

**Desis Rising Up & Moving v New York City
Districting Commn.**

2023 NY Slip Op 31510(U)

May 5, 2023

Supreme Court, New York County

Docket Number: Index No. 151762/2023

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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DESIS 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,

INDEX NO. 151762/2023

MOTION DATE 02/24/2023

MOTION SEQ. NO. 001

Petitioners,

- v -

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, 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,

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the court denies the Verified Petition filed by Petitioners Desis 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 (collectively, "Petitioners").

On February 24, 2023, Petitioners filed this Article 78 Verified Petition against Respondents New York City Districting Commission ("Districting Commission"), Chair Dennis

M. Walcott (“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, Dr. Darrin K. Porcher, Board of Elections in the City of New York (“NYC BOE”) and New York State Board of Elections (“NYS BOE”) (collectively, “Respondents”). The individual Petitioners are registered Asian American voters who live in the area of Richmond Hill/South Ozone Park, Queens, New York. Desis Rising Up and Moving is an organization with members who reside in this community. Petitioners allege that Respondent Districting Commission is responsible for preparing a districting plan for elections, that Respondent Walcott is the chair and that the other individual Respondents were members of the Districting Commission at the time of the Districting Commissions certification of its Certified Final Plan on November 1, 2022.

Petitioners challenge the Districting Commission’s certification of the Final Plan. In their Verified Petition, Petitioners seek a judgment and order vacating the Certified Final Plan; instructing the Districting Commission 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, which was an alternative plan submitted by Petitioners; and granting temporary injunctive relief to Petitioners with a Temporary Restraining Order enjoining Respondents NYC BOE and NYS BOE from administering City Council elections in New York City until an amended plan that satisfies § 52(1)(b) is certified.

In their motion by Order to Show Cause, Petitioners seek a declaration that Respondents have arbitrarily failed to ensure the fair and effective representation of the racial and language minority groups in New York City by failing to create an opportunity district for Asian American voters in Richmond Hill/South Ozone Park; an order annulling Respondents’ certification of the

Final Plan that failed to ensure the fair and effective representation of racial minority groups as arbitrary and capricious; and an order directing Respondents to certify a new New York City Council District Plan that creates an opportunity district for Asian American voters in Richmond Hill/South Ozone Park no later than two weeks from the date of the Order to Show Cause, which was signed by the court on February 27, 2023, and entered the following day.

The court previously denied Petitioners request for a Temporary Restraining Order enjoining NYC BOE and NYS BOE from administering City Council elections in New York City until a lawful amended plan is certified when the court declined to sign this section of the proposed Order to Show Cause. However, Petitioners also requested a preliminary injunction pending the court's decision, which the court did not grant on March 9, 2023, during oral argument.

Petitioners allege in substance that the Certified Final Plan violated the New York City Charter by failing to ensure the fair and effective representation to the maximum extent practicable of the Indo-Caribbean and Punjabi South Asian community residing in Richmond Hill/South Ozone Park. Petitioners further allege that the group qualifies as a racial or language minority group and that it is centered along a two-mile stretch of Liberty Avenue. Petitioners argue that the Final Plan failed to prioritize the representation of this protected racial minority community because it unlawfully diluted the community's voting strength by splitting it into three City Council districts, namely Districts 28, 29 and 32. Petitioners further argue that the Final Plan unlawfully split the district along Liberty Avenue and again by 100th and 99th Streets to the West.

Petitioners further argue in substance that the Districting Commission could have easily adopted the alternative redistricting proposal, called the "Unity Map," that was submitted, which

would have complied with the New York City Charter, as well as state and federal law. They argue that the Unity Map proposal would keep the Richmond Hill/South Ozone Park Asian community intact in District 32, it would not have diluted the representation of any other racial or language minority group and that it would not have violated the one person, one vote principle. Instead, Petitioners argue in substance that the decision to certify the Final Plan was arbitrary and capricious because the Districting Commission chose to prioritize the representation of a white community interest over the fair and effective representation of a protected minority racial group along the coastline of the Western Rockaways and Howard Beach areas in violation of the New York City Charter. Petitioners further argue that the Final Plan prevents the Asian voters in Richmond Hill/South Ozone Park from having a reasonable opportunity to elect a candidate of their choice.

Respondent NYC BOE and NYS BOE take no position in this proceeding.

The remaining Respondents oppose Petitioners' Verified Petition and motion by Order to Show Cause. They argue in substance that Petitioners failed to establish any of the requirements for emergency injunctive relief because such relief is barred by the doctrine of laches. They further argue that the Districting Commission's decision to certify the Final Plan was not arbitrary and capricious or unlawful, as it was made with a rational basis and did not violate the New York City Charter or federal or state law. The non-BOE Respondents further argue in substance that the Districting Commission followed the process mandated by the New York City Charter, it reviewed and considered the public's input and testimony, including input from many of the Petitioners, and held public hearings and sessions. It also considered the Unity Map and retained Dr. Lisa Handley, who is a voting rights and redistricting expert. Dr. Handley determined in substance that the Final Plan satisfied the requirements of the United States Voting

Rights Act of 1965 and that it increased the number of districts that offer Asian voters an opportunity to elect their preferred candidates of choice.

The non-BOE Respondents argue that the Petitioners improperly waited until February 24, 2023, to file their Petition, which was almost to the end of the four-month Statute of Limitations. They argue in substance that Petitioners had ample notice and knowledge of the contents of the Certified Final Plan because it was adopted by the Districting Commission and submitted to the New York City Council for consideration on October 6, 2022, pursuant to Charter § 51(c). City Council accepted the Plan and the Districting Commission voted 11-4 at a public meeting to certify the Final Plan, pursuant to Charter § 51(g). The non-BOE Respondents further argue that the Districting Commission certified that the requirements of Charter § 52(1)(b) were implemented in the Final Plan by filing a Certification Statement, dated November 1, 2022, which was filed with the Clerk's office on November 2, 2022, as required by Charter § 51(g). The non-BOE Respondents also argue that the Petitioners were on notice even earlier since the Preliminary Plan had been released on July 15, 2022, which began the public hearing process. The non-BOE Respondents further argue that Petitioners should be barred by laches for waiting almost four months after the Certified Final Plan was filed, which was on the eve of the commencement of petitioning, to file this proceeding.

The non-BOE Respondents further argue in substance that the election schedule has been set, petitioning began on February 28, 2023, and the City, State, candidates and voters rely on this schedule. The non-BOE Respondents argue in substance that early voting for the Primary elections for New York City Council, Judges and District Attorneys are scheduled for June 17, 2023 to June 25, 2023, and the Primary elections will be held on June 27, 2023. They argue in substance that if the court were to order a change in even one Election District, then the

surrounding Election Districts would be impacted based upon the size, population and physicality of that area. It would also require considerable expense and time to staff necessary positions to redraw the Election District map and time to reconstitute the Districting Commission and complete the process of certifying a new Plan. They further argue in substance that if the court were to grant Petitioners' request to vacate certification of the Final Plan and delay petitioning, then it would have a domino effect and make it impossible to hold the City Council primary elections as scheduled.

The non-BOE Respondents further argue that if the court were to grant Petitioners' request to enjoin the City from implementing the election activities, then the Primary election would be delayed by several months, voters would have to vote in two elections which would suppress voter turnout, the City would have to bear a significant financial cost, it would cause the candidates to have to re-file applications for matching funds and possibly even have to return funds. Therefore, Respondents argue that if the court were to grant Petitioners' request, then the candidates, their supporters, New York City taxpayers and voters would all be severely prejudiced.

Petitioners disagree and argue in substance that if the court were to grant their request to redraw District 32 and keep the Asian community in Richmond Hill/South Ozone Park intact, while still complying with the requirements of the City Charter, then only six other City Council Districts would need to be adjusted, including Districts 23, 24, 27, 28, 29, and 31.

New York City Charter § 52(1)(b) requires that "to the maximum extent practicable" the Districting Commission's plan "shall be established in a manner that ensures 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 acts of nineteen hundred sixty-five, as amended"

(New York City Charter § 52[1][b]). This criteria is given the second highest priority out of the seven considerations.

A determination subject to review under Article 78 exists when, first, the agency “reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party” (*Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency’s determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency’s determination, courts must ascertain whether there is a rational basis for the agency’s action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1st Dept 2018]; *Matter of Pell*, 34 NY2d at 231). Where the agency’s determination involves factual evaluation within an area of the agency’s expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010]). When a court reviews an agency’s determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency’s determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1st Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (*see Vink v New York State Div. of Hous. and Community Renewal*, 285 AD2d 203, 210 [1st Dept 2001]).

The Legislature is tasked with balancing the requirements imposed by the New York State Constitution, the United States Constitution, the New York City Charter and any additional legislation (*see Matter of Wolpoff v Cuomo*, 80 NY2d 70, 79 [1992]). The court's role is not "to second-guess the Districting Commission's reasonable policy choice related to implementing the technical requirements of districting" (*Brooklyn Heights Ass'n v Macchiarola*, 82 NY2d 101, 106 [1993]; citing *Matter of Wolpoff*, 80 NY2d at 79). As the Court of Appeals noted, it is "hesitant to substitute [its] own determination for that of the Legislature even it [it] would have struck a slightly different balance on [its] own" (*id.*).

Here, the court finds that Petitioners failed to demonstrate their entitlement to the relief requested and that Respondents demonstrated that if the court were to grant Petitioners' requested relief then the candidates, voters and New York City taxpayers would be extremely prejudiced. Therefore, the court denies Petitioners' request for a preliminary injunction. The court finds that Petitioners failed to demonstrate the likelihood of their success on the merits of the Verified Petition, that they will suffer irreparable harm absent the preliminary injunction and that the balance of equities favor the court granting the preliminary injunction.

Additionally, the court denies Petitioners' request to vacate the Certified Final Plan and to direct the Districting Commission to certify an amended plan. The court disagrees with Respondents and finds that Petitioners are not barred by the doctrine of laches for their delay in

filing this proceeding until the eve of the commencement of petitioning and the alleged prejudice that would follow if the court stayed petitioning, vacated the Certified Final Plan and caused the City Council elections to be delayed. However, the court determines that Petitioners failed to demonstrate that the decision to certify the Final Plan was not in violation of lawful procedures, it was not arbitrary and capricious, and it was not affected by an error of law. Additionally, Petitioners failed to demonstrate that the Districting Commission violated the New York City Charter by failing to apply the mandates of § 52(1)(b) for failing to ensure the fair and effective representation of the racial and language minority groups in New York City to the maximum extent practicable.

The court finds that the record indicates that the determination to certify the Final Plan was rationally based. The decision was made after the Districting Commission properly completed the certification process as required. There was a public comment process which included testimony from numerous people and many of the Petitioners testified, submitted comments, or otherwise participated in the process. The Districting Commission properly considered the testimony, comments, submissions and alternatives, such as the Unity Map. The Districting Commission carefully evaluated the Certified Final Plan's compliance with the New York State and United States Constitutions, the New York City Charter and weighed the applicable criteria set forth in New York City Charter § 52(1), (2) and (3). The court agrees with Respondents that the Districting Commission weighed the competing interests and all necessary requirements to create the Final Plan and decided to adopt the Final Plan in lieu of all others. The Districting Commission retained Dr. Handley as an expert consultant and considered her findings. Dr. Handley concluded that the Certified Final Plan complied with the Voting Rights Act and that it expanded the voting power of Asians in New York City. Although Petitioners and

their expert disagree with Dr. Handley's findings and they submitted the Unity Map as a viable alternative, the Districting Commission chose not to accept Petitioners' expert's determinations or the Unity Map's redistricting proposal.

Since the court finds that the certification of the Districting Commission's Final Plan was rationally based and lawful, even if the court were to disagree with the Districting Commission's decision not to adopt the Unity Map or any other viable alternative to the Certified Final Plan, then the court is precluded from substituting its own judgment for that of the Districting Commission.

Additionally, the court finds that Respondents demonstrated that if the court were to grant Petitioners' requests for relief, then it would impact neighboring Election Districts at a minimum, the map would have to be redrawn, the Districting Commission would have to be reconstituted, the City Council primaries would be delayed, there would have to be two primary elections and it would be costly and require a delay of several months. Therefore, the candidates, voters, tax payers and City would be extremely prejudiced.

Although the court always endeavors to protect the rights of racial and language minorities against voting rights violations, here, Petitioners simply failed to demonstrate the merits of their claims.

The court has considered additional arguments raised by the parties which were not specifically discussed herein and the court denies all requests for relief not expressly granted herein.

As such, it is hereby

ORDERED and ADJUDGED that the court denies the relief requested in Petitioners' Verified Petition, the court denies Petitioners' motion by order to show cause and the court dismisses the Verified Petition without costs to any party.

This constitutes the decision and order of the court.


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<u>5/5/2023</u> DATE		<u>ERIKA M. EDWARDS, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE