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Big Food and Soda Versus Public Health: Industry Litigation Against Local Government Regulations to Promote Healthy Diets

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BIG FOOD AND SODA VERSUS PUBLIC HEALTH: INDUSTRY LITIGATION AGAINST LOCAL GOVERNMENT REGULATIONS TO PROMOTE HEALTHY DIETS

Sarah A. Roache, Charles Platkin,** Lawrence O. Gostin***
& Cara Kaplan*****

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INTRODUCTION

Unhealthy diets are contributing to alarming levels of obesity, cardiovascular disease, type 2 diabetes, and certain cancers throughout the United States.¹ While high-fat, sugar- and sodium-laden diets are major contributors, one of the most important causative factors is the increased consumption of sugary beverages, which include beverages that contain added caloric sweeteners such as flavored milks, fruit drinks, sports drinks, and sodas.² Sugary beverages are the single largest source of added sugar in the American diet.³ Higher intake of sugary beverages among children was associated with a fifty-five percent higher risk of being overweight or obese than those with lower intake.⁴

Although federal and state governments have taken some proactive measures to prevent diet-related diseases, local governments have emerged as key innovators to promote healthier diets.⁵ Innovative local measures include menu labeling laws, a soda portion cap, soda taxes, and warning labels.⁶ These interventions seek to discourage overconsumption of fats, sodium, and sugars, which raises tensions between health promotion and the food and beverage industry's commercial interests in promoting products and

1. U.S. DEP'T OF AGRIC., SCIENTIFIC REPORT OF THE 2015 DIETARY GUIDELINES ADVISORY COMMITTEE: ADVISORY REPORT TO THE SECRETARY OF HEALTH AND HUMAN SERVICES AND THE SECRETARY OF AGRICULTURE 2 (2015).

2. See Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, NEW ENG. J. MED. 1599, 1599–1601 (2009).

3. Frank B. Hu, *Resolved: There Is Sufficient Scientific Evidence That Decreasing Sugar-Sweetened Beverage Consumption Will Reduce the Prevalence of Obesity and Obesity-Related Diseases*, 14 OBESITY REVS. 606, 606 (2013).

4. *Id.*

5. See Belinda Reeve et al., *State and Municipal Innovations in Obesity Policy: Why Localities Remain a Necessary Laboratory for Innovation*, 105 AM. J. PUB. HEALTH 442, 442–48 (2015).

6. See *infra* Section II.C.

maximizing profits.⁷ Although cities are making progress to encourage and promote healthier diets,⁸ these local governments must prepare for the inevitable resistance from powerful food and beverage industry actors, including litigation, which can undermine innovative, evidence-based public health measures.⁹

Part I of this Article discusses the rise of diet-related chronic diseases and the serious social and economic impacts on individuals and societies. Part II examines federal, state, and local government interventions to prevent these diseases. Part III discusses food and beverage industry efforts to undermine public health regulations, including lobbying and public messaging. Analyzing four case studies from cities throughout the United States, Part IV identifies litigation as a key component of the food and beverage industry's strategy to undermine local government measures promoting healthier diets. Part V argues that local jurisdictions should prepare to defend their public health laws and policies against industry litigation and suggests steps to help ensure legal viability, political sustainability, and public support.

I. DIET-RELATED CHRONIC DISEASES

Over the last four decades, there has been a significant rise in overweight and obesity in the United States.¹⁰ These medical conditions are unhealthy, harmful, and increase the risk of other chronic and terminal health problems, including type 2 diabetes, cardiovascular disease, and certain cancers.¹¹ Recognizing these health risks, and social and economic impacts, is imperative to fully appreciate the gravity of the current public health crisis, which demands meaningful attention from federal, state, and local governments.

7. See *infra* Part III.

8. See Lawrence O. Gostin, *Tackling Obesity and Disease: The Culprit Is Sugar; the Response Is Legal Regulation*, 48 HASTINGS CTR. REP. 5, 5–7 (2018).

9. See *infra* Part V.

10. J.N. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999–2000*, 288 JAMA 1723, 1723–27 (2002); J.E. Manson & S.S. Bassuk, *Obesity in the United States: A Fresh Look at Its High Toll*, 289 JAMA 229, 229–30 (2003).

11. *Adult Obesity Causes & Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/adult/causes.html> [<https://perma.cc/8S34-HYRD>]; *The Health Effects of Overweight and Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyweight/effects/index.html> [<https://perma.cc/MXD5-N5K8>].

A. The Rise of Diet-Related Chronic Diseases

Public health professionals have raised concerns about the rapid rise of diet-related chronic diseases. According to a 2011 study, “nearly 70% of adults are classified as overweight or obese compared with fewer than 25% forty years ago.”¹² In 2014, more than one third of adults in the United States had obesity.¹³ Among U.S. children aged two through nineteen years, one in six, or approximately seventeen percent, had obesity.¹⁴ These statistics indicate that obesity now affects a significant portion of the population.

Public health and medical officials are particularly concerned about rising obesity rates because obesity causes many adverse health effects and is associated with an increased risk of premature death.¹⁵ Furthermore, “[i]f the current trends continue, obesity may overtake cigarette abuse as the leading cause of preventable disease.”¹⁶ The Centers for Disease Control and Prevention (“CDC”) has noted that people who have obesity are at greater risk for a number of harmful and potentially fatal diseases or conditions, including:

[H]igh blood pressure (Hypertension), [h]igh LDL cholesterol, low HDL cholesterol, or high levels of triglycerides (Dyslipidemia), [t]ype 2 diabetes, [c]oronary heart disease, [s]troke, [g]allbladder disease, [o]steoarthritis (a breakdown of cartilage and bone within a joint), [s]leep apnea and breathing problems, [s]ome cancers . . . (endometrial, breast, colon, kidney, gallbladder, and liver), [l]ow quality of life, [m]ental illness such as clinical depression, anxiety, and other mental disorders, [and] [b]ody pain and difficulty with physical functioning.¹⁷

Notably, obesity disproportionately affects low-income and minority populations. In 2014, the obesity rate among non-Hispanic black adults was 48.1% compared to 42.5% of Hispanic adults and 34.5% of non-Hispanic white adults.¹⁸ The obesity rate among

12. Carl J. Lavie et al., *Obesity and Cardiovascular Disease: Risk Factor, Paradox, and Impact of Weight Loss*, 53 J. AM. C. CARDIOLOGY 1925, 1925 (2009).

13. *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/data/adult.html> [<https://perma.cc/AE9D-HHBX>].

14. *Childhood Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/data/childhood.html> [<https://perma.cc/F54D-4G8W>].

15. Luma Akil & H. Anwar Ahmad, *Relationships Between Obesity and Cardiovascular Diseases in Four Southern States and Colorado*, 22 J. HEALTH CARE FOR POOR & UNDERSERVED 61, 63–64 (2011).

16. *Id.* at 64.

17. *Adult Obesity Causes & Consequences*, *supra* note 11.

18. CYNTHIA L. OGDEN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE OF OBESITY AMONG ADULTS AND YOUTH: UNITED STATES, 2011–2014,

Hispanic children was 21.9% compared to 19.5% of non-Hispanic black children and 14.7% of non-Hispanic white children.¹⁹ According to a 2015 study, the association between race and ethnicity and childhood obesity disappeared after controlling for family income, indicating that socioeconomic status is more important than race or ethnicity in predicting childhood obesity.²⁰ Obesity and its related health impacts threaten the most vulnerable populations.

B. Costs of Diet-Related Chronic Diseases

In addition to the health and equity impacts of diet-related chronic diseases, their increased prevalence raises significant concerns about the economic impacts on individuals, families, and society.²¹ There are two types of costs associated with the treatment of chronic diet-related diseases—direct costs and indirect costs.²² Direct costs result from medical treatment, both inpatient and outpatient, including surgeries, drug therapy, and laboratory and radiological tests.²³ According to the CDC, the medical care costs of obesity are estimated to be \$147 billion per year.²⁴ A 2011 study estimated that the annual direct medical costs for people with obesity were \$1,723 higher than normal weight persons.²⁵ Professor John Cawley and Professor Chad Meyerhoefer estimate that obesity-related health care costs constitute 20.6% of national expenditures on health care.²⁶

In addition to direct economic costs, obesity-related diseases result in significant indirect costs, including absenteeism, lack of productivity at work, increased insurance premiums, and lower

at 2 (2015), <https://www.cdc.gov/nchs/data/databriefs/db219.pdf> [<https://perma.cc/E25V-GE8D>].

19. *Id.* at 4.

20. Robert Rogers et al., *The Relationship Between Childhood Obesity, Low Socioeconomic Status, and Race/Ethnicity: Lessons from Massachusetts*, 11 CHILDHOOD OBESITY 691, 691 (2015).

21. See Benjamin H. Harris & Aurite Werman, *Obesity Costs Evident at the State Level*, BROOKINGS INSTITUTION: UP FRONT BLOG (Dec. 12, 2014), <https://www.brookings.edu/blog/up-front/2014/12/12/obesity-costs-evident-at-the-state-level/> [<https://perma.cc/R26B-8N45>].

22. See *Obesity Prevention Source: Economic Costs*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-consequences/economic/> [<https://perma.cc/B2EU-7WX4>].

23. *Id.*

24. *Adult Obesity Causes and Consequences*, *supra* note 11. Estimates are in 2008 dollars.

25. Adam Gilden Tsai et al., *Direct Medical Cost of Overweight and Obesity in the United States: A Quantitative Systematic Review*, 12 OBESITY REV. 50, 55 (2011).

26. John Cawley & Chad Meyerhoefer, *The Medical Care Costs of Obesity: An Instrumental Variables Approach*, 31 J. HEALTH ECON. 219, 226 (2012).

wages.²⁷ According to the CDC, the “annual nationwide productive costs of obesity-related absenteeism range between \$3.38 billion (\$79 per obese individual) and \$6.38 billion (\$132 per obese individual).”²⁸

If left unchecked, the rising prevalence of diet-related diseases poses serious consequences for population health, the healthcare system, and the economy more broadly.²⁹ Preventative measures, discussed in Part II, can improve individual and population health outcomes and reduce the economic costs of chronic diet-related diseases.

II. GOVERNMENT MEASURES TO PROMOTE HEALTHY DIETS AND PREVENT DIET-RELATED CHRONIC DISEASES

As a result of the severe health impacts and social and economic costs of diet-related disease, federal, state, and local governments are taking steps to promote healthier diets and prevent obesity. Public officials have a range of legal and policy interventions at their disposal, including public awareness campaigns, nutrition information and warnings on food labels and menu boards, taxes and subsidies, and marketing restrictions.

A. Federal Government Action

The federal government, primarily through the Food and Drug Agency (“FDA”) and the United States Department of Agriculture (“USDA”), has taken steps to address obesity and nutrition. The FDA is responsible for “ensuring the safety of our nation’s food supply,” among other functions.³⁰ Among its numerous responsibilities, the FDA oversees the Nutrition Facts label on food packaging, which includes information on calories, fats, sodium, and vitamins.³¹ In May 2016, the FDA significantly updated the Nutrition Facts label, requiring disclosure of the amount of added sugars in grams and expressed as a percentage of the recommended daily maximum intake, based on a 2000-calorie daily diet.³² The new

27. See *Obesity Prevention Source: Economic Costs*, *supra* note 22.

28. *Adult Obesity Causes & Consequences*, *supra* note 11.

29. Y Claire Wang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and the UK*, 378 LANCET 815, 821–22 (2011).

30. See *What We Do: FDA Mission*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/AboutFDA/WhatWeDo/#mission> [<https://perma.cc/KRJ7-5U53>].

31. U.S. DEP’T OF HEALTH AND HUM. SERVICES, FOOD & DRUG ADMIN., A FOOD LABELING GUIDE: GUIDANCE FOR INDUSTRY 43 (2013).

32. See Annie Gasparro & Mike Esterl, *FDA Approves New Nutrition Panel That Highlights Sugar Levels*, WALL ST. J. (May 20, 2016), <https://www.wsj.com/>

Nutrition Facts label requirements were due to take effect in July 2018; however, the FDA recently issued a proposed rule extending compliance dates to 2020 for large manufacturers and 2021 for smaller companies.³³

The USDA also issues policies and regulations to encourage healthier diets and prevent obesity. Every five years, the USDA, together with the Department of Health and Human Services (“HHS”), is required to publish a report containing dietary guidelines based on the preponderance of current scientific and medical knowledge.³⁴ The USDA also administers the National School Lunch Program, a meal program providing low-cost or free nutritionally balanced lunches to children.³⁵

Despite some progress, policy and law-making at the federal level is impacted by interest group politics and lobbying,³⁶ which contribute to slow and inadequate action on obesity prevention.³⁷ The Trump administration has indicated it may roll back diet-related measures adopted under the Obama administration (e.g., the Healthy, Hunger-Free Kids Act (2010)).³⁸ Lack of political will at the federal level leaves state and local governments as the most likely actors to take meaningful action to prevent and control obesity in the coming years.

B. State Government Programs

Although state governments enjoy broad authority to legislate on matters of public health and nutrition, state efforts in response to commercial food and beverage marketing and unhealthy eating patterns have largely focused on educational settings. Between 2012 and 2013, twenty-eight states and the District of Columbia adopted legislation relating to nutrition in schools or authorized funding for school nutrition programs, which aim to increase access to healthy

articles/fda-approves-controversial-changes-to-nutrition-facts-panel-1463750195 [https://perma.cc/VPX3-K7KL].

33. See Proposed Extension of Compliance Dates, 82 Fed. Reg. 45,753, 45,754 (proposed Oct. 2, 2017) (to be codified at 21 C.F.R. pt. 101).

34. See generally National Nutrition Monitoring and Related Research Act of 1990, 7 U.S.C. § 5341 (2012).

35. *National School Lunch Program (NSLP)*, U.S. DEP’T AGRIC. FOOD & NUTRITION SERV. (Mar. 12, 2018), <https://www.fns.usda.gov/nslp/national-school-lunch-program-nslp> [https://perma.cc/6NDJ-9RF3].

36. See discussion *infra* Section III.A.

37. See generally Reeve et al., *supra* note 5.

38. Jessica Taylor, *Trump Administration Rolls Back Michelle Obama’s Healthy School Lunch Push*, NAT’L PUB. RADIO (May 1, 2017), <https://www.npr.org/2017/05/01/526451207/trump-administration-rolls-back-2-of-michelle-obamas-signature-initiatives> [https://perma.cc/SJK6-YL93].

food products.³⁹ In Colorado, for example, lawmakers prohibited the provision or sale of food items containing any amount of industrially produced trans-fat in public and charter schools.⁴⁰ In addition to nutrition standards and funding, states have also adopted laws on nutrition education, physical activity and education, body mass index (“BMI”) and student fitness screening, and diabetes screening and management in schools.⁴¹

Despite legislative proposals and advocacy efforts on issues such as taxes on sugary drinks, state governments have passed few legislative measures outside educational and community settings. Facing significant industry opposition, proposed public health-based taxes on sugary drinks have failed in the California and New York state legislatures.⁴² Multiple states have failed in their efforts to ban the use of Supplemental Nutrition Assistance Program (“SNAP”) benefits to purchase sugary drinks.⁴³ The USDA, which administers SNAP, has denied state waiver requests that sought to exempt unhealthy products from SNAP eligibility, recommending states incentivize healthy food purchases rather than restricting SNAP-eligible products.⁴⁴ Like the federal government, state government action on nutrition and obesity is hampered by industry opposition, limited political will, and the complexities inherent in ensuring food

39. See, e.g., S. 12-068, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012); AMY WINTERFELD, NAT’L CONFERENCE OF STATE LEGS., STATE ACTIONS TO REDUCE AND PREVENT CHILDHOOD OBESITY IN SCHOOLS AND COMMUNITIES 3, 11 (2014). The report defines school nutrition programs as those that “help ensure that students have access to healthier food and beverage options at school or encourage other community supports for child nutrition.” WINTERFELD, *supra*, at 11. Other categories analyzed in the report include nutrition education and farm-to-school programs. *Id.* at 17.

40. See Colo. S. 12-068; WINTERFELD, *supra* note 39, at 12.

41. See generally WINTERFELD, *supra* note 39.

42. Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES (July 2, 2010), <http://www.nytimes.com/2010/07/03/nyregion/03sodatax.html> [<https://nyti.ms/2h91w2a>] (discussing New York’s failure to pass a tax on sugary beverages); Jeremy B. White, *California Soda Tax Bill Pulled Without a Vote*, SACRAMENTO BEE (Apr. 13, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article71436032.html> [<https://perma.cc/WM45-GXN3>] (reporting on failed legislation in California that would have imposed a two-cent tax on sugary beverages).

43. Caitlin Dewey, *State Group: USDA Mulling Big Changes to Food Stamps, Including Allowing States to Impose Soda Ban*, WASH. POST: WONKBLOG (Dec. 8, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/08/state-group-usda-mulling-big-changes-to-food-stamps-including-allowing-states-to-impose-soda-ban/?utm_term=.865d7c1056c7 [<https://perma.cc/SM6X-JD9Z>].

44. *Id.*

systems and environments that provide accessible, affordable, sufficient, and nutritious food for all.

C. Local Government Initiatives

Local governments have emerged as innovators and leaders in public health laws and policies to prevent obesity and promote healthier diets. “Home-rule,” the delegation of state power to local jurisdictions, enables local governments to adopt laws and perform functions that are typically reserved for state governments.⁴⁵ In many instances, local governments have adopted innovative and progressive reforms that have failed at the state and federal levels.⁴⁶ Bolder reforms are enabled by a range of factors including smaller, more homogeneous constituencies, less bureaucratic and time-consuming law-making procedures, and proximity to constituents and their challenges.⁴⁷ Innovative local government initiatives to promote access to nutritionally adequate diets include a Minneapolis ordinance requiring grocery stores to stock staple foods⁴⁸ and increasing the available number of vending permits to sell fresh fruit and vegetables from food carts in underserved areas of New York City.⁴⁹ Many local jurisdictions, including Boston and Baltimore, incentivize the use of SNAP benefits at farmers’ markets, which has increased consumption of fresh fruits and vegetables among SNAP participants.⁵⁰

45. Patrick M. Steel, *Obesity Regulation Under Home Rule: An Argument That Regulation by Local Governments Is Superior to Administrative Agencies*, 37 CARDOZO L. REV. 1127, 1131 n.22 (2016).

46. *Id.* at 1139–42; see also H.R. 1687, 114th Cong. (2015) (referring to the Subcommittee on Health); Mark Bittman, Opinion, *Introducing the National Soda Tax*, N.Y. TIMES (July 29, 2014), <https://www.nytimes.com/2014/07/30/opinion/mark-bittman-introducing-the-national-soda-tax.html> [<https://nyti.ms/1laWE5B>] (discussing a proposed federal soda tax). The proposed tax discussed in the article did not advance past the House committee level.

47. Reeve et al., *supra* note 5, at 445.

48. MINNEAPOLIS, MINN., ORDINANCE 10, § 203 (2017); see also Minneapolis Health Dep’t, *Staple Food Ordinance*, MINNEAPOLISMN.GOV (Oct. 10, 2017), <http://www.minneapolismn.gov/health/living/eating/staple-foods> [<https://perma.cc/XL35-LNAM>] (“[The ordinance] requires licensed grocery stores (including corner stores, gas stations, dollar stores, and pharmacies) to sell a certain amount of basic food items including fruits and vegetables, whole grains, eggs, and low-fat dairy. The staple foods ordinance was originally adopted in 2008, but was amended by the Minneapolis City Council in October 2014 to set more comprehensive and clear standards for food retailers.”).

49. *NYC Green Carts*, N.Y.C. DEP’T OF HEALTH, <http://www1.nyc.gov/site/doh/health/health-topics/green-carts.page> [<https://perma.cc/43UQ-7PWE>].

50. *Healthy Incentives Programs*, CITY OF BOS. (Mar. 29, 2018), <https://www.boston.gov/departments/food-initiatives/healthy-incentives-program>

In addition to measures to promote access to healthier foods, local jurisdictions have also adopted measures to restrict availability and discourage consumption of unhealthy products. The City of Los Angeles, for example, restricts the density of fast food outlets⁵¹ and many cities and counties ban the sale of sodas and other unhealthy food and beverage products in schools.⁵²

Public health-based taxes on sugary beverages, which can discourage consumption, raise revenue for governments, and encourage manufacturers to decrease the amount of sugar in their products,⁵³ are increasingly popular throughout the United States and globally. After reviewing evidence from early adopters including Mexico and the city of Berkeley, California, the World Health Organization (“WHO”) recommended that governments adopt excise taxes on sugary drinks, concluding that “[s]uch taxes lead to more than proportional reductions in . . . consumption and net reductions in caloric intake, and thus contribute to improving nutrition and reducing overweight, obesity and NCDs.”⁵⁴ Following Mexico’s adoption of a one-peso-per-liter tax in 2013, sales of taxed products

[<https://perma.cc/M45U-82K7>]; Md. Farmers Market Ass’n, *Using SNAP Benefits at the Baltimore Farmers Market and Bazaar!*, MD. FARMERS MKT. ASS’N: BLOG (Oct. 20, 2014), <http://www.marylandfma.org/using-snap-benefits-at-the-baltimore-farmers-market-and-bazaar/> [<https://perma.cc/QV95-CPX9>] (“Maryland Market Money provides a \$1 for \$1 match, up to \$10, per week when you spend your SNAP benefits at market. Customers can earn an additional \$10 each week at market, as long as they spend their SNAP benefits with a participating vendor!”).

51. L.A., Cal., Fast Food Interim Control Ordinance 180103 (July 29, 2008).

52. Felice J. Freyer, *Chances Are, Boston Schools Are Safe from Sugary Drinks*, BOS. GLOBE (Mar. 3, 2016), <https://www.bostonglobe.com/metro/2016/03/03/sugary-drinks-have-nearly-disappeared-from-boston-schools-study-finds/D9KM5qT1zGFAUSCEHPWCzN/story.html> [<https://perma.cc/H87Z-3PC6>].

53. Sarah A. Roache & Lawrence O. Gostin, *The Untapped Power of Soda Taxes: Incentivizing Consumers, Generating Revenue, and Altering Corporate Behavior*, 6 INT’L J. HEALTH POL’Y & MGMT. 489, 490–91 (2017); see also Allison Aubrey, *PepsiCo Pledges to Cut Sugar as Big Soda Comes Under Scrutiny*, NAT’L PUB. RADIO (Oct. 17, 2016), <http://www.npr.org/sections/thesalt/2016/10/17/498274851/pepsico-pledges-to-cut-sugar-as-bigsoda-comes-under-scrutiny> [<https://perma.cc/2YUM-7MTP>]; Abby Norman, *Pepsi Will Cut the Amount of Sugar in Its Sodas, & It’s a Small Step Forward*, ROMPER (Oct. 18, 2016), <https://www.romper.com/p/pepsi-will-cut-the-amount-of-sugar-in-its-sodas-its-a-small-step-forward-20664> [<https://perma.cc/VH8N-ES7E>].

54. WORLD HEALTH ORG., FISCAL POLICIES FOR DIET AND PREVENTION OF NONCOMMUNICABLE DISEASES 24 (2016). The WHO also recommends that governments adopt taxes that raise retail prices of sugary beverages by at least twenty percent. *Id.*

fell by 5.5% in the first year and 9.7% in the second year.⁵⁵ In 2014, Berkeley became the first U.S. jurisdiction to implement a public health-based tax on sugary drinks.⁵⁶ In the first year, consumption in Berkeley's low-income neighborhoods fell by 21%.⁵⁷ As of January 2018, six U.S. jurisdictions are levying similar taxes.⁵⁸ Although sugary drink taxes currently apply to a small fraction of the total population, there is growing interest and momentum for such taxes, especially among local governments.⁵⁹

III. INDUSTRY ATTEMPTS TO THWART PUBLIC HEALTH REGULATIONS

Taxes on sugary drinks, along with other government interventions intended to reduce consumption of unhealthy food and beverage products, conflict with the notion of individual autonomy and the food and beverage industry's commercial interests in maximizing sales and profits.⁶⁰ The food and beverage industry opposes government measures that threaten profits and dedicates significant resources to prevent the adoption of such measures and to undermine existing ones. Industry's strategic approach incorporates lobbying, funding, and messaging techniques to influence policy-makers, scientific evidence, and public opinion.

A. Lobbying

The food and beverage industry, including corporations and trade groups, dedicates significant resources to influence federal, state, and

55. M. Arantxa Colchero et al., *In Mexico, Evidence of Sustained Consumer Response Two Years After Implementing a Sugar-Sweetened Beverage Tax*, 36 HEALTH AFF. 1, 4 (2017).

56. Jennifer Falbe et al., *Impact of the Berkeley Excise Tax on Sugar-Sweetened Beverage Consumption*, 106 AM. J. PUB. HEALTH 1865, 1865 (2016).

57. *Id.* at 1867.

58. The six jurisdictions are: Albany, Berkeley, and Oakland, CA; Boulder, CO; Philadelphia, PA; and Seattle, WA. See Lawrence O. Gostin, Op-Ed, *2016: The Year of the Soda Tax*, 95 MILBANK Q. 19, 19–20 (2017); Daniel Beekman, *Prices Going Up for Sugary Drinks as Seattle Tax Kicks In*, SEATTLE TIMES (Jan. 1, 2018), <https://www.seattletimes.com/seattle-news/politics/promoting-health-at-a-hefty-price-seattles-soda-tax-starts-jan-1/> [<https://perma.cc/DTR2-7FHL>]; see also Laurel Morales, *The Navajo Nation's Tax on Junk Food Splits Reservation*, NAT'L PUB. RADIO (Apr. 8, 2015), <https://www.npr.org/sections/codeswitch/2015/04/08/398310036/the-navajo-nations-tax-on-junk-food-splits-reservation> [<https://perma.cc/54N7-Y2ET>] (discussing the Navajo Nation's adoption of a tax of two percent on unhealthy foods, which is not considered high enough to discourage purchases).

59. Gostin, *supra* note 58, at 1.

60. Steel, *supra* note 45, at 1143–44.

local law and policy. Industry seeks to protect its interests by influencing broader nutrition and diet policies and by combating attempts to regulate the industry and its products.⁶¹ Between 2009 and 2015, Coca-Cola, PepsiCo, and the American Beverage Association (“ABA”) spent a total of \$114.2 million on federal lobbying.⁶² Specifically:

The ABA has lobbied against any government action . . . that might raise the cost of soda production and marketing or discourage consumption . . . [including] against nutrition labeling, packaging standards, fair labor standard, the exclusion of sodas from food assistance programs and school meals, limitations on franchises, quotas on sugar, container deposit laws, and restrictions on television advertising to children, among other issues.⁶³

In the recent 2016 election cycle, the food and beverage industry contributed over twenty-five million dollars to national campaigns.⁶⁴ In addition to significant spending, the food and beverage industry hires lobbyists to meet with members of both houses of Congress, the White House, and various government agencies that promulgate food-related regulations, including the USDA and the FDA.⁶⁵

At the state level, the food and beverage industry has successfully pushed for laws that prevent or nullify local government legislation on nutrition,⁶⁶ which is often more restrictive at the local level (e.g., soda taxes, menu labeling, and bans on toy giveaways with fast-food meals for children). The legal doctrine of preemption refers to the aversion, displacement, or negation of laws by conflicting laws made by higher levels of government.⁶⁷ Powerful industries, such as the tobacco and firearms industries, have championed efforts to preempt local regulations that could affect their bottom line.⁶⁸ The American

61. MARION NESTLE, *SODA POLITICS: TAKING ON BIG SODA (AND WINNING)* 315 (2015).

62. JIM O’HARA & AVIVA MUSICUS, *BIG SODA VS. PUBLIC HEALTH: HOW THE INDUSTRY OPENS ITS CHECKBOOK TO DEFEAT HEALTH MEASURES 2* (2015).

63. NESTLE, *supra* note 61, at 315.

64. Ctr. for Responsive Pol., *Food & Beverage: Long-Term Contribution Trends*, OPENSECRETS.ORG, <http://www.opensecrets.org/industries/totals.php?cycle=2016&ind=N01> [<https://perma.cc/V86F-NZBD>].

65. NESTLE, *supra* note 61, at 317–18.

66. Rob Waters, *Soda and Fast Food Lobbyists Push State Preemption Laws to Prevent Local Regulation*, FORBES (June 21, 2017), <https://www.forbes.com/sites/robwaters/2017/06/21/soda-and-fast-food-lobbyists-push-state-preemption-laws-to-prevent-local-regulation/> [<https://perma.cc/A6T2-EWDK>].

67. James G. Hodge & Alicia Corbett, *Legal Preemption and the Prevention of Chronic Conditions*, 13 PREVENTING CHRONIC DISEASE 1, 1–2 (2016).

68. *Id.* at 3.

Legislative Exchange Council, a group supported by conservative foundations and corporations, promotes collaboration between lobbyists and lawmakers to disseminate model preemption legislation.⁶⁹ Today, at least nine states have nutrition-related preemption laws,⁷⁰ which prevent local governments enacting evidence-based regulations aimed at promoting healthier diets and preventing obesity within their communities.⁷¹ In Ohio, for example, state law preempts local regulation on the provision of nutrition information in restaurants (e.g., calorie information on menus) and customer incentive items (e.g., toys with children's meals).⁷²

In addition to lobbying federal and state lawmakers and agencies, the food and beverage industry also lobbies at the local level. Companies and trade associations hire well-connected consultants with ties to local liberal and conservative politicians. In its efforts to oppose taxes on sugary drinks in San Francisco and Berkeley, for example, the soda industry engaged a research firm that had previously worked for Michelle Obama's *Let's Move!* initiative and the Robert Wood Johnson Foundation, the nation's largest public health philanthropy organization.⁷³ In Cook County, the Can the Tax Coalition and other repeal advocates lobbied individual members of the Board of Commissioners, and soda companies made donations to commissioners in favor of repeal via political action committees.⁷⁴ Looking forward, the rise of local government measures to promote healthier diets will likely be accompanied by increased industry lobbying at the local level.

69. Waters, *supra* note 66.

70. Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 901 (2017).

71. *See id.*

72. OHIO REV. CODE ANN. § 3717.53 (West 2018).

73. *See Soda Industry Spent \$67 Million Opposing State, City Soda Taxes & Warning Labels: Total Big Soda Federal Lobbying at About \$14 Million a Year*, CTR. FOR SCI. PUB. INT. (Sept. 21, 2016), <https://cspinet.org/news/soda-industry-spent-67-million-opposing-state-city-soda-taxes-warning-labels-20160921> [<https://perma.cc/AVR2-C9XZ>].

74. Caitlin Dewey, *Why Chicago's Soda Tax Fizzled After Two Months—and What It Means for the Anti-Soda Movement*, WASH. POST: WONKBLOG (Oct. 10, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/10/10/why-chicagos-soda-tax-fizzled-after-two-months-and-what-it-means-for-the-anti-soda-movement/> [<https://perma.cc/U522-6WXH>].

B. Funding Scientific Research

As part of its overall strategy, the food and beverage industry has funded scientific research that tends to shift the responsibility for health impacts away from their products. Recently uncovered internal sugar industry documents chronicle decades of sugar industry influence on the development of scientific evidence on sugar and heart disease.⁷⁵

In 1967, the Sugar Association paid Harvard scientists to publish a paper on the relationship between sugar, fat, and heart disease.⁷⁶ In addition to funding the research, Sugar Association executives worked closely with the Harvard scientists, supplying articles for review and reviewing drafts. The resulting paper, which was published in the *New England Journal of Medicine* (“*NEJM*”), was developed in response to studies associating sugar with increased triglyceride levels linked to heart disease, as well as higher levels of insulin directly connected to type 2 diabetes. The *NEJM* paper minimized the link between sugar and heart health by emphasizing the role of fat and saturated fat in cardiovascular problems.⁷⁷

The industry-funded research proved successful in its aim to minimize the criticism of sugar and shift the focus to fat.⁷⁸ In 1976, the Sugar Association won a public relations award for “influencing the public opinion about the health effects of sugar consumption.”⁷⁹ One of the Harvard scientists who authored the paper, D. Mark Hegsted, later became the head of nutrition at the USDA, where he was involved in drafting the forerunner to the federal government’s

75. Cristin E. Kearns et al., *Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, 176 JAMA INTERNAL MED. 1, 1–2 (2016).

76. Anahad O’Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), <http://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html> [<https://nyti.ms/2jDtsxa>]. According to the organization’s website, the Sugar Association is:

[T]he scientific voice of the U.S. sugar industry, making a difference by continuously supporting scientific research and sharing our knowledge of sugar to increase consumer understanding and confidence in the role that sugar plays in a nutritious, balanced and enjoyable diet. . . . The Sugar Association, founded by members of the U.S. sugar industry, began in 1943 as the Sugar Research Foundation, dedicated to the scientific study of sugar’s role in food and communication of that role to the public. In 1947, the Association assumed its current name.

About Us, SUGAR ASS’N, <https://www.sugar.org/about-us/> [<https://perma.cc/QPB2-TQ6Z>].

77. O’Connor, *supra* note 76.

78. *Id.*

79. SUGAR COATED (Cutting Factory 2015).

dietary guidelines.⁸⁰ Research suggests that the sugar industry may have had a long history of influencing federal diet and nutrition policy.⁸¹

Industry efforts to influence scientific research continue to the present day. A recent analysis found that studies sponsored by the food and beverage industry were five times more likely to find no positive association between consumption of sugary drinks and weight gain or obesity than studies that reported no industry funding or conflicts of interest.⁸² Increasing public recognition and criticism of industry influence over scientific evidence led to the disbandment of the Global Energy Balance Network (“Network”) in 2015.⁸³ The Network’s scientists undertook research that tended to blame weight gain and obesity on lack of exercise rather than diet.⁸⁴ Founded in 2014, the Network received \$1.5 million from Coca-Cola.⁸⁵ Despite the Global Energy Balance Network president’s insistence that any funding received from Coca-Cola did not influence the organization’s activities, emails between the organization and Coca-Cola suggest that the company wielded influence over the group’s strategy and development.⁸⁶ The chairman of the Department of Nutrition at Harvard University, along with thirty-six other scientists, penned an open letter criticizing the work of the Global Energy Balance Network as “scientific nonsense.”⁸⁷

80. O’Connor, *supra* note 76.

81. Kearns et al., *supra* note 75, at 7.

82. Maira Bes-Rastrollo et al., *Financial Conflicts of Interest and Reporting Bias Regarding the Association Between Sugar-Sweetened Beverages and Weight Gain: A Systematic Review of Systematic Reviews*, PLOS MED., Dec. 2013, at 1, 2.

83. See Zosia Kmietowicz, *Coca-Cola Funded Group Set Up to Promote “Energy Balance” Is Disbanded*, BMJ (Dec. 4, 2015), <http://www.bmj.com/content/351/bmj.h6590> [<https://perma.cc/B6VM-B5BM>]; Anahad O’Connor, *Research Group Funded by Coca-Cola to Disband*, N.Y. TIMES: WELL BLOG (Dec. 1, 2015 4:57 PM), <https://well.blogs.nytimes.com/2015/12/01/research-group-funded-by-coca-cola-to-disband/> [<https://perma.cc/M8CF-KHLT>].

84. Anahad O’Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES: WELL BLOG (Aug. 9, 2015, 5:25 PM), <http://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/> [<https://perma.cc/HF8T-PT6E>].

85. *Id.*

86. Nancy Fink Huehnergath, *Emails Reveal How Coca-Cola Shaped the Anti-Obesity Global Energy Balance Network*, FORBES (Nov. 24, 2015, 3:24 PM), <https://www.forbes.com/sites/nancyhuehnergath/2015/11/24/emails-reveal-how-coca-cola-shaped-the-anti-obesity-global-energy-balance-network/#4607f42779a7> [<https://perma.cc/W9NA-7QT9>].

87. Michael F. Jacobson & Walter Willett, Letter to the Editor, *Coke’s Skewed Message on Obesity: Drink Coke. Exercise More.*, N.Y. TIMES (Aug. 13, 2015),

C. Public Messaging

Industry-funded research feeds into the food and beverage industry's larger public messaging strategy, which emphasizes the industry's economic benefits, individual choice, personal responsibility, and consumption of unhealthy food and beverage products as an appropriate part of healthy lifestyles, including balanced diets and physical activity.⁸⁸ The ABA, together with Coca-Cola, Pepsi Co., and the Dr. Pepper Snapple Group, created a website advising consumers on maintaining a healthy lifestyle while nevertheless consuming their products.⁸⁹ This website promotes the idea that the key to a healthy lifestyle is "energy balance," balancing calories consumed with calories expended through exercise.⁹⁰ The website highlights product reformulation efforts by the industry, the wide range of beverage choices available to consumers, and industry-sponsored initiatives to promote healthier communities.⁹¹ Echoing the work of the Global Energy Balance Network, this website promotes unhealthy products under the guise of consumer information in a manner that tends to shift the blame for obesity away from their products to a lack of exercise.

D. Funding "Grassroots" Opposition

Amplifying the impact of its public messaging strategy, the food and beverage industry fosters "grassroots" opposition to laws and regulations promoting healthier diets and nutrition. Groups, such as New Yorkers for Beverage Choices, Philadelphians Against the Grocery Tax, and Can the Tax Coalition, typically receive support and resources from the food and beverage industry to build a coalition of individuals, small businesses, and community groups to oppose proposed measures in their local jurisdictions.⁹² Through activities that include flyer distribution, media appearances, advertising, and public protests, these groups provide local voices

<https://www.nytimes.com/2015/08/13/opinion/cokes-skewed-message-on-obesity-drink-coke-exercise-more.html> [<https://nyti.ms/1N51CTf>].

88. *E.g.*, Michael M. Grynbaum, *Soda Makers Begin Their Push Against New York Ban*, N.Y. TIMES (July 1, 2012), <http://www.nytimes.com/2012/07/02/nyregion/in-fight-against-nyc-soda-ban-industry-focuses-on-personal-choice.html> [<https://nyti.ms/2Gk8fVF>]; AM. BEVERAGE ASS'N, <http://www.balanceus.org/en/> [<https://perma.cc/5V65-FJHZ>].

89. *See* AM. BEVERAGE ASS'N, *supra* note 88.

90. *See id.*; *see also* O'Connor, *supra* note 84.

91. *See* AM. BEVERAGE ASS'N, *supra* note 88.

92. *See infra* Part IV.

warning of the intrusion of the “nanny state” and of potential negative economic impacts on communities and families.⁹³ Part IV examines specific examples of industry-supported “grassroots” advocacy against local government measures in New York City, Philadelphia, and Cook County, Illinois. Given the rise in local governments’ use of their authority to discourage the consumption of unhealthy products, the food and beverage industry will likely continue to use innovative methods to generate maximum opposition against measures that threaten their profits.

IV. INDUSTRY LITIGATION CHALLENGING LOCAL GOVERNMENT MEASURES TO PROMOTE HEALTHIER DIETS

Litigation forms a key part of the food and beverage industry’s strategy to limit local government measures that promote healthier diets. This Article reports on research analyzing cases brought by the food and beverage industry or industry-supported groups against local governments in the United States, challenging the legality of measures intended to discourage the consumption of unhealthy food and beverage products and in which judgments have been delivered. The increase in local government measures that conflict with the food and beverage industry’s commercial interests will likely be met with an increase in this type of litigation. This part discusses four cases.

A. New York City Soda Portion Cap Rule

In September 2012, the New York City Board of Health adopted the “Portion Cap Rule,” which prohibited the sale of sugary drinks in containers larger than sixteen ounces.⁹⁴ The Portion Cap Rule formed part of New York City’s broader strategy to reduce diet-related chronic diseases among the city’s residents.⁹⁵ An opposition campaign, led by New Yorkers For Beverage Choices, an industry-backed grassroots-style group, framed the rule as an encroachment on personal freedoms by Mayor Bloomberg’s “nanny state.”⁹⁶ Opponents of the rule also cultivated relationships with minority

93. See *infra* Part IV.

94. Natalie Blazer, *20 Ounces to Freedom: Soda Ban Ball in City Council’s Court*, WEIL: PROD. LIAB. MONITOR (July 2, 2014), <https://product-liability.weil.com/food-and-beverage/20-ounces-to-freedom-soda-ban-ball-in-city-councils-court/> [<https://perma.cc/A9MU-AYY7>].

95. See N.Y.C. OBESITY TASK FORCE, REVERSING THE EPIDEMIC: THE NEW YORK CITY OBESITY TASK FORCE PLAN TO PREVENT AND CONTROL OBESITY 12–14 (2012).

96. Grynbaum, *supra* note 88.

lawmakers and argued against the rule on the basis that it would disproportionately impact vulnerable populations, as well as minority-owned businesses.⁹⁷ Between 2009 and 2015, the beverage industry spent more than fifteen million dollars in New York State campaigning against the Portion Cap Rule and other nutrition-related initiatives, including a proposed statewide soda tax.⁹⁸

In October 2012, before the Portion Cap Rule went into effect, six national and statewide not-for-profit and labor organizations commenced a hybrid Article 78 proceeding and declaratory judgment action seeking to invalidate the rule.⁹⁹ This action, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene*,¹⁰⁰ was heard by the Supreme Court of the County of New York, which invalidated the rule and permanently enjoined the City from implementing it.¹⁰¹ The New York court found that the New York City Board of Health was an administrative agency and, therefore, did not possess the requisite authority to promulgate this law.¹⁰² It also held that the rule was arbitrary and capricious.¹⁰³

The New York State Appellate Division upheld the trial court's judgment on the basis that the board had exceeded the scope of its regulatory authority.¹⁰⁴ *Boreali v. Axelrod*,¹⁰⁵ an earlier New York case on administrative agency authority, sets out a two-step analysis to determine whether a government agency has exceeded its regulatory authority by engaging in policy-making that is reserved for the legislative body.¹⁰⁶ First, the court must determine whether the

97. *Id.*

98. *See Soda Industry Spending Against Public Health Tops \$100 Million: Spending Since 2009 Targets Taxes, Warning Label Measures*, CTR. FOR SCI. PUB. INT. (Aug. 25, 2015), <https://cspinet.org/new/201508251.html> [<https://perma.cc/VPZ3-Y4DN>].

99. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 16 N.E.3d 538, 542 (N.Y. 2014). Private plaintiffs can use an Article 78 proceeding to challenge an administrative, or other governmental agency's actions. *See* N.Y. Supreme Court, Civil Branch, *How to Start a Special Proceeding*, N.Y. COURTS, <https://www.nycourts.gov/courts/1jd/suptctmanh/Self-Rep%20Forms/Special%20Proceeding2.pdf> [<https://perma.cc/4BJ8-8ZKX>].

100. 16 N.E.3d 538 (N.Y. 2014).

101. *Id.* at 542.

102. *Id.* at 542, 545–46.

103. *Id.* at 542.

104. *Id.* at 541.

105. 517 N.E.2d 1350 (N.Y. 1987).

106. *See generally id.* (finding that a city agency engaging in a cost-benefit analysis was engaging in legislative conduct reserved for city council, the city's legislative branch of government).

government agency is regulatory or legislative.¹⁰⁷ If the agency merely possesses regulatory authority, the court should then determine whether the agency exceeded this limited authority and engaged in legislative policy making.¹⁰⁸ If the regulatory agency has, in fact, engaged in legislative action or policy-making, the court should necessarily invalidate its rule, as it violates the separation of powers.¹⁰⁹

Applying *Boreali*, the New York Court of Appeals held that the New York City Board of Health's role was regulative, rather than legislative.¹¹⁰ Referring to the New York City Charter, the court determined that the sole legislative body within the city's government is the New York City Council.¹¹¹ "While the charter empowers the City Council 'to adopt local laws for . . . public welfare,'" it also limits the New York City Board of Health's rulemaking authority to the publication of the health code.¹¹² Under the City Charter, the New York City Board of Health has the authority to "add to and alter, amend or repeal any part of the health code, . . . [to] publish additional provisions for security of life and health in the city and [to] confer additional powers on the [Department of Health and Mental Hygiene] not inconsistent with the constitution, laws of this state or this charter."¹¹³ Given these limitations, the court determined that the New York City Board of Health's authority was restricted to regulatory functions.¹¹⁴

107. See *id.* at 1353–57; see also *N.Y. Statewide Coal.*, 16 N.E.3d at 543–45.

108. See *Boreali*, 517 N.E.2d at 1353–57; see also *N.Y. Statewide Coal.*, 16 N.E.3d at 543–45.

109. See *Boreali*, 517 N.E.2d at 1353.

110. See *N.Y. Statewide Coal.*, 16 N.E.3d at 543–45.

111. *Id.* at 542.

112. *Id.* at 544 (quoting N.Y. CITY CHARTER § 28(a) (2004)). The Charter further prevents the N.Y.C. Board of Health from intruding on the city council's legislative power by limiting the N.Y.C. Board of Health's authority to matters within the authority of the Department of Health. *Id.*

113. *Id.* (quoting N.Y. CITY CHARTER § 558(b)). Notably, the New York City Charter sets out that "[t]he City Council is the sole legislative branch of City government; it is 'the legislative body of the city . . . vested with the legislative power of the city.'" *Id.* at 543 (quoting N.Y. CITY CHARTER § 21).

114. *Id.* at 544 (quoting N.Y. CITY CHARTER § 28(a)) ("Nonetheless, the Charter contains no suggestion that the Board of Health has the authority to create laws. While the Charter empowers the City Council 'to adopt local laws . . . for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants, the Charter restricts the Board's rulemaking to the publication of a health code, an entirely different endeavor.'").

The court then turned to whether “the Board properly exercised its regulatory authority in adopting the Portion Cap Rule.”¹¹⁵ The court emphasized that the *Boreali* analysis should “center on the theme that ‘it is the province of the people’s *elected* representative, rather than appointed administrator, to resolve difficult social problems by making choices among competing ends.’”¹¹⁶ Therefore, “[t]he focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner,” and the task of this policy-making is reserved to the legislative branch.¹¹⁷ In analyzing the Portion Cap Rule, the court determined that (1) crafting the Portion Cap Rule required complexity that exceeded simple rule-making and drifted into policy-making due to “value judgments concerning personal autonomy and economics”;¹¹⁸ (2) the New York City Board of Health did not have any policy foundation upon which to craft the rule and thus “did not simply fill in details guided by independent legislation”;¹¹⁹ and (3) the New York City Board of Health tried to “fill the vacuum and impose a solution of its own.”¹²⁰ Given these factors, the court concluded that the Board of Health’s conduct had amounted to policy-making, thereby exceeding its regulatory authority.¹²¹ Because the regulatory agency engaged in impermissible policy-making, the court of appeals invalidated the Portion Cap Rule.¹²²

B. Philadelphia Soda Tax

In June 2016, the Philadelphia City Council voted 13-4 in favor of the Philadelphia Beverage Tax (“PBT”), a 1.5-cent-per-ounce tax on sugary, diet, and low-calorie beverages.¹²³ The PBT was expected to raise ninety million dollars annually.¹²⁴ Philadelphia Mayor Jim Kenney championed the tax as an additional source of revenue to improve community resources, including parks, recreation centers, and libraries, and to fund universal pre-kindergarten for

115. *Id.* at 546.

116. *Id.* (quoting *Boreali v. Axelrod*, 517 N.E.2d 1350, 1350 (N.Y. 1987)).

117. *Id.*

118. *Id.* at 548.

119. *Id.*

120. Steel, *supra* note 45, at 1132–36 (quoting *Boreali*, 517 N.E.2d at 1356).

121. *N.Y. Statewide Coal.*, 16 N.E.3d at 548.

122. *Id.* at 549.

123. Dann Cuellar, *Philadelphia City Council Passes Beverage Tax with 13-4 Vote*, 6ABC NEWS (June 17, 2016), <http://6abc.com/news/philadelphia-city-council-passes-beverage-tax-/1388228/> [<https://perma.cc/L24F-5ZVF>].

124. *Id.*

Philadelphia's children.¹²⁵ Mayor Kenney's public statements emphasized the tax's revenue raising potential, paying little attention to the potential public health benefits of the tax.¹²⁶ Opponents of the tax, including the industry-funded group Philadelphians Against the Grocery Tax, framed the tax as an unfair intrusion on personal choice that would raise grocery bills and cause job losses.¹²⁷ Both opponents and supporters, such as the group Philadelphians for a Fair Future, spent millions of dollars promoting their view of the tax to the public. During the first half of 2017, the ABA spent more than three million dollars on advertisements opposing the tax.¹²⁸ Between mid-July and mid-September of the same year, Michael Bloomberg, the former Mayor of New York City, contributed over two million dollars to fund ads in favor of the tax.¹²⁹

In addition to seeking to shape public opinion against the tax, the ABA, together with a group of individuals and small businesses, filed a lawsuit challenging the tax in September 2016.¹³⁰ The plaintiffs alleged that the PBT is preempted by state tax laws and federal SNAP regulations and violates the Uniformity Clause of the Pennsylvania Constitution.¹³¹ The Philadelphia Court of Common Pleas dismissed the lawsuit in December 2016, enabling the tax to go into effect shortly thereafter.¹³² The plaintiffs appealed the dismissal to the Commonwealth Court of Pennsylvania, which heard arguments in April 2017 and affirmed the lower court's dismissal in June 2017.¹³³

The commonwealth court upheld the lower court's finding that the PBT was not preempted by Pennsylvania State tax law.¹³⁴ Under the Pennsylvania Sterling Act, which aims to protect against double taxation by city and state governments, cities have broad local

125. *Id.*

126. Luc Cohen, *Philadelphia Passes Soda Tax After Mayor Rewrites Playbook*, REUTERS (June 16, 2016), <https://www.reuters.com/article/us-beverages-philadelphia-sodatax/philadelphia-passes-soda-tax-after-mayor-rewrites-playbook-idUSKCN0Z22G3> [<https://perma.cc/6GE9-V4K4>].

127. *FAQs, NO PHILLY GROCERY TAX*, <http://nophillygrocerytax.com/faq.aspx> [<https://perma.cc/476Z-8EHQ>].

128. Joe Trinacria, *All Those Philly Soda Tax Ads Cost \$5.4 Million This Year*, PHILLY MAG. (Sept. 27, 2017), <http://www.phillymag.com/news/2017/09/27/soda-tax-lobbyists-spent-millions-tv-ads/> [<https://perma.cc/6SSQ-9HVU>].

129. *Id.*

130. *Williams v. City of Philadelphia*, 164 A.3d 576, 576, 580–81 (Pa. Commw. Ct. 2017).

131. *Id.* at 580–82.

132. *Id.* at 580–84.

133. *Id.* at 579.

134. *Id.* at 587.

taxation authority to generate revenue but are preempted from exercising this authority on a product or transaction subject to a state tax.¹³⁵ In the current case, the plaintiffs claimed that the PBT was preempted by the state's existing sales tax on sugary beverages and sodas.¹³⁶ The commonwealth court rejected this argument, holding that the tax is not duplicative because the city tax is levied on non-retail distributions whereas the state tax is levied on retail sales and payable by consumers.¹³⁷

On the issue of federal preemption, the commonwealth court found that SNAP regulations and requirements did not preempt the PBT.¹³⁸ Section 2013(a) of the Federal Food Stamp Act, and section 204(46) of the Tax Code preclude a government from imposing a tax on items bought using SNAP benefits.¹³⁹ The commonwealth court affirmed the lower court's dismissal of this claim, ruling that the controlling federal SNAP statute and regulations "only prohibit the imposition of a tax on retail purchase transactions, and not a tax on non-retail distribution transactions," such as the current PBT.¹⁴⁰ The court again emphasized that the PBT is a tax on the "distributors or dealers upon distribution," not the consumer.¹⁴¹ Furthermore, the "fact that the PBT may be passed on to recipients through higher retail prices does not alter the incidence of the PBT nor transform it into a prohibited tax within the purview of [s]ection 2013(a) of the Food Stamp Act, its regulations, or [s]ection 204(46) of the Tax Code."¹⁴² Thus, because the tax is imposed at the distributor level, it is not preempted by state or federal law.

Finally, the commonwealth court affirmed the lower court's finding that the PBT did not violate the Pennsylvania Constitution's Uniformity Clause. The Uniformity Clause requires uniform taxation

135. *Blauner's Inc. v. City of Philadelphia*, 198 A. 889, 890–91 (Pa. 1938); *see also* 53 PA. STAT. AND CONST. STAT. ANN. § 15971 (West 2017).

136. Dan Packel, *Philly Defends Soda Tax Against Beverage Groups' Challenge*, LAW360 (Oct. 11, 2016), <http://www.law360.com/articles/850051/philly-defends-soda-tax-against-beverage-groups-challenge> [<https://perma.cc/K2JJ-63V9>].

137. *Williams*, 164 A.3d at 587 ("The subject matter of the tax, the non-retail distribution of sugar-sweetened beverages for sale at retail in the City, and the measure of the tax, per ounce of sugar-sweetened beverage, are distinct from the Sales Tax imposed under the Tax Code upon the retail sale of the sugar-sweetened beverage of the ultimate purchaser.").

138. *Id.* at 594.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

of items within the same class.¹⁴³ The commonwealth court held that the PBT only created one class: distributors of taxed beverages.¹⁴⁴ It further found that the manner and measure of calculating the tax indicates that it is a specific tax uniformly applied to all members of the class, distributors, and therefore meets the requirements of the uniformity clause.¹⁴⁵

The soda industry has not been deterred by the commonwealth court's affirmation of the lower court's dismissal of its claims challenging the PBT. On July 13, 2017, the plaintiffs in the suit filed a petition to appeal to the Pennsylvania Supreme Court.¹⁴⁶ In January 2018, the court granted the petition on a limited basis, stating it will determine whether the tax violates the Sterling Act.¹⁴⁷

C. Cook County Soda Tax

In November 2016, the Cook County Board of Commissioners enacted the Sweetened Beverage Tax Ordinance ("SBTO"), a one-cent-per-ounce tax on sweetened beverages.¹⁴⁸ The ordinance defines a "sweetened beverage" as "any non-alcoholic beverage, carbonated or non-carbonated, which is intended for human consumption and contains any caloric sweetener or non-caloric sweetener, and is available for sale in a bottle or produced for sale through the use of syrup and/or powder."¹⁴⁹ Exemptions include 100% natural fruit and vegetable juices, infant formula, beverages for medical use, and "beverages to which a purchaser can add, or request that a retailer add, caloric sweetener or non-caloric sweetener."¹⁵⁰ Unlike the PBT,

143. PA. CONST. art. VIII, § 1.

144. *Williams*, 164 A.3d at 595.

145. *Id.* at 584 (finding compelling the lower court's finding that "all distributors are subject to the same tax calculation formula and therefore no disparate treatment exists within a distributor class in regard to the formula and rate of tax" and that "the only classes created by the PBT are distributors and arguably [sugar-sweetened beverages] which are one and the same for purposes of this analysis," and that "[t]he consumer and retailer classes identified by [Objectors] are not classes created by the PBT and are therefore not subject to tax liability under the PBT." (alteration in original)). "The PBT is not imposed on the ownership of the sugar-sweetened beverages or on their sale; rather, it is only imposed if the beverages are supplied, acquired, delivered, or transported for purposes of holding them out for retail sale in the City." *Id.* at 595.

146. Petition for Allowance of Appeal, *Williams*, 164 A.3d 576 (No. 321 EAL 2017).

147. Order for Allowance of Appeal from the Order of the Commonwealth Court, *Williams*, 164 A.3d 576 (No. 321 EAL 2017).

148. Cook County, Ill., Ordinance 16-5931, § 74-852(a) (repealed 2017).

149. *Id.* at § 74-851.

150. *Id.*

the SBTO is imposed on the purchaser or consumer, rather than the distributor, and the tax must be included in the price of the product.¹⁵¹ Perhaps in an effort to avoid potential preemption challenges emanating from SNAP regulations, the ordinance indicates that ordinarily taxed items purchased using SNAP benefits are exempt from the SBTO.¹⁵²

The SBTO was enacted in an express “effort to promote public health, including lowered obesity rates.”¹⁵³ The ordinance cited data and evidence on the health impacts of consumption of sugary drinks from the WHO, the CDC, and the American Medical Association.¹⁵⁴ In addition to public health benefits, the tax was expected to raise \$200 million in revenue for 2018 alone.¹⁵⁵

In the lead-up to, and following the Board of Commissioners 8-8 tied vote on the tax, broken by Board President Toni Preckwinkle, there had been significant division on the desirability of Cook County’s tax. The Can the Tax Coalition, largely funded by tax opponents including the ABA, ran a lengthy and well-resourced public messaging campaign framing the tax as an ineffective public health measure that would place a heavy economic burden on businesses and families.¹⁵⁶ As seen in Philadelphia, opponents spent heavily on advertisements and public relations, including circulating fliers petitioning for the repeal of the tax in local malls and shopping centers. The Can the Tax Coalition spent at least \$3.2 million on radio and television ads against the tax, while former New York City

151. *Id.* at § 74-852(b)–(c).

152. *See id.* § 74-852; *see also* Ill. Retail Merchs. Ass’n v. Cook Cty. Dep’t of Revenue, No. 17 L 50596, 2017 WL 3318078, at *3 (Ill. Cir. Ct. July 28, 2017). The court explains that in purchases where the consumer is using SNAP benefits to purchase the sweetened beverage, the retailer must do one of two things:

First, if the tax is separately stated on a retailer’s cash register receipts, the POS system should be programmed not to charge the tax. Second, if the tax is included in the selling price on a retailer’s cash register receipt, the POS system should be programmed to reduce the price by the amount of tax. If this programming is not possible, the retailer must have a procedure whereby a purchaser who uses SNAP benefits can receive an immediate refund at the customer service desk or other location within the retailer’s premises.

Id.

153. *Ill. Retail Merchs.*, 2017 WL 3318078, at *2.

154. *See generally* Cook County, Ill., Ordinance 16-5931 (repealed 2017).

155. Jennifer Maloney & Shayndi Raice, *Expanded Soda Taxes Stir Pushback*, WALL ST. J. (Sept. 1, 2017), <https://www.wsj.com/articles/expanded-soda-taxes-stir-pushback-1504288005> [<https://perma.cc/H6JL-96LP>].

156. *Frequently Asked Questions, CAN THE TAX COAL.*, <http://www.stopthecookcountytax.com/faq.aspx> [<https://perma.cc/AH2Q-WMKR>].

Mayor Michael Bloomberg spent more than \$10 million on ads promoting the public health benefits.¹⁵⁷

On June 27, 2017, four days prior to the tax taking effect, the plaintiffs, including the Illinois Retail Merchants Association, filed a complaint for injunctive relief and declaratory judgment to preemptively enjoin collection of the tax.¹⁵⁸ The plaintiffs challenged the SBTO on two primary grounds, arguing that the SBTO violated the Illinois Constitution's uniformity clause¹⁵⁹ and that the ordinance was unconstitutionally vague.¹⁶⁰ The Circuit Court of Cook County rejected these two arguments and upheld the SBTO.

The court found that the SBTO did not violate Illinois's uniformity clause. The Illinois Constitution provides for uniform taxation of similar products to enforce minimum standards of fairness and reasonableness between groups of taxpayers.¹⁶¹ To survive scrutiny, a non-property tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy.¹⁶² The plaintiffs primarily challenged the SBTO as non-uniform because the tax does not apply to sweetened beverages that are made to order. The plaintiffs alleged that exception (3) of the SBTO, which states that, "beverages to which a purchaser can add, or can request that a retailer add, caloric sweetener or non-caloric sweetener," was arbitrary and unreasonable.¹⁶³ Specifically, the plaintiffs argued that pre-made sweetened beverages (e.g., bottled frappuccino) and on-demand, custom sweetened beverages (e.g., handmade frappuccino) are

157. Hal Dardick, *Anti-Pop-Tax Hired Guns Pay \$11 an Hour for Workers to 'Educate' Cook County Voters on Repeal*, CHI. TRIB. (Sept. 29, 2017), <http://www.chicagotribune.com/news/local/politics/ct-cook-county-pop-tax-ads-met-20170929-story.html> [<https://perma.cc/X4XN-4S6N>].

158. *Ill. Retail Merchs.*, 2017 WL 3318078, at *3.

159. *Id.* at *4. The plaintiffs argue that while pre-made, or ready-to-drink sugary beverages would be subject to the tax, on-demand, or custom sweetened beverages were exempted from the tax, therefore creating classifications that are not based on any real or substantial differences in violation of the Illinois's constitution Uniformity Clause. *Id.*

160. *Id.* ("Specifically, the Merchants contend that the Ordinance is inconsistent with how sweetened beverages in non-pre-determined size containers (such as fountain drinks) are served and is inconsistent and may run afoul of the Supplemental Nutrition Assistance Program ("SNAP"), the Illinois Retailers' Occupation Tax, and the City of Chicago's Alternative Pricing System Rules.").

161. *Id.* at *5, *8.

162. *Id.* at *5.

163. *Id.* at *2, *6.

substantially similar and therefore must be taxed in the same way.¹⁶⁴ The defendants emphasized that the two products are different in two distinct ways: (1) pre-made sweetened beverages are more widely available and thus more likely to be purchased than on-demand specialty drinks, and (2) it is easier to administer the tax on pre-made products, because the cashier is not required to make a determination about whether the product is taxable at the point of sale.¹⁶⁵ The court found that the difference in availability, opportunity for purchase, and subsequently the “differences in revenue between classifications constitute[d] a real and substantial difference” between the pre-made beverages that are taxed and the custom-made drinks that are not.¹⁶⁶ Additionally, the court determined that imposing the tax on made-to-order beverages would be administratively burdensome, further demonstrating a real and substantial difference between a seemingly similar class of beverages.¹⁶⁷

After concluding that there was a real and substantial difference between the tax on pre-made products and made-to-order beverages, the court determined that the tax’s structure bore a reasonable relationship to its objective of promoting health and lowering rates of obesity. The court noted that it is “not constrained by the question of whether the legislature should have taxed all sweetened beverages that may contribute to obesity.”¹⁶⁸ In its decision, the court referred to the “many findings from studies, agencies, and organizations explaining the adverse health impact of sweetened beverage consumption.”¹⁶⁹

The court also found that the SBTO was not unconstitutionally vague. The Illinois Supreme Court has explained that “[a] statute can be impermissibly vague for one of two independent reasons: (1) if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) if it authorizes or even encourages arbitrary and discriminatory enforcement.”¹⁷⁰ When examining whether a statute is unconstitutionally vague, courts consider the statutory construction

164. *Id.* at *4.

165. *Id.* at *6.

166. *Id.*

167. *Id.* at *7–8.

168. *Id.* at *9.

169. *Id.* at *8.

170. *City of Chicago v. Pooh Bah Enters., Inc.*, 865 N.E.2d 133, 165–66 (Ill. 2006). When the court considers statutes with civil, rather than criminal, penalties regulating economic matters, the test for vagueness is “less strict.” *See Ill. Retail Merchs.*, 2017 WL 3318078, at *9.

and plain language of the statute “in light of its common understanding and practice.”¹⁷¹ The plaintiffs’ arguments focused on the sale of drinks in non-predetermined size containers (fountain drinks) and alleged inconsistency with SNAP, the Illinois Retailers’ Occupation Tax, and the City of Chicago’s Alternative Pricing System Rules.¹⁷²

The plaintiffs alleged that the application of the tax to fountain drinks would lead to the imprecise collection of taxes, which could expose retailers to litigation.¹⁷³ While the court acknowledged the possibility of imprecise collection, it decided that this did not meet the standard of rendering the ordinance unconstitutionally vague.¹⁷⁴ The judgment noted that the ordinance allowed for a five percent discount on the amount of tax payable with respect to syrup or powder for fountain drinks, taking into account spillage and product preparation at the retail level.¹⁷⁵

The plaintiffs also alleged that the requirement for the tax to be included in the sale price means that retailers could not comply without violating federal law prohibiting application of state or local sales taxes on purchases made with SNAP benefits.¹⁷⁶ The court held that this argument was overcome by the ordinance provisions requiring point-of-sale programming to avoid charging the tax on SNAP purchases or, if this was not possible, providing an immediate refund at the customer service desk or other location.¹⁷⁷ The court made similar findings in relation to alleged conflicts with the Illinois Retailers’ Occupation Tax and the City of Chicago’s Alternative Pricing System Rules.¹⁷⁸

Despite the decision confirming its legal validity, the Cook County Board of Commissioners voted overwhelmingly to repeal the SBTO in October 2017.¹⁷⁹ The tax appears to have been plagued by a lack

171. *Ill. Retail Merchs.*, 2017 WL 3318078, at *9.

172. *Id.* at *10.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at *10.

177. *Id.* at *11.

178. *See id.*

179. Associated Press & Julian Crews, *Cook County Board Approves Repeal of Soda Tax*, WGN9 (Oct. 11, 2017, 7:11 AM), <http://wgntv.com/2017/10/11/vote-to-repeal-cook-county-soda-tax-expected-today/> [<https://perma.cc/67BN-Y9KE>].

of popular support, fostered by the industry's public messaging campaign, administrative issues, and multiple lawsuits.¹⁸⁰

D. San Francisco Soda Warning Ordinance

In 2015, San Francisco became the first United States jurisdiction to pass legislation requiring soda companies to include a statement on advertisements warning of the health impacts of consuming sugar-sweetened beverages.¹⁸¹ Specifically, the ordinance required companies to place warnings on advertisements on billboards, vehicles, and similar structures, stating: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."¹⁸² The ordinance required that this warning occupy twenty percent of the total advertisement space.¹⁸³ It applied to advertisements for non-alcoholic beverages containing caloric sweeteners and more than twenty-five calories per twelve ounces of beverage, with exemptions for milk, milk alternatives, and 100% natural fruit and vegetable juices.¹⁸⁴ San Francisco's purpose in requiring the warning was to "inform the public of the presence of added sugars and thus promote informed consumer choice that may result in reduced caloric intake and improved diet and health, thereby reducing illnesses to which [sugar-sweetened beverages] contribute and associated economic burdens."¹⁸⁵

180. See Greg Trotter & Becky Yerak, *Cook County Retailers Cheer Soda Tax Repeal: 'This Was a Nightmare'*, CHI. TRIB. (Oct. 11, 2017, 4:00 PM), <http://www.chicagotribune.com/business/ct-biz-soda-tax-repeal-reaction-20171011-story.html> [<https://perma.cc/6D3K-FB7V>]. In addition to the lawsuit discussed in this Article, consumers sued retailers, including Walgreens, for allegedly misapplying the tax. *Id.*

181. Corey L. Andrews, *San Francisco's Sweetened-Beverage Warning Mandate and Ad Ban Tread on First Amendment*, FORBES (Sept. 11, 2015, 5:37 PM), <https://www.forbes.com/sites/wlf/2015/09/11/san-franciscos-sweetened-beverage-warning-mandate-and-ad-ban-tread-on-first-amendment/> [<https://perma.cc/AQ2X-2NPS>].

182. S.F., CAL., HEALTH CODE art. 42, div. 1, § 4202, 4203(a) (2016); Andrews, *supra* note 181.

183. Dorothy Atkins, *Beverage Industry Fights SF Soda Warnings at 9th Circ.*, LAW360 (Apr. 17, 2017, 10:06 PM), <https://www.law360.com/articles/914135> [<https://perma.cc/VPS2-GMS4>]; *Court Blocks San Francisco Law Requiring Warnings on Soda Ads*, CBS S.F. BAY AREA (Sept. 19, 2017, 4:05 PM) [hereinafter *Court Blocks*], <http://sanfrancisco.cbslocal.com/2017/09/19/soda-ad-warning-label-blocked-9th-circuit-court/> [<https://perma.cc/96AS-MP62>].

184. HEALTH CODE § 4202.

185. *Am. Beverage Ass'n v. City & County of San Francisco (Am. Beverage II)*, 871 F.3d 884, 888–89 (9th Cir. 2017) (citing HEALTH CODE § 4201).

Shortly after the City passed the ordinance, the ABA, the California Retailers Association, and the California State Outdoor Advertising Association filed a suit in the United States District Court, Northern District of California, to preliminarily enjoin the ordinance, alleging that it violated the plaintiffs' freedom of speech and unjustly targeted sugar-sweetened beverages as a contributing factor to the obesity epidemic.¹⁸⁶ To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."¹⁸⁷

At the district court level, the judge found that the plaintiffs were unlikely to succeed on the merits of their First Amendment claim and were unlikely to suffer irreparable harm if the ordinance went into effect.¹⁸⁸ Furthermore, the district court found that even if the plaintiffs may succeed on the merits, the balancing test would weigh in favor of denying the injunction.¹⁸⁹ The district court noted that the city had a reasonable basis to enforce the ordinance due to its interest in public health and safety.¹⁹⁰ The plaintiffs subsequently appealed the decision to the Ninth Circuit Court of Appeals, which reversed the district court's decision and upheld the preliminary injunction to enjoin the San Francisco ordinance.¹⁹¹

First, the court of appeals found that the plaintiffs were likely to succeed on the merits of their First Amendment claims.¹⁹² The plaintiffs claimed that the warning label requirements infringed on their First Amendment right to freedom of speech.¹⁹³ While the First Amendment freedom of speech protections may traditionally be associated with individual liberty, the U.S. Supreme Court has confirmed that these protections extend to commercial speech.¹⁹⁴

186. *Am. Beverage II*, 871 F.3d at 887–89; Atkins, *supra* note 183; see also Maura Dolan, *Federal Appeals Court Blocks San Francisco Law Requiring Health Warnings on Soda*, L.A. TIMES (Sept. 19, 2017, 12:25 PM), <http://www.latimes.com/local/lanow/la-me-ln-soda-san-francisco-20170919-story.html> [<https://perma.cc/DJA2-7FRP>].

187. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

188. *Am. Beverage II*, 871 F.3d at 889; *Am. Beverage Ass'n v. City & County of San Francisco (Am. Beverage I)*, 187 F. Supp. 3d 1123, 1145–46 (N.D. Cal. 2016).

189. See *Am. Beverage I*, 187 F. Supp. 3d at 1146–47.

190. *Id.* at 1138, 1140, 1142, 1145.

191. *Am. Beverage II*, 871 F.3d at 888, 899; see also *Court Blocks*, *supra* note 183.

192. *Am. Beverage II*, 871 F.3d at 898.

193. *Id.* at 888.

194. "[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy," the free flow of commercial

Regulations on the content of noncommercial speech are subject to strict scrutiny, meaning they are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹⁹⁵ Regulations on commercial speech, such as sugary drink advertisements, are subject to a lesser standard.¹⁹⁶ The lesser standard of scrutiny flows from the government’s “legitimate interest in protecting consumers from commercial harms.”¹⁹⁷

The level of scrutiny that applies to regulations on commercial speech depends on the nature of the regulation.¹⁹⁸ Restrictions on “nonmisleading commercial speech regarding lawful activity” are subject to intermediate scrutiny.¹⁹⁹ Regulations that compel a disclosure, rather than affirmatively limit speech, are subject to the lesser standard of scrutiny set out by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.²⁰⁰ Here, the Ninth Circuit determined that the warning label constituted a compelled disclosure and, therefore, applied the *Zauderer* test.²⁰¹ The *Zauderer* test has three components—the compelled speech (1) must be purely factual and uncontroversial; (2) must not be unduly burdensome such that it may chill protected speech; and (3) must be reasonably related to a substantial government interest.²⁰²

The Ninth Circuit found that the warning was not purely factual or uncontroversial because it “convey[ed] the message that sugar-sweetened beverages contribute to [certain] health conditions regardless of the quantity consumed or other lifestyle choices.”²⁰³ The judgment suggested that the warning would likely satisfy the first

information serves that end because it is indispensable to ensuring that economic decisions “in the aggregate, be intelligent and well informed.” *Id.* at 890 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)). The Court has defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

195. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

196. *Am. Beverage II*, 871 F.3d at 891.

197. *Id.* at 890–91 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011)).

198. *Am. Beverage II*, 871 F.3d at 891.

199. *Id.* (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010)). Intermediate scrutiny requires that regulations directly advance a substantial government interest and be “no more extensive than is necessary to serve that interest.” *Id.* (quoting *Cent. Hudson*, 447 U.S. at 566).

200. 471 U.S. 626 (1985); see *Am. Beverage II*, 871 F.3d at 891.

201. *Id.* at 892–93.

202. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

203. *Am. Beverage II*, 871 F.3d at 895.

component of the *Zauderer* test if it stated that “*overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay” or “consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay.”²⁰⁴ The Ninth Circuit also held that the “black box warning overwhelm[ed] the other visual elements in the advertisements” so much so that the compelled disclosure was “unduly burdensome” and would chill protected commercial speech in violation of the second component of the *Zauderer* test.²⁰⁵ Having ruled that San Francisco’s required warning failed the first two components of the *Zauderer* test, the court ruled that the plaintiffs would likely succeed on the merits of their First Amendment claim.²⁰⁶

After establishing that the plaintiffs would likely succeed on the merits, the court then turned to the remaining three factors that determine whether a plaintiff is entitled to a preliminary injunction. The court found that the plaintiffs would likely suffer irreparable harm because they had made a colorable First Amendment claim.²⁰⁷ Next, the court balanced the hardships of each party and referred back to its conclusion that the plaintiffs were likely to succeed on the merits of their First Amendment claim.²⁰⁸ Finally, the court examined whether the injunction would be in the public interest and found that the public has a strong interest in upholding First Amendment principles.²⁰⁹ Therefore, the Ninth Circuit held that the

204. *See id.* at 893, 895. The Court went on to explain that “[b]ecause San Francisco’s warning does not state that *overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay, the accuracy of the warning is in reasonable dispute.” *Id.* at 895. Furthermore, “[b]y focusing on a single product, the warning conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute obesity, diabetes, and tooth decay than other foods,” which the court notes is “deceptive in light of the current state of research on this issue.” *Id.* Finally, while the state has “substantial leeway in determining appropriate information disclosure requirements for business corporations,” it cannot require companies to issue one-sided or misleading messages. *Id.* at 896 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15 n.12 (1986) (plurality opinion)).

205. *Id.* at 893, 897. “A disclosure requirement may be also unduly burdensome and chill commercial speech if the disclosure promotes policies or views that are one-sided or ‘are based against or are expressly contrary to the corporation’s views.’” *Id.* at 894 (quoting *Pac. Gas & Elec.*, 475 U.S. at 15 n.12).

206. *Id.* at 898. The court held that the compelled disclosure satisfied the third limb of the *Zauderer* test because there was “no dispute that San Francisco ha[d] a substantial government interest in the health of its citizens” *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

plaintiffs met the requirements for seeking a preliminary injunction and accordingly reversed the district court's decision and granted the motion.²¹⁰

Public health and health law organizations, including the American Heart Association and the Public Health Law Center, filed amicus curiae briefs in the district court and the court of appeals.²¹¹ The briefs argued that the accuracy of the warnings is scientifically well established and that the warnings should easily survive review under the *Zauderer* framework.²¹² According to the Public Health Law Center, the court of appeals' judgment relied on evidence produced by the industry that contradicts the well-established scientific evidence on the health impacts of sugary beverages that was presented in the amicus curiae briefs.²¹³

In October 2017, following the court of appeals' ruling, the Public Health Law Center, together with nine other tobacco control and public health organizations, filed a further amicus brief requesting an en banc review by an expanded eleven-judge panel of the court of appeals.²¹⁴ The brief argued that the court of appeals' original decision misinterpreted the *Zauderer* test, jeopardizing government-mandated public health warnings, including federal tobacco warnings.²¹⁵ For example, the brief argues that the decision's mischaracterization of the evidence-based warnings as "disputed policy views" may be used by the tobacco industry to challenge warnings mandated by the federal government.²¹⁶ The brief also calls for the court to clarify that the requirement for a warning covering twenty percent of an advertisement does not render the regulation per-se unconstitutional.²¹⁷ Federal law requires that some tobacco warnings occupy more than twenty percent of the packaging, meaning

210. *Id.* at 899.

211. *See generally* Brief for Am. Heart Ass'n et al. as Amici Curiae Supporting Respondents, *Am. Beverage II*, 871 F.3d 884 (No. 16-16072) [hereinafter *Am. Heart Ass'n et al. Ninth Circuit Brief*]; Brief for Am. Heart Ass'n et al. as Amici Curiae Supporting Respondents, *Am. Beverage I*, 187 F. Supp. 3d 1123 (N.D. Cal. 2016) (No. 3:15-cv-03415 EMC) [hereinafter *Am. Heart Ass'n et al. District Court Brief*].

212. *See* *Am. Heart Ass'n et al. Ninth Circuit Brief*, *supra* note 211, at 4–15, 27–31; *Am. Heart Ass'n et al. District Court Brief*, *supra* note 211, at 20–25..

213. *See American Beverage Association, et al. v. The City and County of San Francisco (2016)*, PUB. HEALTH LAW CTR., <http://www.publichealthlawcenter.org/resources/american-beverage-association-et-al-v-city-and-county-of-san-francisco-2016> [<https://perma.cc/MA6Z-EMQG>].

214. *See generally* *Am. Heart Ass'n et al. Ninth Circuit Brief*, *supra* note 211.

215. *Id.* at 1, 3.

216. *Id.* at 1, 8–9.

217. *Id.* at 14–17.

the industry could cite the Ninth Circuit decision in support of a claim that tobacco warnings are unduly burdensome under the *Zauderer* test, rendering them unconstitutional.²¹⁸

The San Francisco soda warnings litigation shows that calling into question well-established evidence can help industry undermine evidence-based warnings, threatening federal, state, and local efforts to protect consumers from harmful commercial goods. The case confirms the importance of courts' interpretation of complex scientific evidence in the context of First Amendment challenges to public health-based restrictions on commercial speech, and the need for governments to produce clear and convincing evidence in support of their regulations.

In January 2018, the Ninth Circuit Court of Appeals agreed to hear the matter en banc.²¹⁹ An eleven-judge panel will further weigh the protection of commercial speech against the government's interest in regulating advertisements to protect public health, providing further opportunity for San Francisco to defend its evidence-based warnings.²²⁰

V. LEGAL VIABILITY AND POLITICAL SUSTAINABILITY OF LOCAL GOVERNMENT MEASURES TO PROMOTE HEALTHIER DIETS

When public health measures come into tension with the potential for sales and profitability, the food and beverage industry dedicates significant resources to protecting its position.²²¹ The industry's strategy comprises lobbying, funding scientific research, public messaging, and litigation.²²² Local governments investing in measures to promote healthier diets must anticipate and prepare to overcome each of these interrelated but distinct challenges. This part recommends steps to help ensure legal viability, political sustainability, and public support.

218. *Id.* at 14–16.

219. *See* *Am. Beverage Ass'n v. City & County of San Francisco* (*Am. Beverage III*), 880 F.3d 1019, 1020 (2018) (“The three-judge panel disposition in these cases shall not be cited as precedent by or to any court of the Ninth Circuit.”).

220. *See Beverage Industry Challenge to SF Soda Warning Label Law Under Review*, CBS S.F. BAY AREA (Jan. 29, 2018), <http://sanfrancisco.cbslocal.com/2018/01/29/challenge-soda-warning-law-under-review/> [<https://perma.cc/LP8K-RMET>].

221. *See supra* Part III.

222. *See supra* Part III.

A. Legal Viability

The small but growing body of litigation and jurisprudence relating to government interventions to promote healthy diets presents a useful source of information to identify legal bases and arguments that industry litigants invoke to support their suits against local governments. This information may assist local government officials to formulate and, if necessary, defend their laws against industry litigation, ensuring legal viability.

Two basic but important issues are regulatory authority and preemption.²²³ The case opposing New York City's Portion Cap Rule illustrates the importance of ensuring that laws and regulations are grounded within the scope of the regulatory authority of the specific government body making the rule. In that case, the court's decision that the New York City Board of Health had exceeded the scope of its regulatory authority led to the invalidation of an innovative public health measure.²²⁴ The judgments in the Philadelphia and Cook County soda tax decisions also analyzed the regulatory authority of the respective rule-making bodies,²²⁵ confirming the importance of this issue for municipal law-makers. In addition to regulatory authority, the law-making process may also affect the likelihood of litigation and the longer-term viability of local government public health measures. Of the eight U.S. jurisdictions that have adopted public health-based soda taxes, the five that were passed via ballot measures have not been challenged in court, while two of the three adopted by governing boards have faced industry litigation.²²⁶

223. See *infra* notes 214–19 and accompanying text.

224. See *generally* *Matter of N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 16 N.E.3d 538 (N.Y. 2014).

225. See *Ill. Retail Merchs. Ass'n v. Cook Cty. Dep't of Revenue*, No. 17 L 50596, 2017 WL 3318078, at *1, *11 (Ill. Cir. Ct. 2017); *Williams v. City of Philadelphia*, 164 A.3d 576, 589–90 (Pa. Commw. Ct. 2017).

226. The five jurisdictions that adopted a tax via ballot measure include: Boulder, CO; Albany, CA; Berkeley, CA; Oakland, CA; and San Francisco, CA. See Gostin, *supra* note 58, at 19; Nancy Fink Huehnergath, *Passage of Four Soda Tax Measures Deals Major Blow to the Beverage Industry*, FORBES (Nov. 9, 2016), <https://www.forbes.com/sites/nancyhuehnergath/2016/11/09/passage-of-four-soda-tax-measures-deals-major-blow-to-the-beverage-industry/#1fd8ad1a3099> [<https://perma.cc/7TPZ-WGRD>]. The three jurisdictions that adopted the tax via governing board action include: Philadelphia, PA (challenged); Cook County, IL (challenged, but tax repealed in October 2017); and Seattle, WA. See Beekman, *supra* note 58 (discussing effects of the tax in Seattle); *supra* Section IV.B and accompanying footnotes (discussing the Philadelphia soda tax litigation); *supra* Section IV.C and accompanying footnotes (discussing the Chicago soda tax litigation). Seattle's tax went into effect on January 1, 2018, so it remains to be seen whether it will be challenged in court. See *generally* Beekman, *supra* note 58.

Preemption is another key legal issue local governments may face when adopting public health measures to promote healthier diets.²²⁷ Preemption may flow from legislation designed to prevent local jurisdictions from legislating on nutrition-related issues or when local laws address a subject covered by existing state or federal law.²²⁸ This issue was raised with respect to both federal and state laws in soda tax litigation in Philadelphia.²²⁹ The Commonwealth Court of Pennsylvania rejected the preemption argument because Philadelphia's tax is levied on non-retail distributions, whereas the relevant state and federal laws addressed retail sales to consumers.²³⁰ The structure of public health-based taxes, in particular the point in the distribution chain at which they are levied, may be an important factor to overcome potential challenges based on preemption.

Evidence in support of local government public health measures can play an important role in the adjudication of their legality. Relevant evidence includes analysis of the health impacts of regulated products and evidence of effectiveness of regulatory measures. Courts use this type of evidence to determine whether regulations are permissible, especially when courts are called upon to determine the legality of public health measures that interfere with competing rights and interests.²³¹ For example, as part of its determination of whether San Francisco's soda warnings unlawfully infringed on commercial freedom of speech, the Ninth Circuit considered the scientific evidence of the health impacts of sugary drinks.²³² In holding that the required warning was not "purely factual and uncontroversial" as required by *Zauderer*, the court held:

By focusing on a single product, the warning conveys the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to

227. NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2017) ("[Preemption is] the use of state law to nullify a municipal ordinance or authority. State preemption can span many policy areas including environmental regulation, firearm use and labor laws. States can preempt cities from legislating on particular issues either by statutory or constitutional law. In some cases, court rulings have forced cities to roll back ordinances already in place.").

228. *See supra* Section III.A.

229. *See supra* Section IV.B.

230. *See Williams v. City of Philadelphia*, 164 A.3d 576, 585–86, 591–92 (Pa. Commw. Ct. 2017).

231. *See, e.g., Ill. Retail Merchs. v. Cook Cty. Dep't of Revenue*, No. 17 L 50596, 2017 WL 3318078, at *1, *8–9 (Ill. Cir. Ct. 2017).

232. *See generally Am. Beverage Ass'n v. City & County of San Francisco*, 871 F.3d 884 (9th Cir. 2017).

obesity, diabetes, and tooth decay than other foods. This message is deceptive in light of the current state of research on the issue.²³³

The Ninth Circuit's conclusions appear to rely heavily on evidence presented by the industry litigants, which contradicts well-established scientific evidence that sugary drinks have a unique impact on public health.²³⁴ This case illustrates the importance of the evidentiary basis for public health measures. Perhaps even more crucially, local lawmakers should anticipate that industry litigants will argue for the most demanding evidentiary standards possible and produce evidence that contradicts or questions health impacts and effectiveness. Local government defendants should prepare to clearly articulate applicable evidentiary standards and produce evidence to prove scientific facts relevant to the case before judges who may not be familiar with public health concepts and issues.

Many of the legal bases and arguments used by the food and beverage industry to challenge interventions to promote healthier diets reflect those used by the tobacco industry to challenge tobacco control laws.²³⁵ An analysis of tobacco industry litigation to deter local public health measures identified preemption as a common basis for successful legal challenges.²³⁶ As with the Cook County and Philadelphia soda taxes, the tobacco industry has challenged tobacco taxes on the basis that they violate tax uniformity clauses of state constitutions.²³⁷ Like the San Francisco soda warnings litigation, the tobacco industry has invoked the First Amendment to challenge federal regulations requiring tobacco companies to include graphic images as part of warnings on tobacco packages.²³⁸ The soda industry's efforts to contradict or question scientific evidence surrounding the health impacts of their products and the effectiveness of government interventions reflect a long history of similar conduct

233. *Id.* at 895 (footnotes omitted).

234. *See* Am. Heart Ass'n et al. Ninth Circuit Brief, *supra* note 211, at 16–20; *see also supra* Section IV.D.

235. Pamela Mejia, *Food Industry Messaging Pulled from Big Tobacco Playbook*, BSMG BLOG (Apr. 18, 2014), <http://www.bmsg.org/blog/big-food-next-tobacco-industry> [<https://perma.cc/SZ8Q-U5Z4>].

236. M.L. NIXON ET AL., TOBACCO INDUSTRY LITIGATION TO DETER LOCAL PUBLIC HEALTH ORDINANCES: THE INDUSTRY USUALLY LOSES IN COURT 65 (2004).

237. *See supra* Sections IV.B, IV.C. *See generally* Arangold Corp. v. Zehnder, 787 N.E.2d 786 (Ill. 2003); Hegar v. Tex. Small Tobacco Coal., 496 S.W.3d 778 (Tex. 2016).

238. *See supra* Section IV.D. *See generally* R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 845 F. Supp. 2d 266 (D.C. 2012) (holding that a federal regulation requiring tobacco companies to include graphic images violated the First Amendment).

by the tobacco industry.²³⁹ Acknowledging differences between the tobacco industry²⁴⁰ and the food and beverage industry, and their respective products, tobacco litigation is another source of information for public officials working to ensure the legal viability of interventions to promote healthier diets.

B. Political Sustainability

In addition to legal viability, local lawmakers should also take into account the political sustainability of measures to promote healthier diets. Cook County provides an example where, although the legality of the soda tax was confirmed by the circuit court, the measure was ultimately repealed by the Board of Commissioners.²⁴¹ As discussed in Part IV, the repeal followed an industry-led campaign that fueled public opposition against the soda tax.

Public demand for public health measures is key to their adoption and their ongoing political sustainability.²⁴² Strategies to increase public demand include educating and informing the public to better understand the need for, and benefits of, interventions that promote healthy diets.²⁴³ Evidence of the positive public health impacts and cost-effectiveness of measures can bolster public support.²⁴⁴ Increased public awareness of industry misconduct, such as the obfuscation of scientific evidence on sugar and heart disease, discussed in Part III, may also contribute to public support for regulation of industries and products.²⁴⁵

Ensuring the legal viability and political sustainability of public health interventions are interrelated but distinct challenges. The food and beverage industry's public messaging campaigns differ from arguments put forth in litigation. The industry's public messaging strategy incorporates positive messages about consuming their products as part of a "balanced," physically active lifestyle.²⁴⁶

239. See generally Lisa A. Bero, *Tobacco Industry Manipulation of Research*, 120 PUB. HEALTH REP. 200 (2005).

240. Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?*, 87 MILBANK Q. 259, 261 (2009).

241. See *supra* Section IV.C.

242. See generally Terry T-K Huang et al., *Mobilisation of Public Support for Policy Actions to Prevent Obesity*, 385 LANCET 2422 (2015).

243. *Id.* at 2424.

244. See John Cawley, *The Economics of Childhood Obesity*, 29 HEALTH AFF. 364, 367-70 (2010).

245. See Huang et al., *supra* note 242, at 2426.

246. See *supra* Section III.C.

Industry strategy also includes negative messages about government interventions, such as “nanny state” infringement on personal freedoms and commercial interests, and negative economic impacts of regulations on vulnerable population groups.²⁴⁷ These arguments are not replicated in the courtroom, where industry attorneys focus on legal grounds including regulatory authority and preemption.²⁴⁸

Although based on different arguments, industry lawsuits and public messaging against government interventions tend to complement and reinforce one another. Local government involvement as defendants in industry-initiated litigation, which tends to be well publicized, lengthy, and expensive, may negatively influence the public’s opinion of public health interventions, and contribute to impetus for repeal. The Cook County lawsuit, for example, has been identified as a factor that may have contributed to the repeal of that jurisdiction’s soda tax.²⁴⁹ Although it is difficult to measure, the politically charged nature of some public health interventions, as well as vigorous public debates, may influence judicial decision-making when measures are challenged in court. Local government officials should anticipate and prepare to counter industry challenges in both the public domain and in the courtroom.

Overall, litigation to date suggests that lawsuits challenging local government laws and regulations can be avoided or overcome with careful design, law-making processes, implementation, and evaluation.²⁵⁰ Together with legal viability, political sustainability is also important to ensure that measures impact consumption patterns and, ultimately, improve the public’s health.

CONCLUSION: TOWARD A HEALTHIER AND MORE PRODUCTIVE FUTURE

Governments have numerous effective, evidence-based tools to encourage healthier diets and prevent obesity, thus promoting health and productivity. Yet, diet-related diseases remain a great public health threat in the United States and globally.²⁵¹ Local governments have emerged as key innovators in nutrition promotion, adopting

247. *See supra* Sections III.C, III.D.

248. *See supra* Part IV.

249. *See* Trotter & Yerak, *supra* note 180.

250. NAT’L ACADS. OF SCIS., ENG’G & MED., STRATEGIES TO LIMIT SUGAR-SWEETENED BEVERAGE CONSUMPTION IN YOUNG CHILDREN: PROCEEDINGS OF A WORKSHOP—IN BRIEF 6 (2017), <https://www.nap.edu/read/24897/chapter/1#6> [<https://perma.cc/8SV4-MMCD>].

251. *See supra* Part I.

laws and policies that aim to increase healthier consumption patterns. Regulation of the food and beverage industry and products often comes into tension with the industry's interest in maximizing profits from sales of unhealthy products. Industry litigation, together with lobbying, research funding, and public messaging campaigns, threaten evidence-based public health measures, which aim to address the obesity epidemic and reduce diet-related cardiovascular disease, type 2 diabetes, and cancer. The industry's strategy to prevent or undermine public health measures may also discourage adoption of similar, or better, measures by other governments. The growing body of litigation and jurisprudence relating to government interventions to promote healthy diets, together with experience in tobacco control, presents a wealth of knowledge for public health policy makers to develop measures that are legally viable and politically sustainable. With careful planning and design, local lawmakers can avoid or overcome industry opposition and build on global momentum for local health.