**COURT OF APPEALS**
**STATE OF NEW YORK**

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

Plaintiffs-Petitioners-Respondents,

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

-against-

Appeal No.: 2013-00291

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

Defendants-Respondents-Appellants.

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# BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-PETITIONERS-RESPONDENTS

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*Of Counsel*:

Cory L. Andrews
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 588-0302

Roy T. Englert, Jr.
Alex Potapov
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

Sarah R. Prins (*pro hac vice* admission pending)
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

*Counsel for Amici Curiae*


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, *amici* state that Washington Legal Foundation and Allied Educational Foundation are non-profit corporations with no parents, subsidiaries or affiliates.

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## STATEMENT OF INTEREST

The Washington Legal Foundation ("WLF") is a public interest law firm and policy center with supporters in all 50 states, including New York. WLF devotes substantial resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. In particular, WLF frequently litigates in favor of individual consumer choice. *See Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291 (4th Cir. 2013); *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1159 (2008).

The Allied Educational Foundation ("AEF") is a non-profit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this and other state and federal courts on a number of occasions.

*Amici* strongly support this Court's tradition of enforcing the separation of powers and resisting executive overreach. As described in this brief, separation-of-powers principles are indispensable to liberty and good governance. They also serve as a bulwark against misconceived and heavy-handed policies such as New York City's "soda ban."

*Amici* regard the soda ban as arbitrary, paternalistic, and profoundly inconsistent with the separation of powers. Accordingly, we believe that this Court

should strike it down. Such a decision would vindicate fundamental constitutional values, protect consumer freedom, and encourage sound regulatory policies.

## PRELIMINARY STATEMENT

The Board of Health has an important role to play in improving the health of New Yorkers, but its powers are not without limit. In passing the soda ban, the Board exceeded its administrative authority and improperly sought to exercise *legislative* power.

The separation-of-powers doctrine is clearly embodied in the New York State Constitution, which mandates that "[t]he legislative power of this state shall be vested in the senate and the assembly." N.Y. Const. art. III, § 1. Further, Section 21 of the New York City Charter provides that "[t]here shall be a council which shall be the legislative body of the city" and that the legislative power is vested with the council. *See* N.Y.C. Charter § 21. Section 21 additionally provides that "[a]ny enumeration of powers in this charter shall not be held to limit the legislative power of the council, except as specifically provided in this charter." *Id.* These provisions establish a separation of powers scheme at both the state and the city level. *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344, 355-56 (1985).

This Court's decision in *Boreali v. Axelrod* provides crucial guidance in applying these separation-of-powers provisions. 71 N.Y.2d 1 (1987). *Boreali*

invalidated the regulations at issue because the Public Health Council overstepped its bounds and attempted to exercise legislative power. In reaching that conclusion, this Court established a robust framework for evaluating whether the executive has usurped inherently legislative authority.

Defendants' position in this case depends, at every turn, on weakening the *Boreali* framework. Although they never ask this Court to overrule *Boreali*, they do invite the Court to narrow it beyond all recognition. *See* Defs' Br. 30 (suggesting that this Court "sidestep[]" *Boreali* (internal quotation marks omitted)).

This attempt to undermine *Boreali* does not come as a surprise. In their attempt to justify the soda ban, Defendants have been forced to claim "a uniquely broad mandate to take *all necessary steps*" when it comes to public health issues. Defs.' Br. 23 (emphasis added). Indeed, they openly claim entitlement to address "serious issues of public health . . . *without being subjected to the vagaries of the political process*." *Id.* at 4 (emphasis added).

In other words, Defendants believe they are entitled to make health policy on their own, without bothering with the lawmaking process prescribed in the New York State Constitution and New York City Charter. This mindset is fundamentally incompatible with *Boreali*, which explicitly declared that it is "[m]anifestly . . . the province of the people's elected representatives, rather than

appointed administrators, to resolve difficult social problems by making choices among competing ends." 71 N.Y.2d at 13.

So it is natural that Defendants are eager to sidestep *Boreali*—but *Boreali* is not so easily evaded. This Court has repeatedly expounded the same principles in other cases, emphasizing the "critical" proposition that "any difficulty or even impossibility of obtaining legislation through the constitutionally prescribed mechanisms *may not be made a source of executive lawmaking power*." *Rapp v. Carey*, 44 N.Y.2d 157, 167 (1978) (emphasis added); *see also Subcontractors Trade Ass'n v. Koch*, 62 N.Y.2d 422, 429 (1984) (explaining that executive action is impermissible without legislative authority, "[h]owever desirable the ostensible purpose may be"); *Broidrick v. Lindsay*, 39 N.Y.2d 641, 646 (1976) (explaining that the "subtle nature" of a problem makes it "appropriate for a broad declaration of policy" by the legislature). Accordingly, avoiding the "vagaries of the political process," as Defendants urge, is not a valid reason to usurp what is more appropriately a legislative function.

More broadly, as *amici* will show below, *Boreali* is just one link in an unbroken chain of decisions in which this Court has vigorously policed the separation of powers and resisted executive encroachment on legislative authority. Those precedents are deeply rooted in the American legal tradition and indispensable to sound governance as well as ordered liberty.

Defendants may genuinely believe that they have the right ideas for addressing the obesity problem.[1] But, as this Court explained almost 90 years ago, "[l]aws are made by the law-making power and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be." *Picone v. Comm'r of Licenses*, 241 N.Y. 157, 162 (1925).

## ARGUMENT

### I. THIS COURT HAS STEADFASTLY PREVENTED THE EXECUTIVE FROM USURPING THE LEGISLATURE'S POLICYMAKING AUTHORITY

The "central feature of [New York's governmental system] is distribution of powers" among the branches of government. *Fullilove v. Beame*, 48 N.Y.2d 376, 378 (1979). This "separate grant[ ] of power to each of the coordinate branches of government" gives rise to the separation-of-powers doctrine. *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985); *see Under 21*, 65 N.Y.2d at 355-56. The doctrine bars any branch from arrogating unto itself a power belonging to another. *Under 21*, 65 N.Y.2d at 356; *see Nicholas v. Kahn*, 47 N.Y.2d 24, 30-31 (1979). Quite simply, "[r]espect for [the government's] structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch." *Subcontractors*, 62 N.Y.2d at 427.

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[1] *But see* Pls.' Br. 65-74 (explaining that the soda ban is not well crafted to achieve its ostensible purpose and is, for that reason and others, arbitrary and capricious).

The legislative power is the power to set policy. *Rapp*, 44 N.Y.2d at 160; *see Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 822 (2003) ("[T]he Governor's actions were policymaking, and thus legislative in character."); *Fullilove*, 48 N.Y.2d at 379 (explaining that it is the legislature's prerogative to mandate policy). Accordingly, separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995). Executive agencies are limited to the interstitial and practical task of implementation; "[a]n agency cannot by its regulations effect its vision of societal policy choices." *Campagna v. Shaffer*, 73 N.Y.2d 237, 242 (1989); *see also Under 21*, 65 N.Y.2d at 359 ("[A]n executive may not usurp the legislative function by enacting social policies not adopted by the Legislature.")

This Court has repeatedly highlighted the importance of curtailing executive overreach. The separation of powers "prevent[s] too strong a concentration of authority in one person or body," *id.* at 355, *see also Rapp*, 44 N.Y.2d at 162. In the absence of guidance from the legislative branch, "there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer." *Small v. Moss*, 279 N.Y. 288, 299 (1938).

More broadly, this Court has always been quite clear about the crucial role the separation of powers plays in the state constitutional scheme. "Extended

analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the [branches], for history teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another." *Cnty. of Oneida v. Berle*, 49 N.Y.2d 515, 522 (1980). As this Court put it more than a century ago, "[i]t is not merely for convenience in the transaction of business that [the branches] are kept separate by the constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men." *Burby v. Howland*, 9 E. H. Smith 270, 282 (1898).

Moreover, only this Court, as "the final arbiter of true separation of powers disputes," *Cohen v. State*, 94 N.Y.2d 1, 11 (1999), can ensure that the balance among the branches is preserved. *See Saratoga*, 100 N.Y.2d at 822 ("It . . . falls to the courts, and ultimately to this Court, to determine whether a challenged gubernatorial action is 'legislative' and therefore *ultra vires*.")

Unsurprisingly, this Court has consistently rejected any suggestion that the separation-of-powers doctrine is a "vestigial relic." *Under 21*, 65 N.Y.2d at 356 (internal quotation marks omitted). To the contrary, it has remained vigilant in its search for any "assumption of [*ultra vires*] power [that] might erode the genius" of New York's system of government. *Rapp*, 44 N.Y.2d at 167. Indeed, it has insisted that "we [should] be alive to the imperceptible but gradual increase in the

assumption of power properly belonging to another department." *Id.* (internal quotation marks omitted).

Accordingly, this Court has not shied away from invalidating executive actions that usurped legislative power. Instead, it has curbed executive overreach in a number of opinions addressing such disparate areas as financial disclosure requirements, affirmative action, employment discrimination, preferences for locally based enterprises, and tribal gaming compacts. *See Under 21*, 65 N.Y.2d at 353; *id.* at 358 (discussing *Broidrick*, *Fullilove*, *Rapp*, and *Koch*); *Saratoga*, 100 N.Y.2d at 824.

*Boreali* typifies this Court's approach to separation-of-powers issues. There, this Court confronted the Public Health Council's proposed code of tobacco regulations. 71 N.Y.2d at 6. The opinion set out the basic governing principles in this area: namely, that the agency's role "must be deemed limited by its role as an administrative, rather than a legislative, body" and that, accordingly, "an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Id.* at 6, 9. The Court explained that "administrative regulatory activity" consists of "interstitial rule making," and does not include the "open-ended discretion to choose ends." *Id.* at 13, 11 (internal quotation marks omitted). Judged against that standard, the tobacco code was clearly legislative, so the Court did not hesitate to strike it down. *Id.* at 11. *Boreali*'s rejection of the

executive's *ultra vires* action is fully consistent with this Court's separation-of-powers jurisprudence, so it is not surprising that the Court has continued to cite *Boreali* approvingly in later separation-of-powers cases. *Med. Soc'y of State of N.Y. v. Serio*, 100 N.Y.2d 854, 865 (2003) ("*Boreali* is instructive."); *Campagna*, 73 N.Y.2d at 243.[2]

Any attempt to sidestep *Boreali*, then, is really an attempt to sidestep this Court's entire body of separation-of-powers decisions—case law that is consistent, robust, and firmly anchored in the fundamental structure of New York government.[3]

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[2] By contrast, the only authority the Defendants have mustered in support of their proposal to sidestep *Boreali* is a concurrence by a single Judge of this Court. Defs.' Br. 30. Although the concurrence accused the majority of "sidestepping" *Boreali*, it nevertheless acknowledged that the case did not "directly involve[]" the separation of powers. *Consol. Edison Co. of N.Y., Inc. v. Dep't of Envtl. Conservation*, 71 N.Y.2d 186, 196, 197 (1988) (Bellacosa, J., concurring).

[3] Consistent with their broader effort to curtail this Court's separation of powers jurisprudence, Defendants offer a Procrustean and illogical interpretation of the *Boreali* framework. While their view has vacillated and remains elusive, they seem to argue that all four *Boreali* factors must be present for a separation-of-powers violation to occur. Reply Br. 24 n.6. But *Boreali* makes clear that the four factors were merely the "indicator[s]" or "coalescing circumstances" that persuaded the Court that the line "ha[d] been transgressed" in that particular case. 71 N.Y.2d at 13, 11. Nothing in the opinion even hints at the incongruous position that each of those factors must be present *every* time an agency crosses the line. *Id.* at 11-14. According to the Defendants, it would be perfectly appropriate for an agency to construct a regulatory scheme on an entirely clean slate (Factor 2), relying on its own weighing of economic and social concerns (Factor 1), and without exercising *any* special expertise or technical competence (Factor 4)—as

## II. THIS COURT'S SEPARATION-OF-POWERS JURISPRUDENCE HAS DEEP ROOTS IN THE AMERICAN LEGAL TRADITION

The separation-of-powers principles articulated by this Court are part of a rich intellectual tradition that stretches back at least to the Founding Era of the United States. Leading legal and political thinkers of that period repeatedly emphasized the fundamental import of confining the executive to its proper role.

The distinction between legislative and executive power "was well understood, and often discussed, by the founding generation and subsequent legal actors." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 341 (2002). During that period, "the legislative power was understood"—consistently with this Court's precedents—"as the authority to make rules for the governance of society." Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1305 (2003).

In a famous passage, the great political theorist John Locke wrote that "[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, *and not to make legislators*, the legislative can have *no power to transfer their authority of making laws* and place it in other hands." John Locke, *The Second Treatise of Government* § 141 (emphasis added).

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long as the legislature had not attempted to tackle the issue before (Factor 3). That is untenable.

Locke understood that granting legislative power to the executive would prove disastrous: "it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage." *Id.* § 143.

Similarly, Baron de Montesquieu "believed that there can be no liberty when the legislative and executive powers are combined because apprehensions may arise, lest 'the same monarch or senate that makes tyrannical laws will execute them tyrannically.'" Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 Tul. L. Rev. 265, 307 (2001) (quoting Montesquieu, *The Spirit of the Laws* 157 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748)).[4]

Montesquieu's warning was so compelling that James Madison cited it in Federalist No. 47. Madison agreed that "[t]he accumulation of all powers . . . in

[4] As Professor Rappaport notes, similar sentiments were also expressed by William Blackstone, among others. Rappaport, 76 Tul. L. Rev. at 306 (collecting sources).

the same hands . . . may justly be pronounced the very definition of tyranny."[5] Similarly, in Federalist No. 51, Madison explained "that separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty." John Adams echoed those thoughts, noting that an assembly exercising all three powers "would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favor." John Adams, "Thoughts on Government" (1776), *reprinted in* 1 *American Political Writing During the Founding Era, 1760-1805* 401, 404 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

Chief Justice Marshall expressed the same understanding of the subject in his seminal opinion in *Wayman v. Southard*, 23 U.S. [10 Wheat.] 1 (1825). As he explained, "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Id.* at 42. Indeed, Marshall even articulated a test for determining the boundaries of legislative power that presaged current New York doctrine. He distinguished between "those important subjects, which must be entirely regulated by the legislature itself" and "those of less interest" which may be left to others. *Id.* at 43.

[5] Montesquieu was also cited on this point in the Essex Result, "a seminal American tract on separation-of-powers principles." Alexander & Prakash, 70 U. Chi. L. Rev. at 1314 (discussing the Essex Result).

In other words, important policy decisions must be left to the legislature—just as this Court has held.

In short, the *Boreali* approach to separation-of-powers issues has an impeccable historical pedigree. Its lineage is directly traceable to some of the most profound and influential writings in the American legal tradition and should not be sidestepped.

## III. VIGOROUS ENFORCEMENT OF SEPARATION-OF-POWERS PRINCIPLES IS INDISPENSABLE TO LIBERTY AND SOUND GOVERNANCE

The separation of powers protects liberty and improves governance in several fundamental respects. First, it is a bulwark against "unfair discrimination or other arbitrary action" by the executive. *Small*, 279 N.Y. at 299; *see also Seignious v. Rice*, 273 N.Y. 44, 51 (1936) (denying the executive the "power to discriminate . . . between individuals in accordance with his own judgment of what is best in that particular case"). Given the instances in which the soda ban prohibits and permits identical conduct by vendors operating right next to each other (*see* Pls.' Br. 65-70), the value of separation-of-powers principles in protecting against discrimination and arbitrariness is evident in this case.

As James Madison noted in Federalist No. 57, legislators "can make no law which will not have its full operation on themselves and their friends," and this fact deters them from adopting "oppressive measures." By contrast, as Professor

Rappaport explains, an executive "exercis[ing] legislative power . . . could pass harsh and unfair laws knowing that it can decide against whom to enforce these laws." Rappaport, 76 Tul. L. Rev. at 307-08. This Court was quite right to observe that, without standards set by the legislature, "there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities." *Rapp*, 44 N.Y.2d at 162.[6]

Enforcing the separation of powers also protects liberty in another way: by fostering bicameralism and promoting other elements of constitutional design that make passing legislation more difficult. As Professors Prakash and Alexander note, "transfer[ring] all substantive policy discretion to the executive" effectively bypasses such procedures. Alexander & Prakash, 70 U. Chi. L. Rev. at 1301. But the difficulties inherent in passing legislation "are an important guarantor of liberty," because they require a consensus before government power can be brought to bear against an individual. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 320 (2000). This consensus-building requirement serves as a check on heavy-handed and paternalistic policies such as the soda ban, which curtail consumer freedom without adequate justification.

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[6] Sadly, world history shows that the Court's reference to "authoritarian possibilities" is no mere rhetorical flourish. As Professor Sunstein has noted, other countries have been forced to adopt explicit nondelegation doctrines in the wake of abuses by authoritarian regimes. Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 320 n. 29 (2000).

In addition, the need for consensus tends to "reduce the risk that self-interested representatives, with narrow agendas of their own, would use the lawmaking process to promote their parochial interests"—making the difficulty of passing legislation a key mechanism for limiting "efforts by well-organized private groups to redistribute wealth or opportunities in their favor." *Id.* at 321 (citing Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 63-67 (1982)).

Of course, the separation of powers also promotes democratic accountability. As noted above, Defendants wish to circumvent the political process—but it is distinctly anti-democratic to suggest that regulatory policy decisions must be insulated from politics. *See* John F. Manning & Matthew C. Stephenson, *Legislation and Regulation* 382 (2010). "[D]emocratic accountability . . . serves extraordinarily valuable functions, chief among them allowing the people to select the leaders they want and to check legislative abuses through the threat of electoral retaliation." *Id.* Without the separation of powers, however, accountability is diluted or defeated altogether. *See id.* As John Hart Ely put it, "the common case of nonaccountability involves . . . a situation where the legislature . . . has refused to draw the legally operative distinctions, leaving that chore to others who are not politically accountable." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 130-31 (1980).

Legislators often "go to great lengths to use delegation to avoid blame" for various decisions. David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 745 (1999). This delegation tactic allows "controversial choices [to] be made without votes being taken and responsibility being publicly assumed" by legislators. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1244 (1985). As a result, decisionmaking is made "less visible and responsibility more attenuated"; it becomes virtually impossible for a citizen to ascertain a legislator's position. *Id.* at 1244-45. In the end, excessive delegation can allow legislators to "shirk[] responsibility for some of the most fundamental political questions affecting our society." Harold J. Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. 710, 714 (1994) (reviewing David Schoenbrod, *Power Without Responsibility* (1993)). This Court's careful enforcement of separation-of-powers principles ensures that such an outcome cannot come to pass in New York.

In short, the separation of powers serves a range of crucial goals. Some critics, however, have charged that enforcing separation-of-powers principles is incompatible with effective regulation. Nothing could be further from the truth.

This Court's separation-of-powers jurisprudence requires only that "critical policy decisions" be made by the Legislature—the "practical" aspects of effectuating the policy decisions can be left to the executive. *New York State*

*Health Facilities Ass'n, Inc. v. Axelrod*, 77 N.Y.2d 340, 349 (1991). Indeed, under the "commonsense" approach this Court has always followed, *Bourquin*, 85 N.Y.2d at 785, the degree of "flexibility allowed the executive . . . depends upon the nature of the problem to be solved." *Rapp*, 44 N.Y.2d at 163.

In making that assessment, the Court has evaluated whether it is "practicable for the Legislature itself to set precise standards." *Id.* In especially complex areas, such as nuclear regulation, the Court has concluded that it is simply not possible for the legislature to anticipate the precise characteristics of the problem in advance. The executive may be allowed a bit more leeway in such areas, because they are "simply incapable of statutory completion." *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 410 (1991) (internal quotation marks omitted). Absurdly, Defendants seem to suggest that the regulation of sugary drinks is such an area. *See* Defs.' Br. 48. But the soda ban obviously has more in common with the tobacco code rejected in *Boreali* than it does with nuclear regulation. If Defendants are not willing to trust the legislature with permissible cup size, they would not trust it with anything.

In all events, the doctrine of separation of powers as this Court has actually applied it fully accommodates effective regulation. The legislature must make the policy decisions in the first instance, but the executive may be allowed to work out the details; both branches can exercise the full extent of their expertise and

legitimate authority.[7] The fact that no crisis of insufficient regulation has befallen New York, even as this Court has vigilantly enforced the separation of powers, shows that the two concepts are compatible.

If any additional proof were needed that the separation of powers is not inimical to sound regulation, one need only consult the experiences of other jurisdictions. Many other high courts police separation-of-powers issues just as diligently as this Court does. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1193-98 (1999) (collecting cases from Arizona, Florida, Illinois, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, South Carolina, Texas, Virginia, and West Virginia, as well as New York). All of these courts agree that, far from undermining good governance, the separation of powers is absolutely crucial to it. This Court should continue to "join those states in a commitment to

[7] Defendants have a very different function in mind for the Board of Health. According to them, the Board has "concurrent jurisdiction" over health matters with the City Council, so the two entities should legislate "in tandem." Reply Br. 29-30. In other words, Defendants believe that the Board's legislative authority in this area is limited only by the Board's own willingness to "act[] in harmony" with the City Council. *Id.* at 6. Contrary to their half-hearted denials, then, Defendants' position is *precisely* that the Board's legislative powers are "'unchecked.'" *Ibid.*; *see id.* at 10 (referring to the Board's "extraordinary legislative power").

the separation of powers and constitutional government." *Saratoga*, 100 N.Y.2d at 824.

## CONCLUSION

For the reasons stated above, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that this Court uphold the order of the Appellate Division.

Dated: April 24, 2014

Respectfully submitted,

Sarah R. Prins (*pro hac vice* admission pending)
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

*Of Counsel*:

Cory L. Andrews
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 588-0302

Roy T. Englert, Jr.
Alex Potapov
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510