

**New York City Council Member Adrienne E. Adams v
City of New York**

2021 NY Slip Op 31511(U)

May 4, 2021

Supreme Court, New York County

Docket Number: 160662/2020

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

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NEW YORK CITY COUNCIL MEMBER ADRIENNE E. ADAMS, AMERICAN BROTHERHOOD FOR THE RUSSIAN DISABLED, INC., AMERICAN CHINESE EMPOWERMENT ASSOCIATION INC., NEW YORK CITY COUNCIL MEMBER ALICKA AMPRY-SAMUEL, BROOKLYN EMERGE, INC., CHINESE ACTION NETWORK INC., NEW YORK CITY COUNCIL MEMBER ROBERT E. CORNEGY, JR., NEW YORK CITY COUNCIL MEMBER LAURIE A. CUMBO, KHYBER SOCIETY OF AMERICA INC., JASON LOUGHRAN, NEW YORK CITY COUNCIL MEMBER FARAH N. LOUIS, NEW YORK CITY COUNCIL MEMBER I. DANEEK MILLER, PAKISTANI AMERICAN YOUTH SOCIETY, INC., RUSSIAN AMERICAN VOTERS EDUCATIONAL LEAGUE, INC., UA3 INC., UNITED CLERGY COALITION BY BISHOP GERARD SEABROOKS, SUSTAINABLE UNITED NEIGHBORHOODS INC., YOUR NETWORK CARING COMMUNITY ADVOCATE (YNCAA), INC.,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, NEW YORK CITY CAMPAIGN FINANCE BOARD,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 120, 121, 122, 124, 125, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, it is

ORDERED that the application of Plaintiffs for an order temporarily enjoining and restraining Defendants City of New York (the "City"), New York City Board of Elections (the "Board of Elections"), and New York City Campaign Finance Board (the "City CFB") (collectively, Defendants), their agents and successors in office, and all persons acting in concert

**DECISION + ORDER ON
MOTION**

with, or as an agent of, from administering, implementing, or conducting an election in the City with the use of ranked choice voting (“RCV”), including, and not limited to, the June 22, 2021 election, until there is proper implementation of a RCV elections system (Motion Seq. 004) is denied; and it is further

ORDERED that the branch of Plaintiffs’ motion seeking leave to amend their complaint to seek an order restraining all future elections in the City from using RCV until there is proper implementation of a RCV elections system is denied without prejudice.

MEMORANDUM DECISION

In this Election Law proceeding, Plaintiffs Adrienne E. Adams, et al. move by Order to Show Cause for a temporary restraining order (“TRO”) and preliminary injunction enjoining and restraining Defendants City of New York (the “City”), New York City Board of Elections (the “Board of Elections”), and New York City Campaign Finance Board (the “City CFB”) (collectively, Defendants), their agents and successors in office, and all persons acting in concert with, or as an agent of, from administering, implementing or conducting any future elections in the City with the use of ranked choice voting (“RCV”) (Motion Seq. 004).

Pursuant to CPLR 6313, pending the hearing and determination of this application, Plaintiffs also seek an order temporarily restraining and enjoining Defendants from administering, implementing, or conducting an election in the City with the use of RCV, including, and not limited to, the June 22, 2021 election, until there is proper implementation of a RCV elections system.

Defendants, Intervenor-Defendant Moumita Ahmed, and Permissive Intervenors Common Cause, New York Communities for Change, The Black Institute, the Northwest Bronx Community and Clergy Coalition, the Citizens Union, and the League of Women Voters of the City of New York, Inc. (collectively, Permissive Intervenors) oppose Plaintiffs’ application in its entirety.

BACKGROUND

In 2019, the City Charter Revision Commission proposed an amendment to the New York City Charter (NYC Charter) to provide for RCV in City elections. The proposed amendment would allow City voters to rank up to five candidates in primary and special

elections for Mayor, Public Advocate, Comptroller, Borough President, and City Council, beginning in January 2021 (NYSCEF doc No. 135 at 3).

The proposed amendment appeared as Ballot Question #1 in the City election held November 5, 2019 (NYSCEF doc No. 134 at 3). The City voters approved the proposed amendment by an approximately 3-1 margin (*id.*). After the amendment passed, in accordance with the language of NYC Charter §1057-g, the Board of Elections submitted its implementation plan to the Mayor and the City Council (NYSCEF doc No. 3).

As of the date of this decision, four special elections in the City have been conducted using RCV since the amendment took effect in January 2021: a February 2 special election in City Council District 24, a February 23 special election in City Council District 31, and two March 23 special elections in City Council Districts 11 and 15 (NYSCEF doc No. 135 at 3).

On June 22, 2021, the City will hold a primary election for the offices of Mayor, Comptroller, Public Advocate, Borough President, and Member of the City Council with the use of RCV (NYSCEF doc No. 134 at 2).

PROCEDURAL HISTORY

On December 8, 2020, Plaintiffs, led by City Council member Adrienne E. Adams, commenced this proceeding by filing a summons and complaint against Defendants, seeking declaratory and injunctive relief to prevent the use of RCV in city elections, on the grounds that the Board of Elections has failed to comply with the implementation requirements of the City Charter, including securing the certification of RCV tabulation software required by the New York State Board of Elections (the “State Board of Elections”). Plaintiffs further assert that Defendants’ RCV plan, if allowed to proceed, would deprive the City’s limited-English proficient population of the right to vote and elect candidates of their choice, in violation of both

the Voting Rights Act (52 U.S.C. § 10101 et seq.) and New York State Election Law § 3-412 (NYSCEF doc No. 1).

On December 14, 2020, Plaintiffs moved by Order to Show Cause for a TRO and a preliminary injunction enjoining and restraining Defendants from using RCV in the aforementioned February 2, 2021 special election in City Council District 24 (Motion Seq. 001).

On December 16, 2020, the Court held oral argument on Motion Seq. 001 via Microsoft Teams, wherein counsel for the Board of Elections maintained that it was ready, willing and able to properly conduct the February 2 special election using RCV (NYSCEF doc No. 22).

At the conclusion of the December 16 hearing, the Court issued an order denying both Plaintiffs' application for an interim stay as well as their application for an expedited preliminary injunction hearing (NYSCEF doc No. 20).¹ The Court held it was without jurisdiction to grant an interim stay, given that pursuant to CPLR § 6313(a), “[n]o temporary restraining order may be granted in an action...against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties,” and here, the Board had a statutory duty to conduct the February 2 special election using RCV. (*id.*). The Court further was similarly disinclined to order an expedited preliminary injunction hearing as the overseas ballots for the February 2 special election were scheduled to be dispersed just two days after the hearing, on December 18, 2020, and a determination on a preliminary injunction thus could not be made in time to override a potential nullity of the overseas ballots (*id.*). (The Court stated: “This Court is disinclined to take any action that may result in the disenfranchisement of even one voter or take any action that may result in even one voter’s ballot being nullified” [*id.* at 3]).

¹ The Court also granted the application of Intervenor-Defendant Moumita Ahmed, a candidate for City Council in the February 2 special election, to appear in this proceeding.

On December 17, Plaintiffs sought leave to appeal this Court's December 16 order denying their motion for a TRO and sought a preliminary injunction from the First Department. On January 7, 2021, the First Department denied both of Plaintiffs' applications (NYSCEF doc No. 135 at 3).

On January 13, 2020, Permissive Intervenors, six civic and community organizations in the City, filed a motion to intervene in this proceeding (Motion Seq. 003).² As the motion was opposed by Plaintiffs, the Court held a hearing via Microsoft Teams on January 22, 2021 to address the parties' arguments (NYSCEF doc No. 55.) At the conclusion of the January 22 hearing, the Court granted Permissive Intervenors' application, finding that Permissive Intervenors' interest in the outcome of this proceeding, while opposite to Plaintiffs', was equally substantial in nature, as Permissive Intervenors and Plaintiffs both consist of civic and community organizations seeking to ensure that RCV is properly implemented for the voters they represent.³ The Court also set an expedited discovery schedule at the January 22 hearing, directing Plaintiffs, Intervenor-Defendant, and Permissive Intervenors to serve all written demands on Defendants on or before January 29 (NYSCEF doc No. 55). The parties proceeded with discovery, with Defendants producing documentation in response to the requests throughout February (NYSCEF doc Nos. 70-78).

On March 4, 2021, the parties appeared for a compliance conference via Microsoft Teams wherein the Court directed that the parties assess all document production that had taken place thus far and identify any issues or deficiencies on or before March 18 (NSYCEF doc No. 79). The Court also directed counsel to notice any depositions or before April 8.

² Plaintiffs filed Motion Seq. 002 on January 6, 2021, seeking a default judgment against Defendants, but withdrew their motion after the Defendants filed their Answer later that same day (NYSCEF doc No. 32).

³ On January 27, 2021, the Court issued a written decision outlining the rationale for its decision to grant Permissive Intervenors' application (NYSCEF doc No. 57).

The Instant Motion

On April 19, 2021, Plaintiffs commenced the instant motion by Order to Show Cause, seeking a TRO and preliminary injunction enjoining and restraining Defendants, their agents and successors in office, and all persons acting in concert with, or as an agent of, from administering, implementing or conducting any future elections from administering, implementing, or conducting an election in the City with the use of RCV, including, and not limited to, the June 22, 2021 primary election (“the June 22 election”), until there is proper implementation of an RCV elections system. (NYSCEF doc No. 91, ¶ 2). Plaintiffs also seek leave to amend their complaint to *inter alia*, effect a line-by-line amendment to their Complaint and to restrain future City elections from using RCV until there is proper implementation of a RCV elections system (NSYCEF doc No. 91, ¶¶ 60-67).

Plaintiffs argue that as the State Board of Elections has not yet approved the Board of Elections’ tabulation software to electronically tabulate votes, the Board of Elections has engaged in manual hand counting, which is claimed to neither be authorized by § 1057-g of the City Charter nor the Election Law (*id.* at ¶¶ 19-34). Plaintiffs also argue that polling evidence demonstrates that the Board of Elections’ education efforts regarding the use of RCV have been unsuccessful and have failed to reach minority populations (*id.* at ¶ 42, 66, 40; NYSCEF Doc 6, “Ranked-choice, not quite ready”).⁴

⁴ It is noted that the weblink appearing at the bottom NYSCEF Doc. 6 does not exist. The text of the submitted article, under a different headline, was located on the Daily News Opinion section online, written by Selvena Brooks-Powers and Eric Dinowitz (April 15, 2021) at <https://www.nydailynews.com/opinion/ny-oped-ranked-choice-unready-closeup-20210415-nuyq4za35vhk3cijqr132dxjaq-story.html>.

After reviewing Plaintiffs' Order to Show Cause and accompanying affirmation, the Court determined that a conference with all parties was needed prior to any initialization of the Order to Show Cause.⁵

The April 22, 2021 Conference

On April 22, the Court held a Microsoft Teams conference to address the instant motion. Defendants and all Intervenors argued that Plaintiffs have not asserted a legally viable claim as manual hand counting is authorized by § 1057-g of the City Charter. Intervenor-Defendant also pointed out that Plaintiffs are again seeking a TRO to prevent the use of RCV in an election but have not addressed this Court's prior determination that it lacks jurisdiction to issue a TRO against the Board of Elections under CPLR 6313(a) (NYSCEF doc No. 127 at 35, l: 19-24).

Defendants and all Intervenors also raised the argument that this Court need not reach the legal issues presented by Plaintiffs' instant motion, as the branch of the motion seeking a TRO enjoining the use of RCV in the June 22 election can be denied based on laches alone (*id.* at 47, l: 15-21). Defendants and Intervenors maintained that Plaintiffs have been aware from the outset of this proceeding in December 2020 that the City planned to manually count votes if it had not secured certification of the tabulation software from the State Board of Elections, and yet still waited until two months before the June 22 election and 16 days before the deadline to send out military and absentee ballots for the same, to file the instant motion (NSYCEF doc No. 134 at 5).

The Court stated that the application to enjoin the use of RCV in the June 22 election is potentially barred by laches *if* Defendants and Intervenors can establish that the evidentiary record reflects that Plaintiffs were aware of hand counting from the outset ("The laches issue is,

⁵ By Letter to the Court dated April 20, 2021, counsel for Intervenor-Defendant requested that the Court decline to sign the Order to Show Cause on the ground that Plaintiffs' argument was founded on information that had been readily available since § 1057-g of the City Charter took effect, and Plaintiffs nevertheless waited until two months before the June 22 election to bring the application (NYSCEF doc No. 103).

why didn't the Court hear about this argument from the time in December, when the Board of Elections said we're going to hand count . . . if the record bears out that back in December and in January, and the transcripts will reflect this . . .if it bears out that hand counting was represented back in December, January and even up to February 2nd, there is no reason that I . . . am seeing a motion now with respect to hand counting" [NYSCEF doc No. 127 at 54, l: 19-22; 55, l: 16-23]).

The Court concluded that a determination on whether Plaintiff's application for a TRO enjoining the use of RCV at the June 22 election is barred by laches must be made prior to any adjudication of the legal merits of the motions ("I need real briefing on the legal issue quite honestly before I consider anything close to a stay or a preliminary hearing or an injunction" [*id.* at 44, l: 12-15]). The Court accordingly ordered an expedited submission schedule on this discreet issue (NSYCEF doc No. 124). The Court directed Intervenor-Defendant, Defendants, and Permissive Intervenors to submit briefs and supporting documentation in support of their position that Plaintiffs' application for a TRO enjoining the use of RCV in the June 22 election is barred by laches on or before April 28, and directed that Plaintiff respond by May 3 (*id.*). The Court held that there would be no further submissions beyond Plaintiff's response (*id.*).

The Court also stayed all discovery in this proceeding pending its determination on the issue of laches.⁶

Intervenor-Defendant's Arguments

Intervenor-Defendant argues that the evidentiary record here clearly reflects that hand-counting was raised at the outset of this proceeding, and Plaintiffs thus erred in not seeking a TRO enjoining RCV in the June 22 election in December 2020 immediately after this Court declined their prior application for an interim stay (NYSCEF doc No. 128). Plaintiffs instead

⁶ Included in the stay is Plaintiffs' motion to compel Defendants to comply with outstanding discovery demands (Motion Seq. 005), which was filed April 21.

waited several months to bring the instant application, notwithstanding that the transcript of the December 2020 hearing reflects Plaintiffs were already aware of the delay in the State Board of Elections' approval of the tabulation software in "mid-December" (*id.* at 4). Intervenor-Defendant also notes that the focus of inquiry for laches is "not merely on the conduct of the parties but whether the injunction would impair or impede some right or interest of non-parties" (quoting *Silberberg v Bd. of Elections of N.Y.*, 216, F. Supp 3d, 411, 421 [SDNY 2016]). Here, numerous non-party organizations have already issued ranked endorsements for the upcoming election as it has long been public knowledge that RCV will be used in the June 22 election (*id.* at 3).

Intervenor-Defendant also raises the argument that this application must be barred by laches solely on the ground that Plaintiffs did not file their motion until 16 days before May 7, which is the day that overseas and military ballots for the June 22 election must be dispersed, a deadline that Plaintiffs have been aware of throughout this proceeding (*id.* at 1).⁷ Intervenor-Defendant contends that as Plaintiffs unreasonably waited to file their motion until April 21, rendering it virtually impossible for the Court to order a briefing schedule on the merits of the application, let alone render a decision in time to prevent a potential nullity of the overseas ballots, laches must apply (*id.* at 1-2).

As a final note, Intervenor-Defendant draws the Court's attention to the fact that Plaintiffs' arguments in support of their application have now been publicly contradicted by one of the named Plaintiffs in this proceeding. On April 28, 2021, named Plaintiff Ampry-Samuel appeared at a press conference at which Mayor de Blasio announced an investment of \$15 million in City education on RCV, and stated that the investment "will ensure that New York

⁷ By Letter to the Court dated April 25, 2021, counsel for Plaintiffs confirmed that the deadline to transmit ballots for Military/Special Federal voters is May 7, 2021 (NYSCEF doc No. 125).

City voters receive the information and tools needed to not only be comfortable, but confident in using this rank choice ballot” (*id.* at 3, citing an informal transcription of the press conference).

Defendants’ Arguments

Defendants argue that the Board of Elections has repeatedly stated that a manual count is authorized by § 1057-g of the City Charter throughout this proceeding, including at the December 2020 hearing, and again at a follow up conference in January 2021 (NYSCEF doc No. 132 at 11). They further note that Plaintiffs’ appeal of this Court’s denial of a TRO staying the use of RCV in the February 2021 special election was expressly rejected by the First Department on appeal (*id.*), and it is maintained that the Board of Elections has already successfully conducted four special elections in compliance City Charter§ 1057-g.⁸

With respect to Plaintiffs’ claims that the Board of Elections has not sufficiently educated voters, Defendants aver that the Board of Elections and CFB have undertaken a substantial advertising campaign to educate and inform all voters across the five boroughs about the use of RCV in the June 22 election, including a mailer sent to every registered City voter between April 15 and 18, 2021, and a voter guide that will be mailed to every voter in mid-May (*id.* at 14).

As a final note, Defendants echo Intervenor-Defendant’s point that as military ballots must be mailed no later than May 7, 2021 pursuant to Election Law § 10-108, and absentee ballots must be mailed shortly thereafter, there is no time for the parties to brief the substantive issues raised in Plaintiffs’ application (*id.* at 15).

Permissive Intervenors’ Arguments

Permissive Intervenors similarly argue that Plaintiffs’ application must be barred as they impermissibly waited to file the instant motion even though the use of hand counting has been

⁸ The first election in February 2021 did not ultimately require the use of RCV as the prevailing candidate received more than 50% of the votes, but RCV was required at the three subsequent elections (NYSCEF doc No. 132 at 13).

discussed at several prior hearings in this proceeding, and their application is thus “premised on a supposed emergency entirely of [their] own making” (NYSCEF doc No. 135 at 1). Permissive Intervenor also note that the Court of Appeals and the First Department have repeatedly held that waiting months after learning about a policy or law to seek a TRO or preliminary injunction is sufficient to deny the request on the ground of laches (*id.* at 7, citing *Elfante v Hanna*, 40 NY2d 908, 908-09 [1976]; *SportsChannel Am. Assocs. v Nat’l Hockey League*, 186 AD2d 417 [1st Dept 1992]). Permissive Intervenor note that all grounds cited by Plaintiffs in support of their TRO application, namely: the failure to get tabulation software certified, the Board of Election’s plan to use hand counting, the alleged violation of State Election Law, and the alleged unsuccessful education efforts, have been known to Plaintiffs throughout the history of this proceeding (*id.* at 7-9).

Permissive Intervenor also argue that a TRO enjoining the use of RCV would cause undue prejudice as the Board of Elections, the City CFB, and Permissive Intervenor themselves have already devoted millions of dollars and countless hours in staff time to educating City voters about RCV (*id.* at 11). Permissive Intervenor conclude that any change to the voting process in the June 22 election at this juncture would cause enormous confusion for voters that have already been educated about the use of RCV and have planned their voting strategies accordingly.

Plaintiffs’ Response

In opposition, Plaintiffs maintain that the evidentiary record in fact reflects that counsel for the Board of Elections repeatedly represented that electronic tabulation software would be ready in time for the June 22 election, both at the December 2020 and March 2021 court appearances (NYSCEF doc No. 138 at 4-5). Plaintiffs also argue that Defendants have repeatedly

delayed in responding to discovery requests pertaining to the electronic tabulation software approval process, and such delays have caused Plaintiffs to file the instant motion at this late juncture (*id.* at 6).

Plaintiffs also dispute Defendants' argument that the City Charter allows for manual hand counting, contending that the City Charter allows hand canvassing beyond the specific instances allowed by the Election Law only if the Board of Elections promulgates rules that supersede the State Election Law, and in any case, the City Charter does not permit the Board of Elections to promulgate rules that provide for exclusive hand canvassing (*id.* at 7). Plaintiffs also contend that Defendants and Intervenors' argument regarding a potential nullity of the military and absentee ballots is a non-sequitur, as even if the ballots with ranked choice voting are sent out before this Court renders its decision, the voters' first choices on their mailed ballots can simply be deemed to be the voters' selection.

Plaintiffs contend that laches should not bar the relief sought as Defendants misled Plaintiffs into believing that electronic software tabulation would be used in the June 22 election, and Plaintiffs have only just learned that such statements were misrepresentations (*id.* at 16). Plaintiffs maintain that they have not been dilatory in commencing this motion and "the fault for any delay here lies squarely" with Defendants due to their misrepresentations and delays in discovery compliance (*id.*). Plaintiffs conclude that notwithstanding any of reasoning advanced by Defendants and Intervenors in support of their laches defense, the alleged culpable conduct of the Board of Elections renders laches inapplicable to the instant motion.

DISCUSSION

Laches is an "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." (*In re Linker*, 23 AD3d 186, 189 [1st Dept

2005]). It is a concept very much applicable in Election Law cases, where even the shortest of delays have the potential to result in significant prejudice due to the disruption of the election and the necessity of judicial intervention to avoid that disruption (*Elefante*, supra; *Dao Yin v. Cuomo*, 183 AD3d 926 [2d Dept 2020]).

“The focus of the inquiry is not merely on the conduct of the parties but whether the injunction would impair or impede some right or interest of non-parties (*Silberberg v. Board of Elections of the State of New York*, 216 F.Supp.3d 411, 421 [SDNY 2016]). Thus, to prevail on a claim of laches, the party pleading the claim must prove their claim not on demonstration of the delay alone, (*In re Linker*, 23 AD3d 190) but by also showing injury, change of position, loss of evidence or some other disadvantage resulting from the delay (*Skrodelis v. Norbergs*, 272 AD2d 316 [2d Dept 2000]; *Schulz v. State*, 81 NY2d 336, 348 [1993]; *Wessendorf v. Donohue*, 54 Misc.2d 1045 [Sup. Ct. Alb. Cty. 1967])). Where found, laches can operate to bar a TRO or preliminary injunction (*De Candido v. Young Stars, Inc.*, 10 AD2d 922 [1st Dept 1960]).

In this case, although Plaintiffs claim entitlement to the injunction they seek predicated on the actions and inactions of defendants claimed to have caused delay, they fail to explain their own extensive delay in bringing this application.

At the outset, the credible proof supports the finding that contrary to Plaintiffs’ assertions, the Board of Elections set forth a detailed plan for implementation of RCV as early as June 2019 (NYSCEF doc No 2), a plan which was submitted to the City in June 2020 in accordance with the requirements of the City Charter §1057-g (i) (NYSCEF doc No. 3; NYSCEF doc No. 22 at 12). The Board of Elections moved forward on its plan, albeit clearly not as quickly as they hoped, seeking vendors to produce the needed software. By August 2020, the Board of Elections had conveyed its concerns as to implementation and certification of the

needed tabulation software to the State Board of Elections, which indicated awareness that further steps were needed, and understood that RCV was slated to be used in NYC as early as February 2021. All of this is reflected in the official video of the State Board of Elections Board of Commissioners Meeting held on September 8, 2020,⁹ a meeting repeatedly referenced in Plaintiffs' Complaint and subsequent papers (NYSCEF doc No 9, at 12; NYSCEF doc No. 126 at 37-38).

The Board of Elections further established that it has taken numerous steps to acquire, implement, and obtain certification for the necessary software for NYC voting machines. The parties in this Special Proceeding concede that the Requests for Proposal (RFP) as to the necessary software went out on November 2020 and was returnable December 7, 2020 (NYSCEF Doc No 22 at 43, 89). The credible proof supports the finding that the Board of Elections began making its concerns as to the needed software and its certification known publicly in September 2020 (NYSCEF 91, FN3).¹⁰ The credible proof also supports the finding that the software was ultimately acquired and being tested in real-time application alongside manual canvassing in early 2021, notwithstanding the lack of State Board of Elections Certification (NYSCEF doc No. 126 at 15-16).¹¹

What is not established here is Plaintiffs' lack of any of this knowledge. Most of the above information was presented to the Court by *Plaintiffs* in their initial December 2020 papers.

⁹ <https://www.youtube.com/watch?v=f-3Fr-opFs8&feature=youtu.be> (at minutes 51:00 – 56).

¹⁰ Plaintiffs' footnote provides a link to records from the Commissioners' Meetings for the Board Of Elections (<https://vote.nyc/page/commissioners-meetings>, which further supports the findings that the Board of Elections was also expressing public concern as certification of tabulation software as early as September 8, 2020.

¹¹ MR. KITZINGER: [...] “[T]he board has just conducted a second ranked choice election and the counting the ranked choice or the count on that is proceeding right now. That is proceeding both on a manual and electronic basis. The electronic tabulation software has not yet been approved by the State Board of Elections as far as I know. But they are running it in parallel to essentially test it to make sure that it produces the same results as a manual canvass on the ranked choice rounds” (NYSCEF doc No. 126 at 15-16).

Moreover, during the first Court appearance on December 17, Plaintiffs were made aware of the Board of Elections' desire to have certification of the RCV software in place for the June 22 election to the extent they were not aware before¹² (NYSCEF Doc No. 22 at 39-41).

Similarly, Plaintiffs have failed to establish that they had no knowledge, or delayed knowledge, or even insufficient knowledge prior to April 19, 2021 that the Board of Elections intended to use manual canvassing, or hand counting of RCV votes cast, either in whole or in part. The use of manual canvassing is identified in City Charter §1057-g, and that language, has not changed since implementation. *All* of Plaintiffs' arguments as to the use of manual canvassing, or hand counting of the RCV votes cast, were first presented to the Court in Plaintiffs' December 2020 TRO application. Those issues were argued and discussed on the record before the Court in December 2020 (NYSCEF Doc. No. 22 at 41)¹³, January 2021 (NYSCEF Doc. No 56 at 31-33) and March 2021 (NYSCEF Doc No 126 at 15-16). Plaintiffs' claim in April 2021, advanced 16

¹² It is noted that to date, there is no proof presented by any of the parties to support a finding that certification of the software will not happen, or even give rise to the concern that it might not happen in time for the June 22 election.

¹³ Relevant excerpts of the transcripts as to this issue include:

MR. KITZINGER: Your Honor, I believe the Board of Elections is preparing -- will be ready and able to do it either way -- in some fashion for the February 2nd election using the electronic scanning and tabulation for the June primary. (December 17, 2020 Tr. p. 41).

MR. KITZINGER: Your Honor, the reason I asked for a conference is because after receiving Ms. Marion's letter I reached out to Ms. Marion and her co-counsel, Mr. Carone, to inquire exactly what they wanted a hearing on [...] They don't seem to like that the Board of Elections may manually canvas the ranked-choice portion of the election, if that is necessary, or how they are going about selecting the software to do an electronic tabulation, but, again, that is something that the law explicitly leaves to the Board of Elections to do. And the provision of the law, 1057-g, I believe it is, --

THE COURT: Yes.

MR. KITZINGER: -- of the Charter vests the Board of Elections with the authority to do a manual count if that is necessary (January 27, 2021 Tr. p. 31-33).

MR. KITZINGER; [...] The documents really demonstrate what the board has done and that they are ready to go. The fact they now conducted two elections under the ranked choice voting law and the Campaign finance Board has produced its materials, will continue to produce materials as they are created and produced, the proof is in the pudding (March 4, 2021 Tr. p. 16).

days before the known distribution date of the primary ballots for overseas and military voters, that they somehow did not know earlier that the Board of Elections intended to engage in manual counting of RCV ballots, exclusively or otherwise, is therefore simply without merit.

Plaintiffs' opposition gives short shrift to the arguments advanced in their initial affirmation that Defendants have not sufficiently educated City voters on the use of RCV in the June 22 election.¹⁴ This might be due to the fact that in the time that Plaintiffs hinted at bringing this application in all three court appearances held between December 2020 and March 2021 but did not bring the application, the credible proof supports the finding that Defendants spent millions of dollars and assigned countless hours of staff resources on the promotion and education of RCV to the City's voters. Moreover, the credible proof supports the finding that as of April 28, 2021, in addition to the named plaintiff cited by Intervenor-Defendant in her opposition, a second named plaintiff in this action and one of the two elected officials whose statements are relied upon in support of one of Plaintiffs' claims as to failed RCV education, have all made public statements acknowledging and endorsing Defendants' extensive efforts in educating registered voters as to the use of RCV, and the importance of RCV in upcoming City elections:¹⁵

"As we approach our City elections in June, communities hardest hit by the COVID-19 pandemic continue to struggle with access to information and resources. Voting is a right and Communities of Color have historically been disenfranchised. I am excited to hear that Mayor de Blasio is investing \$15 Million towards outreach and education initiatives to ensure every voter in New York City is educated about the new Rank Choice Voting process and system. And we are able to encourage a higher voter turnout that will impact generations to come. This infusion of \$15 million is much needed and will be a game

¹⁴ Indeed, said arguments appear to be abandoned as they are not discussed in Plaintiffs' opposition (NYSCEF Doc No. 138)

¹⁵ April 28, 2021, [New York City to Launch \\$15 Million Ranked Choice Voting Education Campaign | City of New York \(nyc.gov\)](https://www.nyc.gov/newsroom/2021-04-28-launch-ranked-choice-voting-education-campaign).

changer in our most vulnerable neighborhoods," said Council Member Alicka Ampry-Samuel.

"With Primary Day less than two months away, we must ramp up our efforts to educate voters in every language and zip code to combat misinformation and disenfranchisement. Our government must reflect our cultural diversity and that goal can only be achieved when we work together to make sure every voice is heard and every vote is counted," said Council Member Farah N. Louis.

"Ranked Choice Voting education is a critical investment for our city, and I commend the Mayor and DemocracyNYC for their commitment to our democratic process. As a longtime advocate for voter access, I am thrilled that this campaign will use a variety of methods to reach voters, particularly those who are too often left behind. It is vital that everyone have the tools they need to make their voices heard during this pandemic recovery, and with such an important primary quickly approaching, we hope these efforts will help empower New Yorkers," said Council Member Eric Dinowitz.

In terms of specific actions taken by Defendants with respect to educating registered and eligible voters about RCV, the credible proof supports the finding that in accordance with the language of NYC Charter 1057-g(h), the City CFB created a voter education campaign in printed media generating an educational RCV postcard, and a Voter Guide booklet containing detailed instructions on RCV, both of which are sent to all registered City voters and eligible households (NYSCEF doc Nos 129-131). The City CFB also commenced an advertising campaign promoting RCV using television and digital advertisements, as well as posters produced in English, Spanish, Chinese, Korean, and Bengali (NYSCEF doc No 129 at 3). As required by law, on March 15, 2021, the City CFB published a RCV video explainer which is posted on multiple digital platforms and has been viewed thousands of times (*id.*), and, since January 2021, the City CFB's social media pages and email communications have included information on RCV with hyperlinks for voters to find more information on the use of RCV in upcoming elections (*id.* Tr. 3-4). The record reflects that Plaintiffs had knowledge of the education plan created by the City

CFB, as the plan was detailed in Defendants' appeals papers before the First Department (NYSCEF doc No 10, 135 at 16).

The Board of Elections has also undertaken public education efforts as to RCV (NYSCEF doc No 132). On December 23, 2020, the Board of Elections launched a landing page explaining RCV with an instructional video (*id.* p. 2). Content is available on the Board of Election's website, promoted extensively through social media, in their five required languages: English, Spanish, Chinese, Korean, and Bengali (*id.*). Between April 15 and 18, 2021, in accordance with statutory requirements, the Board of Elections sent out information notices to all registered voters detailing the addition of RCV and its use in upcoming elections (*id.*; NYSCEF doc No 133). The Board of Elections also hired an external advertising agency to create a comprehensive media advertisement campaign, in print and digital forms. The Board of Elections also created instructional palm cards in multiple languages which have been distributed at all Early Voting and Election Day sites for each of the Special Elections since January 1, 2021 (NYSCEF doc No 132).

After careful consideration of the facts presented by the parties and the extensive evidentiary record presented in this case, the Court concludes that to grant a preliminary injunction at this late date, when it is evident that Plaintiffs' instant application could have been made as early as December 2020 if not sooner, would do little more than create unnecessary confusion, delay, and prejudice to the Voters of the City of New York (*Elefante*, 40 NY2d 908; *Dao Yin*, 183 AD3d 926). Plaintiffs' instant application for relief is therefore barred by laches and is denied.

Leave to Amend

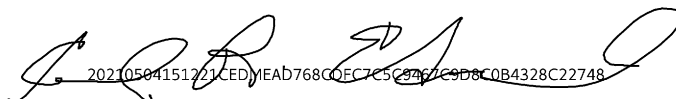
As discussed *supra*, Plaintiffs also seek leave to amend their complaint to *inter alia*, effect a line-by-line amendment to their Complaint and to restrain future City elections from using RCV until there is proper implementation of a RCV elections system (NSYCEF doc No. 91, ¶¶ 60-67). Given that the Proposed Amended Complaint overlaps, subsumes and includes the issue of laches addressed herein, Plaintiffs’ application to amend the complaint is denied without prejudice.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Plaintiffs for an order temporarily enjoining and restraining Defendants City of New York (the “City”), New York City Board of Elections (the “Board of Elections”), and New York City Campaign Finance Board (the “City CFB”) (collectively, Defendants), their agents and successors in office, and all persons acting in concert with, or as an agent of, from administering, implementing, or conducting an election in the City with the use of ranked choice voting (“RCV”), including, and not limited to, the June 22, 2021 election, until there is proper implementation of a RCV elections system (Motion Seq. 004) is denied; and it is further

ORDERED that the branch of Plaintiffs’ motion seeking leave to amend their complaint to seek an order restraining all future elections in the City from using RCV until there is proper implementation of a RCV elections system is denied without prejudice.



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5/4/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: