to the - - - the
4 Public Health Council which passed the regulation at
5 issue in Boreali, that there is for the City Board of
6 Health.

7 JUDGE GRAFFEO: Well, I'm sure they have
8 pretty substantial medical evidence that smoking was
9 detrimental to health.

10 MR. DEARING: I'm talking now about the
11 legal record affirming the - - - the plenary breadth
12 of the - - - of the agency's powers. But even under
13 Boreali, I do think the difference between a ban, the
14 intrusiveness and sweeping nature of what the agency
15 did in Boreali, including applying to every employer
16 in the State of New York, almost every commercial
17 retailer in the State of New York, a host of entities
18 that agency had never regulated before. That's
19 Boreali's regulation. Our regulation is a modest,
20 science-based - - -

21 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

22 MR. DEARING: - - - and narrowly drawn
23 regulation - - -

24 CHIEF JUDGE LIPPMAN: Okay. You'll have
25 your rebuttal.

1 MR. DEARING: - - - but not - - - thank
2 you.

3 CHIEF JUDGE LIPPMAN: Let's hear from your
4 adversary.

5 MR. BRESS: May it please the court. I am
6 Richard Bress, and I represent the plaintiffs-
7 respondents in this case.

8 CHIEF JUDGE LIPPMAN: Counsel, you have a
9 body that clearly has plenary legislative power. You
10 do have a documented health crisis in New York. They
11 are not doing a widespread ban; they're taking a
12 incremental, measured approach. Why don't - - - why
13 isn't this within the scope of their power, and why
14 isn't it reasonable, the way they framed it,
15 particularly when in other areas of health, I think,
16 we would all not challenge, whether it be fluoride
17 with the water or trans fats or whatever - - -
18 whatever the issue. Why isn't this along those lines
19 of a reasonable, measured approach within their
20 recognized - - - and with, you know, many precedents
21 over many years, and done in a reasonable, rational
22 fashion. What's wrong with what they did?

23 MR. BRESS: Well, Your Honor, I think there
24 were three questions within that. One was - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. BRESS: One was the premise that they
2 are - - - have plenary legislative power.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. BRESS: We obviously disagree with
5 that; I'm happy to address it. Number two, that they
6 exercised it in a way that was within the - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. BRESS: - - - the authority that's been
9 given to them. And the third was that it was
10 reasonable, Your Honor.

11 CHIEF JUDGE LIPPMAN: Okay. Start with the
12 legislative power. You don't think that they have
13 plenary legislative power - - -

14 MR. BRESS: Absolutely not.

15 CHIEF JUDGE LIPPMAN: - - - that's kind of
16 unique in our governmental - - -

17 MR. BRESS: Absolutely not, Your Honor.

18 CHIEF JUDGE LIPPMAN: What do they have.

19 MR. BRESS: What they've got - - -

20 CHIEF JUDGE LIPPMAN: What is their power?

21 MR. BRESS: Your Honor, they are an
22 administrative agency within the executive branch in
23 New York City.

24 JUDGE READ: Has that al - - -

25 CHIEF JUDGE LIPPMAN: Period?

1 JUDGE READ: Has that always been the case?

2 MR. BRESS: Period.

3 JUDGE READ: Has it always - - -

4 MR. BRESS: What?

5 JUDGE READ: Has the - - - have the
6 different changes to the City Charter over the years
7 altered their status?

8 MR. BRESS: I don't think so, Your Honor,
9 but - - - but if you - - - but if you were going to
10 put - - -

11 JUDGE READ: So they never had plenary
12 power?

13 MR. BRESS: I don't think they ever - - -

14 JUDGE READ: They never - - -

15 MR. BRESS: - - - had plenary power, Your
16 Honor. But if you were going to pick a demarcation
17 point, certainly never since the 1937 Charter, the
18 Home Rule Charter. And - - - and it's awfully clear,
19 by the way, from the Constitution, on through the
20 Municipal Home Rule Law, on through the City Charter.
21 So you start with the Constitution. The Constitution
22 provides that every local - - - every local body will
23 have an elective legislative branch. They're not
24 elective. You move on to the Municipal Home Rule
25 Law. It provides that local laws are passed either

1 by legislatures or by referenda, not by agencies.

2 CHIEF JUDGE LIPPMAN: You don't deny that
3 they are expert in what they do, and - - -

4 MR. BRESS: No - - -

5 CHIEF JUDGE LIPPMAN: - - - and that they
6 do have wide powers, however you characterize them,
7 in terms of addressing health issues in New York
8 City.

9 MR. BRESS: Your Honor - - -

10 CHIEF JUDGE LIPPMAN: That you would
11 accept?

12 MR. BRESS: Your Honor, we will accept that
13 they've got the same sort of authority that the PHC
14 has as - - - at a - - - at the State level. No
15 question about it. But when you get to the City
16 Charter, the City Charter says that the City Council
17 is the legislative body, that the legislative power
18 belongs to them. It classifies, specifically in
19 CAPA, the - - - the Board and other agencies, as
20 executive agencies - - -

21 CHIEF JUDGE LIPPMAN: What if we didn't
22 characterize it as - - - what they did as
23 legislative? What if we said it's a - - - it's a
24 regulation?

25 MR. BRESS: Let - - -

1 CHIEF JUDGE LIPPMAN: Assume your
2 terminology - - -

3 MR. BRESS: Let's do that.

4 CHIEF JUDGE LIPPMAN: - - - that they're an
5 administrative entity and they issued a regulation
6 within the scope of their power, and assume that it's
7 rational, what - - - what's wrong with that?

8 MR. BRESS: Absolutely, Your Honor. I
9 think that - - - that one way of looking at it would
10 be to compare this case to Boreali, at the invitation
11 of my brother.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. BRESS: So Boreali was a case that
14 involved a regulation that was far closer to the line
15 of lawful than this one. Boreali involved an agency
16 - - -

17 CHIEF JUDGE LIPPMAN: You don't think
18 Boreali was more intrusive and more a wide spectrum
19 of what they were doing and - - -

20 MR. BRESS: If I may - - -

21 CHIEF JUDGE LIPPMAN: - - - ventured more
22 into the policy arena, even than this?

23 MR. BRESS: Not at all, Your Honor, because
24 - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. BRESS: - - - what I'm talking about
2 here is the difference between - - - that the two
3 circumstances bring between what the agency was doing
4 in terms of the role of government in people's lives.
5 So in Boreali, you had a circumstance where what was
6 being regulated was toxins, carcinogens being put
7 into the air that harmed third parties. The dissent
8 in that case, mind you, in Boreali, noted that if
9 instead - - -

10 JUDGE SMITH: You're saying that the - - -
11 that in this case they're protecting from themselves,
12 not from other people, but the Department of Health
13 is always protecting people from themselves.

14 MR. BRESS: They've protected people from
15 themselves, Your Honor, in circumstances where you're
16 dealing with sanitation, when you're dealing with
17 infectious diseases, and those are all powers that
18 they've had very expressly under the charter.

19 JUDGE ABDUS-SALAAM: But what about window
20 guards? Don't they require that window guards be
21 placed in windows where there's children - - -

22 MR. BRESS: Yes, and they had specific
23 authority within the charter and within Title 17 - -
24 -

25 JUDGE PIGOTT: Calorie counts.

1 MR. BRESS: - - - to protect people from
2 accidents. That was - - - that was, again, an
3 express power. So if you look at the - - -

4 JUDGE PIGOTT: Didn't they do calorie
5 counts?

6 MR. BRESS: They did calorie counts, Your
7 Honor, which are akin to misbranding types of
8 regulations and lab - - - and labeling. These are,
9 again, traditional health regulations.

10 JUDGE PIGOTT: Yeah, but that's because,
11 you know, they're there and I guess you like 'em, but
12 I mean, what - - - what's the big deal about saying
13 you get - - - you know, if you're going to buy your
14 pop, you've got to buy the smaller cup?

15 MR. BRESS: Your Honor, the difference is
16 for the very first time, a government body, here the
17 Board, has taken it on to itself to have government
18 intrude in a way in people - - - into people's
19 personal decisions here: how much you want to eat,
20 what you want to eat - - -

21 JUDGE PIGOTT: No.

22 JUDGE SMITH: Well, what about whether - -
23 -

24 MR. BRESS: - - - in ways that it hasn't
25 before.

1 JUDGE SMITH: - - - you want fluoride in
2 your water?

3 MR. BRESS: Fluoride in your water wasn't
4 your water, of course, Your Honor. We're talking
5 about the City's water, and there was an express
6 authorization with regard to the wholesomeness of the
7 City water. You didn't - - - what you didn't have
8 there was a - - -

9 JUDGE ABDUS-SALAAM: What were they
10 supposed to do? Were they supposed to take this
11 record of scientific evidence to the City Council and
12 ask the City Council to pass legislation to stop - -
13 -

14 MR. BRESS: Absolutely, Your Honor. That's
15 exactly what happened in Boreali - - -

16 JUDGE PIGOTT: And then you wouldn't have
17 cared. Then you'd say this is okay?

18 MR. BRESS: Well, Your Honor, as a
19 political matter, we would have exercised all of our
20 rights that we ordinarily have.

21 JUDGE PIGOTT: There were public hearings
22 here. There was - - - you know, there were studies,
23 there were a lot of things that - - -

24 MR. BRESS: Your Honor, what we didn't have
25 is the will of the people. And what this court said

1 in Blanchard was that the - - - that the sovereign
2 law-making power of the people belongs to the
3 legislature, not to administrative agencies. So if
4 government is going to make a sea change in how it
5 regulates - - -

6 CHIEF JUDGE LIPPMAN: Counsel, what's such
7 a sea change? You could still drink soda.

8 MR. BRESS: Your Honor, they are dictating
9 - - -

10 CHIEF JUDGE LIPPMAN: You buy it in a
11 different - - - in a different package or smaller or
12 larger or whatever. Doesn't - - - they're not
13 telling people they can't have it.

14 MR. BRESS: Your Honor, what they're
15 telling a mother who wants to order pizza with a two-
16 liter bottle for her family is that she can't have
17 it. What they're telling someone - - -

18 JUDGE GRAFFEO: But there's not a - - -

19 MR. BRESS: - - - who wants a - - -

20 JUDGE GRAFFEO: There's not as much of an
21 economic impact here as an - - - as an outright ban
22 would be.

23 MR. BRESS: Absolutely, Your Honor.

24 JUDGE GRAFFEO: I mean, somebody can still
25 buy - - -

1 MR. BRESS: But - - -

2 JUDGE GRAFFEO: - - - two or three - - -

3 MR. BRESS: But - - -

4 JUDGE GRAFFEO: - - - containers of soda,

5 if they want to - - -

6 MR. BRESS: They can, but the Board is - -

7 -

8 JUDGE GRAFFEO: - - - and get the same

9 total ounces.

10 MR. BRESS: Agreed. The State is banking
11 on the fact that by making it more inconvenient - - -
12 the call it the hassle factor, on page 1423 - - -
13 they will, in a sense, use government coercion to
14 convince people not to. They call it informational.

15 JUDGE PIGOTT: Well, they do that - - - for
16 example, with gasoline cans, you can't buy gas for
17 your lawnmower in more than a two-and-a-half gallon
18 can. Now, that may be aggravating if you've got a
19 big lawn, but it - - - but he says it's safer and all
20 this other stuff, and so you do it. What's the big
21 deal?

22 MR. BRESS: Your Honor, when it comes to
23 food regulation, which is the claim that they're
24 making in this case, no governmental body has
25 overstepped the bounds and told us what portions we

1 can have. And if I may, I believe that the Board is
2 running away - - -

3 CHIEF JUDGE LIPPMAN: So anything to do
4 with portions they can't do?

5 MR. BRESS: Not just portions; they can't
6 ban the products, Your Honor. When we're talking
7 about - - -

8 CHIEF JUDGE LIPPMAN: What if they say that
9 you can't sell only a small amount, you've got to
10 make it bigger rather than make is smaller? Why - -
11 - why is such a great, terrible government intrusion
12 to - - - to make some regulations about how you
13 package food?

14 MR. BRESS: Your Honor, we're not talking
15 about great and terrible; what we're talking about is
16 inserting government - - -

17 CHIEF JUDGE LIPPMAN: If it's not so great
18 and terrible, why isn't it okay?

19 MR. BRESS: Well, no, Your Honor - - -

20 CHIEF JUDGE LIPPMAN: Isn't that - - -

21 MR. BRESS: Your Honor, the mayor himself,
22 and the Board, when they announced this, didn't say
23 this is a small and modest-sized fixed change. What
24 they said is this is historic. They said this is
25 groundbreaking. They said it's a bold new policy.

1 And in fact, what they said on page 14 - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but a bold new
3 policy could be incremental in nature.

4 MR. BRESS: Your Honor, on page 1429 of the
5 record, when - - - in their response to comments,
6 what they said is that this brings to bear the
7 question of the appropriate role of government in our
8 lives, just like any other innovative policy like
9 smoking. They're the ones that said that. On page
10 1479 and 1480, other board members noted that this
11 brings up the question of what makes us Americans,
12 the right to choose. And what I'm getting at here,
13 Your Honor, is the decision, in and of itself, to
14 insert the government into what we eat and how much
15 we eat - - -

16 CHIEF JUDGE LIPPMAN: Counselor, the
17 government is involved in our lives in so many
18 different ways and there are different views as to
19 how far the government can go.

20 MR. BRESS: I agree.

21 CHIEF JUDGE LIPPMAN: But clearly, that the
22 government is a factor in our lives, in our everyday
23 lives, is not open to discussion - - -

24 MR. BRESS: Absolutely, Your Honor.

25 CHIEF JUDGE LIPPMAN: - - - in the year

1 2014.

2 MR. BRESS: What this court has said, over
3 and over and over again, is that the basic policy
4 choices, those with profound economic and social
5 significance, are made by the legislature. And it's
6 to the agencies - - -

7 JUDGE SMITH: Well, no, you're saying the
8 legislature can decide how far the government inserts
9 itself.

10 MR. BRESS: Yes.

11 JUDGE SMITH: Suppose the legislature had
12 said a port - - - we think that overconsumption of
13 sugary drinks is a problem, and we authorize the
14 Board of Health to devise regulations to fix it, and
15 they come up with this, is that okay?

16 MR. BRESS: I don't think, at that point,
17 Your Honor, that we would have a Boreali argument.

18 JUDGE SMITH: Why not?

19 MR. BRESS: Now, we would still have - - -

20 JUDGE SMITH: Why not? Boreali makes it
21 sound as though they were transgressing a
22 Constitutional limit on delegation.

23 MR. BRESS: In Boreali, Your Honor, what
24 this court did is it presumed, irrebutably, that the
25 statute - - - the statutory authorization did not

1 allow a degree of delegation that would allow the
2 agency to behave like a legislature. And
3 essentially, what it is, it's an interpretive
4 principle. You look at the - - - when you're trying
5 to figure out whether the agency has certain
6 authority, you assume, again, irrebutably, that the
7 legislature did not mend (sic) - - - mean to give law
8 making power to the agency - - -

9 JUDGE PIGOTT: You said even if you don't
10 have Boreali, you have another argument?

11 MR. BRESS: Well, certainly, Your Honor.
12 It's - - -

13 JUDGE PIGOTT: I just didn't want you to
14 miss it.

15 MR. BRESS: Oh, no, thank you. Your Honor,
16 in addition to the fact that they overstepped their -
17 - - their bounds as an administrative agency, the
18 rule is also arbitrary and capricious in three
19 different ways, in the sense that it - - - of the
20 establishments that it covers; it doesn't even cover
21 the Home of the Big Gulp, in the sense of the types
22 of products that it covers and in the way it
23 regulates them. And if I can quickly walk through
24 the three, Your Honor. As the first - - -

25 CHIEF JUDGE LIPPMAN: Why do you think that

1 they - - - why do you think they made the
2 distinctions that they did in - - - in who it applies
3 to or what it applies to?

4 MR. BRESS: Your Honor, they claim that the
5 distinction is based on the MOU. Let me start with
6 first principles here. First of all, they get no
7 deference in reading the MOU; it's simply a contract
8 between two state agencies.

9 Number two, if you look at what the MOU is
10 about, it's about cleanliness, it's about sanitation,
11 and it's about misbranding. And the reason for
12 covering those things is those are the things that
13 the two agencies share regulatory authority for.
14 It's not necessary - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but isn't it
16 rational to want to make sure that - - -

17 MR. BRESS: Absolutely, Your Honor. I'm
18 not - - -

19 CHIEF JUDGE LIPPMAN: - - - that you're
20 consistent and you're not overstepping - - -

21 MR. BRESS: Your Honor, I agree with the
22 MOU.

23 CHIEF JUDGE LIPPMAN: Why is that - - -

24 MR. BRESS: It makes a lot of sense.

25 CHIEF JUDGE LIPPMAN: Yeah.

1 MR. BRESS: But here's the problem.
2 Telling people how much soda they can drink, pizza
3 they can eat, cheeseburgers they can eat - - - and
4 mind you, all of those are within the power they're
5 claiming; don't let their comments about the record
6 fool you.

7 CHIEF JUDGE LIPPMAN: Yeah, yeah, but their
8 - - -

9 MR. BRESS: But - - - but telling people
10 those things - - -

11 CHIEF JUDGE LIPPMAN: But their
12 hypotheticals that we're raising, their - - - again,
13 their particular regulation is as to size and
14 particular establishments - - -

15 MR. BRESS: Of course.

16 CHIEF JUDGE LIPPMAN: - - - and that you
17 could still get the item; you just can't be packaged
18 in a certain way. What is so revolutionary - - - put
19 aside the hype about what would - - - what they're
20 doing; what's so revolutionary?

21 MR. BRESS: Well, the revolutionary thing
22 about it, Your Honor, is it may be only a first step,
23 but it is a first step over the line to telling us
24 what portion sizes we can have. There is no
25 difference in principle.

1 CHIEF JUDGE LIPPMAN: So if there are later
2 steps we're at the later steps - - -

3 MR. BRESS: No.

4 CHIEF JUDGE LIPPMAN: - - - then those
5 under the tent idea takes away from the fact that
6 we're looking at this particular relatively modest
7 regulation - - -

8 MR. BRESS: And this - - -

9 CHIEF JUDGE LIPPMAN: - - - no matter how
10 it's characterized.

11 MR. BRESS: And this relatively modest
12 regulation, Your Honor, does tell us what portion
13 sizes we can have of soft beverages - - -

14 CHIEF JUDGE LIPPMAN: So you can never do
15 portion size?

16 MR. BRESS: Your Honor, they can't - - -

17 CHIEF JUDGE LIPPMAN: Is that right?

18 MR. BRESS: That's right, not without - - -

19 CHIEF JUDGE LIPPMAN: They - - -

20 MR. BRESS: Not without legislative
21 authority.

22 CHIEF JUDGE LIPPMAN: So there never could
23 - - - Board of Health could never make any
24 regulations relating to portion size?

25 MR. BRESS: They can't tell us how many

1 cheeseburgers or French fries we can have without - -
2 -

3 JUDGE SMITH: Until the legislature says
4 they can.

5 MR. BRESS: Until they're told that they
6 can. But - - - and Your Honor, the other distinction
7 that - - - that is important here - - -

8 JUDGE GRAFFEO: Can school dist - - -

9 MR. BRESS: - - - is in - - -

10 JUDGE GRAFFEO: Can school districts
11 restrict the sale of sugar drinks - - -

12 MR. BRESS: Absolutely.

13 JUDGE GRAFFEO: - - - in schools?

14 MR. BRESS: Absolutely. They've got - - -

15 JUDGE GRAFFEO: How - - -

16 MR. BRESS: - - - plenary power.

17 JUDGE GRAFFEO: How is that different from
18 - - -

19 MR. BRESS: Because they have specific - -
20 -

21 JUDGE GRAFFEO: - - - this court acting?

22 MR. BRESS: Sorry, Your Honor. They have
23 specific statutory authorization when it comes to the
24 care of students in schools. Similarly, with day
25 care, there's a specific provision that allows them

1 to inspect for appropriate care of the children in
2 day care.

3 CHIEF JUDGE LIPPMAN: But why is - - -

4 MR. BRESS: But you don't have that with
5 grownups.

6 CHIEF JUDGE LIPPMAN: Why is portion size
7 so unique, as opposed to don't put trans fats when
8 you make the French fries, so when they go into the
9 package they're going to be different, what goes in.

10 MR. BRESS: But - - -

11 CHIEF JUDGE LIPPMAN: So here the - - -
12 when it goes into the package, it's going to be
13 different; it'll be a little smaller rather than a
14 little bigger. What's so different about it?

15 MR. BRESS: Well, the difference, Your
16 Honor - - - and this is an important difference - - -
17 is that the policy decision as to food regulation, as
18 to sanitary - - - sanitation, as to contamination,
19 all of that, has been made by the legislature.
20 They've assigned those roles to the Board of Health.
21 They've never told the Board of Health, or any other
22 governmental body, that not only size portions - - -
23 there's no difference in the principle - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but trans fats
25 - - -

1 MR. BRESS: - - - between that and banning.

2 CHIEF JUDGE LIPPMAN: Trans fats are bad
3 for you because they kill people. This - - -

4 MR. BRESS: Your Honor - - -

5 CHIEF JUDGE LIPPMAN: This is bad for you
6 because they kill people.

7 MR. BRESS: Your Honor, under certain - - -

8 CHIEF JUDGE LIPPMAN: That's the same
9 theory that they're - - - they're advocating.

10 MR. BRESS: Their theory also covers
11 cholesterol. They could - - - just as - - - the
12 difference that we're talking about here is the
13 difference between a regulation that tells you the
14 proper storage and care of eggs to prevent
15 salmonella; that they traditionally can have. The
16 authority they don't have is to tell us that we - - -
17 we can only have two eggs a day because the
18 cholesterol is bad for us. They've got authority to
19 prevent spoliation of meat. They don't have the
20 authority to tell us - - -

21 JUDGE SMITH: You - - -

22 MR. BRESS: - - - we can only have a four-
23 ounce - - -

24 JUDGE SMITH: You would not - - -

25 MR. BRESS: - - - slice.

1 JUDGE SMITH: - - - say that an agency
2 can't make policy judgments, can they? Can an agency
3 do cost-benefit analysis?

4 MR. BRESS: As this court said in Boreali,
5 agencies do cost-benefit analysis all the time,
6 ordinarily with guidance from the legislature in
7 terms of how to do that. The problem in this case is
8 they've gone beyond - - - another problem in this
9 case is, is in trying to design a regulation that
10 they claim is more modest, what they're doing is
11 their own balancing of personal privacy and social
12 concerns - - -

13 CHIEF JUDGE LIPPMAN: Yeah, yeah, but the
14 thrust - - -

15 MR. BRESS: - - - as to choice.

16 CHIEF JUDGE LIPPMAN: But the thrust - - -

17 MR. BRESS: That's got a lot to - - -

18 CHIEF JUDGE LIPPMAN: - - - of your
19 argument - - - let's get it clear; the thrust of what
20 you're saying, they can't tell you what to eat or how
21 much to eat or drink, is that what it is?

22 MR. BRESS: No, Your Honor, the - - -

23 CHIEF JUDGE LIPPMAN: Sum up your argument
24 in a nutshell. Is it the intrusion on your
25 lifestyle? What is it that - - - that if you had - -

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MR. BRESS: What - - -

CHIEF JUDGE LIPPMAN: - - - to identify one thing that's wrong with this effort, what is it?

MR. BRESS: Your Honor, what they can't do is make a policy choice that the legislature hasn't made if the government - - -

CHIEF JUDGE LIPPMAN: Only the elected representatives can - - -

MR. BRESS: The elected rep - - - if government is going to get involved with questions of how much of normal healthy diet - - -

CHIEF JUDGE LIPPMAN: So your argument is this is a - - -

MR. BRESS: And more than we - - -

CHIEF JUDGE LIPPMAN: - - - this is a policy choice that they can't make?

MR. BRESS: Exactly.

CHIEF JUDGE LIPPMAN: That's the heart of it - - -

MR. BRESS: That's right, Your Honor.

CHIEF JUDGE LIPPMAN: - - - end of story.

MR. BRESS: And if I can just - - -

CHIEF JUDGE LIPPMAN: As opposed to trans fats or fluoride; those aren't policy choices?

1 CHIEF JUDGE LIPPMAN: Answer Judge Pigott's
2 question that you wanted - - -

3 MR. BRESS: So Judge Pigott - - -

4 CHIEF JUDGE LIPPMAN: - - - to address.

5 MR. BRESS: Thank you. As to - - - as to
6 the MOU, nothing in the MOU speaks to this kind of
7 regulation. So we don't think it's - - - it was ever
8 intended to be covered. Secondly, as to the MOU, the
9 City has plenty of other regulations, including
10 prohibitions on use of coffee - - -

11 JUDGE SMITH: Suppose the - - - suppose the
12 depart - - - the Board wanted to do a more - - - a
13 less ambitious regulation, the kind that you say is
14 ordinarily perfectly legitimate; any problem with
15 them applying it only to - - - on the basis of the
16 MOU, like in grocery stores?

17 MR. BRESS: Your Honor, they may be able to
18 come up with a different reason why applying it to
19 only grocery stores makes sense. So for example,
20 take trans fats; assume - - -

21 JUDGE SMITH: I mean, suppose - - - suppose
22 this regulation said you can sell any size you want
23 but tell people how many calories they're getting.
24 That's legitimate, right?

25 MR. BRESS: Yes, certainly.

1 JUDGE SMITH: And can they say it's only
2 movie theatres, not grocery stores that we're - - -
3 that we're going to be doing that?

4 MR. BRESS: Well, at a certain point you
5 would become arbitrary and capricious, Your Honor,
6 but that's the test that you would have to look at.
7 It wouldn't have anything to do with Boreali at that
8 point. And - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

10 MR. BRESS: If I - - -

11 CHIEF JUDGE LIPPMAN: Counselor. Okay, I
12 think you've answered Judge Pigott's question.

13 MR. BRESS: No, I didn't answer the other
14 two points.

15 CHIEF JUDGE LIPPMAN: Unless Judge Pigott -
16 - -

17 MR. BRESS: If you want - - -

18 CHIEF JUDGE LIPPMAN: - - - has another
19 question.

20 JUDGE PIGOTT: That's okay.

21 MR. BRESS: So just - - -

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. BRESS: - - - just quickly, the other
24 two points.

25 CHIEF JUDGE LIPPMAN: No, no, counsel,

1 let's - - - your adversary has rebuttal. That's - -
2 - okay, go ahead.

3 MR. DEARING: Just a couple points. First,
4 Mr. Bress said - - -

5 CHIEF JUDGE LIPPMAN: Counselor, they say
6 trans fats is no good also.

7 MR. DEARING: That's how I heard it too,
8 Your Honor, and I think there - - -

9 CHIEF JUDGE LIPPMAN: Why - - - why is - -
10 -

11 MR. DEARING: - - - there was something in
12 - - - in something of a contradiction. They say - -
13 - well, they say calorie counts is fine. They say
14 the problem here is not - - - as how I understood the
15 answer to Judge Smith's question, the problem here is
16 that the City Council hasn't said sugar sweetened
17 beverages are bad. If they had said that, this
18 portion size would be fine.

19 CHIEF JUDGE LIPPMAN: Yeah, yeah, but they
20 say in effect - - - in effect, you're doing a policy
21 area and the people who are elected by the citizens
22 should be the ones who determine that, not an
23 administrative entity.

24 MR. DEARING: But identifying health risks
25 and identifying them based on scientific evidence,

1 which is what we have here - - - Commissioner
2 Farley's affidavit, record 1544 to 1568, is squarely
3 within the domain - - -

4 JUDGE PIGOTT: Their concern, I think - - -

5 MR. DEARING: - - - of the Board of Health.

6 JUDGE PIGOTT: - - - is that you're an
7 unruly horse, that it's unfettered. We don't know
8 where you're going with chronic disease. And
9 everybody can think of another place you can go and
10 people are saying, you know, wait a minute, this
11 isn't the legislature, this isn't the mayor, this is
12 some group - - -

13 MR. DEARING: Right, I think that - - -

14 JUDGE PIGOTT: - - - that's going to do
15 these things - - -

16 MR. DEARING: - - - that - - -

17 JUDGE PIGOTT: - - - so that's why I think
18 earlier on you were asked, you know, what - - -
19 what's the limit on what you can do? Is it simply
20 chronic disease and, therefore, you can ban cars
21 because it's - - - you know, the carbon monoxide
22 would be - - -

23 MR. DEARING: Your Honor, that would tread
24 far into the do - - - into domains out - - -

25 JUDGE PIGOTT: I was doing that on purpose.

1 MR. DEARING: Understood.

2 JUDGE PIGOTT: But can you - - - can you
3 tell me where your - - - where your boundary is?

4 MR. DEARING: The boundary is public health
5 in New York City in matters that aren't - - - aren't
6 allocated to other agencies. It can be overruled by
7 the State Legislature, and I guarantee you - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but what about
9 if you did a total ban on drinking soda? What's
10 different from - - - or drinking sugary soda?

11 MR. DEARING: On - - -

12 CHIEF JUDGE LIPPMAN: What's different if
13 it has no nutritious value and you're - - - you have
14 this power, this legislative, whatever you want to
15 call it, plenary power, no nutritious value, it's
16 killing people; why can't you just ban those sugary
17 drinks, not just the big container.

18 MR. DEARING: Right.

19 CHIEF JUDGE LIPPMAN: Why can't you ban it?

20 MR. DEARING: I think - - -

21 CHIEF JUDGE LIPPMAN: And you do the same
22 thing; you make certain exceptions, whatever - - -

23 MR. DEARING: Right.

24 CHIEF JUDGE LIPPMAN: - - - you only do it
25 in certain stores. Why can't you say you can't drink

1 the soda; it's killing you, that's it. What's the
2 difference between that and what you did?

3 MR. DEARING: It's - - - the difference is
4 that soda is not - - - is not a per se health risk.
5 It is not dangerous in small quantities. If you're
6 going to ban something, that might be the right
7 question to ask.

8 JUDGE SMITH: If a legis - - - if the New
9 York State Legislature wants to ban soda, it can ban
10 it, can't it?

11 MR. DEARING: It may or may - - - I would
12 not - - - I would not - - - I don't know how that
13 case would come out.

14 JUDGE SMITH: Do you have as much power as
15 they do? Is that what you're saying?

16 MR. DEARING: Not as much power as they do
17 - - -

18 JUDGE SMITH: Well, they - - -

19 MR. DEARING: - - - but we have - - -

20 JUDGE SMITH: - - - they have the power to
21 overrule you.

22 MR. DEARING: Yes.

23 JUDGE SMITH: But as long as they don't
24 overrule you, you can do anything they can do?

25 MR. DEARING: No, because we - - - we are

1 constrained - - -

2 JUDGE SMITH: In the public health realm.

3 MR. DEARING: - - - in New York City in
4 public health. And just - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but what if the
6 scientific evidence said that small amounts of the
7 sugary sodas kill people, they're no good for you,
8 it's not harm - - - harmless in - - - in small
9 amounts; can you ban it?

10 MR. DEARING: If that were true, we could
11 ban it the way trans fats is banned, lead paint is
12 severely restricted. If you hypothesize that na - -
13 - the nature of the - - - that nature of the risk - -
14 -

15 CHIEF JUDGE LIPPMAN: Like the legislature
16 - - -

17 MR. DEARING: You could.

18 CHIEF JUDGE LIPPMAN: You could do - - -
19 like the legislature could do it, you could do it,
20 right?

21 MR. DEARING: That would be an appropriate
22 ban. Can I - - -

23 JUDGE GRAFFEO: Can they just say this
24 product has no nutritional value?

25 MR. DEARING: Can they say it?

1 JUDGE GRAFFEO: Right, that - - - that
2 would include more than just sugary drinks; that
3 would include anything with artificial sweeteners as
4 well. Can they say all soda has no nutritional
5 value? In other words, broaden this - - -

6 MR. DEARING: Yes.

7 JUDGE GRAFFEO: - - - particular
8 restriction to include - - -

9 MR. DEARING: No, the restriction here is
10 based on a part - - - on a particularized health risk
11 that is posed by the added sugar content - - -

12 JUDGE SMITH: Yeah, but can't you - - -

13 MR. DEARING: - - - of sugary drinks.

14 JUDGE SMITH: But can't you come up with a
15 particularized health risk for almost any product you
16 can name? There's probably some for diet soda too.

17 MR. DEARING: Nothing comparable to the
18 record presented here - - -

19 JUDGE GRAFFEO: It's not - - -

20 MR. DEARING: - - - that is the record - -
21 -

22 JUDGE GRAFFEO: It's not opening a
23 Pandora's box to - - -

24 MR. DEARING: It's not opening a Pandora's
25 box - - -

1 JUDGE GRAFFEO: - - - all kinds of other
2 products?

3 MR. DEARING: The Board has acted - - - it
4 is entirely speculative and hypothetical. The Board
5 has acted reasonably. We've been in the area of
6 anti-obesity for ten years. We've taken appropriate
7 steps - - -

8 JUDGE ABDUS-SALAAM: And if you are - - -

9 MR. DEARING: - - - during that period.

10 JUDGE ABDUS-SALAAM: If you are considered
11 an administrative body rather than a legislative
12 body, and you did - - - and your portions-cap rule
13 was passed by you or disseminated by you, is it your
14 position that the City Council could not legislate
15 that and say we don't want this portion cap?

16 MR. DEARING: That's our position. Whether
17 that - - -

18 JUDGE ABDUS-SALAAM: And why - - -

19 MR. DEARING: That question's not presented
20 - - -

21 JUDGE ABDUS-SALAAM: Why wouldn't they be
22 able to do that?

23 MR. DEARING: Because under the structure
24 of the Charter, the Board of Health - - - the area of
25 health - - - the Board of Health is the paramount

1 authority in the area of health - - -

2 JUDGE SMITH: Well, as a matter of fact - -

3 -

4 MR. DEARING: - - - subject - - -

5 JUDGE SMITH: - - - as I read some of those

6 old cases, the City Council can't tell - - - can't

7 touch public health at all. You're not saying that,

8 are you?

9 MR. DEARING: We're not saying that, but

10 some of the old cases suggest it. The - - - the

11 State Legislature could always step in, and if the

12 Board really ran amok nothing - - - there's no

13 historical basis to believe that will happen - - -

14 the State Legislature, I promise, would shut it down

15 quickly, or the voters of the City of New York would

16 amend the charter.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. DEARING: There are many ways that

19 would be stopped.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you

21 both. Appreciate it.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York Statewide Coalition of Hispanic Chambers Of Commerce, et al. v. The New York City Department of Health and Mental Hygiene, et al., No. 134, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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