

STATE OF NEW YORK  
SUPREME COURT, COUNTY OF NEW YORK

In the Matter of the Application of

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

DESI RISING UP AND MOVING, AARON FERNANDO, PAUL PERSAUD, SARWAN PERSAUD, NADIA PERSAUD, NADIRA PERSAUD, BISHAM PERSAUD, HARBHAJAN S. SURI, CHARANJIT S. SURI, DAVINDER S. SURI, SUKHVIR SINGH, SWARAN SINGH, LOVEDEEP MULTANI, PRINTHPAL S. BAWA, KAMLESH TANEJA, RAJWINDER KAUR, INDERBIR SINGH, PARAMJIT KAUR, and RAJBIR SINGH

Petitioners,

**MEMORANDUM OF LAW**

For and Order Pursuant to Article 78 of the N.Y. C.L.P.R.

-against-

NEW YORK CITY DISTRICTING COMMISSION, CHAIR DENNIS M. WALCOTT, HON. MARILYN D. GO, MARIA MATEO, JOSHUA SCHNEPS, LISA SORIN, MSGR. KEVIN SULLIVAN, KAI-KI WONG, MAF MISBAH UDDIN, MICHAEL SCHNALL, KRISTEN A. JOHNSON, YOVAN SAMUEL COLLADO, GREGORY W. KIRSCHENBAUM, MARC WURZEL, KEVIN JOHN HANRATTY, and DR. DARRIN K. PORCHER each in their capacity as members of the New York City Districting Commission, BOARD OF ELECTIONS IN THE CITY OF NEW YORK, NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

## Memorandum of Law in Support of Petition

Petitioners respectfully move the Court for a temporary restraining order (“TRO”) and to compel Respondents to certify an amended district plan for New York City Council that complies with the mandate of the New York City Charter to ensure fair and effective representation for the Asian community of Richmond Hill/South Ozone Park.

Along with this memorandum of law and the underlying verified petition, Petitioners submit the accompanying Affirmation of Jerry Vattamala, with exhibits referenced therein.

### Argument

#### Standard of Review

1. After exhausting administrative remedies, petitioners may raise a question pursuant to Article 78 of the New York Civil Practice Law and Rules,<sup>1</sup> asking, among other questions, “whether a determination was . . . affected by an error of law or was arbitrary and capricious or an abuse of discretion.”<sup>2</sup> This proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.”<sup>3</sup>
2. Petitioners have met the threshold for filing an Article 78 petition in New York Supreme Court. To begin, Petitioners have exhausted the administrative review process. The Districting Commission held sessions for public feedback at which petitioner DRUM’s Political Director, Jagpreet Singh, and Petitioner Aaron Fernando gave testimony on May 26, 2022, and June 27, 2022 respectively.<sup>4</sup> The Districting Commission created a districting plan, finalized it, sent it to the City Council for review on October 6, 2022, and after the City Council did not object to the

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<sup>1</sup> CPLR § 7801.

<sup>2</sup> CPLR § 7803(3).

<sup>3</sup> N.Y. C.P.L. R. 217(1).

<sup>4</sup> Exhibit .

map, certified it on November 1, 2022. Petitioners had no administrative remedies available to them that would allow them to challenge the map sent by the Commission to the City Council or to prevent the Commission from certifying the map on November 1, 2022, at which point it became final and binding. Petitioners filed this petition on February 22, 2023, less than four months after the Commission's decision became "final and binding."

3. When reviewing an Article 78 petition challenging a certified map by the Commission, courts have applied the "arbitrary and capricious" standard of review.<sup>5</sup> Generally, this "involves an allegation that the agency improperly interpreted or applied a statute or regulation."<sup>6</sup> Here, petitioners allege that the Commission violated the Charter by failing to apply the mandates of § 52(1)(b) requiring the Commission to ensure the fair and effective representation of the protected racial and language minority groups in New York City, to the maximum extent practicable. Courts previously found that judicial review is warranted for a challenge that seeks to enforce the mandates of § 52 in Brooklyn Heights Ass'n, Inc. v. Macchiarola, 82 N.Y.2d 101, 623 N.E.2d 1140 (1993).

4. For these reasons, judicial review of the Commission's determination is warranted.

**The Commission Arbitrarily and Capriciously Failed to Apply the Mandates of N.Y. City Charter § 52(1)(b) By Splintering Richmond Hill/South Ozone Park into Several Districts**

5. When creating a district map, the Commission is obligated by the Charter to follow a set of criteria that are to be "applied and given priority in the order in which they are listed" as set forth in § 52(1) "to the maximum extent practicable."<sup>7</sup> After the first criteria of complying with one person-one vote, the Charter instructs the Commission to give greatest weight to ensuring

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<sup>5</sup> Brooklyn Heights Ass'n, Inc. v. Macchiarola, 82 N.Y.2d 101, 106 623 N.E.2d 1140 (1993).

<sup>6</sup> Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals, 995 N.Y.S.2d 659, 666 (Sup. Ct. 2013), *aff'd*, 992 N.Y.S.2d 667 (Mem.) (App. Div. 2014).

<sup>7</sup> § 52(1).

“the fair and effective representation of the racial and language minority groups in New York City which are protected by the United States Voting Rights Act.”<sup>8</sup> Only after prioritizing the representation of racial and language minority groups may the Commission consider drawing district lines that “keep intact neighborhoods and communities with established ties of common interests and association.”<sup>9</sup> The Commission has a clear legal duty to prioritize fair and effective representation of protected racial and language minority groups over other communities of interest, but the Final Certified Plan failed to do so, elevating a white community over a racial minority group, and thus arbitrarily misapplying the Charter.

6. The districting criteria of § 52(1)(b) clearly and unambiguously compels the Commission to prioritize representation of racial and language minority groups. Courts have already recognized the importance of the § 52 criteria prioritization, and specifically that the second criteria must take precedence over the third. In Brooklyn Heights Ass'n, Inc. v. Macchiarola, 82 N.Y.2d 101, 623 N.E.2d 1140 (1993), the court wrote that in § 52 “the requirement of population equivalence among the districts takes precedence over the requirement of fair and effective representation of minority groups, *which takes precedence over the requirement of neighborhood integrity*, which takes precedence over the remaining criteria (emphasis added).” Brooklyn Heights Ass'n, Inc. v. Macchiarola, 82 N.Y.2d 101, 623 N.E.2d 1140 (1993) (overturned on other grounds). In an instance when the Commission may create an opportunity district that provides fair and effective representation for a protected racial or language minority group, even while deprioritizing neighborhood integrity or a non-minority community of interest, the Charter compels them to do so.

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<sup>8</sup> § 52(1)(b).

<sup>9</sup> § 52(1)(c).

**The Richmond Hill/South Ozone Park Asian Community is Entitled to a Reasonable  
Opportunity to Elect a Candidate of its Choice**

7. Asians are a racial minority group protected by the Voting Rights Act,<sup>10</sup> and the community of Richmond Hill/South Ozone Park has a population of Asians that are entitled to protections under the Charter. Section 52(1)(b) provides that the Commission must prioritize “fair and effective representation” for racial minority groups, which includes the Richmond Hill/South Ozone Park Asian community.

8. The Commission’s Final Certified Plan dramatically limits the opportunity of the Richmond Hill/South Ozone Park Asian community to elect candidates of choice. By splitting the community into three councilmanic districts in which the community does not have a reasonable opportunity to elect a candidate of its choice, it has not ensured fair and effective representation to the maximum extent practicable.

9. While the Charter does not define “fair and effective representation,” legislative history paints a clear picture of how it was intended to apply. In its submission to the Department of Justice for preclearance of the revised charter, the Districting Commission noted that the Charter’s mandates and prioritization in § 52(1)(b) would establish a council district in Chinatown in which Asian Americans would have “a reasonable opportunity to elect council members of their choice.”<sup>11</sup> This “reasonable opportunity” was demonstrated with prototype districts drawn in Chinatown that reflect nearly identical demographic numbers to the Unity Map’s proposed District 32 in Richmond Hill/South Ozone Park. The prototype districts referenced by the Revision Commission had the Asian share of total population at 28.7% and

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<sup>10</sup> Voting Rights Act language “For the purposes of this section, the term “language minorities” or “language minority group” means persons who are American Indian, the American Indian, Asian American, Alaskan Natives, or of Spanish heritage. “52 U.S.C. § 10503(e).

<sup>11</sup> Exhibit E, at 21.

30.6%, respectively, and the total non-white share of population at 76.8% and 62.5%, respectively. The Unity Map's proposed District 32 contains an Asians/Other share of total population of 33.3% and a non-white population of 79.0%. These figures reflect the fact that proposed District 32 provides an even greater "reasonable opportunity" for Asian voters to elect a candidate of their choice than the example put forth by the drafters of the Charter provisions.

10. The Charter compels the Districting Commission to create a district similar to the Unity Map's proposed District 32, so that Asian voters in Richmond Hill/South Ozone Park have a reasonable opportunity to elect a candidate of their choice.

11. In the Final Certified Plan, however, the Richmond Hill/South Ozone Park Asian community does not have such a reasonable opportunity. As seen through the racial bloc voting analysis of the 2021 District 32 City Council general election and the 2017 District 28 City Council primary election, the white community and Black community both vote cohesively and in opposition to the Richmond Hill/South Ozone Park Asian community's candidates of choice.

12. In the 2021 District 32 City Council general election, the election was for an open seat in which a candidate of Punjabi and Guyanese decent, Felicia Singh, was the Asian candidate of choice. She was defeated by the white candidate of choice, Joann Ariola, despite the Asian community's preference and support from District 32's Hispanic community.

13. Likewise, racial bloc voting analysis shows that Asians do not have the opportunity to elect candidates of choice in District 28. In the last competitive primary for the City Council seat, in 2017, the Asian candidate of choice, Richard David, a Guyanese resident of Richmond Hill/South Ozone Park, was defeated by the Black community's candidate of choice, Adrienne E. Adams, now the Speaker of the City Council. District 28 drawn under the Final Certified Plan

has an even higher Black share of population and a lower Asian and Other share of population than existed under the 2013–2022 Plan.

14. The Commission’s own expert, Dr. Lisa Handley, stated, “if you have polarized voting, then you have to make sure that you create districts that give minority voters an opportunity to elect their candidates of choice.” Such an opportunity district, according to Dr. Handley, need not be greater than 50% minority residents or citizen; it must simply grant the minority community the opportunity to elect candidates of choice.

15. Such an opportunity should exist for Asian voters in Richmond Hill/South Ozone Park, but the District Commission’s decision to ignore the Charter’s legal requirements and dilute the community’s electoral power among three separate councilmanic districts denied the possibility of fair and effective representation. The Final Certified Plan’s denial of opportunity to the Richmond Hill/South Ozone Park Asian community does not ensure the fair and effective representation mandated by § 52(1)(b).

**Commission Abused Its Discretion in Failing to Ensure Fair and Effective Representation  
to the “Maximum Extent Practicable”**

16. The Commission’s Final Certified Plan does not ensure fair and effective representation of the Richmond Hill/South Ozone Park Asian community, but instead splits the community into three councilmanic districts, denying an Asian opportunity district.<sup>12</sup> The Commission must seek to protect the rights of this group “to the maximum extent practicable,” but the Final Certified Plan dilutes the voting power of the community, despite the ability to draw an Asian opportunity district in which the Richmond Hill/South Ozone Park Asian community would have fair and

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<sup>12</sup> Exhibit N, at 66-69.

effective representation without coming into conflict with other racial and language opportunity districts, as demonstrated by the Unity Map.<sup>13</sup>

17. The only valid reason for the Commission to fail to draw an opportunity district in Richmond Hill/South Ozone Park is if doing so would conflict with a higher or equally prioritized criteria. However, creating an opportunity district for the Richmond Hill/South Ozone Park Asian community would not conflict with the Commission's mandates under the Charter. As demonstrated in the Unity Map, proposed District 32 would not conflict with the one person-one vote requirements of § 52, nor would it dilute the fair and effective representation of other racial and language minority groups, as Districts 31, 28, and 27 would remain opportunity districts for the Black communities in the area.<sup>14</sup> In fact, the Unity Map upgrades District 28 from a Black plurality district to a Black majority district, District 28, which currently is a plurality Black district.

18. As a lower priority criteria, a community of interest may be divided in order to create an opportunity district for a racial minority group such as the Richmond Hill/South Ozone Park Asian community. The Unity Map shows an Asian American opportunity district could be created in District 32 by dividing up some of the white population of the Rockaways and Breezy Point. While the population in those areas arguably comprise a community of interest as conceptualized by § 52(1)(c), the Charter is clear that such communities of interest are to be given a lower priority than racial and language minorities such as the Richmond Hills/South Ozone Park Asian community. Prioritizing a white community of interest over a protected racial and language minority group is a misapplication of the clear statutory language in § 52, and clear

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<sup>13</sup> Exhibit D.

<sup>14</sup> *Id.*

evidence that the Commission did not apply the criteria set forth by the Charter “to the maximum extent practicable.”

19. There are no other duties imposed by the Charter that prevent the Commission from ensuring the fair and effective representation of the Richmond Hill/South Ozone Park racial minority group. In the only previous case on § 52(1)’s mandates, the court did find that the Districting Commission was justified in dividing a community of interest because doing so would incur conflict with another requirement of the Charter. In that case, the Commission could not draw the community into a single district without subdividing a census block, which the court found conflicted with another requirement of the Charter to use census data, and thus not subdivide census blocks.<sup>15</sup> However, such a conflict is not present in this case, as neither the adopted map nor the Unity Map subdivides census blocks. Absent a compelling reason to fail to apply the criteria of § 52(1)(b), it is clear that the Commission’s determination was an arbitrary and capricious abuse of discretion.<sup>16</sup>

### **The Commission’s Arbitrary and Capricious Determination to Violate the Charter Was Not Supported by Evidence in the Record**

20. Despite clear testimony on the record alerting the Commission that dividing up Richmond Hill/South Ozone Park would violate the Charter, the Districting Commission still chose to do so. The Commission put no evidence on the record justifying why it could not keep Richmond Hill/South Ozone Park whole. The Commission’s expert Dr. Handley made no finding that such a district could not be drawn, and no analysis was presented by the Commission beyond Commission member Uddin’s rote statement that “we wanted to put Richmond Hill and

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<sup>15</sup> Brooklyn Heights Ass’n, Inc. v. Macchiarola 82 N.Y.2d 101, 106 (1993).

<sup>16</sup> CPLR § 7803(3).

South Ozone Park in one district, but we could not do that.” Lack of substantial evidence on the record for an agency’s decision is an indication of an abuse of discretion even if such evidence does exist, as “the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis” Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs., 77 N.Y.2d 753, 573 N.E.2d 562 (1991) (quoting Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) (See also In re Vargas, 18 A.D.3d 994, 795 N.Y.S.2d 144, 146 (2005) “While [Respondents] had the discretion to credit or reject any portion of [Petitioner’s] testimony, it could not draw an opposite conclusion for which there is no affirmative evidence in the record.”).

21. The submission of The Unity Map makes a factual demonstration on the record that fair and effective representation of the Asian community in Richmond Hill/South Ozone Park is possible and can be done in compliance with the Charter. In certifying a districting plan that fails to ensure the fair and effective representation of the Richmond Hill/South Ozone Park Asian community without any substantial evidence or rationale, in the face of demonstrable evidence that such a map is possible, respondents have failed to comply with a clear statutory mandate and committed an “arbitrary action” that was “without sound basis in reason” and “taken without regard to the facts.” Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 [1974]. (See also People by James v. Schofield, 73 Misc. 3d 1209(A), 154 N.Y.S.3d 359 (N.Y. Sup. Ct.), aff'd, 199 A.D.3d 5 (N.Y. App. Div. 2021). “a court must set aside a determination that is based on vague information or contrary to the procedure required by law.”) Such an arbitrary action cannot be maintained by this court, and the defective district plan must

be corrected by the Commission so that the rights of the Asian community in Richmond Hill/South Ozone Park are preserved.

### **Claim for Relief**

22. In an Article 78 proceeding, “judgment may grant the petitioner the relief to which he is entitled” and “if the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent.” CPLR § 7806. The court is “empowered to annul the determinations and fashion a proper remedy.” Matter of Garrett v. Coughlin, 128 A.D.2d 210, 212 (3d Dept. 1987; see also Bower Assocs. v. Planning Bd. of Town of Pleasant Valley, 289 A.D.2d 575, 575–76 (2nd Dept. 2001) (in which the court directs the respondent to perform a specific remedy following a determination by respondent that was arbitrary and capricious, rather than remit the decision to the respondent).

23. In light of the facts above, Petitioners respectfully requests that this Court enters judgement, pursuant to CPLR § 7806, and:

- a. Vacate the Final Certified Plan;
- b. Instruct the Districting Committee to certify an amended plan that correctly applies the criteria of § 52(1)(b) to the Richmond Hill/South Ozone Park Asian community as exemplified in the Unity Map;
- c. Grant temporary injunctive relief to Petitioners with a Temporary Restraining Order enjoining Respondents City BOE and State BOE from administering City Council elections in New York City until an amended plan that satisfies § 52(1)(b) is certified;

- d. Grant Petitioners such other and further relief as this Court deems necessary and equitable.

Dated: February 24, 2023

Respectfully Submitted,



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