



Written by [Michael Tennant](#) on March 12, 2013

Judge Tosses NYC's Super-Sized Soda Ban

Talk about a close shave: Just one day before New York City's ban on the sale of super-sized sodas was to take effect, a judge [struck it down](#), arguing that it was "arbitrary and capricious" and vastly exceeded the powers granted to the New York City Board of Health, which issued the edict last summer at the behest of Mayor Michael Bloomberg.



The regulation, known as the Portion Cap Rule, would have prohibited the sale of sugary beverages in sizes larger than 16 ounces. The rule exempted alcoholic drinks and drinks that are at least 50 percent milk or soy-based milk substitute, and it only applied to restaurants and other businesses that the city has the authority to regulate. Grocery and convenience stores, which are regulated by the state, would have been exempt from the rule.

A coalition of beverage makers, restaurant owners, labor unions, and small-business owners sued the Board of Health. They argued that the board had overstepped its authority, that its rule was unfair because of its uneven enforcement against different types of businesses and beverages, and that the regulation would fail to achieve its stated purpose of reducing obesity among New Yorkers.

New York State Supreme Court Justice Milton A. Tingling, Jr., agreed with them. On Monday he issued a permanent injunction barring the Portion Cap Rule from taking effect and declared the rule "invalid."

The rule, Tingling wrote, is "fraught with arbitrary and capricious consequences."

It is arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule, including but not limited to no limitations on re-fills, defeat and/or serve to gut the purpose of the Rule.

In other words, it was more about making a political statement than about actually solving a problem. The judge, in fact, observed earlier in his ruling that the rule was "laden with exceptions based on economic and political concerns." He noted in particular that if the Board of Health really believed that restricting the sizes of sodas would improve people's health, they would have worked with the state to ensure that all businesses, not just those the city has the power to regulate, were affected by the rule. Instead, the board chose to make a rule that required no such collaboration, which was more expedient from a political perspective but less effective at combating obesity.

Tingling found that the board had vastly exceeded the authority granted to it by the city charter, which gives only the city council the authority to legislate. To accept the board's argument that it had such



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authority, he averred, “would leave its authority to define, create, mandate and enforce limited only by its own imagination.”

The Portion Cap Rule, if upheld, would create an administrative Leviathan and violate the separation of powers doctrine. The Rule would not only violate the separation of powers doctrine, it would eviscerate it. Such an evisceration has the potential to be more troubling than sugar sweetened beverages.

The plaintiffs in the case were, of course, ecstatic at the outcome. According to [Reuters](#), Christopher Gindlesperger, spokesman for the American Beverage Association, called the decision a “sigh of relief”; and Dawn Sweeney, CEO of the National Restaurant Association, “said the decision would save thousands of restaurants and suppliers from unnecessary costs.”

Mayor Bloomberg, on the other hand, was anything but pleased, saying the ruling “was clearly in error” and vowing to appeal it. Bloomberg, after all, wrote the regulation and presented it to the Board of Health, which adopted it “verbatim,” according to the decision. He is also concerned that his successor — he leaves office at the end of the year — may not be as enthusiastic about the soda ban as he is and might choose to discontinue any unresolved appeals.

Bloomberg, who just before the decision had urged other cities to follow New York’s lead in imposing a soda ban, claimed — in the time-honored nanny-state tradition — to be doing it all for the children.

“I’ve got to defend my children, and yours, and do what’s right to save lives,” the mayor [said](#) at a press conference after Tingly’s ruling came down.

Yes, Bloomberg actually believes it is his job to defend other people’s children, not just his own. (His children, by the way, are both in their thirties, yet apparently they still need him to protect them from the big, bad soft-drink companies.) And to Bloomberg, doing “what’s right” means trampling individual liberties in pursuit of a perfect, centrally planned society.

For now, though, one of his most pointless assaults on liberty has been stopped in its tracks.



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