

0STATE OF NEW YORK
 SUPREME COURT : COUNTY OF ERIE

PATRICK M. GALLIVAN, NEW YORK STATE SENATOR,
 A.C. + J RESTAURANT, INC. d/b/a THE PEPPERMILL RESTAURANT,
 ALFIERI DUQUIN, INC.,
 AMHERST PIZZA & ALE HOUSE, INC.,
 BANCHETTI BY RIZZOS, INC., d/b/a BANCHETTI BY RIZZO'S,
 BILL SHAFLOCAS, LLC, d/b/a BREW BUS BUFFALO and
 DJ TRIVIA OF WNY,
 BOTTOMS UP V, LLC d/b/a BOTTOMS UP,
 BUFFALO'S BEST CATERING, LLC,
 BUFFALO GRILL N ALE HOUSE, LLC d/b/a, BUFFALO
 GRILL N ALE HOUSE,
 BVPK, INC.,
 CAMPFIRE GRILL II, INC,
 CARJONS RESTAURANT GROUP, INC. d/b/a SHARE
 KITCHEN + BAR ROOM,
 CHICK'S RESTAURANT AND LANES, INC.,
 COWBOY OF CHIPPEWA, INC., d/b/a THE COWBOY
 COLONIE LOUNGE, INC. d/b/a COLONIE LOUNGE,
 CRITCHEN, LLC, d/b/a THE CRITCHEN,
 DA BADA, INC. d/b/a BADABING BAR AND GRILL,
 DADDY GOO GOO, LLC, d/b/a CASA DI FRANCESCA'S,
 DDF RESTAURANTS, INC. d/b/a DUFF'S FAMOUS WINGS,
 DON BENOIT d/b/a PRESCOTT'S PROVISIONS,
 DVS PROPERTIES, LLC,
 D&R KAZ, INC. d/b/a KAZ'S BAR,
 EXPO MARKET, INC.,
 GALLERY EVENTS, LLC d/b/a VENU,
 GABRIEL'S GATE, INC.,
 GERTIES, INC. d/b/a GERTIE'S RESTAURANT,
 GREEK TO ME RESTAURANT, LLC, d/b/a GREEK TO ME
 RESTAURANT,
 GYPSY BOHEMIAN GROVE BAR, INC.,
 HUTCH & ASSOCIATES, INC., d/b/a HUTCH'S RESTAURANT
 ICE HOUSE PUB, LLC, d/b/a ICE HOUSE PUB,
 JMB ENTERPRISES OF ERIE, INC. d/b/a MURPH'S WARSAW GRILL,
 JOHN DOE CORP.,
 KFEATHER5, LLC d/b/a DUFF'S FAMOUS WINGS,
 KMT MANAGEMENT, INC. d/b/a BUFFALO BREW PUB,
 KELLY'S KORNER, INC.,
 KOOKOOVAYIA, LLC, d/b/a DUFFS OF ORCHARD PARK,
 LADY BIRDS RESTAURANTS, LLC d/b/a THE BAYOU,
 LOCAL BUFFALO, LLC,

**PETITION AND
 COMPLAINT**

Index No. _____

LOCAL GRILLE & CATERING, LLC,
LYONS, BIGGANE, INC. d/b/a THE BYRD HOUSE RESTAURANT,
MALBEAT INC., d/b/a MALLWITZ'S ISLAND LANE,
MAMBRINO KING WINE-COFFEE BAR, LLC,
MANFURT & TORALTI RESTAURANTS, INC.,
MARY SANTARINI d/b/a LONDA'S DINER,
MATILDA BIRD, LLC d/b/a THE GLOBE,
MCCANS, INC. d/b/a MOONEY'S SPORTS BAR & GRILL,
MGPUBLIC, LLC,
MIKEYCATIE, INC. d/b/a ROOKIES SPORTS BAR
MKC RESTAURANTS, LLC d/b/s NEAT,
MPR RESTAURANTS WNY, Inc. d/b/a SCHNITZEL & CO.,
MUSTANG SALLYS SPIRITS AND GRILL, INC. d/b/a NY SHOWGIRLS,
MY TOMATO PIE, INC.,
OVERPASS PUB, LLC d/b/a OVERPASS PUB,
PHARAOHS GC, INC.,
RADCOL, INC. d/b/a RADIGAN'S,
RAPHAEL'S CORP. d/b/a RAPHAEL'S,
RIZOTTO, INC., d/b/a RIZOTTO ITALIAN EATERY,
RIZZO'S CASA DI ITALIA, INC., d/b/a RIZZO'S CASA DI ITALIA,
RUSSELL M. BRAUN, INC. d/b/a SMOKIN LITTLE DINER
SANTORA'S PHASE II, LLC,
SANTORA'S PIZZA PUB AND GRILL, INC.,
SCOTT A. JARGIELLO d/b/a CAMPFIRE GRILL,
SCHWEIS SPRINGER, LLC, d/b/a EBENEZER ALE HOUSE
SHOWNY, LLC d/b/a SCULPTURE HOSPITALITY OF WNY,
SMITH BUDUSON, INC. d/b/a ROBBIE'S BAR AND GRILL,
SPORTS CITY PIZZA PUB, INC. d/b/a SPORTS CITY PIZZA PUB,
STEEL CITY PUB, INC. d/b/a STEEL CITY PUB,
SUNNY'S DRIVE IN, INC., d/b/a NINA'S CUSTARD,
SUNNY'S DRIVE IN TRANSIT, INC.,
TACO COCINE ELLICOTT, LLC d/b/a DEEP SOUTH TACO,
TACO COCINE HERTEL, LLC d/b/a DEEP SOUTH TACO,
TANTALUS, LLC, d/b/a THE YELLING GOAT RESTAURANT,
TBF ENTERPRISES, INC.,
TETON SKY CORP. d/b/a TETON KITCHEN and
TETON KITCHEN ELMWOOD,
THE DEFIELDS CORP. d/b/a
THE FIRE HOUSE SPORTS BAR & GRILL,
THE HOWLING ROOSTER, LLC,
THE ORIGINAL PANCAKE HOUSE OF ORCHARD PARK, INC.,
THE ORIGINAL PANCAKE HOUSE OF WILLIAMSVILLE, INC.,
TRACY STREET PRODUCTIONS, INC.,
WILLIAM JAMES DEVELOPMENT CORP. d/b/a RODNEY'S RESTAURAN
WNY BEER CLUB, LLC d/b/a RUSTY NICKEL BREWING CO.,
WNY RESTAURANT SYSTEM d/b/a DUFF'S FAMOUS WINGS,

3G ENTERTAINMENT, INC., d/b/a MANOR LANES,
23 S. BUFFALO ST., INC. d/b/a THE POUR HOUSE BAR AND GRILL
99 BRICK OVEN BAR AND GRILLE, LLC,
3989 MAIN STREET, INC. d/b/a, BRUNNER'S TAVERN,
5111 GENESEE ST., INC. d/b/a SCORES,
5786 TRANSIT RD., INC. d/b/a FIELDSTONE COUNTRY INN, and
8444 TRANSIT RD., LLC d/b/a TAVERN AT WINDSOR PARK,

Petitioners/Plaintiffs,

For Judgment Pursuant to
Article 78 of the CPLR

v.

ANDREW M. CUOMO, GOVERNOR OF NEW YORK,
NEW YORK STATE DEPARTMENT OF HEALTH, and
NEW YORK STATE LIQUOR AUTHORITY

Respondents/Defendants.

Petitioners/Plaintiffs, PATRICK M. GALLIVAN, in his official capacity as a New York State Senator ("Senator Gallivan"), HUTCH & ASSOCIATES d/b/a HUTCH'S RESTAURANT, by and through their undersigned counsel, LIPSITZ GREEN SCIME CAMBRIA LLP, and Petitioners/Plaintiffs A.C. + J RESTAURANT, INC. d/b/a THE PEPPERMILL RESTAURANT, ALFIERI DUQUIN, INC., AMHERST PIZZA & ALE HOUSE, INC., BANCHETTI BY RIZZOS, INC., d/b/a BANCHETTI BY RIZZO'S, BILL SHAFLOCAS, LLC, d/b/a BREW BUS BUFFALO and DJ TRIVIA OF WNY, BOTTOMS UP V, LLC d/b/a BOTTOMS UP, BUFFALO'S BEST CATERING, LLC, BUFFALO GRILL N ALE HOUSE, LLC d/b/a, BUFFALO GRILL N ALE HOUSE, BVPK, INC., CAMPFIRE GRILL II, INC., CARJONS RESTAURANT GROUP, INC. d/b/a SHARE KITCHEN + BAR ROOM, CHICK'S RESTAURANT AND LANES, INC., COLONIE LOUNGE, INC. d/b/a COLONIE LOUNGE, CRITCHEN, LLC, d/b/a THE CRITCHEN, DA BADA INC d/b/a BADA

BING BAR AND GRILL, DADDY GOO GOO, LLC, d/b/a CASA DI FRANCESCA'S, DDF RESTAURANTS INC d/b/a DUFF'S FAMOUS WINGS, DON BENOIT d/b/a PRESCOTT'S PROVISIONS, DVS PROPERTIES, LLC, D&R KAZ, INC. d/b/a KAZ'S BAR, EXPO MARKET, INC., GALLERY EVENTS, LLC d/b/a VENU, GABRIEL'S GATE, INC., GERTIES, INC. d/b/a GERTIE'S RESTAURANT, GREEK TO ME RESTAURANT, LLC, d/b/a GREEK TO ME RESTAURANT, GYPSY BOHEMIAN GROVE BAR, INC., ICE HOUSE PUB, LLC, d/b/a ICE HOUSE PUB, JMB ENTERPRISES OF ERIE, INC. d/b/a MURPH'S WARSAW GRILL, JOHN DOE CORP., KFEATHER5, LLC d/b/a DUFF'S FAMOUS WINGS, KMT MANAGEMENT, INC. d/b/a BUFFALO BREW PUB, KELLY'S KORNER, INC., KOOKOOVAYIA, LLC, d/b/a DUFFS OF ORCHARD PARK, LADY BIRDS RESTAURANTS, LLC d/b/a THE BAYOU, LOCAL BUFFALO, LLC, LOCAL GRILLE & CATERING, LLC, LYONS, BIGGANE, INC. d/b/a THE BYRD HOUSE RESTAURANT, MALBEAT INC., d/b/a MALLWITZ'S ISLAND LANE, MAMBRINO KING WINE COFFEE, LLC, MANFURT & TORALTI RESTAURANTS, INC., MARY SANTARINI d/b/a LONDA'S DINER, MATILDA BIRD, LLC d/b/a THE GLOBE, MCCANS, INC. d/b/a MOONEY'S SPORTS BAR & GRILL, MGPUBLIC, LLC, MKC RESTAURANTS, LLC, OVERPASS PUB, LLC d/b/a OVERPASS PUB, MPR RESTAURANTS WNY, Inc. d/b/a SCHNITZEL & CO., MUSTANG SALLYS SPIRITS AND GRILL, INC. d/b/a NY SHOWGIRLS, MY TOMATO PIE, INC., PHAROHS GC, INC., RADCOL, INC. d/b/a RADIGAN'S, RAPHAEL'S CORP. d/b/a RAPHAEL'S, RIZOTTO, INC., d/b/a RIZOTTO ITALIAN EATERY, RIZZO'S CASA DI ITALIA, INC., d/b/a RIZZO'S CASA DI ITALIA, RUSSELL M. BRAUN, INC. d/b/a SMOKIN LITTLE DINER SANTORAS PHASE II, LLC, SANTORAS PIZZA PUB AND GRILL, INC., SCOTT A. JARGIELLO d/b/a CAMPFIRE GRILL, SCHWEIS SPRINGER,

LLC, d/b/a EBENEZER ALE HOUSE, SHOWNY, LLC d/b/a SCULPTURE HOSPITALITY OF WNY, SMITH BUDUSON, INC. d/b/a ROBBIE'S BAR AND GRILL, SPORTS CITY PIZZA PUB, INC. d/b/a SPORTS CITY PIZZA PUB, STEEL CITY PUB, INC. d/b/a STEEL CITY PUB, SUNNY'S DRIVE IN, INC., d/b/a NINA'S CUSTARD, SUNNY'S DRIVE IN TRANSIT, INC., TACO COCINE ELLICOTT, LLC d/b/a DEEP SOUTH TACO, TACO COCINE HERTEL, LLC d/b/a DEEP SOUTH TACO, TANTALUS, LLC, d/b/a THE YELLING GOAT RESTAURANT, TBF ENTERPRISES, INC., TETON SKY CORP. d/b/a TETON KITCHEN and TETON KITCHEN ELMWOOD, THE DEFIELDS CORPORATION d/b/a THE FIRE HOUSE SPORTS BAR & GRILL, THE HOWLING ROOSTER, LLC, THE ORIGINAL PANCAKE HOUSE OF ORCHARD PARK, INC., THE ORIGINAL PANCAKE HOUSE OF WILLIAMSVILLE, INC., TRACY STREET PRODUCTIONS, INC., WILLIAM JAMES DEVELOPMENT CORP. d/b/a RODNEY'S RESTAURANT, WNY BEER CLUB, LLC d/b/a RUSTY NICKEL BREWING CO., WNY RESTAURANT SYSTEM d/b/a DUFF'S FAMOUS WINGS, 3G ENTERTAINMENT, INC., d/b/a MANOR LANES, 23 S. BUFFALO ST., INC. d/b/a THE POUR HOUSE BAR AND GRILL, 99 BRICK OVEN BAR AND GRILLE, LLC, 5786 TRANSIT RD, INC. d/b/a FIELDSTONE COUNTRY INN, 3989 MAIN STREET, INC. d/b/a, BRUNNER'S TAVERN, 5111 GENESEE ST., INC. d/b/a SCORES, 5786 TRANSIT RD., INC. d/b/a FIELDSTONE COUNTRY INN, and 8444 TRANSIT RD, LLC d/b/a TAVERN AT WINDSOR PARK by and through their undersigned counsel, HOGANWILLIG, PLLC (all Plaintiff/Petitioners other than Patrick M. Gallivan, jointly, the "Restaurant Petitioners"), as and for their Petition and Complaint against Respondents/Defendants ANDREW M. CUOMO, in his official capacity as the Governor of the State of New York, NEW YORK STATE DEPARTMENT OF HEALTH, and NEW YORK

STATE LIQUOR AUTHORITY (jointly "Respondents"), hereby and herein respectfully and collectively allege as follows:

NATURE OF ACTION

1. This is a special proceeding brought under Article 78 of the CPLR and/or a declaratory action brought under CPLR § 3001 seeking injunctive relief to enjoin Respondents from enforcing or applying a 10:00 p.m. to 5:00 a.m. curfew on restaurants that is arbitrary and capricious, not reasonably necessary, illegal, and/or unconstitutional under the New York State Constitution.

PARTIES

2. At all times relevant hereto, Petitioner A.C. + J RESTAURANT, INC. d/b/a THE PEPPERMILL RESTAURANT, was and is a New York corporation with its principal place of business at 1776 Dewey Avenue, Rochester, New York 14615, wherein it operates a licensed bar and/or restaurant.

3. At all times relevant hereto, Petitioner ALFIERI DUQUIN, INC., was and is a New York corporation with its principal places of business at 253 Allen Street, Buffalo, New York 14201, 617 Main Street, Buffalo, New York 14203, 1488 Hertel Avenue, Buffalo, NY 14217, and 256 Allen Street, Buffalo, New York 14201, wherein it operates licensed bars and/or restaurants.

4. At all times relevant hereto, Petitioner AMHERST PIZZA & ALE HOUSE, INC. was and is a New York corporation with its principal place of business at 55 Crosspoint Parkway No. 138, Getzville, New York 14068, wherein it operates a licensed bar and/or restaurant.

5. At all times relevant hereto, Petitioner BANCHETTI BY RIZZOS, INC., d/b/a BANCHETTI BY RIZZO'S, was and is a New York corporation with its principal place of

business at 550 N. French Road, Buffalo, New York 14228, wherein it operates a licensed bar and/or restaurant.

6. At all times relevant hereto, Petitioner BILL SHAFUCAS, LLC, d/b/a BREW BUS BUFFALO and DJ TRIVIA OF WNY, was and is a New York limited liability company with its principal place of business 30 Heathwood Road, Amherst, New York, 14221, wherein it operates a licensed bar and/or restaurant.

7. At all times relevant hereto, Petitioner BOTTOMS UP V, LLC d/b/a BOTTOMS UP was and is a New York limited liability company with its principal office at 69 West Chippewa Street, Buffalo, New York 14202, wherein it operates a licensed bar and/or restaurant.

8. At all times relevant hereto, Petitioner BUFFALO'S BEST CATERING, LLC was and is a New York limited liability corporation with its principal place of business at 1436 Ridge Road, Buffalo, New York 14218, wherein it operates a licensed bar and/or restaurant.

9. At all times relevant hereto, Petitioner BUFFALO GRILL N ALE HOUSE, LLC d/b/a, BUFFALO GRILL N ALE HOUSE was and is a New York limited liability corporation with its principal place of business at 601 Dingens Street, Cheektowaga, New York 14206, wherein it operates a licensed bar and/or restaurant.

10. At all times relevant hereto, Petitioner BVPK, INC. was and is a New York corporation with its principal place of business at 256 Allen Street, Buffalo, New York 14201, wherein it operates a licensed bar and/or restaurant.

11. At all times relevant hereto, Petitioner CAMPFIRE GRILL II INC was and is a New York corporation with its principal place of business at 9980 Main Street, Clarence New York, 14031, wherein it operates a licensed bar and/or restaurant.

12. At all times relevant hereto, Petitioner **CARJONS RESTAURANT GROUP, INC. d/b/a SHARE KITCHEN + BAR ROOM** was and is a New York corporation with its principal place of business at 5590 Main Street, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

13. At all times relevant hereto, Petitioner **CHICK'S RESTAURANT AND LANES, INC.** was and is a New York corporation with its principal place of business at 8196 Erie Road, Angola, New York 14006, wherein it operates a licensed bar and/or restaurant.

14. At all times relevant hereto, Petitioner **COLONIE LOUNGE, INC. d/b/a COLONIE LOUNGE** was and is a New York corporation with its principal place of business at 1795 Hertel Avenue, Buffalo, New York 14216, wherein it operates a licensed bar and/or restaurant.

15. At all times relevant hereto, Petitioner **CRITCHEN, LLC, d/b/a THE CRITCHEN** was and is a New York limited liability corporation with its principal place of business at 3377 Clinton Street, West Seneca, New York 14224, wherein it operates a licensed bar and/or restaurant.

16. At all times relevant hereto, Petitioner **DA BADA, INC. d/b/a BADABING BAR AND GRILL** was and is a New York corporation with its principal place of business at 42 West Chippewa Street, Buffalo, New York 14202, wherein it operates a licensed bar and/or restaurant.

17. At all times relevant hereto, Petitioner **DADDY GOO GOO, LLC, d/b/a CASA DI FRANCESCA'S** was and is a New York limited liability corporation with its principal place of business at 2022 Seneca Street, Buffalo, New York 14210, wherein it operates a licensed bar and/or restaurant.

18. At all times relevant hereto, Petitioner DDF RESTAURANTS, INC. d/b/a DUFF'S FAMOUS WINGS was and is a New York corporation with its principal place of business located at 4545 Transit Road, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

19. At all times relevant hereto, Petitioner DON BENOIT d/b/a PRESCOTT'S PROVISIONS was and is a sole proprietorship with its principal office at 40 East Niagara Street, Tonawanda, New York 14150, wherein it operates a licensed bar and/or restaurant.

20. At all times relevant hereto, Petitioner DVS PROPERTIES, LLC was and is a New York limited liability company with its principal place of business located at 318 East Avenue, Rochester, New York 14604, wherein it operates a licensed bar and/or restaurant.

21. At all times relevant hereto, Petitioner D&R KAZ, INC. d/b/a KAZ'S BAR was and is a New York corporation with its principal place of business located at 113 Lake Avenue Blasdell New York 14219, wherein it operates a licensed bar and/or restaurant.

22. At all times relevant hereto, Petitioner EXPO MARKET, INC. was and is a New York corporation with its principal place of business located at 617 Main Street, Buffalo, New York 14203, wherein it operates a licensed bar and/or restaurant.

23. At all times relevant hereto, Petitioner GALLERY EVENTS, LLC d/b/a VENU was and is a New York limited liability company with its principal office at 75 West Chippewa Street, Buffalo, New York 14202, wherein it operates a licensed bar and/or restaurant.

24. At all times relevant hereto, Petitioner GABRIEL'S GATE, INC. was and is a New York corporation with its principal office at 145 Allen Street, Buffalo, New York 14201, wherein it operates a licensed bar and/or restaurant.

25. At all times relevant hereto, Petitioner GERTIES, INC. d/b/a GERTIE'S RESTAURANT was and is a New York corporation with its principal office at 6010 Goodrich Road, Clarence Center, New York 14032, wherein it operates a licensed bar and/or restaurant.

26. At all times relevant hereto, Petitioner GREEK TO ME RESTAURANT, LLC, d/b/a GREEK TO ME RESTAURANT was and is a New York limited liability company with its principal office at 2309 Eggert Road, Suite 9, Tonawanda, New York 14150, wherein it operates a licensed bar and/or restaurant.

27. At all times relevant hereto, Petitioner GYPSY BOHEMIAN GROVE BAR, INC. was and is a New York corporation with its principal office at 1488 Hertel Avenue, Buffalo, New York 14217, wherein it operates a licensed bar and/or restaurant.

28. At all times relevant hereto, Petitioner ICE HOUSE PUB, LLC, d/b/a ICE HOUSE PUB was and is a New York limited liability company with its principal office at 715 Ridge Road, Lackawanna, New York 14218, wherein it operates a licensed bar and/or restaurant.

29. At all times relevant hereto, Petitioner JMB ENTERPRISES OF ERIE, INC. d/b/a MURPH'S WARSAW GRILL was and is a New York corporation with its principal office at 576 Dick Road, Depew, NY 14043, wherein it operates a licensed bar and/or restaurant.

30. At all relevant times hereto, Petitioner JOHN DOE CORP. was and is an individual (or group of) licensed bar(s) and/or restaurant(s) operating in Erie County, New York, who are fearful of retribution by and from Respondents should their identities be disclosed publicly, but who is (are) otherwise qualified to act as a Petitioner in this proceeding.

31. At all relevant times hereto, Petitioner KFEATHER5, LLC d/b/a DUFF'S FAMOUS WINGS was and is a New York limited liability company with its principal office at 550 Dick Road, Depew, New York 14043, wherein it operates a licensed bar and/or restaurant.

32. At all relevant times hereto, KMT MANAGEMENT, INC. d/b/a BUFFALO BREW PUB was and is a New York corporation with its principal office at 6861 Main Street, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

33. At all relevant times hereto KELLY'S KORNER, INC. was and is a New York corporation with its principal office at 2526 Delaware Avenue, Buffalo, New York 14216, wherein it operates a licensed bar and/or restaurant.

34. At all relevant times hereto KOOKOOVAYIA, LLC, d/b/a DUFFS OF ORCHARD PARK was and is a New York limited liability company with its principal office at 3090 Orchard Park Road, Buffalo, New York 14224, wherein it operates a licensed bar and/or restaurant.

35. At all relevant times hereto, Petitioner LADY BIRDS RESTAURANTS, LLC d/b/a THE BAYOU was and is a New York limited liability company with its principal place of business located at 142 French Road, Cheektowaga, New York 14227, wherein it operates a licensed bar and/or restaurant.

36. At all relevant times hereto, Petitioner LOCAL BUFFALO, LLC was and is a New York limited liability company with an office at 8 W. Chippewa Street, Buffalo, New York 14202, wherein it operates a licensed restaurant.

37. At all relevant times hereto, Petitioner LOCAL GRILLE & CATERING, LLC was and is a New York limited liability company with an office at 8230 Wehrle Drive, Williamsville, New York 14221, wherein it operates a licensed restaurant.

38. At all relevant times hereto, Petitioner LYONS, BIGGANE, INC. d/b/a THE BYRD HOUSE RESTAURANT was and is a New York corporation with an office at 4190 N. Buffalo Road, Orchard Park, New York 14127, wherein it operates a licensed restaurant.

39. At all relevant times hereto, Petitioner MALBEAT INC., d/b/a MALLWITZ'S ISLAND LANE was and is a New York corporation with an office at 1887 Whitehaven Road, Grand Island, NY 14072, wherein it operates a licensed restaurant and bowling alley.

40. At all relevant times hereto, Petitioner MAMBRINO KING WINE-COFFEE BAR, LLC was and is a New York limited liability company with its principal office at 640 Main Street, East Aurora, New York 14052, wherein it operates a licensed bar and/or restaurant.

41. At all relevant times hereto, Petitioner MANFURT & TORALTI RESTAURANTS, INC. was and is a New York corporation with its principal office at 10250 Main Street, Clarence, New York 14031, wherein it operates a licensed bar and/or restaurant.

42. At all relevant times hereto, Petitioner MARY SANTARINI d/b/a LONDA'S DINER was and is a sole proprietorship with its principal office at 576 Dick Road, Depew, New York 14043, wherein it operates a licensed bar and/or restaurant.

43. At all relevant times hereto, Petitioner MATILDA BIRD, LLC d/b/a THE GLOBE was and is a New York limited liability company with its principal office at 709-711 Main Street, East Aurora, New York 14052, wherein it operates a licensed bar and/or restaurant.

44. At all relevant times hereto, Petitioner MCCANS, INC. d/b/a MOONEY'S SPORTS BAR & GRILL was and is a New York corporation with its principal office at 1531 Military Road, Kenmore, New York 14217, wherein it operates a licensed bar and/or restaurant.

45. At all relevant times hereto, Petitioner MGPUBLIC, LLC was and is a New York limited liability company with its principal office at 1488 Hertel Avenue, Buffalo, New York 14217, wherein it operates a licensed bar and/or restaurant.

46. At all relevant times hereto, Petitioner MIKEYCATIE, INC. d/b/a ROOKIES SPORTS BAR was and is a New York limited liability company with its principal office at 701 Main Street, East Aurora, New York 14052, wherein it operates a licensed bar and/or restaurant.

47. At all relevant times hereto, Petitioner MKC RESTAURANTS, LLC d/b/a NEAT was and is a New York limited liability company with its principal office located at 5175 Transit Road, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

48. At all relevant times hereto, Petitioner MPR RESTAURANTS WNY, Inc. d/b/a SCHNITZEL & CO. was and is a New York corporation with its principal office located at 9210 Transit Road, East Amherst, New York 14051, wherein it operates a licensed bar and/or restaurant.

49. At all relevant times hereto, Petitioner MUSTANG SALLYS SPIRITS AND GRILL, INC. d/b/a NY SHOWGIRLS was and is a New York corporation with its principal office located at 300 Sawyer Avenue, Tonawanda, New York 14150, wherein it operates a licensed bar and/or restaurant.

50. At all relevant times hereto, Petitioner MUSTANG SALLYS SPIRITS AND GRILL, INC. d/b/a NY SHOWGIRLS was and is a New York corporation with its principal office located at 300 Sawyer Avenue, Tonawanda, New York 14150, wherein it operates a licensed bar and/or restaurant.

51. At all relevant times hereto, Petitioner MY TOMATO PIE, INC. was and is a New York corporation with its principal office located at 3035 Niagara Falls Blvd., Amherst, New York 14228, wherein it operates a licensed bar and/or restaurant.

52. At all relevant times hereto, Petitioner OVERPASS PUB, LLC d/b/a OVERPASS PUB was and is a New York limited liability company with its principal office at 2720 Seneca Street, West Seneca, New York 14224, wherein it operates a licensed bar and/or restaurant.

53. At all relevant times hereto, Petitioner PHARAOHS GC, INC. was and is a New York corporation with its principal place of business located at 999 Aero Drive, Cheektowaga, New York 14225, wherein it operates a licensed bar and/or restaurant.

54. At all relevant times hereto, Petitioner RADCOL, INC. d/b/a RADIGAN'S was and is a New York corporation with its principal place of business located at 4170 Southwestern Blvd, Orchard Park, New York 14127, wherein it operates a licensed bar and/or restaurant.

55. At all relevant times hereto, Petitioner RAPHAEL'S CORP. d/b/a RAPHAEL'S was and is a New York corporation with its principal office located at 4572 Clark Street, Hamburg, New York 14075, wherein it operates a licensed bar and/or restaurant.

56. At all relevant times hereto, Petitioner RIZOTTO, INC., d/b/a RIZOTTO ITALIAN EATERY was and is a New York corporation with its principal office located at 930 Maple Road, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

57. At all relevant times hereto, Petitioner RIZZO'S CASA DI ITALIA, INC., d/b/a RIZZO'S CASA DI ITALIA was and is a New York corporation with its principal office located at 2763 Eggert Road, Tonawanda, New York 14150, wherein it operates a licensed bar and/or restaurant.

58. At all relevant times hereto, Petitioner RUSSELL M. BRAUN, INC. d/b/a SMOKIN LITTLE DINER was and is a New York corporation with its principal office located

at 54 St. Mary's Street, Lancaster, New York 14086, wherein it operates a licensed bar and/or restaurant.

59. At all relevant times hereto, Petitioner SANTORAS PHASE II, LLC PUB was and is a New York limited liability company with its principal office at 7800 Transit Road, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

60. At all relevant times hereto, Petitioner SANTORA'S PIZZA PUB AND GRILL, INC. was and is a New York corporation with its principal office located at 1402 Millersport Highway, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

61. At all relevant times hereto, Petitioner SCOTT A. JARGIELLO d/b/a CAMPFIRE GRILL was and is a sole proprietorship with its principal office at 3003 Walden Avenue, Depew, New York 14043, wherein it operates a licensed bar and/or restaurant.

62. At all relevant times hereto, Petitioner SCHWEIS SPRINGER, LLC, d/b/a EBENEZER ALE HOUSE was and is a sole proprietorship with its principal office at 4348 Seneca Street, West Seneca, New York 14224, wherein it operates a licensed bar and/or restaurant.

63. At all relevant times hereto, Petitioner SHOWNY, LLC d/b/a SCULPTURE HOSPITALITY OF WNY was and is a New York limited liability company with its principal place of business located at 744 North French Road, Amherst, New York 14228.

64. At all relevant times hereto, Petitioner SMITH BUDUSON, INC. d/b/a ROBBIE'S BAR & GRILL was and is a New York corporation with its principal place of business located at 610 North Greece Road, Hilton, New York 14468, wherein it operates a licensed bar and/or restaurant.

65. At all relevant times hereto, Petitioner SPORTS CITY PIZZA PUB, INC. d/b/a SPORTS CITY PIZZA PUB was and is a New York corporation with its principal place of business located at 1407 Niagara Street, Buffalo, New York 14213, wherein it operates a licensed bar and/or restaurant.

66. At all relevant times hereto, Petitioner STEEL CITY PUB, INC. d/b/a STEEL CITY PUB was and is a New York corporation with its principal place of business located at 1449 Abbott Road, Lackawanna, New York 14218, wherein it operates a licensed bar and/or restaurant.

67. At all relevant times hereto, Petitioner SUNNY'S DRIVE IN, INC., d/b/a NINA'S CUSTARD was and is a New York corporation with its principal place of business located at 2577 Millersport Highway, Getzville, New York 14068, wherein it operates a licensed bar and/or restaurant.

68. At all relevant times hereto, Petitioner SUNNY'S DRIVE IN TRANSIT, INC. was and is a New York corporation with its principal place of business located at 5780 S. Transit Road, Lockport New York 14094, wherein it operates a licensed bar and/or restaurant.

69. At all relevant times hereto, Petitioner TACO COCINE ELLICOTT, LLC d/b/a DEEP SOUTH TACO was and is a New York limited liability company with its principal place of business located at 291 Ellicott Street, Buffalo, New York 14203, wherein it operates a licensed bar and/or restaurant.

70. At all relevant times hereto, Petitioner TACO COCINE HERTEL, LLC d/b/a DEEP SOUTH TACO was and is a New York limited liability company with its principal place of business located at 1701 Hertel Avenue, Buffalo, New York 14216, wherein it operates a licensed bar and/or restaurant.

71. At all relevant times hereto, Petitioner TANTALUS, LLC, d/b/a THE YELLING GOAT RESTAURANT was and is a New York limited liability company with its principal place of business located at 205 Central Avenue, Lancaster, New York 14086, wherein it operates a licensed bar and/or restaurant.

72. At all relevant times hereto, Petitioner TBF ENTERPRISES, INC. was and is a New York corporation with its principal place of business located at 1 Galleria Drive, Suite 102, Cheektowaga, New York 14225, wherein it operates a licensed bar and/or restaurant.

73. At all relevant times hereto, Petitioner TETON SKY CORP. d/b/a TETON KITCHEN and TETON KITCHEN ELMWOOD was and is a New York corporation with principal offices located at 415 Dick Road, Depew, New York 14043 and 153 Elmwood Avenue, Buffalo, New York 14201, wherein it operates licensed bars and/or restaurants.

74. At all relevant times hereto, Petitioner THE DEFIELDS CORPORATION d/b/a THE FIRE HOUSE SPORTS BAR & GRILL was and is a New York corporation with principal place of business located at 2141 Clinton Street, West Seneca, New York 14206, wherein it operates a licensed bar and/or restaurant.

75. At all relevant times hereto, Petitioner THE FIRE HOUSE SPORTS BAR & GRILL was and is a New York limited liability company with its principal office located at 2141 Clinton Street, West Seneca, NY 14206, wherein it operates a licensed bar and/or restaurant.

76. At all relevant times hereto, Petitioner THE HOWLING ROOSTER, LLC was and is a New York limited liability company with its principal office located at 529 Englewood Avenue, Buffalo, New York 14223, wherein it operates a licensed bar and/or restaurant.

77. At all relevant times hereto, Petitioner THE ORIGINAL PANCAKE HOUSE OF ORCHARD PARK, INC. was and is a New York corporation with its principal office located at

3019 Union Road, Orchard Park New York, 14217, wherein it operates a licensed bar and/or restaurant.

78. At all relevant times hereto, Petitioner THE ORIGINAL PANCAKE HOUSE OF WILLIAMSVILLE, INC. was and is a New York corporation with its principal office located at 5479 Main Street, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

79. At all relevant times hereto, Petitioner TRACY STREET PRODUCTIONS, INC. was and is a New York corporation with its principal place of business located at 3151 Main Street, Buffalo, New York 14214; 3165 Main Street, Buffalo, New York 14214, wherein it operates a licensed bar and/or restaurant.

80. At all relevant times hereto, Petitioner WILLIAM JAMES DEVELOPMENT CORP. d/b/a RODNEY'S RESTAURANT was and is a New York corporation with its principal place of business located at 4179 Lakeshore Road, Hamburg, New York 14075, wherein it operates a licensed bar and/or restaurant

81. At all relevant times hereto, Petitioner WNY BEER CLUB, LLC d/b/a RUSTY NICKEL BREWING CO. was and is a New York limited liability company with its principal place of business located at 4350 Seneca Street, West Seneca, New York 14224, wherein it operates a licensed bar and/or restaurant.

82. At all relevant times hereto, Petitioner WNY RESTAURANT SYSTEMS, INC. d/b/a DUFF'S FAMOUS WINGS was and is a New York corporation with principal place of business located at 3651 Sheridan Drive, Amherst, New York 14226 wherein it operates a licensed bar and/or restaurant.

83. At all relevant times hereto, Petitioner 3G ENTERTAINMENT, INC., d/b/a MANOR LANES was and is a New York corporation with its principal office at 150 Grand Island Blvd., Tonawanda, New York 14150, wherein it operates a licensed bar and/or restaurant.

84. At all relevant times hereto, Petitioner 23 S. BUFFALO ST., INC. d/b/a THE POUR HOUSE BAR AND GRILL was and is a New York corporation with its principal office at 23 South Buffalo Street, Hamburg, New York 14075, wherein it operates a licensed bar and/or restaurant.

85. At all relevant times hereto, Petitioner 99 BRICK OVEN BAR AND GRILLE, LLC was and is a New York limited liability company with its principal office at 99 Aurora Street, Lancaster, New York 14086, wherein it operates a licensed bar and/or restaurant.

86. At all relevant times hereto, Petitioner 3989 MAIN STREET, INC. d/b/a, BRUNNER'S TAVERN was and is a New York corporation with its principal office at 3989 Main Street Amherst, New York 14226, wherein it operates a licensed bar and/or restaurant.

87. At all relevant times hereto, 5111 GENESEE ST., INC. d/b/a SCORES was and is a New York corporation with its principal office at 5111 Genesee Street, Cheektowaga, New York 14225, wherein it operates a licensed bar and/or restaurant.

88. At all relevant times hereto, Petitioner 5786 TRANSIT RD, INC. d/b/a FIELDSTONE COUNTRY INN was and is a New York corporation with its principal place of business located at 5986 South Transit Road, Lockport, New York 14094, wherein it operates a licensed bar and/or restaurant.

89. At all relevant times hereto, Petitioner 8444 TRANSIT RD, LLC d/b/a TAVERN AT WINDSOR PARK was and is a New York limited liability company with its principal place

of business located at 844 Transit Road, Williamsville, New York 14221, wherein it operates a licensed bar and/or restaurant.

90. Upon information and belief, and at all times relevant hereto, Respondent ANDREW M. CUOMO (the “Governor”) was and is the Governor of the State of New York, and was and is acting under color of State law and in his official capacity with a principal place of business is located at the State Capitol Building, Albany, New York 12224.

91. Upon information and belief, and at all times relevant hereto, Respondent NEW YORK STATE DEPARTMENT OF HEALTH (the “NYSDOH”) was and is an agency of the New York State Government with a principal place of business is located at Corning Tower, Empire State Plaza, Albany, New York 12237.

92. Upon information and belief, and at all times relevant hereto, Respondent NEW YORK STATE LIQUOR AUTHORITY (the “SLA”) was and is an agency of the New York State Government with a principal place of business located at 535 Washington Street, Suite 303, Buffalo, New York 14203.

JURISDICTION AND VENUE

93. This Court has jurisdiction over this proceeding under Article 78 of the CPLR, CPLR § 3001, the New York State Constitution Article 6, § 7, and the common law of the State of New York.

94. Erie County is a proper venue for this proceeding under CPLR §§ 503(a), 506(b), and 7804(b) because a substantial part of the events giving rise to Petitioners’ claims occurred in Erie County, and because Petitioners’ businesses are primarily located in Erie County.

FACTUAL BACKGROUND

95. The business operations of the Restaurant Petitioners have been severely impacted by the pandemic caused by the novel coronavirus, COVID-19, and the illness that it causes, and has, through no fault of its own, been forced to cease its restaurant operations as required by governmental order.

96. On March 3, 2020, Section 29-a of Article 2-B of the Executive Law was amended to provide the Governor with the ability to issue directives during a state of emergency. Prior to this amendment, the Governor was only authorized to issue suspensions during a state of emergency. A true and correct copy of bill S.7919, which amended Executive Law § 29-a to its current form is attached hereto as **Exhibit A**.

97. The new Executive Law § 29-a, includes limits the ability of the Governor to issue directives and suspensions. Specifically, as it relates to directives, Executive Law § 29-a(2) provides:

Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits, which shall apply to any directive where specifically indicated:

a. no suspension or directive shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each;

b. no suspension or directive shall be made which is not in the interest of the health or welfare of the public and which is not reasonably necessary to aid the disaster effort; [and]

...

e. any such suspension order or directive shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary

98. Under the new Executive Law § 29-a, the Governor issued executive orders requiring the full or partial suspension of restaurants, which includes enforceable authority by virtue of civil authorities with jurisdiction over Petitioners' businesses.

99. Specifically, on November 12, 2020, the Governor issued Executive Order 202.74, which directed: "All restaurants, irrespective of whether such restaurant is licensed by the State Liquor Authority, shall cease in-person dining at 10:00PM, but may continue curbside takeout and delivery service after 10:00PM so long as otherwise permitted, and may reopen no earlier than 5:00AM" (this directive, the "Restaurant Curfew"). A true and correct copy of Executive Order 202.74 is attached hereto as Exhibit B.

**AS AN FIRST CAUSE OF ACTION
(Declaring the Restaurant Curfew to be Arbitrary and Capricious)**

100. Petitioners repeat and reallege each and every paragraph above with the same force and effect as if fully set forth herein.

101. There is no valid or sound scientific or medical rationale for Respondents to require restaurants to cease in-person dining from 10:00 p.m. until 5:00 a.m.

102. Indeed, New York's own contract tracing data finds that restaurants only account for 1.43% of COVID-19 transmission in New York. The Governor unveiled this data at a press conference held on December 11, 2020. This press conference can be viewed at <https://www.governor.ny.gov/news/governor-cuomo-announces-updated-zone-metrics-hospital-directives-and-business-guidelines>. Starting at 8:47, the Governor discusses the results of New York's contract tracing data and presents a chart identifying the percent of COVID-19 transmissions that occur in various locations. A screen shot of this chart is attached hereto as Exhibit C.

103. The Restaurant Curfew is not based on science or medicine, but instead is based entirely on the time of day, which is completely irrelevant in the context of the COVID-19 virus.

104. Essentially, Respondents are seeking to institute a blanket prohibition against restaurant dining between the hours of 10:00 p.m. and 5:00 a.m. with no evidence whatsoever as to how this Restaurant Curfew would reduce the transmission of COVID-19.

105. Respondents established the Restaurant Curfew with *no* findings, studies, or evidence to support the Restaurant Curfew.

106. There is no valid or sound scientific or medical rationale for prohibiting restaurants from operating between the hours of 10:00 p.m. and 5:00 a.m. while allowing supermarkets, malls, and other businesses with large numbers of customers from operating during these hours, as has been done by Respondents. This is particularly the case here, where restaurants were already subject to NYSDOH guidance designed to mitigate the risk of COVID-19 transmission.

107. The NYSDOH's guidance for restaurants specifically takes into account the fact that dinners take their masks off while eating and includes additional social distancing regulations designed to take this fact into account. This guidance continues to be enforced by NYSDOH. A true and correct copy of the NYSDOH's *Interim Guidance for Food Services During the Covid-19 Public Health Emergency* (the "NYSDOH Restaurant Guidance") is attached hereto as **Exhibit D**.

108. Respondents have promulgated the Restaurant Curfew with *no* findings, studies, or evidence to support the need for this additional restriction on restaurant operations on top of the restrictions and safety measures restaurants were already required to follow pursuant to the NYSDOH Restaurant Guidance.

109. Respondents have offered no evidence that the NYSDOH Restaurant Guidance is insufficient to allow restaurants to safely operate between the hours of 10:00 p.m. and 5:00 a.m.

110. Recently, Debra S. Blog, M.D., MPH, the Director of the Division of Epidemiology, NYSDOH, offered an affidavit on behalf of Respondents and in support of COVID-19 restrictions on restaurants that was completely devoid of any justification for the Restaurant Curfew. A true and accurate copy of the Affidavit of Debra S. Blog, M.D., MPH, dated January 5, 2021 is attached hereto as **Exhibit E**.

111. Petitioners have commenced this proceeding pursuant to CPLR §§ 3001 and 7803(2).

112. By reason of the foregoing, the decision of Respondents to prohibit restaurant dining between the hours of 10:00 p.m. and 5:00 a.m. is arbitrary, capricious, and an abuse of discretion.

113. Respondents' arbitrary and capricious decision has caused a serious financial hardship on the Restaurant Petitioners and has eviscerated the Restaurant Petitioners' ability to operate their businesses.

114. The Restaurant Petitioners have a clear legal right not to be subject to the subjective and discriminatory decisions and policies being made by Respondents which amount to so-called government acceptance of one form of business over another form of business, and not grounded in good science or medical data, and is thus, arbitrary and capricious as well.

115. The Restaurant Petitioners are suffering irreparable injury and are threatened with irreparable injury in the future by reason of being forced to cease the operation of their businesses between the hours of 10:00 p.m. and 5:00 a.m. or face enforcement actions by Respondents (including the suspension of their liquor licenses by the SLA) and Petitioners have

no plain, adequate nor complete remedy to protect their State constitutional rights and to redress the wrongs and illegal acts complained of, other than immediate and continuing injunctive relief.

116. The Restaurant Petitioners face the prospect of a loss of its businesses and the violation of its civil rights and liberties as a result of Respondents' decision to prohibit Petitioners from operating their businesses between the hours of 10:00 p.m. and 5:00 a.m.

117. Petitioners are therefore entitled to a declaratory judgment declaring that the prohibition against restaurants from operating between the hours of 10:00 p.m. and 5:00 a.m. is arbitrary and capricious, together with a preliminary and permanent injunction prohibiting the enforcement of the Restaurant Curfew by Respondents, and such relief would not be contrary to the public interest.

**AS A SECOND CAUSE OF ACTION
(Declaring the Restaurant Curfew Unconstitutional Under the Equal Protection Clause of
the New York State Constitution)**

118. Petitioners repeat and reallege each and every paragraph above with the same force and effect as if fully set forth herein.

119. Petitioners have commenced this proceeding pursuant to CPLR §§ 3001 and 7803(2).

120. The Restaurant Curfew violates the Equal Protection Clause of the New York State Constitution because it restricts the operation of restaurants between the hours of 10:00 p.m. and 5:00 a.m., but allows the operation of other businesses, including similarly situated businesses that pose a risk of COVID-19 transmission, to operate during these hours despite the fact that the pre-existing NYSDOH Restaurant Guidance is sufficient to mitigate the risk of transmissions in restaurants, and despite the fact that this NYSDOH Restaurant Guidance is superior to the guidance applicable to other businesses, including the guidance applicable to big

box stores. A true and accurate copy of the *Updated Interim Guidance For Retail Grocery Stores During The Covid-19 Public Health Emergency* that is applicable to big box retailers is attached hereto as **Exhibit F**.

121. Petitioners have a clear legal right to operate its business, and the Respondents have issued and enforced the Restaurant Curfew, which does not treat similarly situated parties in the same manner.

122. Petitioners have a clear legal right not to be subject to the subjective and discriminatory decisions and polices being made by Respondents which amount to so-called government acceptance of one form of business over another form of business, and not grounded in good science or medical data, and is thus, arbitrary and capricious as well.

123. The Restaurant Petitioners are suffering irreparable injury and are threatened with irreparable injury in the future by reason of being forced to cease the operation of their businesses between the hours of 10:00 p.m. and 5:00 a.m. or face enforcement actions by Respondents (including the suspension of their liquor licenses by the SLA) and Petitioners have no plain, adequate nor complete remedy to protect the State constitutional rights and to redress the wrongs and illegal acts complained of, other than immediate and continuing injunctive relief.

124. Petitioners face the prospect of a loss of its businesses and the violation of its civil rights and liberties as a result of Respondents' decision to prohibit Petitioners from operating their businesses between the hours of 10:00 p.m. and 5:00 a.m.

125. Absent an injunction, the harm to Petitioners in the loss of their State constitutional rights exceeds any conceivable harm Respondent or the State of New York would suffer if they were prohibited from enforcing an Executive Order which violates the Equal Protection Clause.

126. Petitioners are therefore entitled to a declaratory judgment declaring that the Restaurant Curfew violates the Equal Protection Clause of the New York State Constitution, together with a preliminary and permanent injunction prohibiting the enforcement of the Restaurant Curfew by Respondents, and such relief would not be contrary to the public interest.

AS A THIRD CAUSE OF ACTION
(Declaring the Restaurant Curfew Invalid because the Restaurant Curfew Violates
Executive Law 29-a(2)(a))

127. Petitioners repeat and reallege each and every paragraph above with the same force and effect as if fully set forth herein.

128. Petitioners have commenced this proceeding pursuant to CPLR §§ 3001 and 7803(2).

129. The Restaurant Curfew contained in Executive Order 202.74 violate the limits imposed on directives under Executive Law § 29-a(2).

130. Specifically, the Restaurant Curfew is not “reasonably necessary” (*see* Exec. Law § 29-a(2)(b)) and are not “the minimum deviation . . . consistent with the goals of the disaster action deemed necessary” (*see* Exec. Law § 29-a(2)(d)).

131. The Restaurant Curfew cannot be said to be either “reasonably necessary” nor “the minimum deviation . . . consistent with the goals of the disaster action deemed necessary” because the Restaurant Curfew was imposed without any findings, studies, or evidence whatsoever to justify the closing of resturants between the hours of 10:00 p.m. and 5:00 a.m.

132. Moreover, when Respondents imposed the Restaurant Curfew they failed to take into account the preexisting NYSDOH Restaurant Guidance. *See* Ex. D. Accordingly, the Restaurant Curfew violates Executive Law § 29-a(2) because Respondents have failed to show how it is “reasonably necessary” to layer the Restaurant Curfew on top of the preexisting

NYSDOH Restaurant Guidance. Respondents have also failed to show how the NYSDOH Restaurant Guidance, alone, is not “the minimum deviation . . . consistent with the goals of the disaster action deemed necessary”, such that the Restaurant Curfew must be layered on top of the preexisting NYSDOH Restaurant Guidance in order to adequately respond to the COVID-19 crisis.

133. The Restaurant Petitioners have a clear legal right to continue to operate their restaurants between the hours of 10:00 p.m. and 5:00 a.m. in the absence of the Restaurant Curfew.

134. The Restaurant Petitioners are suffering irreparable injury and are threatened with irreparable injury in the future by reason of being forced to cease the operation of their businesses between the hours of 10:00 p.m. and 5:00 a.m. or face enforcement actions by Respondents (including the suspension of their liquor licenses by the SLA) and Petitioners have no plain, adequate nor complete remedy to protect the State constitutional rights and to redress the wrongs and illegal acts complained of, other than immediate and continuing injunctive relief.

135. Petitioners face the prospect of a loss of their businesses and the violation of their civil rights and liberties as a result of Respondents purporting to implement and enforce the Restaurant Curfew in a manner inconsistent with Executive Law 29-a(2).

136. Absent an injunction, the harm to Petitioners in the loss of their State constitutional and/or legal rights to operate their business exceeds any conceivable harm Respondents or the State of New York would suffer if they were prohibited from continuing to implement and enforce an Executive Order that facially exceeds the Governor’s statutory authority.

137. Petitioners are therefore entitled to a judgment declaring that the issuance of the Restaurant Curfew violates the plain text of Executive Law 29-a(2)(a), together with a preliminary and permanent injunction prohibiting the enforcement of the Restaurant Curfew by Respondents, and such relief would not be contrary to the public interest.

**AS A FOURTH CAUSE OF ACTION
(Declaring the Extension of the Restaurant Curfew Invalid because it Violates the 30-Day
Time Limit Imposed by Executive Law 29-a(2)(a))**

138. Petitioners repeat and reallege each and every paragraph above with the same force and effect as if fully set forth herein.

139. Petitioners have commenced this proceeding pursuant to CPLR §§ 3001 and 7803(2).

140. The Restaurant Curfew is a directive which was initially issued on November 12, 2020.

141. Respondents have purported to extend the Restaurant Curfew for a period beyond thirty days.

142. By purporting to extend the Restaurant Curfew for a time period beyond thirty days, the Governor has exceeded the limits imposed on his ability to issue directives under Executive Law 29-a(2)(a).

143. Upon information and belief, the Governor has not promulgated any new directive which would prevent the Restaurant Petitioners from operating their businesses between the hours of 10:00 p.m. and 5:00 a.m. within the thirty days preceding this Complaint.

144. Petitioners have a clear legal right to continue to operate their businesses between the hours of 10:00 p.m. and 5:00 a.m. in the absence of any directive prohibiting it from doing so that has been issued in the prior thirty days.

145. The Governor is prohibited from extending directives, such as the Restaurant Curfew, for a time period beyond thirty days by the plain text of Executive Law 29-a(2)(a).

146. Petitioners are suffering per se irreparable injury and is threatened with irreparable injury in the future by reason of being directed and forced to cease its lawful business operations between the hours of 10:00 p.m. and 5:00 a.m., and Petitioners have no plain, adequate nor complete remedy to protect the State constitutional and/or legal rights and to redress the wrongs and illegal acts complained of, other than immediate and continuing injunctive relief.

147. Petitioners face the prospect of a loss of its businesses and the violation of its civil rights and liberties as a result of the Governor purporting to extend the Restaurant Curfew for a period beyond thirty days.

148. Absent an injunction, the harm to Petitioners in the loss of their State constitutional and/or legal rights to operate their business exceeds any conceivable harm Respondents or the State of New York would suffer if they were prohibited from continuing to implement and enforce an a directive that facially exceeds the Governor's statutory authority.

149. Petitioners are therefore entitled to a judgment declaring that the extension of the Restaurant Curfew violates the plain text of Executive Law 29-a(2)(a), together with a preliminary and permanent injunction prohibiting the enforcement of the Restaurant Curfew by Respondents, and such relief would not be contrary to the public interest.

**AS A FIFTH CAUSE OF ACTION
(Declaring Executive Law 29-a(2)(a) Unconstitutional under the Constitution of the State of
New York as Applied)**

150. Petitioners repeat and reallege each and every paragraph above with the same force and effect as if fully set forth herein.

151. Petitioners have commenced this proceeding pursuant to CPLR §§ 3001 and 7803(2).

152. Under Executive Law 29-a, directives have the force of law, commensurate with a statute.

153. The extension of a directive issued by the Governor for a period of more than thirty days violates the separation of power set forth in the New York State Constitution.

154. The continued implementation and enforcement by an executive branch department or division of a directive issued by the Governor for a period of more than thirty days violates the separation of power set forth in the Article III, Section 1 of the Constitution of the State of New York, which provides that: “The legislative power of this State shall be vested in the Senate and Assembly.”

155. The Restaurant Petitioners have a clear legal right to continue to operate their business under the pre-existing laws of the State in the absence of a constitutionally valid directive curtailing, limiting, or prohibiting the operation of their business.

156. Petitioners are suffering per se irreparable injury and is threatened with irreparable injury in the future by reason of being directed and forced to cease its lawful business operations between the hours of 10:00 p.m. and 5:00 a.m., and Petitioners have no plain, adequate nor complete remedy to protect the State constitutional and/or legal rights and to redress the wrongs and illegal acts complained of, other than immediate and continuing injunctive relief.

157. Petitioners face the prospect of a loss of its businesses and the violation of its civil rights and liberties as a result of the Governor purporting to extend the Restaurant Curfew for a period beyond thirty days.

158. Absent an injunction, the harm to Petitioners in the loss of their State constitutional and/or legal rights to operate their business exceeds any conceivable harm Respondents or the State of New York would suffer if they were prohibited from continuing to implement and enforce an a directive that facially exceeds the Governor's statutory authority.

159. Petitioners are therefore entitled to a judgment declaring that the extension of the Restaurant Curfew is unconstitutional, together with a preliminary and permanent injunction prohibiting the enforcement of the Restaurant Curfew by Respondents, and such relief would not be contrary to the public interest.

**AS A SIXTH CAUSE OF ACTION
(Declaring Executive Law 29-a Facially Unconstitutional under the Constitution of the
State of New York)**

160. Petitioners repeat and reallege each and every paragraph above with the same force and effect as if fully set forth herein.

161. Petitioners have commenced this proceeding pursuant to CPLR §§ 3001 and 7803(2).

162. Shortly after the amendment to Exec. Law § 29-a was passed into law, the Senate and the Assembly adopted remote voting procedures that specifically referenced that remote voting was being adopted in order that the Legislature could expeditiously consider legislation relating to directives. True and accurate copies of the Senate resolution is attached hereto as **Exhibits G** and is available at: <https://www.nysenate.gov/legislation/resolutions/2019/r3108>. A true and accurate reproduction of the text of the Assembly resolution is attached hereto as **Exhibits H** and is available at:

[https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=E00854&term=2019&Summary=Y
&Actions=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=E00854&term=2019&Summary=Y&Actions=Y&Text=Y)

163. Specifically, the Senate resolution providing for remote voting states that it was adopting remote voting because:

The current declared state of national emergency relating to the coronavirus disease require the Senate, in the exercise of its constitutional power and prerogative, to implement special temporary procedures *permitting the consideration of legislation in an expedited fashion to meet the urgent needs of the people of the state of New York while confronting rapidly changing circumstances and public health concerns and directives.*

See Ex. G at “Whereas Clause”.

164. Similarly, the Assembly resolution providing for remote voting states that it was adopting remote voting because:

the current declared state or national emergency require such Assembly, in the exercise of its constitutional power and prerogative, to implement special temporary procedures *permitting the consideration of legislation in an expedited fashion to meet the urgent needs of the people of the State of New York while confronting rapidly changing circumstances and public health concerns and directives*

See Ex. H at “Whereas Clause”.

165. Under Executive Law 29-a, directives have the force of law, commensurate with a statute.

166. The Constitution of the State of New York requires that statutes be passed by each separate house of the legislature before they can have the force of law.

167. Specifically, Article III, Section 13 of the Constitution of the State of New York provides that: “The enacting clause of all bills shall be ‘The People of the State of New York, represented in Senate and Assembly, do enact as follows,’ and no law shall be enacted except by bill.”

168. Executive Law 29-a unbalances this constitutional framework by allowing the Governor to issue directives, which can only be reversed by a concurrent resolution of both houses of the legislatures.

169. Thus, while the consent of both houses of the legislature is required to pass a statute, the consent of either house of the legislature is sufficient to maintain a directive issued by the Governor under Executive Law 29-a.

170. Accordingly, Executive Law 29-a and every directive issued pursuant to Executive Law 29-a violates the principle of bicameralism inherent in the New York State Constitution.

171. The implementation and enforcement by an executive branch department or division of a directive issued under Executive Law 29-a thus also violates the principle of bicameralism inherent in the Constitution of the State of New York.

172. Petitioners have a clear legal right to continue to operate its business under the pre-existing laws of the State in the absence of a constitutionally-valid directive curtailing, limiting, or prohibiting the operation of its business.

173. Petitioners are suffering per se irreparable injury and is threatened with irreparable injury in the future by reason of being directed and forced to cease its lawful business operations, and Petitioners have no plain, adequate nor complete remedy to protect the constitutional and/or legal rights and to redress the wrongs and illegal acts complained of, other than immediate and continuing injunctive relief.

174. Petitioners face the prospect of a loss of their businesses and the violation of their civil rights and liberties as a result of the Respondents purporting to extend, implement, and/or

enforce directives issued under Executive Law 29-a with the force of law, but without the constitutionally required concurrence of both houses of the legislature.

175. Absent an injunction, the harm to Petitioners in the loss of their legal and constitutional right to operate their business exceeds any conceivable harm Respondents or the State of New York would suffer if they were prohibited from continuing to implement and enforce Executive Orders that violate the separation of powers set forth in the New York State Constitution. Indeed, there can be no harm to the Respondents because Respondents can enforce statutes of identical substance if the State Legislature passed such a statute, in conformance with the bicameral law-making process set forth in the New York State Constitution.

176. Petitioners are therefore entitled to a judgment declaring that Executive Law 29-a is unconstitutional to the extent it purports to give the Governor the power to issue directives which have the force of law without requiring the consent of the State Legislature in conformance with the bicameral law-making process set forth in the Constitution of the State of New York, together with a preliminary and permanent injunction prohibiting the Governor from enforcing directives under Executive Law 29-a unless and until these directives are approved by both houses of the legislature, and such relief would not be contrary to the public interest.

- A. On their First Cause of Action, declaring that the designation of the Erie County Orange Zone is arbitrary, capricious, and an abuse of discretion;
- B. On their Second Cause of Action, declaring the restaurant curfew unconstitutional under the Equal Protection Clause of the New York State Constitution;
- C. On their Third Cause of Action, declaring the restaurant curfew invalid because the restaurant curfew violates Executive Law 29-a(2)(a)

- D. On their Fourth Cause of Action, declaring the extension of the restaurant curfew invalid because it violates the 30-day time limit imposed by Executive Law 29-a(2)(a);
- E. On their Fifth Cause of Action, declaring executive law 29-a(2)(a) unconstitutional under the Constitution of the State of New York as applied;
- F. On their Sixth Cause of Action, declaring Executive Law 29-a facially unconstitutional under the Constitution of the State of New York;
- G. Preliminarily during the pendency of this proceeding and permanently thereafter enjoining and restraining Respondents from enforcing or implementing the Erie County Orange Zone restrictions on restaurants;
- H. Awarding Petitioners their costs and disbursements in this proceeding; and
- I. Awarding such other and further relief as the Court deems just and proper.

DATED: January 26, 2020
Buffalo, New York

HOGANWILLIG, PLLC

LIPSITZ GREEN SCIME CAMBRIA LLP

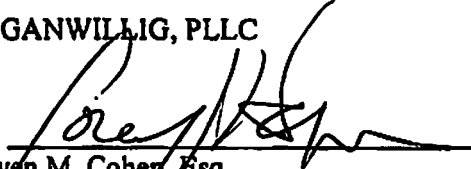
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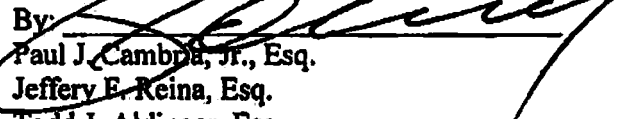
- D. On their Fourth Cause of Action, declaring the extension of the restaurant curfew invalid because it violates the 30-day time limit imposed by Executive Law 29-a(2)(a);
- E. On their Fifth Cause of Action, declaring executive law 29-a(2)(a) unconstitutional under the Constitution of the State of New York as applied;
- F. On their Sixth Cause of Action, declaring Executive Law 29-a facially unconstitutional under the Constitution of the State of New York;
- G. Preliminarily during the pendency of this proceeding and permanently thereafter enjoining and restraining Respondents from enforcing or implementing the Erie County Orange Zone restrictions on restaurants;
- H. Awarding Petitioners their costs and disbursements in this proceeding; and
- I. Awarding such other and further relief as the Court deems just and proper.

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