

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF CHEMUNG

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**COUNTY OF CHEMUNG**, and  
**CHRISTOPHER J. MOSS**, in his official capacity  
as Chemung County Executive;

Petitioners-Plaintiffs,

**VERIFIED  
PETITION / COMPLAINT**

For a Judgement Pursuant to Article 78 and a  
Declaratory Judgment Pursuant to Section 3001  
of the Civil Practice Law and Rules

Index No. \_\_\_\_\_

-against-

**ANDREW M. CUOMO**, in his official capacity as the  
New York State Governor; and **HOWARD A. ZUCKER**,  
in his official capacity as Commissioner of New York  
State Health Department,

Respondents-Defendants.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF CHEMUNG:

This is a Verified Petition / Complaint made on behalf of the County of Chemung and Christopher Moss, with assistance M. Hyder Hussain, Esq., County Attorney for the County of Chemung, for relief pursuant to Article 78 as well as a Declaratory Judgment pursuant to Section 3001 of the New York Civil Practice Law and Rules, and respectfully shows:

**NATURE OF THE ACTION**

1. This special proceeding is brought challenging the Constitutionality of Executive Order 202.68, and its associated guidelines; and moreover, that even if the even if said Order is deemed Constitutional, Petitioners / Plaintiffs assert that Executive Order 202.68 has been applied in an arbitrary and capricious manner, based on the Respondents' improper designation of Chemung County as being, in part, an "Orange" COVID-19 Micro-Cluster designation, and /or Respondents'

failure thereafter to review the COVID-19 Micro-Cluster designation for the County of Chemung in a timely fashion.

2. This proceeding is appropriate pursuant to N.Y. C.P.L.R. § 7801, *et.al.*, being brought within four months of above referenced determination and /or failure to review said determination. The proceeding is also proper under N.Y. C.P.L.R. § 3001, *et.al.*, which authorizes the Court to enter a declaratory judgment, in addition to any other relief that may be available, declaring the rights and obligations of the parties to a justiciable controversy.

3. No previous application for the relief sought has been made to this or any other Court.

#### **VENUE**

4. Pursuant to N.Y. C.P.L.R. § 506(b) and N.Y. C.P.L.R. § 7804(b), venue of this proceeding is properly laid in the Supreme Court of Chemung County, being the county in which the material events took place (to wit: the location of an alleged “Orange” COVID-19 Micro-Cluster designation).

#### **PARTIES**

5. Petitioner / Plaintiff, County of Chemung, is a governmental entity organized on existing pursuant to the Laws of the State of New York.

6. Christopher Moss is the County Executive for the County of Chemung, the chief elected official in said County and the administrative head of county government.

7. The Respondent, Andrew M. Cuomo, is the Governor of the State of New York. The Respondent, Howard A. Zucker, is the Commissioner of Health of the State of New York.

#### **FACTUAL ALLEGATIONS**

8. As the Court is aware, the COVID-19 pandemic has impacted all aspects of life across the globe since a least early 2020.

9. On or about March 7, 2020, Governor Cuomo declared a “State of Emergency” based on cases of COVID-19 transmission within the borders of New York State.
10. Thereafter, Governor Cuomo issued Executive Order 202.1 on or about March 12, 2020, the first of many such successive Executive Orders made in an effort to control the COVID-19 outbreak within the State of New York.
11. In the series of successive Executive Orders, Governor Cuomo on or about October 6, 2020, issued Executive Order 202.68<sup>1</sup>, which (in part) called upon the Department of Health to restrict certain activities based on clusters of COVID-19 cases. Said restrictions were supposed to be based on three color-coded zone criteria, identified as: “red zones”, “orange zones” and “yellow zones.” For example, pursuant to Executive Order 202.68, under the precautionary “Yellow Zone” indoor and outdoor dining was permitted with a four (4) person limitation per table and under the “Orange Zone” designation, only outdoor dining was permitted.
12. On or about October 21, 2020, guidance on New York’s “Micro-Cluster” Strategy was released.<sup>2</sup> Said guidance included (in part) that: “If after 14 days there has been no notable increase in positivity, new cases, or new hospital admissions from the buffer zone, the zone will - based on other epidemiological factors – become eligible to qualify for a new zone designation, or ending a zone designation, if appropriate.”
13. Thereafter, on or about October 23, 2020, the Respondents/ Defendants designated a portion of Chemung County as being an “Orange Zone.”
14. Petitioner / Plaintiff, Christopher J. Moss, in his official capacity as Chemung County Executive, forwarded a letter on November 12, 2020<sup>3</sup>, disputing both the validity as well as the efficacy of said “Orange” designation and requesting an amendment of said designation.

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<sup>1</sup> Exhibit A is a copy of Executive Order 202.68

<sup>2</sup> Exhibit B is a copy of the “Micro-Cluster” Strategy as promulgated by the State

<sup>3</sup> Exhibit C is the letter dated November 12, 2020 from Moss to Cuomo

15. On or about December 14, 2020, Governor Andrew Cuomo announced a new set of metrics by which cluster zones would be established.
16. Using this new metric, upon information and belief from my review of information gathered in part by the Chemung County Board of Health, Chemung County is not an “Orange Zone” as defined by the most recently released metrics released to define cluster zones. More specifically, the zone still defined as an “Orange Zone” should be designated yellow, or less.
17. Christopher J. Moss, in his official capacity as Chemung County Executive, forwarded another letter to both Respondents Cuomo and Zucker on December 21, 2020<sup>4</sup>, reminding those parties that re-evaluation of the color designations was supposed to have occurred after 14 days, and indicating that Chemung County’s rolling averages of hospital bed availability as well as its rolling averages of positive cases warranted a reduction from the “Orange Zone” status.
18. Upon information and belief, no action was undertaken to review or amend Chemung County’s “Orange Zone” status by the Respondents following either correspondence; moreover, no action was taken to review and or amend Chemung County’s “Orange Zone” status based on the new set of metrics released on or about December 14, 2020.
19. At present, the 7-day rolling average of positive cases for the area is at 4.5%, hospital bed availability is at 45%, and ICU bed availability is at 38%.
20. Petitioners / Plaintiffs challenge Executive Order 202.68 as issued by the Governor on October 6, 2020, as unconstitutional.
21. Moreover, even if said Order is deemed Constitutional, Petitioners / Plaintiffs assert that Executive Order 202.68 has been applied in an arbitrary and capricious manner; in addition to the partial “Orange Zone” designation as applied to Chemung County being disputed from its

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<sup>4</sup> Exhibit D is the letter dated December 21, 2020 from Moss to Cuomo and Zucker

inception, upon information and belief, other zones with similar or higher numbers of COVID-19 transmissions have not been given the same designation as Chemung County.

22. Further, it is submitted that the 14-day review period set forth in the October 21, 2020, guidance on New York's "Micro-Cluster" Strategy has not occurred for the Chemung County "Orange Zone," nor upon information and belief has Chemung County been properly evaluated under the most recently released metrics.
23. It is further submitted that New York's "Micro-Cluster" Strategy as applied interferes with and/or usurps Petitioner / Plaintiff, Christopher Moss' duties as the Chemung County Executive.
24. For example, the County Executive is responsible for the operating and capital budgets for the County. As a result of the actions and / or inactions of the Respondents, Chemung County's sales tax revenue has been diminished.
25. Local sales tax revenue is utilized to provide a multitude of services to the community, including (but not limited to): public safety, road and bridge construction and maintenance; social service programs, and more.
26. Respondents unequal and disproportionately treatment by imposing and failing to amend the "Orange Zone" States as to Chemung County as compared to other counties throughout New York State jeopardizes these vital services.

**AND AS FOR A FIRST CAUSE OF ACTION**

27. Petitioners repeat and reallege each and every allegation in the preceding paragraphs of this Verified Petition and Complaint, as if fully set forth herein.
28. Pursuant to the doctrine of nondelegation, and implicit in all written Constitutions, one branch of government must not authorize another branch of government to exercise power or function which it is constitutionally authorized to exercise itself.

29. The New York State Constitution provides for a complete distribution and separation of powers among the three “co-ordinate and co[-]equal branches” of government. *County of Oneida v. Berle*, 49 N.Y.2d 515, 522 (1980); *see also LaGuardia v. Smith*, 288 N.Y. 1, 5-6 (1942); *N.Y. Const., art. III, sec. 1; art. IV, sec. 1; and art. VI*.
30. To wit, Article III, Section 1 of the New York State Constitution provides that “[t]he legislative power of this state shall be vested in the [S]enate and [A]ssembly,” whereas Article IV, Section 1, of the New York State Constitution provides that: “The executive power shall be vested in the [G]overnor[.]” *N.Y. Const., art. III, sec. 1; N.Y. Const., art. IV, sec. 1*.
31. Respondent Cuomo has expressly cited to Executive Law § 29-a as a basis for his authority to issue Executive Orders having the full force and effect of law in response to COVID-19. However, Executive Law § 29-a unconstitutionally broadened Respondent Cuomo’s authority to act during official state disasters *beyond* the COVID-19 crisis.
32. Moreover, Respondent Cuomo’s extraordinary use of his purported executive authority is demonstrated by his issuance of not less than eighty-seven (87) related Executive Orders to date, and hundreds of sweeping changes to various State laws.
33. Executive Law § 29-a is in direct violation of the separation of powers doctrine, as the New York State Constitution vests sole legislative authority in Respondents Senate and Assembly and is therefore facially and substantively unconstitutional.
34. The relief being sought by Petitioners in this matter is declaratory and injunctive in nature; specifically, Petitioners are seeking a declaration of this Court providing Executive Law § 29-a to be facially and substantively unconstitutional, as an unconstitutional delegation of legislative power to Respondent Cuomo by Respondents Senate and Assembly.
35. Accordingly, Petitioners’ request for a declaration providing Executive Law § 29-a, and the Executive Orders promulgated thereunder (including but not limited to Executive Order 202.68) are unconstitutional.

36. Even if said Order and its successive Executive Orders are deemed Constitutional, Petitioners / Plaintiffs assert that Executive Order 202.68 has been applied in an unconstitutional arbitrary and capricious manner.
37. In addition to the partial “Orange Zone” designation as applied to Chemung County being disputed from its inception, upon information and belief, other zones with similar or higher numbers of COVID-19 transmissions have not been given the same designation as Chemung County.
38. Respondents’ actions in issuing the Executive Orders, and in thereafter issuing purportedly clarifying guidance and/or attempting to enforce the same, were neither reasonably necessary, nor the minimum deviation from any suspended statute, law, etc., so as to allow the State of New York to do its part in combatting the COVID-19 pandemic.
39. The severe, arbitrary, and unreasonable restrictions imposed upon Petitioners via Executive Order 202.68 and the Initiative have not been revised to reduce the strain proportionally. Moreover, no attempt has been made by Respondents to revise, review, or lessen such restrictions of the “Orange Zone” despite their own guidance and revisions providing for the same.
40. Respondents, and particularly Respondent Cuomo, has far exceeded his authority under Executive Law § 29-a, whether this claim is considered under the tiered levels of constitutional scrutiny, or even under the decidedly deferential standard set forth by the Supreme Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
41. Accordingly, Petitioners’ would request a declaration of this Court providing that Respondent Cuomo’s actions exceed the scope of his powers under Executive Law § 29-a, to the extent the Executive Law is not found to be unconstitutional.

**AND AS FOR A SECOND CAUSE OF ACTION**

42. Petitioners repeat and reallege each and every allegation in the preceding paragraphs of this Verified Petition and Complaint, as if fully set forth herein.
43. Petitioners have commenced this proceeding pursuant to CPLR § 7803, *et.al.*
44. Respondents' actions are arbitrary and capricious, without sound basis in reason, logic, law, or fact.
45. The actions of Respondents are arbitrary and capricious within the explicit meaning of Article 78 of the CPLR, and Respondents should be permanently enjoined from enforcing such restrictions as against Petitioners.
46. Petitioners will be irreparably harmed should their requests for relief be denied by this Court, because the arbitrary and capricious shutdowns imposed under the Executive Orders will undoubtedly result in loss of tax revenues due to the closures and limitations on local businesses and residents, and quite possibly the permanent closure local businesses, and other probable expenses incurred.

**WHEREFORE**, Petitioners respectfully request judgment from this Court as follows:

- (a) On their First Cause of Action, that this Court declare Executive Law § 29-a to be facially and substantively unconstitutional; or in the alternative, that Respondents have unconstitutionally exceed the scope of his authority under Executive Law § 29-a, and are an abuse of Respondent Cuomo's executive powers thereunder;
- (b) On their Second Cause of Action, that this Court issue a permanent injunction, enjoining Respondents from enforcing the restrictions imposed under Executive Order 202.68 and the Initiative as against Petitioners, and otherwise permitting Petitioners to offer indoor dining services to their customers for the duration of the COVID-19 pandemic; and
- (c) Awarding such other and further additional relief as this Court may deem just, proper, and equitable.



Dated: Elmira, New York  
December 30, 2020

By:

**CHEMUNG COUNTY LAW DEPARTMENT**



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VERIFICATION

STATE OF NEW YORK     )  
COUNTY OF CHEMUNG   ) ss.

I, Christopher J. Moss, a Petitioner / Plaintiff in this matter, being duly sworn, depose and say: I have read the foregoing Petition / Complaint, and know the contents thereof; the same are true to my own knowledge except as to matters therein stated to be true upon information and belief and that, as to those matters, I believe them to be true; I make this Verification both on behalf of the County of Elmira as well as in my official capacity as the Chemung County Executive.

  
\_\_\_\_\_  
Christopher J. Moss

Sworn to before me this 30<sup>th</sup>  
day of December, 2020.

  
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NOTARY PUBLIC

**M. HYDER HUSSAIN**  
Notary Public, State of New York  
Chemung County No. 02HU6356181  
Commission Expires March 27, 2021