UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, **Employer,** **-and-** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW.** **Petitioner.**	**Case No. 02-RC-143012**

BRIEF IN SUPPORT OF COLUMBIA'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS

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The Trustees of Columbia University in the City of New York ("Columbia") submit this brief pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board in support of Columbia's exceptions to the Hearing Officer's March 6, 2017 Report and Recommendations on Objections ("RRO") in the above-captioned case. For the reasons explained below, the Board should reject the Hearing Officer's recommendations, sustain Columbia's objections to the conduct of the election, and order a new election.

INTRODUCTION

Board law makes clear that voters in a Board election must be able to cast their vote free from outside coercion, intimidation or irregularities. Regardless of whether such coercion, intimidation or irregularity may impact the outcome of an election, *any* deviation from this basic tenet would undermine voters' trust in the outcome of elections as well as the public's trust in the Board's policies and procedures. As illustrated below, the conduct of the election here created considerable doubt as to whether voters were able to cast their votes under the laboratory conditions necessary to ensure a free and fair election. For this reason, the Board should sustain Columbia's objections and order that the election be rerun.

The RRO ignored or mischaracterized key facts, misapplied Board precedent and held Columbia to an unworkable standard, all of which led to a flawed recommendation. The Board should disregard the Hearing Officer's report and recommendation because, *inter alia*:

- The record evidence showed that in order to enter the primary polling place, voters were forced to walk past known union agents, including the Union's president, who were stationed in the entrance of Earl Hall for many hours during the 2-day election. Although the Hearing Officer stated that the "mere presence of union agents is not necessarily coercive[]" when stationed in a location that voters have to pass to access the polling place, Board law states just the opposite – *i.e.*, that a party engages in objectionable conduct if one of its agents is continually present in a place where voters must pass in order to cast their

vote. These facts present a classic illustration of the basis for that rule, and are themselves sufficient to overturn the election: the fact that, because of the Union's conduct, voters had no choice other than to walk past union agents in the final moments before voting, means that there is no way to know how many voters either changed their vote for fear of reprisal or turned away rather than exercise their right to vote.

- The Hearing Officer compounded the error by, without citing any precedent, requiring Columbia to prove "how many voters walked through the Earl Hall lobby while [the Union President] was present[,]" thereby holding Columbia to an impossible standard that it could have met only by having representatives or observers surveil voters entering the polling site, which would have violated Board law.

- The evidence showed that eligible voters were forced to vote under challenge, and that ineligible voters may have been allowed to vote, based on the Region's inconsistent approach to the use of voter identification.

- In reaching her conclusions, the Hearing Officer misconstrued a joint stipulation between Columbia and the Union that "all parties agreed that the Regional Director would require either 'Government or Columbia issued ID,'" and disregarded the Region's pre-election decision to require voters to provide identification before voting.

- The Hearing Officer misstated and misapplied Board and Court of Appeals cases recognizing that in large and complex elections like this one, the lack of an identification requirement creates reasonable doubt as to the validity of an election.

The Hearing Officer's recommendation to deny Columbia's objections was based largely on the notion that – given the margin of votes in favor of the union – the outcome would not have been different even in the absence of the conduct underlying Columbia's objections. In fact, the margin in favor of the Union, 979, means that 490 voters would have had to have voted against the Union to change the result, assuming (as the Hearing Officer did) that the 647 challenged ballots should be ignored even though many may have been cast by eligible voters affected by the inconsistent approach to identification. When considering that: (i) over 3,100 voters were assigned to vote at Earl Hall, where Union agents were stationed for over 6 hours during the 2-day election; (ii) many of the irregularities resulting from the inconsistent approach to voter identification occurred at Earl Hall; (iii) voters subjected to surveillance both inside and outside of

Earl Hall may have switched their vote for fear of reprisal or decided not to vote, and (iv) the number of challenged ballots, it is not only conceivable – but entirely likely – that the outcome of the election could have been different absent the objectionable conduct.

Through its Exceptions and Brief in Support of Exceptions, Columbia respectfully submits that the Hearing Officer's determinations are based on flawed factual findings and legal conclusions and should not be adopted. Columbia's objections should be sustained and the election should be rerun to ensure free and fair voter choice.

STATEMENT OF THE CASE

Columbia, one of the nation's oldest private institutions of higher education, has approximately 30,000 students, including 21,500 graduate students. On December 17, 2014, Petitioner Graduate Workers of Columbia-GWU, UAW (the "Union") filed a petition seeking to represent certain students who hold teaching and research appointments at Columbia.[1] The petition was dismissed by the Regional Director of Region 2 due to the fact that the students sought to be represented by the Union were not employees under *Brown University*, 342 NLRB 483 (2004). After granting the Union's request for review, the Board reversed *Brown University*, and remanded the case to Region 2 to process the election. On October 31, 2016, the Regional Director issued a Supplemental Decision and Direction of Election ("DDE") stating the eligibility

[1] The Union's petition sought to represent:

> INCLUDED: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Law Associates, Preceptors, Instructors, Listening Assistants, Course Assistants, Readers and Graders); All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
>
> EXCLUDED: All other employees, guards, and supervisors as defined in the Act.

criteria for eligible voters,[2] and setting the dates for a representation election. Pursuant to the Supplemental DDE, the Board conducted an election on December 7 and 8, 2016, at four polling sites located throughout Columbia's campus. The majority of counted ballots were in favor of union representation, although over 1,300 eligible voters did not vote and there were 647 challenged ballots.[3]

Following the election, Columbia filed timely objections to conduct affecting the results of the election. Columbia's objections to the election were premised on the following conduct that cast doubt on the results of the election: (1) the Union's continued, visible presence at a location in the main polling site, Earl Hall, that all 3,114 of the voters supposed to vote there were forced to pass; (2) video surveillance of voters entering the polls to vote at Earl Hall; (3) The Regional Director's eleventh-hour abrogation of her ruling that identification would be required to vote, followed by the Region's decision to prohibit any use of voter identification during the election; (4) the Region's dismissal of one of Columbia's observers; and (5) the Region temporarily

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[2] The Regional Director's eligibility determination included those students who:

> (1) hold an appointment or a training grant in a unit position in the fall semester 2016, or
>
> (2) are course assistants, graders or readers who are on the casual payroll and who worked 15 hours per week or more in a unit position in the fall semester 2016, or
>
> (3) have held a unit position for either the fall, spring and summer during the prior academic year.

[3] The Tally of Ballots was as follows:

> Approximate number of eligible voters:4256
> Number of void ballots:3
> Number of ballots cast for the Petitioner:1602
> Number of votes cast against participating labor organization:623
> Number of valid votes counted:2225
> Number of challenged ballots:647
> Number of valid votes counted plus challenged ballots:2872

suspending the polling at CUMC by closing the doors to the polling place and by running out of challenge ballot envelopes for approximately ninety minutes.

On January 4, 2017, the Regional Director for Region 29 issued a Supplemental Decision on Objections and Notice of Hearing, in which she directed that a hearing be held regarding Columbia's objections.[4] The hearing was held on January 23, 24 and 25, 2017. On March 6, 2017, the Hearing Officer issued the Report and Recommendations overruling Columbia's objections.

STANDARD OF REVIEW

The Board reviews *de novo* a Hearing Officer's decision and its underpinnings. *See Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) ("[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."); *Sands Bethworks Gaming, LLC*, 361 NLRB No. 102 (Nov. 12, 2014) ("The Board then stated that it had considered *de novo* the representation issues and the hearing officer's report recommending disposition of them."). Where the Hearing Officer's legal conclusions are not based on resolutions of all the relevant facts, the Board should make its own factual findings. *See Williamson Mem'l Hosp.*, 284 NLRB 37, 37 (1987) ("Inasmuch as the judge has failed to perceive and resolve on two occasions the factual and legal issues before him, the Board is certainly free to review the record de novo and make appropriate findings of fact and conclusions of law.").

In general, the Board will accept the Hearing Officer's credibility findings that are based primarily on witness demeanor. *See Standard Dry Wall*, 91 NLRB at 545 ("[I]t is our policy to

[4] On December 19, 2016, the case was transferred from Region 2 to Region 29.

attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor."). However, "where credibility resolutions are not based primarily upon demeanor, it is well settled that the Board itself may proceed to an independent evaluation of credibility." *Electrical Workers IBEW Local 38 (Cleveland Electrical)*, 221 NLRB 1073, 1074 (1975); *Harry Lunstead Designs*, 270 NLRB 1163 (1984) ("[W]ith respect to certain matters[,] a clear preponderance of all the relevant evidence establishes that the hearing officer's credibility resolutions were incorrect and without proper support in the record.") (citations omitted).[5]

ARGUMENT

An election must be set aside where "objectionable conduct *could* well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (emphasis added). The evidence presented at the hearing by both Columbia and the Union was largely credited by the Hearing Officer and, with the exception of two witnesses, the Hearing Officer noted that all of the testimony was unrebutted.[6] (RRO at 10, 16, 22, 28, 34-35). Yet, despite crediting the overwhelming majority of testimony from Columbia's witnesses, the Hearing Officer erred by denying Columbia's First, Second, Third, Fifth and Sixth Objections in light of the credited, and unrebutted testimony.[7]

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[5] *Accord RC Aluminum Indus., Inc.*, 343 NLRB 939, 939 n.1 (2004) ("[T]he Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the judge's findings of facts, but bases its findings on a de novo review of the entire record.").

[6] With respect to Objection 6, the Hearing Officer incorrectly credited the Union's witness over Columbia's two witnesses on the question of whether the Board Agent closed the door leading to the polling place at Columbia University Medical Center ("CUMC"), making it appear as if CUMC was closed for voting. This ruling must be rejected for the reasons explained in Section III(B), *infra*.

[7] Columbia hereby withdraws its Fourth objection regarding the dismissal of one of its observers from the CUMC polling site.

As a threshold matter, while the tally of ballots is a relevant factor when determining whether alleged objectionable conduct could have affected the results of the election, it is not the only factor. RRO at 4-5 *citing Sanitation Salvage Corp.*, 359 NLRB 1129 (2013). As noted repeatedly by the Hearing Officer, the Union prevailed in the election by over 900 votes. *See* RRO at 4, 36, 39. This number was central to the Hearing Officer's recommendation to deny the objections because, in the Hearing Officer's view, Columbia did not proffer evidence that "could have affected the results of this election." *Id.* at 39. However, the vote count, while a relevant factor under established Board law, must be properly tabulated. The Hearing Officer erred in requiring that Columbia prove that the conduct affected "more than 900 votes." *Id.* Instead, Columbia only had to demonstrate that 490 voters were affected by the Union and Region's misconduct.

This tabulation comes from simple arithmetic. The Hearing Officer should have looked at the vote spread, 979 votes, and determined how many voters would have had to switch their vote in order to affect the results of the election (490). This approach is supported by *Cambridge Tool & Manufacturing Co.*, 316 NLRB 716 (1995), a seminal case discussing election objections, and the Courts of Appeals. *See id.* ("Here, if both of the challenged ballots that are to be counted are against the Petitioner, *then a switch of one vote to oppose the Petitioner would have been decisive*.") (emphasis added). *See also Avondale Indus. Inc., v. NLRB*, 180 F.3d 633, 636 (5th Cir. 1999) (noting when tallying the margin of victory that the "Union's victory margin to about 250 votes. *A swing of 130 votes would reverse the election results*.") (emphasis added).

Furthermore, the Hearing Officer's tabulation does not take into account the 647 challenged ballots cast in the election, which may have included eligible voters who were forced to

vote by challenge due to the Board's inconsistent rulings on voter identification. The Hearing Officer was tasked with determining whether the conduct described in Columbia's objections could have affected the election. Her failure to address the 647 challenged ballots, outside of a passing mention when reciting the Tally of Ballots, was plain error. The fact that there was such a high percentage of challenged ballots in this case, many of which may have been eligible voters affected by the inconsistent application of the identification requirements, further minimizes the number of voters that Columbia had to demonstrate were affected by the objectionable conduct in this election.

The Hearing Officer also held Columbia to an unreasonably high (and unsupported) standard by refusing to take into account the number of voters who did not vote in the election and voters who may well have been turned away by the objectionable conduct. Where there is conduct that may turn voters away from the polls, the examiner should consider not only the vote tally but also the number of voters who did not vote. *See, e.g.*, *Whatcom Sec. Agency, Inc.*, 258 NLRB 985 (1981) ("Thus, under all the circumstances, *and particularly since the large number of nonvoters could have affected the election results*, we find that the deviation from our normal election procedures created doubt and uncertainty as to the results of the instant election which warrant setting aside the election and holding a new one.") (emphasis added); *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996) ("the number of employees *possibly disenfranchised* by the unscheduled closing of the polls could be sufficient to affect the election result.") (emphasis added). Here, at least 1,381 eligible voters did not cast ballots.[8] Many of these nonvoters may

[8] (4,256 eligible voters) – (2,872 valid votes counted plus challenged ballots) – (3 void ballots) = 1,381 voters who did not vote.

have been turned away by the Union's objectionable conduct.

The Hearing Officer's failure to consider the large number of nonvoters, failure to properly assess the number of voters who could have been affected by the Union's objectionable conduct, the widespread confusion regarding voter identification, the Union's surveillance of voters as they entered Earl Hall (where over 3,100 or 73% of eligible voters were assigned to vote), in addition to the other objectionable conduct described above, all undermine the findings made by the Hearing Officer and warrant setting aside her recommendations.

I. VOTERS AT EARL HALL WERE FORCED TO PASS KNOWN UNION AGENTS IN THE FINAL MINUTES BEFORE CASTING THEIR VOTES.

In denying Columbia's First Objection that voters at Earl Hall were forced to pass known Union agents inside Earl Hall, the Hearing Officer improperly held that: (i) Columbia had to prove "how many voters walked through the Earl Hall lobby while Rosenstein was present[]"; (ii) the law required the Union officers to be stationed in a "no electioneering zone" in order for it to constitute objectionable conduct; and (iii) that Columbia had not proven that Union officers were recognizable or were surrounding the only entrance to the polling place. RRO at 13. Each one of these findings should be disregarded given the Board law and the testimony adduced at the hearing.

First, Board law does not require Columbia to prove how many voters walked through Earl Hall and saw the Union's president stationed in the foyer of the building. Indeed, the Hearing Officer created an impossible standard for Columbia, requiring proof of objectionable conduct that could have only been acquired by Columbia's own unlawful surveillance. In addition to failing to consider the fact that many eligible voters may have been turned away by the Union agents' presence at Earl Hall, the Hearing Officer ignored credible evidence that a sufficient number of

voters were affected by the objectionable conduct to potentially affect the outcome of the election.

Second, the Hearing Officer misstated the law, disregarding clear holdings by Courts of Appeals that "a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001).

Finally, the Hearing Officer ignored or misapplied testimony that Union agents were present in a place in Earl Hall that voters had to pass in order to vote, and that Maida Rosenstein, the President of the Local 2110, was well known to Columbia graduate students.

A. Facts in Support of Columbia's First Objection.

Earl Hall was one of the four polling sites where voting took place. The building sits across from the Columbia library and there are external stairs (that are approximately 20 feet long) leading into the entrance of the building. *See* Photos Attached from **Employer Exhibit 1**. After entering Earl Hall through the external staircase, visitors to the building are located in a small foyer on the second floor. *See* Photos Attached from **Employer Exhibit 2**. There are stairs then leading from the foyer up to the third floor auditorium, where the voting took place. *See* Photo Attached from **Employer Exhibit 3**. The chairs in the foyer are located approximately 25 feet from the base of the stairs that go up to the third floor, and the second floor foyer is approximately 40 feet from the auditorium. The polling place had four tables where voters checked in, broken up by last name: A-F, G-L, M-N and O-Z. *See* **Employer Exhibit 4**;[9] Tr. 110:3-11.[10]

[9] The Hearing Officer relied only on the portions of **Employer Exhibit 4** that Hyacinth Blanchard testified about, although the entire page was admitted. However, the notes of the other two observers on the page, Shewanna House and Theresa Smith, were similarly reliable. Ms. Blanchard testified that she and Ms. Rosenstein would meet every observer at Earl Hall and leave to debrief with them about their shift. RRO at 7. As the Union described in their Petition to Revoke a subpoena, these debriefs were then "transmitted…to Ellen Wallace" who then "compiled these reports…." Petition to Revoke Subpoena at 2-3. As Ms. Blanchard testified, the notes that she sent were reproduced

In order to access the polling place, every eligible voter who entered Earl Hall had to pass through the second floor foyer. RRO at 11. Seated in the second floor foyer for much of the day on December 7th and 8th was Maida Rosenstein, the president of Local 2110, Hyacinth Blanchard, Assistant Director of organizing for the United Auto Workers, and a number of other Union agents. As made clear in the record, there is no way for a voter to access the polling place other than through the second floor foyer. Tr. 98:1-13; 103:12-14. Rosenstein is undoubtedly known as the Union president among the graduate students and often speaks to students about unionization. Tr. 358:16-20; 359:20-22; 361:3-10.

The uncontroverted testimony of Ms. Blanchard demonstrated that Union agents and the Union president were present in the foyer for at least 6 hours over the course of the two-day election. *See* Tr. 282:2-10; 286:5-24; 289:21-24. Ms. Blanchard described how she and other Union agents (including Ms. Rosenstein) went to the foyer in Earl Hal every two hours during the two-day election and remained there for approximately forty minutes each time. *See* Tr. 289:21-24. Ms. Blanchard explained that the Union agents had a "pattern" of arriving "a half hour" before observer shift changes and remained in the foyer for approximately ten minutes after the change in order to meet the Union's outgoing observers. Tr. 286:20-24; 289:10-16. Ms. Blanchard's testimony confirms that, on both December 7 and 8, Union agents were present in the Earl Hall foyer during voting hours from approximately 11:30 a.m. to 12:10 p.m., 1:30 p.m. to 2:10 p.m., 3:30 p.m. to 4:10 p.m., 5:30 p.m. to 6:10 p.m., and 7:30 p.m. until at least 8:00 p.m.

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in their entirety. Tr. 310:16-17 (. "this is what I sent. That's my notes…."). Because the notes were authenticated, and there were multiple indicia of accuracy, the Hearing Officer was wrong to not rely on those parts of the notes.

[10] References to "Tr._ _:_ _" refer to the official pages and lines of the transcripts of the proceedings.

See **Petitioner's Exhibit 4**.[11] On each occasion, the Union officials would station themselves in the foyer, such that they could see, and could be seen by, voters. Tr. 287:13-24. In fact, it was important that the Union agents were visible to individuals entering and exiting the building since they were there to meet the Union election observers who were arriving and leaving the polling site. Tr. 286:20-24; 289:12-16. Ms. Blanchard further testified that, at times, the line of students waiting to vote in the third floor auditorium would extend all the way to the bottom landing of the stairs on the second floor (*See* **Employer's Exhibit 2**), merely 25 feet from where Ms. Blanchard and Ms. Rosenstein were stationed. Tr. 291:24 - 292:3 (Hearing Officer: "there's three steps on the landing. Did you see voters that far down?" Witness: "Correct, yes."); 183:3-6. *See also* Tr. 124:11-15.

B. The Hearing Officer Imposed an Impossible Standard of Proof on Columbia in Contravention of Board Law.

In recommending that Columbia's First Objection be overruled, the Hearing Officer found that "[w]hile the Employer points out that the vast majority of the voters were scheduled to vote at Earl Hall, there is no evidence regarding how many voters walked through the Earl Hall lobby while Rosenstein was present." RRO at 13. This finding rests on the premise that in order to uphold Columbia's objection, Columbia would have had to produce evidence proving precisely how many eligible voters walked into Earl Hall while the Union president was stationed in the foyer. Adopting this recommendation would hold Columbia to an impossible and impermissible standard because it would require Columbia to have stationed its own agents in Earl Hall, or a camera in Earl Hall, in order to tally exactly how many voters passed by while Union agents were stationed in the lobby. This surveillance would have clearly been impermissible under Board

[11] The phone numbers have been redacted for filing.

law. *See Elec. Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) ("Without any explanation for a supervisor to be 'stationed' outside the voting area, it can only be concluded that his purpose in observing the even was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched."). Nonetheless, that is exactly what the Hearing Officer would have required of Columbia to uphold the First Objection.

Furthermore, this standard likely would have required Columbia to keep a list of people who voted, in order to present "evidence" to the Hearing Officer on just how many eligible voters passed by the Union president. This is similarly illegal under Board law. *See Int'l Stamping Co., Inc.*, 97 NLRB 921, 922 (1951) ("It has likewise been the policy of the Board to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to check off the voters as they receive their ballots.").

Instead of requiring Columbia to come forward with affirmative proof of each voter who was under surveillance by the Union agents, the proper standard to be applied here is whether the "objectionable conduct could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). This is the Board's evidentiary standard of proof for objections, and the Hearing Officer's construction of an impossibly high, contradictory standard was clearly erroneous. *See, e.g., Sanitation Salvage Corp.*, 359 NLRB 1129, 1129 (2013) ("The Board overturns election results if the objectionable conduct, taken as a whole, had 'the tendency to interfere with the employees' freedom of choice' and '*could well have affected the outcome of the election.*'") *citing NYES Corp.*, 343 NLRB 791, 791 n.2 (2004) *citing Cambridge Tool & Mfg. Co.*, 316 NLRB at 716 (emphasis added).

The Hearing Officer compounded the error by ignoring clear and credited testimony that

hundreds of students voted while Maida Rosenstein and other known Union agents were present in the Earl Hall foyer. Earl Hall served as the polling place for more than 3,100 (or 73%) of all eligible voters in the election. Tr. 33:15-20. The uncontroverted testimony shows that Maida Rosenstein and other Union agents were present in Earl Hall for over 6 hours during the election. As the Hearing Officer noted, the Union president and Hyacinth Blanchard "went to Earl Hall about 30 minutes before observer shift changes, which occurred every two hours during the election[,]" and sometimes would "have had to wait a few minutes past the end of the observers' shift to leave the building if there was a delay in people coming downstairs or so observers could use a restroom." RRO at 6-7. With ten shifts during the election and each union representative staying for, at minimum, 30-40 minutes at each shift change, this adds up to over 6 hours of time spent by Union agents sitting in the Earl Hall foyer while voters were walking the final forty feet before voting.[12] Looking at these facts, it was impossible for the Hearing Officer to conclude that "there is no evidence regarding how many voters walked through the Earl Hall lobby while Rosenstein was present[,]" considering that she credited testimony demonstrating that the Union president was in the lobby of Earl Hall for at least a third of the time that the polling place was open, at a site where over 3,100 students were eligible to vote.[13]

Furthermore, the testimony completely undermines the Hearing Officer's finding that "there is no evidence regarding how many voters walked through Earl Hall while Rosenstein was present." RRO at 13. Idina Gorman, who served as an election observer for Columbia from 12

[12] Ms. Blanchard testified that Maida Rosenstein *may* not have been present at Earl Hall for one shift change, but was present for every other shift change, 9 in total. Tr. at 297; RRO at 7 n.6. Regardless, this places Maida Rosenstein in the lobby of Earl Hall for, at minimum, slightly under 6 hours.

[13] The Hearing Officer also failed to consider a large number of nonvoters who may have decided not to vote because of the Union's objectionable conduct. *See supra* pp. 8-9; *infra* Section III(C).

p.m. to 4 p.m. on December 7th, testified that during her shift "a couple of hundred" students voted at her table, and that from 3:30 to 4:00 p.m., the exact time that Maida Rosenstein and Union agents would have been waiting in the foyer to pick up their observers, approximately 30 to 50 voters voted. *See* Tr. 194:23-24; 213:24-214:13. Indeed, the Union's own notes record at length how many voters voted at Earl Hall. Employer's Exhibit 4, which consists of the notes of the Union observers taken during the election, notes that from 10 a.m. – 12 p.m. on December 7, an "estimated 30-40" voted with last names starting with A-F, 70 voters with last names G-L, over 50 with last names M-N, and at least 130 with last names O-Z. **Employer's Exhibit 4.** These figures alone show that during a single two-hour shift, approximately 180 voters came to cast their ballots. The Union's notes described exactly how many voters arrived during each shift and described hundreds of voters arriving in waves. Finally, the Union observers' notes also demonstrate that Rosenstein was present in Earl Hall while these voters voted. Employer Exhibit 6 describes that there were "[a]bout 12 challenges" and "40 unchallenged voters" during the 12:00 p.m. to 2:00 p.m. shift at the G-L last name table at Earl Hall, and is punctuated by the name "**Maida**" at the end of the short 10 line note. *See* **Employer Exhibit 6**. This is relevant evidence that the Hearing Officer incorrectly ignored and excluded.[14]

The Hearing Officer erred by applying an impossible standard for Columbia's First Objection and, regardless of the incorrect standard, further erred in ignoring clear evidence that hundreds of students had to pass by Union agents right before they entered the polling place.

[14] The Hearing Officer was wrong to the extent that she did not admit the notes of observers other than Satantani Mukherjee on **Employer Exhibit 6**. *See infra* Section II(D) (addressing the Hearing Officer's error excluding relevant and authenticated evidence).

C. The Hearing Officer Applied Incorrect Law Regarding Party Agents' Presence Around the Polling Place.

The Hearing Officer also incorrectly stated the law applicable to Columbia's First Objection, holding that "The Board has distinguished the presence of employer agents from the presence of union agents at a polling site, finding that the mere presence of union agents is not necessarily coercive." RRO at 12. That holding is plainly incorrect in cases where, as here, Union agents stationed themselves in a location that voters *must* pass in order to access the polls.[15]

Contrary to the Hearing Officer's recommended holding, the Board and Courts of Appeals have recognized that it is objectionable surveillance for agents of a party to station themselves where voters must pass in order to access the polling site. *See, e.g.*, *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001). In *Nathan Katz*, the Court vacated the Board's ruling that Union agents' presence in an area where voters had to pass to access the polling site was not objectionable conduct. *Id.* at 993. The Court ruled that Board law "seem[s] to stand for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote. In light of these cases, Katz's allegations appear to establish that the Union agents' presence outside

[15] Columbia does not take exception to the Hearing Officer's holding that "the mere presence of a union representative in the vicinity of the polls during an election" is not objectionable conduct. However, in both *C & G Heating & Air Conditioning, Inc.*, 356 NLRB 1054 (2011) and *Aaron Medical Transportation, Inc.*, No. 22-RC-070888, 2013 WL 3090117 (NLRB June 19, 2013), the two cases the Hearing Officer relied on, the Union agents did not surround the only entrance and rather were parked in a car far from the entrance to the building with the polling place and there were, presumably, multiple ways to get to that entrance. Courts of Appeals are clear that they will only apply the doctrine where a party's agents surround the only entrance to the polls. *See King Elec., Inc. v. NLRB*, 440 F.3d 471, 474 (D.C. Cir. 2006) (overturning objections and distinguishing *Nathan Katz* holding that "In this case, only two employees passed the union representatives on their way to vote; the rest were already on King's property at the time the polls opened. And in any event, the union representatives were positioned along only one of two driveways leading to King's property. The two employees could have bypassed the union representatives had they so desired."). That, however, is not the case here, where the credited and unrebutted testimony demonstrates that Union agents, including the Union president, surrounded the only entrance to the polls. Tr. 98:1-13; 103:12-14.

the church's entrance constitutes conduct of such a nature that it substantially impaired the multi-site employees' exercise of free choice—*even if the agents did not actually talk to any employee*." *Id.* (emphasis added).

The Hearing Officer recommended overruling Columbia's First Objection based, in part, on the fact that, in *Nathan Katz*, the union agents were in a no-electioneering zone. She distinguished the present case by stating that "[i]n the instant case, the Union agents remained beyond the no electioneering zone set by the Board Agent…." RRO at 10, 13. However, the Court of Appeals in *Nathan Katz* did not rely on the no-electioneering zone in its unambiguous holding, and instead explicitly rejected this argument, stating that

> The Director did not explain why the Union agents' 'continued presence' in a no-electioneering zone by the entrance to the site of the election (where employees had to pass) is different from standing outside the room in which employees actually vote. Standing in either place could 'interfere with the employees' freedom of choice. . ..'

Nathan Katz, 251 F.3d at 993.

Consistent with *Nathan Katz*, the Board and Courts of Appeals set aside elections where agents stationed themselves in a location that voters *must* pass in order to vote because such conduct is objectionable and interferes with the voters' freedom of choice. *See ITT Auto. v. NLRB*, 188 F.3d 375, 387 (6th Cir. 1999) (employer affected voters' freedom of choice in election employer won by a margin of 182 votes out of 823 valid votes because "supervisors . . . engaged in *coercive behavior by* positioning themselves in the center of the building and near [about 60 feet from] the intersection of aisles *through which employees had to pass in order to vote*.") (emphases added); *Elec. Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) (election set aside where "[a] supervisor, was 'stationed' within 10 to 15 feet of the entrance to the voting area" because "it can

only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched."); *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964)

> [T]he continued presence of the Employer's president at a location [within 6 feet of the door to the polling place] where employees were required to pass in order to enter the polling place [constituted] improper conduct not justified by the fact that for part of the time he was instructing supervisors on the release of employees for voting purposes. We find that by this conduct the Employer interfered with employees' freedom of choice in the election;

Belk's Dep't Store, Inc., 98 NLRB 280, 282 (1952)

> We are also convinced that, even though the supervisors were at some distance from the actual polling place, and apparently said nothing calculated to restrain or coerce the employees, their presence in the area where the employees were gathered while waiting to vote tended to interfere with the employees' freedom of choice of a bargaining agent. In particular, we regard as improper Galloway's conduct in walking back and forth in the space which the employees were required to traverse to go to the polling place.

The Hearing Officer's distinction between union and employer agents is similarly unpersuasive. First, and most importantly, *Nathan Katz* was a Court of Appeals case that specifically addressed conduct by a union agent and still held that "a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." 251 F.3d at 993. Regardless of the Hearing Officer's reliance on the Administrative Law Judge's ("ALJ") opinion on remand in *Nathan Katz*, it is axiomatic that an ALJ cannot overturn the Court of Appeals. Second, the Hearing Officer relies on dicta in *Longwood Security Services, Inc.*, 364 NLRB No. 50 (July 19, 2016) that there is "no indication" that the Court of Appeals in *Nathan Katz* analyzed whether the standard was different for the presence of Union versus Employer agents. This statement is belied by the fact that the Court of Appeals in *Nathan Katz* explicitly held that the Union agents'

presence at the entrance to the polling place was coercive. *Nathan Katz*, 251 F.3d at 993 ("*Union agents' presence* outside the church's entrance constitutes conduct of such a nature that it substantially impaired the multi-site employees' exercise of free choice") (emphasis added).

Notably, Member Miscimarra addressed this argument in his dissent in *Longwood Security Services, Inc.*, stating that

> the court read *Performance Measurements* and *Electric Hose & Rubber* 'to stand for the proposition that *a party*'--not just an *employer* party--'engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote.'

364 NLRB No. 50. Member Miscimmara went on to note that any argument that there is a different standard for the conduct of union versus employer agents is undercut by *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006) (*Randell II*), stating that "[i]n *Randell II*, the Board pointed out that 'unions also have ample means available to them to punish employees.'" 364 NLRB No. 50.

Because the Hearing Officer applied an incorrect legal standard, the Board should not adopt her recommendation to set aside Columbia's First Objection.

D. The Hearing Officer's Factual Finding That The Union Agents Were Not Stationed Where All Voters Had to Pass is Contrary to the Record and Should be Rejected.

The Hearing Officer also incorrectly found that "[w]hile the Union agents sat in an area on the left side of the room, voters had to turn right immediately to go up the stairs to the polling place. Although voters had to pass through the same room, they could walk up the stairs without walking directly past the union agents." RRO at 11. The Hearing Officer thus determined, without any evidentiary basis, that the Union agents did not surround the only entrance to the polls. RRO at 13. This finding plainly misconstrues the testimony presented at the hearing as well as

relevant Board law.

First, the Board does not require proof that agents actually obstructed the entrance to the polling place as the Hearing Officer seemed to require in her RRO. RRO at 13 ("The Union agents did not approach the entrance to the polling place during the election. Instead, they remained on a different floor and did not interfere with any voters waiting to vote.") Instead, to mount a valid objection, the objecting party need only proffer evidence that the agents stationed themselves in a location where voters *must* pass to vote. *See Elec. Hose & Rubber Co.*, 262 NLRB at 216 (1982) (election set aside where "[a] supervisor, was 'stationed' within 10 to 15 feet of the entrance to the voting area"). This includes evidence that the agents stationed themselves in the same room that voters had to pass through to vote, regardless of the proximity to the polls. *See id.*; *ITT Auto.*, 188 F.3d at 387 (holding that the voters' freedom of choice was affected because "supervisors . . . engaged in *coercive behavior by* positioning themselves in the center of the building and ["approximately 60 feet from"] the intersection of aisles *through which employees had to pass in order to vote*.") (emphasis added).

Here, as in *ITT Auto* and other cases cited *supra*, the Union agents and Union president stationed themselves in a seating area, approximately 25 feet from where each voter entering Earl Hall had to pass in order to vote. RRO at 6; Tr. at 181:16-19. This distance is significantly shorter than the 60 foot distance between the supervisors and the aisle that voters had to use to access the polls in *ITT Auto*. 188 F.3d at 382. Indeed, the Hearing Officer's analysis should have ended once she found that the chairs where the Union agents were sitting were "approximately 25 feet from the base of the stairs leading to the third floor" and that "voters had to pass through the same room," as the Union agents. RRO at 6, 11.

Regardless, unrebutted testimony demonstrated that union agents were stationed in a place that each Earl Hall voter had to pass to access the polling place on the third floor. The testimony showed that, "[w]hen [a voter] walk[s] in, [they're] right in the foyer" because "[i]t's a very small room . . . you're walking right into what's a small foyer area." Tr. at 98:1-13. Every voter would "come in . . . up the staircase [leading to Earl Hall (**Employer Exhibit 1**), which] will *put them in the second floor which is depicted in* [**Employer Exhibit 2**]. And then they will go up the stairs that's depicted on [**Employer Exhibit 3**]" to the polling place in the third floor auditorium. Tr. 103:18-20 (emphasis added). There was simply no other way for voters to access the voting place other than through the second floor foyer. Tr. 103:12-14; Tr. 183:17-19. In fact, the location in the foyer where the Union agents were stationed was 25 feet from where voters had to pass, and merely 65 feet from the actual polling place. Tr. 181:19-183:16. As Hyacinth Blanchard described, Union agents would station themselves in the foyer specifically so they could be seen by Union observers entering and exiting the polling site. Tr. 287:13-24. Ms. Blanchard further testified that, at times, the line of students waiting to vote would extend from the auditorium all the way to the bottom landing of the stairs (*See* **Employer's Exhibit 2**), merely 25 feet from where Ms. Blanchard and Ms. Rosenstein were seated, so that voters were waiting in line to vote in the presence of the Union president. *See* Tr. 291:24-292:3 (Hearing Officer: "there's three steps on the landing. Did you see voters that far down?" Witness: "Correct, yes."); 183:3-6; *see also* 124:11-15. Indeed, Columbia observers coming to serve at the Earl Hall polling place saw Maida Rosenstein immediately upon entering Earl Hall. Tr. 105:20-106:8; 187:1-9.

Because the clear and unrebutted testimony demonstrates that voters at Earl Hall had to pass through the Earl Hall foyer less than 25 feet from the Union president and other Union agents,

the Board should reject the Hearing Officer's recommendation dismissing Columbia's First Objection.

E. The Hearing Officer's Factual Finding That the Individuals in Earl Hall Were Not Known Union Agents is Contrary to the Record and Should be Rejected.

Finally, the Hearing Officer incorrectly held that Columbia had "not demonstrated that either Rosenstein or Blanchard was known or recognizable to voters." RRO at 13. This finding contradicts the record evidence. First, Ms. Rosenstein and the other Union agents were all wearing union buttons. Tr. 106:14-17; 188:1-7; 190:3-6. These buttons said "UAW", and would have been recognizable since they were worn by other union supporters on the day of the election. *See* Tr. 184:8-10; 188:8-10; 204:6-9. *See also* **Joint Exhibit 6**, screenshot attached as **Joint Exhibit 6(a)**. Furthermore, it strains credulity to find that Ms. Rosenstein, the President of Local 2110, who has been trying to unionize Columbia's graduate students for almost two years, would not be known to graduate students on campus. Indeed, Mirian Stincone and Idina Gorman, both Columbia observers, know Ms. Rosenstein from dealing with Local 2110. Tr. 104:15-25; 187:2-11. Furthermore, there is evidence that eligible graduate student voters recognized Ms. Rosenstein. Ana Isabel Keilson, a union supporter pursuing a Ph.D. in History, knew Ms. Rosenstein as "the President of the Local UAW chapter" and agreed that "Ms. Rosenstein [was] an active person in the organizing at Columbia." Tr. 358:16-20; 359:20-22. Ms. Keilson further acknowledged that "Ms. Rosenstein attend[ed] meetings of the Organizing Committee" and that Ms. Rosenstein spoke "in front of students" about supporting the Union. Tr. 361:3-10. Thus, the Hearing Officer's recommended finding that Ms. Rosenstein was not a known Union agent is controverted by the testimony that graduates students, including a graduate student called to testify by the Union, recognized Ms. Rosenstein.

II. THE REGION'S ELEVENTH-HOUR REVERSAL OF ITS INSTRUCTION TO REQUIRE VOTERS TO PROVIDE IDENTIFICATION DURING THE ELECTION AFFECTED THE OUTCOME OF THE ELECTION.

In recommending that Columbia's Third Objection regarding the Region's reversal of the voter identification requirement be overruled, the Hearing Officer relied on four erroneous findings. First, the Hearing Officer incorrectly ruled that the Regional Director had broad, and seemingly unreviewable, discretion over election procedures in light of an agreement between the parties and the Region regarding the "identifying information to be utilized by voters" in accordance with Section 11312.4 of the NLRB Casehandling Manual. Second, the Hearing Officer misstated and misapplied clear law from Courts of Appeals regarding identification at Board elections. Third, the Hearing Officer disregarded credited testimony demonstrating voting irregularities that call the results of the election into question. Finally, the Hearing Officer impermissibly excluded relevant evidence that demonstrated many more voting irregularities which, standing alone, necessitates rejection of the Hearing Officer's recommendation.

A. Facts in Support of Columbia's Third Objection.

On November 21, 2016, attorneys for Columbia University, attorneys for the Union, representatives of the Union, and representatives of the Region, including Stephen Berger, the Board Agent for the above-captioned case, had a conference call to discuss logistics for the election. During this call, the parties and the Region discussed specifics about the voting locations and a walkthrough of the voting sites that was going to take place the following day. Furthermore, at the Board Agent's prompting, the parties discussed what, if any, identification would be required of voters. Due to the number of eligible voters and the fact that there were four voting sites, the Board Agent recommended that the parties' observers use government or

Columbia issued ID to verify individuals' presence on the eligible voters list. Attorneys for the Union and Columbia University agreed to this suggestion. *See* **Joint Exhibit 1(I)**. This was, without question, an agreement regarding the "identifying information to be utilized by voters" in accordance with Section 11312.4 of the NLRB Casehandling Manual.

Less than 24 hours before the election was to begin, the Region reversed its decision in an email from Nicholas Lewis to the parties' counsel. The email stated, in direct contrast to the earlier agreement, that "voter ID will not be a requirement in order to vote." The Region noted, however, that ID could be "encouraged." *See* **Joint Exhibit 1(III)**.

During the election, the procedures for requesting (or requiring) identification were further muddled when Board Agents began informing observers that they could not require, nor could they even request, identification from voters. At the beginning of the election, observers were told they could not challenge voters if they failed to show identification. Tr. 115:22-24. At approximately 3:30 p.m. on December 7th, Idina Gorman was told by a Board Agent at Earl Hall that she "could no longer request identification from the students." Tr. 193:3-4. This was done, the Board Agent explained, because "we run the election and the only time we request IDs is when the parties enter into a written agreement to require identification[,]" and "we don't request identification in national elections, you know, why would we request them here." Mirian Stincone and other observers who served during the first shift on the morning of December 8 were given the same instruction by a Board Agent - *i.e.*, "no one can ask for IDs.". Tr. 135:14-15; 136:1-6. The Board Agent's actions in this election contravened the Casehandling Manual, the November 21st agreement *requiring* voters to provide identification, and the December 6th order permitting observers to *request* identification. Tr. 193:9-14.

The Region's inconsistent and confusing decisions with respect to the voter ID requirement just before the vote, and during the vote, had a tangible impact on the ability of eligible voters to cast a ballot. The following testimony demonstrated the potential for fraud or confusion created by the unclear voter identification requirements:

- One voter attempted to vote using a name that was not her own and instead was forced to vote under challenge *because* she showed identification. Tr. at 193:18-194:2.
- A second voter's name appeared twice on the *Excelsior* list, but observers were allegedly able to identify the voter through his address. Tr. at 215:19-23.
- A third voter arrived to vote after 3:30 p.m. "but his name had already been checked off." RRO at 21; Tr. at 219:16 - 220:5; **Joint Exhibit 1**.
- A fourth voter appeared to vote "at more than one polling site." RRO at 26.
- The ban on requesting identification prevented observers from having "any other way to make sure that the student was the same person as the name on the list." Tr. 194:14-17.
- Voters had doubts about the validity of the election because of shifting identification requirements, with one voter asking Ms. Stincone "how do you know I am who I say I am[,]" after being informed that Observers were "not asking for IDs." Tr. 114:21-25.
- **Employer Exhibit 4** describes a situation where there was a "G. Wong Lee on the list and the person's [who came to vote] name was G. Wong. Jessica Lee." The note concluded by stating that the person was "[a]llowed to vote without challenge."
- Another instance, described in **Employer Exhibit 6,** stated that there was a voter name "Li Yupik" who was one of "2 students on the list who could only [be] separated by address." Eventually the voter "said which one she was and [the Board Agents] let her vote without challenge."

B. The Hearing Officer Erred by Finding That the Regional Director Did Not Abuse Her Discretion Regarding Election Procedures.

The Hearing Officer stated that "The Regional Director has broad discretion in setting the details for an election." RRO at 22 *citing San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998). The Hearing Officer found that the Regional Director exercised that discretion by deciding "that

voters could not be required to show identification, because such a requirement was not included in the Supplemental Decision or Notice of Election." RRO at 23. The Report goes on to note that "[a]lthough the Regional Director did not prohibit the use of voter identification, the evidence demonstrates that there were periods during the election when such use was in fact prohibited by Board Agents." *Id.* The Hearing Officer erred in failing to find that the Regional Director abused her discretion by disregarding both the agreement of the parties to require identification and the large and complex nature of this election.

During the November 21, 2016 conference call to discuss logistics, at the prompting of the Board Agent, the parties discussed what, if any, identification would be required to vote. The Board Agent recommended that the parties' observers use government or Columbia issued ID to verify individuals' presence on the eligible voters list. Attorneys for the Union and Columbia University agreed to this requirement. This constituted an agreement regarding the "identifying information to be utilized by voters" in accordance with the procedures for "Large or Complex Elections" in Section 11312.4 of the NLRB Casehandling Manual. The Casehandling Manual, in relevant parts, states, "If agreement is not reached between/among the parties, the Regional Director should consider whether to require identifying information in addition to self-identification by voters." Section 11312.4. The Casehandling Manual therefore only gives the Regional Director discretion to decide whether to require identification "if an agreement *is not* reached between/among the parties." (emphasis added). Here, there was an unambiguous agreement by the parties, and disregarding that agreement was an abuse of discretion.

Although the parties stipulated to this agreement during the hearing, *see* **Joint Exhibit 1,** the Hearing Officer either misconstrued or ignored this stipulation. While the Hearing Officer

noted that the stipulation stated that "the parties agreed that the Region would require that voters show identification[,]" she ignored the fact that one of the parties on the call was the Region itself, represented by Board Agent Stephen Berger. The Regional Director, through her agent, *did* exercise her discretion to decide election procedures by accepting the agreement of the parties to require identification. The reversal of the identification agreement by email at 11:23 AM on December 6th, less than 24 hours before the election began, was a clear abuse of that discretion.

Moreover, while the Regional Director has discretion to set election procedures, that discretion is not unlimited. The Board has held that there are instances where the Regional Director has abused its discretion. *See Sunnyvale Med. Clinic*, 241 NLRB 1156, 1157 (1979) (finding the regional director abused his discretion by refusing to allow the employer to withdraw from an election agreement when an Intervenor claimed an interest in the election, stating that "[u]nder these circumstances, we find that it was an abuse of discretion for the Regional Director, on June 20, to refuse the Employer's request."). More recently, in *Covanta Honolulu Resource Recovery Venture Employer*, No. 20-RC-140392, 2015 WL 255831 (NLRB Jan. 20, 2015), dissenting Member Miscimarra held that he would have found an abuse of discretion by the Regional Director when the Region ordered a mail ballot election solely in order to hold an election within 30 days of the Decision and Direction of Election. *Id.* at *1 n.1.

The Regional Director here abused her discretion by ignoring the November 21st agreement between the parties to require identification from voters. The parties were prejudiced by the Region's last-minute reversal of this agreement on December 6th, less than 24 hours before the election was set to begin. Indeed, the Hearing Officer acknowledged that certain Columbia observers "did not challenge any voters for lack of identification[,]" which only highlights the

confusion caused by the Regional Director's eleventh-hour reversal of the identification requirement. Had the identification requirement been enforced, as agreed upon, Columbia observers would have objected to voters who did not present proper identification.[16]

The error was compounded by the large, complex nature of the election. Over 4,000 voters were eligible to vote, at four polling places, over the course of two days. And most of Columbia's observers could not identify any of the students who voted. Tr. 138:20-23; 224:12-15. Students voting in this election, therefore, should have been required to produce government issued or Columbia identification in order to vote.

The Hearing Officer is correct that the "Casehandling manual…does not…override the Regional Director's discretion by requiring use of identification in large or complex elections." RRO 23. However, that discretion was constrained once the Region endorsed the parties' agreement to require identification. Because the Regional Director's decision to reverse the parties' agreement requiring identification was an abuse of discretion, the Board should sustain Columbia's Third Objection.

C. The Hearing Officer Misconstrued the Law Regarding Requiring Identification in Large and Complex Elections.

The Hearing Officer misconstrued the clear case law from the Board and Courts of Appeals requiring identification in large and complex elections. Columbia did not, as the Hearing Officer claimed, argue that *Avondale Indus., Inc. v. NLRB*, 180 F.3d 633 (5th Cir. 1999), "affirmatively require[s] the use of voter identification." RRO at 25. Rather, *Avondale*, and related Board

[16] The Hearing Officer's reliance on Columbia observers not challenging voters without identification is especially misplaced because Board Agents banned Columbia observers from challenging voters for failure to have identification. Tr. 115:22-24.

decisions, require identification to be used *in this case* because of the similarities between the facts in *Avondale* and the facts here.

In *Avondale*, where "approximately 4,000 employees" were members of the voting unit, the court held that, in part, because of the "very large work force," and because "[the] observers [were] unable to be personally acquainted with the voters," the lack of a voter identification requirement was "fatally flawed." 180 F.3d at 634. In *Avondale*, "[w]hen an employee presented himself to vote, the employee identified himself by name at the check-in table. If the employee could not be identified by name, the observers were advised to ask the employee's address or to identify him by his identification badge." *Id.* at 635. Importantly, other identification processes, such as addresses, was used at times, but were not the "routine procedure" in the election. *Id.* at 637. The court, reviewed these procedures under the following standard:

> When examining the voter identification procedures employed in a representation election, this court does not sit to determine whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity. *Even under this deferential standard, however, reasonable doubt means reasonable uncertainty, not disbelief or conclusive proof.*

Id. at 637 (emphasis added) (citations omitted). The court went on to state that:

> Verbal self-identification is appropriate when—as is probably true in a large portion of cases—it is likely that the observers are personally acquainted with the voters. *It is wholly inadequate, however, as the sole guide to identification, where a very large bargaining unit is contemplated, and the voter lists contain virtually the only information that will assure the identity of the voters.* The procedures used in *Newport News* and *Monfort, Inc.*[17] confirm this common sense notion and equally condemn the unthinking adoption of "standard practice" for a

[17] *Newport News Shipbuilding*, 239 NLRB 82, 88 (1978) (identification was properly *not* required because voters were asked for "*the last four digits of their social security numbers.*") (emphasis added); *Monfort, Inc.*, 318 NLRB 209, 211 (1995) (refusing to overturn election where 4 voters' names were checked off when they arrived to vote *because the Board required using pictures IDs*). Both cases support the holding that in complex elections where observers will not recognize unit members, the Board must require an independent way to identify voters.

multi-thousand employer like Avondale.

Id. at 638 (emphasis added). In *Avondale*, the Board objected to this line of reasoning because "most voters truthfully identify themselves." *Id.* at 639. The court noted that while this was "undoubtedly true in this election," that still did not mitigate the need to overturn the election because, "[t]he wisdom of hindsight cannot alone dictate rejection of the inadequate voter identification procedure. . .." *Id.*

The court made clear that the election needed to be overturned not because of any affirmative proof of voter fraud, but rather in order to require the type of objectively verifiable voter identification needed to have a free and trustworthy election. The court stated that, ultimately, "[t]he NLRB's reliance on mere hope, *unsupported by objectively verifiable voter information*, raises a reasonable doubt as to the fairness and validity of the election." *Id.* at 640 (emphasis added).

The unrebutted facts here are remarkably similar to the facts in *Avondale*. As in *Avondale*, this election involved approximately 4,000 eligible voters at multiple polling sites; observers could not identify all voters;[18] it was a hotly contested election; and the Region similarly required no external objective identification in order to vote. As in *Avondale*, the procedures were inadequate notwithstanding the fact that many voters may have "truthfully identif[ied] themselves." *Id.* at 639. Neither the Region nor the Petitioner can state with any reasonable certainty that the people who voted were who they said they were. Given the sheer number of eligible voters at multiple sites, and the confusing voter eligibility formula, the Board should have consistently required identification throughout the election.

[18] Ms. Stincone and Ms. Gorman both responded "No" when asked, respectively, if they have "face to face interactions with students" or "deal with student in [their] job." Tr. 138:20 – 23; 224:10-14.

The Hearing Officer tried to distinguish *Avondale* by noting that the "Excelsior list used in Avondale did not contain employees' full names, but only employees' last names, first initials, and addresses." RRO at 24. The Hearing Officer argued that "[t]he lack of employees' full name on the list left the election in Avondale vulnerable to a greater degree of uncertainty…." *Id.* To support that claim, the Hearing Officer noted that in *Avondale*, "an employee named Jane could present herself as 'any voter on the [Excelsior] list with the first initial 'J' and could vote on no more sure proof of identity." *Id. citing Avondale*, 180 F.3d at 638. It is unclear, and the Hearing Officer does not explain, how that is any different from the present case. Here, there was a large population of voters many of whom, as the Hearing Officer noted, share "common last names, such as Brown (including Zachary Brown and Zachary C. Brown listed at two different addresses), Chen, Liu, and Zhang." RRO at 22. Any one of these individuals could give their last name and "vote on no more sure proof of identity." 180 F.3d at 638.

The failure to require identification, combined with the complexity of the eligibility formula (pursuant to which hundreds if not thousands of graduate students were not eligible to vote) may have caused many ineligible students to believe, in good faith, that they were entitled to vote, particularly if they had previously held an appointment. Absent an identification requirement, nothing prevented such an ineligible student from voting if s/he had the same or a similar name as an eligible voter. *See Avondale*, 180 F.3d at 639 (holding that, in part, because of the "parties' inability to agree whether hundreds of employees would be in the bargaining unit, … [a]n objective voter identification procedure would have belied suspicions, discouraged attempts at vote fraud, and averted this source of future litigation.").

The Hearing Officer also relied, in part, on the fact that in *Avondale*, the court "noted that

there were fourteen instances where an employee appeared to vote whose name had already been crossed off the list." RRO at 25. The Hearing Officer further noted that the union in *Avondale* prevailed by 250 votes, which is less than the margin in this case. *Id.* The Hearing Officer claims that here, Columbia "presented evidence regarding only four voters" who voted illegally. RRO 26. Regardless of whether the number is four or fourteen, those are both significantly less than the vote margin in either case, and here, as in *Avondale*, the clear examples of irregularities serve to raise "a reasonable doubt as to the fairness and validity of the election." *Avondale*, 180 F.3d at 640.[19] The Hearing Officer's holding that "[t]hese few examples of alleged voting irregularities do not call the results of this election into question[,]" is remarkable considering that the Court of Appeals in *Avondale* held that fourteen examples of voting irregularities in that case called the results of the election into question. Both here and in *Avondale* there was simply no way to know how many instances there were of voter fraud or confusion due to the lack of clarity and consistency on the use of voter identification.

Finally, the Hearing Officer miscounted the number of voters engaging in possible voter fraud. The Hearing Officer claims that Columbia only presented evidence of four voters. The first is a student who attempted to vote under an inaccurate name and instead was forced to vote

[19] The Hearing Officer also attempted to distinguish *Avondale* by stating that "[t]he court found that an analysis of the marked Excelsior list showed 'suspicious voting involving hundreds of ballots.'" RRO at 25 *citing Avondale*, 180 F.3d at 636. That is misleading and was unnecessary to the holding in *Avondale*. In a section titled "Factual and Procedural History[,]" the court noted that, during the litigation in front of the Board, Avondale successfully prosecuted a Freedom of Information Act request and the company independently identified "potentially suspicious voting involving hundreds of ballots…." 180 F.3d at 636. However, these claims "could not be reliably investigated[,]" and was not essential to the court's holding in the preceding paragraph that "The crux of the inadequate identification procedure is this: no one knows exactly who voted in the Avondale election." *Id.* at 640. Furthermore, Columbia has similarly presented evidence affecting hundreds of ballots. Specifically, as the Hearing Officer noted, many voters on the *Excelsior* list share last names, some share same first and last names, and there are hundreds of other graduate students who could have voted because they were confused about the eligibility formula. *See* footnote 22, *infra*, for a related discussion.

under challenge *because* she showed identification. Tr. at 193:18-194:2.[20] The second was a voter whose name appeared twice on the *Excelsior* list, but observers were allegedly able to identify the voter through his address. Tr. at 215:19-23. Importantly, the voter was not verified by the voter giving his address, but rather by the observers asking the voter "Are you this one or are you this one?" when looking at the addresses, and eventually just allowing him to use "whatever the address was on the list." Tr. at 215:22-23; 216:17-18. There is no indication that this voter, and many others, did not simply choose an incorrect address so that he could vote. The third voter arrived to vote after 3:30 p.m. "but his name had already been checked off." RRO at 21; Tr. at 219:16-220:5; **Joint Exhibit 1**. Indeed, it seems that someone else may have already voted under their name, something that could have been prevented with identification. Finally, the Hearing Officer credited proof that there was a voter "whom it seems appeared at more than one polling site." RRO at 26.

In addition to these four incidents, there was additional testimony that the Hearing Officer ignored that further demonstrates that the confusing identification requirements raised doubts about the validity of the election. First, the Hearing Officer failed to address the evidence that Board Agents at Earl Hall banned requesting identification from 3:30 p.m. from the first day of the election onwards. Tr. at 193:1-194:2. Idina Gorman confirmed that once identification was banned there was no "other way to make sure that the student was the same person as the name on the list[.]" Tr. 194:14-17. The fact that Board Agents prevented Columbia and Union observers from identifying more individuals trying to vote under inaccurate names should not be counted

[20] Notably, the discovery of a person *not* on the *Excelsior* list trying to vote caused the Board Agent at Earl Hall to ban observers from requesting identification. Tr. at 193:20-194:4.

against Columbia, but instead serves to raise substantial doubts surrounding this election.

Second, the Hearing Officer failed to recognize credible testimony that demonstrated that voters themselves had doubts about the validity of the election because of these shifting requirements. One voter asked Ms. Stincone "how do you know I am who I say I am[,]" after being informed that Observers were "not asking for IDs." Tr. 114:21-25.

Finally, the Hearing Officer ignored at least two other instances of individuals voting under incorrect names. On **Employer Exhibit 4**, a page from Union observers' notes that was admitted during Hyacinth Blanchard's testimony, it describes that "G. Wong Lee on the list and the person's name was G. Wong. Jessica Lee. Allowed to vote without challenge." **Employer Exhibit 4**. This was an individual who voted even though their name, as stated, *was not on the list*. Identification would have solved that confusion. **Employer Exhibit 6** identified a similar issue that was ignored by the Hearing Officer, noting that "Li Yupik - 2 students on the list who could only separated by address. She said which one she was and they let her vote without challenge." **Employer Exhibit 6**. As with the voter discussed by the Hearing Officer who was distinguished by a self-spotted address, Li Yupik "said which one she was[,]" not providing the observers with any independent way to check that she was actually identifying the correct eligible voter.

In sum, Columbia presented the "evidentiary basis on which to find that [the] election was not fairly and properly conducted." RRO at 26. Again, as in *Avondale*, these clear and credited examples of potential voter fraud or confusion serve to raise "a reasonable doubt as to the fairness and validity of the election." *Avondale*, 180 F.3d at 637. Therefore, the election should be set aside and a new election should be run free of conduct that calls the validity of the election into question.

D. The Hearing Officer's Exclusion of Highly Probative Evidence Was in Error and Ignored Board Law Regarding Admissibility of Evidence.

The Hearing Officer erroneously excluded highly probative and relevant evidence regarding many instances of potential voter fraud or confusion, contravening Board law and the Hearing Officer's Bench Book. The Hearing Officer's Bench Book is clear that "[i]f the evidence offered is going to be of help in deciding the matter under consideration, it should be admitted; if not, it should be excluded. Relevancy is a factor not only to oral testimony, but also documentary evidence." Hearing Officer's Bench Book at 153. Importantly, the Bench Book goes on to note that hearsay "may be received into evidence at an R case hearing, in the discretion of the hearing officer." *Id.* at 154. Indeed, the Hearing Officer recognized this at the hearing. Tr. 326:24-25 ("The fact is that hearsay is admissible in Board cases to bolster other testimony.")

The evidence at issue here, which was identified as "debrief slip[s]" from Union observers by the Union's witness Hyacinth Blanchard, described repeated concerns with voter fraud or confusion due to the lack of identification. Tr. 305:23-25. Contrary to the Hearing Officer's Bench Book, the Hearing Officer categorically "rejected [Columbia's] offer of additional notes taken by Union representatives who did not testify to authenticate the notes." RRO at 21-22 n.13.[21] The notes were authenticated by Ms. Blanchard, who identified the notes as "debrief slip[s]" and stated that observers, in general, were debriefed. Tr. 301:6-8; 305:23-25. This meets the "slight" burden of proof required by the Bench Book to authenticate a document since it "establishes authenticity through a witness who can relate its origin." Bench Book at 156. Importantly, the evidence was also highly relevant to the case.

[21] A full copy of the document containing the Union observers' notes is attached hereto as **Exceptions Exhibit A** (phone numbers redacted for filing).

Page 19 of the Union observers' notes demonstrated the confusion and potential for voter fraud and confusion caused by the lack of an identification requirement. The note stated that "[t]he ID issue became problematic as a student with last name 'Chen' was challenged as NOL [not on list]. Esmeralda pointed out that her name may be spelled 'Xiang' which would mean she was in the wrong alphabet. Board agent Burt Perlstone got her point but unclear if board will change the ID policy." On page 34, the notes further highlighted the issue and identified a voter who was "turned . . . away because [the Board Agent] asked him if he was a teaching assistant or a research assistant and did not allow him to vote under challenge. Theresa asked [the Board Agent] if he could vote under challenge and [the Board Agent] said no." These notes, which should have been admitted as relevant under the standard articulated in the Bench Book, demonstrate that numerous voters were turned away, even though they could have voted if they were allowed to prove their identity by showing identification.

Board law and Courts of Appeals cases also indicate that this evidence should have been admitted, and the exclusion of this highly relevant evidence is grounds, at the very least, to reopen the hearing to allow the evidence to be admitted. For instance, in *Dayton Tire & Rubber Co.*, 242 NLRB 1184, 1184 (1979), "the Hearing Officer … excluded all evidence not directly probative of the alleged interrogation and threat of reprisal set for hearing by the Board's Order." The Board reversed this decision and ordered the hearing reopened to admit the evidence, noting that "a hearing officer should not view an order directing hearing so restrictively as to exclude automatically all evidence relating to the circumstances surrounding alleged objectionable conduct." *Id.* In *Avondale*, a case the Hearing Officer relied on extensively, the Court of Appeals ordered that evidence of voter fraud that was not admitted at the hearing had to be

"view[ed] it in the light most favorable to Avondale[,]" and "[a]t the very least, [the] evidence raises serious questions concerning the possible occurrence of vote fraud." 180 F.3d at 640.[22]

Based on the foregoing facts, the Hearing Officer applied an incorrect standard, ignored unrebutted testimony of voter fraud and confusion, and was incorrect to exclude key evidence of potential fraud from the hearing. Therefore, the Hearing Officer's recommendations should be rejected because there were reasonable doubts about the validity of the election requiring the election to be set aside and a new election to be run.

III. BOARD AGENTS SUSPENDED VOTING AT CUMC BY CLOSING THE DOORS TO THE POLLING PLACE AND RUNNING OUT OF CHALLENGE BALLOT ENVELOPES.

As to Columbia's Fifth and Sixth Objections, the Hearing Officer addressed them together since they both alleged conduct which served to suspend voting at CUMC. The Hearing Officer's recommendation to overturn both of these objections was in error. First, the Hearing Officer incorrectly credited the testimony of Seth Prins over Carrie Marlin and Patricia Catapano. Second, there is no dispute that the polling place at CUMC actually did run out of challenge ballot envelopes for approximately 90 minutes, and therefore there is no basis to deny Columbia's Sixth Objection.

A. Facts in Support of Columbia's Fifth and Sixth Objections.

Voting was suspended at a second polling site at Columbia University Medical Center ("CUMC") for over one and one half hours. At approximately 1:30 p.m., the Board Agent

[22] This is referring to the same evidence of suspicious voting in *Avondale* relied on by the Hearing Officer in the Report, as discussed at footnote 19, *supra*. RRO at 25. It is therefore especially surprising that the Hearing Officer would not admit this evidence, and then attempt to use her exclusion of the very same evidence as a basis to claim that Columbia did not present similarly strong evidence as the company in *Avondale*, 180 F.3d at 636. Indeed, there are 35 pages of Union observer debriefing notes that Columbia wanted to introduce to the record, and only three pages were admitted. *See* **Employer Exhibit 4**; **Employer Exhibit 6**; **Exceptions Exhibit A**.

overseeing the election at CUMC announced that she had run out of challenge ballot envelopes. Tr. 32, 46, 49. After she ran out of envelopes, approximately 10 voters came to the CUMC polling place whose names were not on the list of eligible voters. Tr. 32:15. The Board Agent turned them away, telling them that they could not vote because there were no challenge envelopes, and that they could come back later. Tr. 32:10-12. New challenge envelopes arrived at approximately 3:00 p.m. Tr. 63:4-7. A few prospective voters came to vote under challenge after 3:00 p.m., informing the observers that they had been turned away previously. Tr. 63:18-21. It is unknown whether all of the people previously turned away returned, and whether other prospective voters never showed up to vote because word had spread that they may not be allowed to cast a ballot. Nonetheless, credited and unrebutted testimony confirmed that voters were turned away from voting.

Shortly thereafter, between 3:00 p.m. and 3:50 p.m., there was a line of voters waiting to cast their ballots at CUMC. Tr. 65:16-21. The only entrance to the room was a door propped open in front of the tables. Tr. 65:24-66:1. Carrie Marlin, the Assistant Provost for Administration and Planning, testified that the Board Agent closed the door to the polling place for approximately ten minutes. Tr. 67:6-8.[23] The Board Agent, noticing that a line of voters had formed at the main table walked over to the door, and shut it. Tr. 65:16-21. The Union observer asked why the door was closed, and the Board Agent said she wanted to clear out the line in front of the table first. Tr. 66:4-12. Carrie Marlin testified that the polling place looked "like a construction site" while the doors were closed because the glass walls were lined with brown

[23] Carrie Marlin's and Patricia Catapano's testimony regarding the closing of the door at CUMC was the only testimony that the Hearing Officer did not credit during the hearing, instead relying on the testimony of Seth Prins. For the reasons discussed in Section III(B), *infra*, that was in error and Ms. Marlin's testimony on the subject should be credited.

construction paper. Tr. 66:15-18. The door was reopened after the line at the central table cleared out. Tr. 67:1-5.

B. The Hearing Officer Erred by Crediting Seth Prins' Testimony and Not Carrie Marlins' Testimony.

The Hearing Officer discounted the testimony of Carrie Marlin based on the fact that she was "unable to recall many details pertaining to this objection[,]" and credited Seth Prins, a Union witness, because his testimony "provided a much greater amount of detail and specificity[,]" than Marlin's testimony. RRO at 33-34. The Hearing Officer referred to Marlin's demeanor only once in her discussion of testimony, calling her "evasive[,]" and instead focused her credibility analysis on the memory of witnesses, drawing conclusions regarding the two witnesses' comparative memory. The lack of specific discussion of witness demeanor—and the Hearing Officer's focus on witness memory—reveal that her credibility findings are not based on demeanor, and certainly not "primarily" so. Therefore, the Board is not required to defer to the Hearing Officer's ruling. *See Electrical Workers IBEW Local 38*, 221 NLRB at 1074 ("where credibility resolutions are not based primarily upon demeanor, it is well settled that the Board itself may proceed to an independent evaluation of credibility.") Moreover, even if the Hearing Officer's credibility determination was based primarily upon demeanor, which it was not, the Board can and should conduct a *de novo* credibility evaluation where the clear preponderance of the evidence demonstrates that the Hearing Officer's credibility findings are incorrect. *Standard Dry Wall*, 91 NLRB at 545. Although the Hearing Officer remarked that Marlin's testimony regarding the closing of the door was "vague" and faulted Marlin for failing to "recall many details pertaining to this objection[,]" the Hearing Officer credited the testimony of Seth Prins who repeatedly demonstrated his inability to recall key details pertaining to the Objection. RRO

33-34. Prins did not recall: what time the door to the polling place closed; the Board Agent's last name; where the Board Agent was at all times when the door was closed; who allegedly bumped into the garbage can propping open the door, and; if anyone came in while the door was closed. Tr. 237:20-21; 238:1-6, 238:15-16; 244:5-7; 247:25-248:3. Most importantly, Prins did not actually remember seeing anyone close the door or the moment that the door started to close, and merely stated that the door was "probably" closed by someone who bumped into the garbage pail holding the door open. Tr. 240:23-241:2. Importantly, Prins responded "No" when asked if he actually saw someone dislodge the garbage pail. Tr. 241:5-7. This was in sharp contrast to Marlin who actually witnessed "the board agent, when a line had formed…[go]to the door and close[] it." Tr. 65:19-21.[24]

The Hearing Officer focused a great deal on the fact that Prins "saw the door actually swing closed[,]" but failed to identify the even larger discrepancy between the credibility of the two witnesses. Namely, Prins admitted that he *did not actually see the event causing the door to close*, whereas Marlin testified clearly about the Board Agent getting up to close the door. Therefore, because these credibility determinations were not based primarily on demeanor, the Board should credit Marlin's testimony because it is the *only* direct testimony in the record that actually described the details of the closing of the door to the CUMC polling place.

[24] The Hearing Officer also mischaracterizes Marlin's testimony. The Hearing Officer claimed that "[a]t one point, Employer observer Marlin stated she could not recall if there was something propping the door open or if the door was open by itself, Tr. at 69, but later testified that it was a heavy door and that 'something was holding it open.' Tr. at 81" RRO at 32. This is plainly controverted by the record. Instead, Marlin first testified that she believed that one door was open and when asked what, precisely, was holding it open, stated that "I don't know if it was propped, or a stopper was in place, or if there was some mechanical hinge. I'm not sure." Tr. 69:14-20. Later, in the passage incompletely quoted by the Hearing Officer, Marlin relayed the same uncertainty regarding what, precisely, was holding the door open. "It was open. I mean propped, I'm not sure why I used that word. There may have been something holding it open." Tr. 81:4-6. The Hearing Officer's claim of inconsistent testimony is therefore unsupported by the record.

C. The Hearing Officer Erred by Denying Columbia's Fifth and Sixth Objections By Failing to Look at The Full Effect of Closing the CUMC Polling Place.

It is important to note that the Hearing Officer fully credited all testimony regarding the Board Agents running out of challenge ballot envelopes at the CUMC polling place, and that the lack of challenge envelopes caused voters to be turned away for approximately ninety minutes. RRO at 34 ("Turning to credibility, I generally credit the foregoing testimony regarding the lack of challenged ballot envelopes and that potential challenged voters were turned away as a result on December 7. I note that the testimony of the witnesses was straightforward, consistent, and unrebutted on this point."). This includes testimony that at least 8 to 10 voters were turned away because of the lack of challenge envelopes. Tr. 32:15.[25]

The Hearing Officer based her decision on the holding that "the evidence does not show that possibly disenfranchised voters could have affected the results of the election, in which the Petitioner prevailed by more than 900 votes." RRO at 35-36. However, this myopic statement creates a standard under which the closing of a polling place could *never* constitute objectionable conduct unless it is the sole objection. For example, in an election with a margin of 100 votes, if there was widespread threats that affected 50 voters and the closing of the polling place affected 50 *different* voters, under the Hearing Officer's application of this standard the objection would be denied because the 50 "disenfranchised voters could [not] have affected the results of the election." RRO at 35-36. This is an illogical standard and would prevent parties from ever

[25] Importantly, the evidence in this case actually demonstrates that there were far more voters turned away because of a lack of challenge envelopes. **Employer Exhibit 7**, a rejected exhibit containing some of the Union's observer debriefing notes (*see* discussion in Section III(D), *supra*), states that at CUMC, at about 2:00 p m. on December 7th, there were "[a]bout 20-30 challenges [who were] turned away and told to come back because there were no more envelopes."

objecting to the closing of a polling place unless it was the *sole* basis for objecting to the results of an election and there was proof that the number of voters turned away from the polls affected the outcome.

This is also not the standard applied by the Board or the Courts of Appeals. *See, e.g.*, *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 359 n.15 (6th Cir. 1983) ("Although *this threat* may not be sufficient to warrant a new election when considered in isolation . . . we believe that the cumulative effect of the rumor, the foyer incidents, and this threat may be sufficient to warrant a new election.") (emphasis added) (citations omitted). The Hearing Officer summarily dismissed any contention that there were "accompanying circumstances" affecting the vote. However, Board law is clear that, when looking at a suspension of voting, the Board will not only look at the number of people prevented from voting, but also if other voters could have been excluded by the suspension of polling, thereby destroying the laboratory conditions. In *Nyack Hospital*, 238 NLRB 257, 259 (1978), the Board explained that elections have been overturned where "'the late arrival of the Board agent so disturbed the laboratory conditions…' *regardless of whether the ballots of the employees possibly excluded from voting proved determinative.*" *Id.* (emphasis added) *quoting B & B Better Baked Foods, Inc.*, 208 NLRB 493 (1974). *See also Kerona Plastics Extrusion Co.*, 196 NLRB 1120, 1120 (1972) (election set aside because "laboratory conditions have been disturbed" where polls closed 20 minutes early).

The Board will also consider how many voters *did not vote* in an election (here it was over 1,300) when determining whether the closing of the polls affected the laboratory conditions. *See Whatcom Sec. Agency, Inc.*, 258 NLRB 985, 985 (1981) ("Thus, under all the circumstances, *and particularly since the large number of nonvoters could have affected the election results*, we find

that the deviation from our normal election procedures created doubt and uncertainty as to the results of the instant election which warrant setting aside the election and holding a new one.") (emphasis added); *Wolverine Dispatch, Inc.*, 321 NLRB at 797 (directing second election and noting that "the polls were closed for only a few minutes, it is possible that four eligible voters arrived at the polling area to vote during this hiatus, found no one present, and departed unnoticed by the Board agent or the observer."). Finally, the Board considers whether a suspension of voting may have discouraged other voters from going to the polls. *See Garda World Sec. Corp.*, 356 NLRB 594, 594 (2011) (election set aside where Board Agent closed polling place 5 minutes early during morning session of voting, even though there was another opportunity to vote later; noting that individuals prevented from voting may have "told [another] voter that the polls were closed.")

The Hearing Officer therefore took an impermissibly narrow view of the Board law in overruling Columbia's Fifth and Sixth Objections. Instead, Columbia's Objections must be sustained because of the uncontroverted testimony that polling was suspended for at least ninety minutes while CUMC ran out of challenge ballot envelopes and when the door was closed. Because the Hearing Officer acknowledges that "potential challenged voters were turned away as a result on December 7[,]" Columbia's Fifth and Sixth Objections must be sustained and a second election must be run since voters were actively turned away from the polls, thereby destroying the laboratory conditions necessary for a free and fair election.

IV. VOTERS ENTERED THE EARL HALL POLLING SITE UNDER SURVEILLANCE CREATING A GENERAL ATMOSPHERE OF FEAR AND REPRISAL AND RENDERING A FREE ELECTION IMPOSSIBLE.

The Hearing Officer incorrectly recommended overruling Columbia's Second Objection regarding surveillance at Earl Hall, repeatedly noting that the voters "did not appear upset by" being filmed. RRO at 17. This finding ignores the inherently coercive nature of voters being filmed *inside* the building where the voting took place and only 40 feet from the polling place which created a "general atmosphere of fear and reprisal rendering a free election impos[s]ible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Therefore, the Board should reject this recommendation.

A. Facts In Support of Columbia's Second Objection.

The uncontroverted testimony shows that when one of Columbia's observers, Idina Gorman, walked up to Earl Hall at 11:45 a.m. on December 7th, a tripod was set up "dead center" in front of Earl Hall "facing the door." Tr. 184:15, 185:15-24. The tripod was set up by an individual wearing a Union sticker, clearly indicating to Ms. Gorman and anyone else present that the individual was a union supporter. Tr. 184:4-11. The testimony also revealed that, inside Earl Hall on December 7, voters were - for a period of time - subjected to another camera recording them as they walked up the stairs to the third floor auditorium to vote. Tr. 330:16-25. This camera was placed there by Tina Cai, an eligible voter, who pointed her camera directly at the stairwell used by voters to access the polling site. *See* **Joint Exhibit 6**, screenshot attached as **Joint Exhibit 6(b)**.

Ms. Cai set her camera on a tripod at "eye level" on the foyer conference table, leaving it pointed towards the stairwell for approximately 30 to 35 minutes. Tr. 345:13-25. Ms. Cai also

interviewed at least four students after they had voted, asking who they had voted for and why; thus undermining any notion of a free, and secret, election. Tr. 341:19-20; 342:17-19. Perhaps most notably, during Ms. Cai's filming a Board Agent from Region 2, Greg Davis (the Board agent who represented that Region in this proceeding), walked directly past Ms. Cai's camera. As the review of **Joint Exhibit 6** and the attached screenshots (**Joint Exhibit 6(c)**) shows, Mr. Davis made no attempt to question Ms. Cai about her actions, much less request that she stop recording so as to eliminate any impression that voters were under surveillance by either Columbia, the union or any other interested person.

B. The Hearing Officer Ignored the Inherently Coercive Nature of Filming Inside the Building Where the Polling Site Was Located.

Ms. Cai's filming took place at the base of the stairs inside Earl Hall, less than 40 feet from the polling site. Tr. 181-83. At least three voters noticed the camera during the filming. RRO at 16. Furthermore, a Board Agent walked right past the camera while it was filming. In total, Ms. Cai filmed for approximately 30 minutes, and a tripod was set up outside Earl Hall for, at the very least, a few more minutes. RRO at 17. This means that voters entering Earl Hall were confronted with the cameras (in addition to Union agents' presence in the second floor foyer) as they were on their way to cast their votes. Regardless of the Hearing Officer's individual determinations that none of the voters "appear[ed] upset" by the camera, voters were walking into a climate where they were acutely aware that they were being watched by individuals sympathetic to the Union. As discussed in Section III(C), *supra*, the Hearing Officer should not have looked at this objection in a vacuum. *See Kitchen Fresh*, 716 F.2d at 359 n.15 ("Although *this threat* may not be sufficient to warrant a new election when considered in isolation . . . we believe that the cumulative effect of the rumor, the foyer incidents, and this threat may be sufficient to warrant a

new election.") (emphasis added) (citations omitted). Because of the persistent presence by Union agents inside Earl Hall on December 7th and 8th as discussed in Columbia's First Objection, coupled with Union supporters filming directly outside and inside Earl Hall, it was impermissible for the Hearing Officer to disaggregate these claims from the over six hours of Union agents' presence inside Earl Hall. Therefore, the Hearing Officer's ruling that "[t]here is no record evidence to demonstrate that . . . employees might have felt surveilled" was incorrect and is disproven by the over seven hours of surveillance from both Union agents and Union supporters. RRO at 17. Columbia's Second Objection should be sustained.

CONCLUSION

For the foregoing reasons, the Board should reject and overturn the Hearing Officer's findings and conclusions identified in the Employer's Exceptions, and should set aside and order a new election so that eligible voters can decide, in an atmosphere free from improper conduct, whether they wish to be represented for purposes of collective bargaining by the Petitioner.

Dated: New York, New York
March 17, 2017

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

Date of Filing: March 17, 2017

AFFIDAVIT OF SERVICE OF: Brief in Support of Columbia University's Exceptions to the Hearing Officer's Report and Recommendations

I hereby certify that, on the 17th day of March 2017, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

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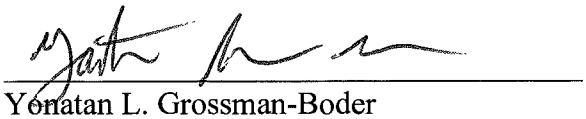
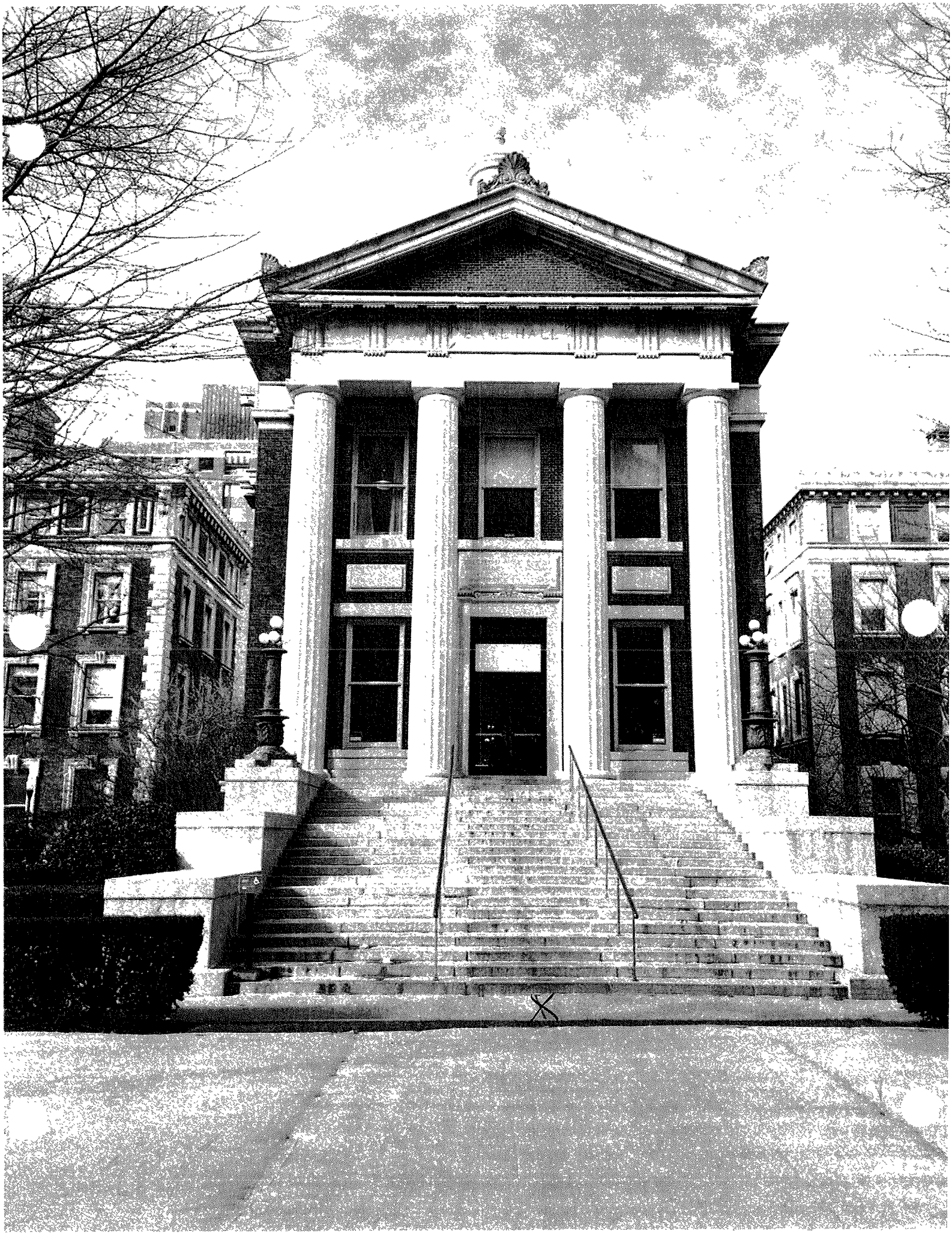
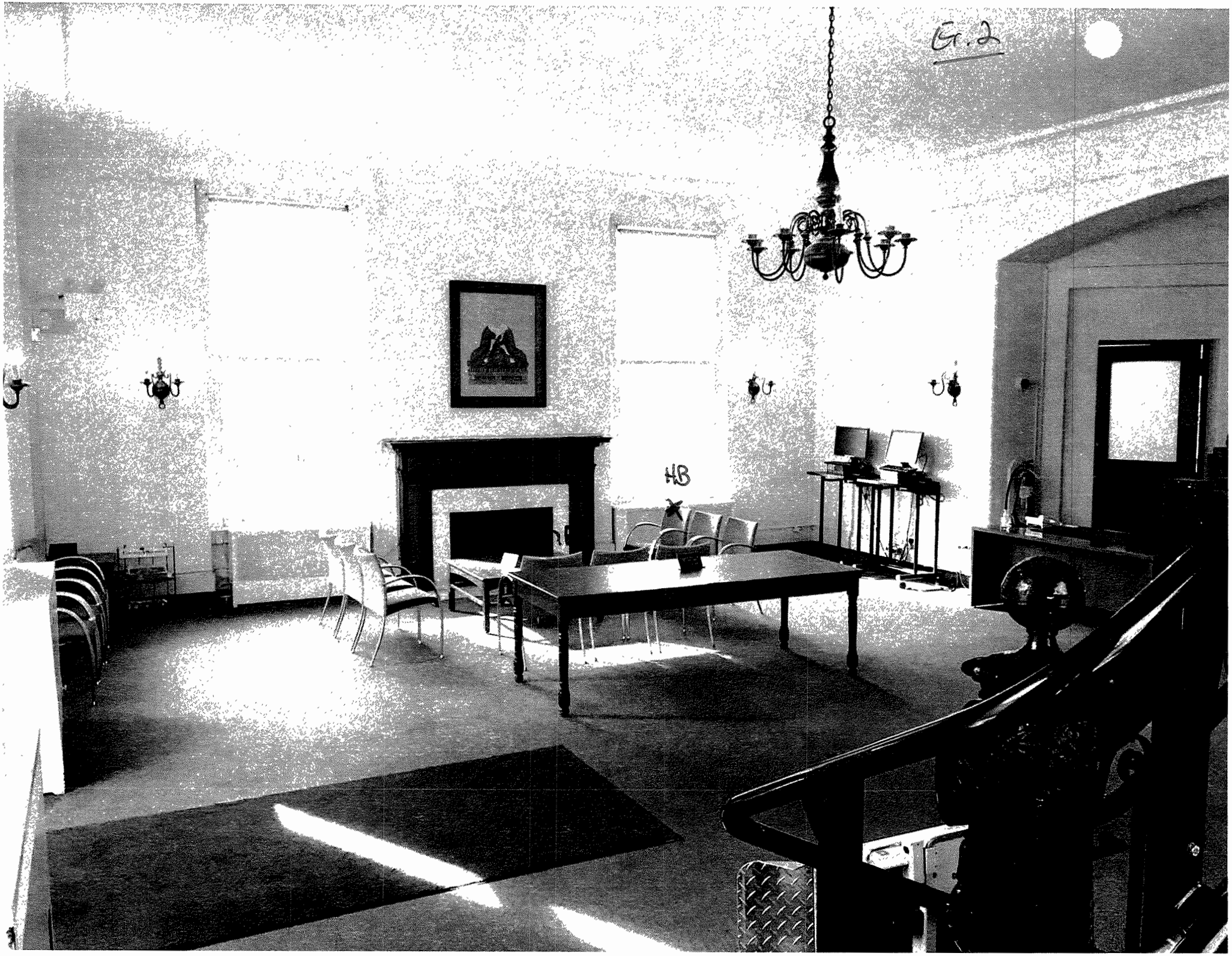


Yonatan L. Grossman-Boder

EMPLOYER
EXHIBIT 1



EMPLOYER
EXHIBIT 2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HB

EMPLOYER
EXHIBIT 3

Ex. 3

EMPLOYER
EXHIBIT 4

ER4

10-12 Union Observer - Shewanna House Table A-F

University observer was from the Provost's Office. She doesn't remember name but thinks she was an assistant to the Vice President. She was aggressive about grabbing the list and then finally, the Board Agent said she, the Board Agent, would keep the list. Shewanna thought that this person did not have a clue about why she was there. She's only been at Columbia a year. She asked what the difference was between Petitioner and Employer.

Board Agent was Susanna Ringel.

Challenges -- at least 10 people who were not on the list.

# of non-challenged voters - estimated 30-40

Some had Columbia ID. Some drivers license. If she couldn't find their name on the list, the Board Agent would instruct them.

Shewanna had to tell the Board Agent that the university observer was on her cell phone.
University didn't challenge anyone extra.
No disruption.

Shewanna remembers the following names: Brath or Barth (last name, male), Molly (?) Az, Fang, Fund, Chung, Foxworth (?)

They had to switch boxes because they were putting challenges in the same box as unchallenged voters. Several people -- she thinks 3-5 people -- said they were first year students when they were challenged.

She thought there were 30-40 people on the challenge line.

Theresa Smith Table G-L

University Observer was Mirian Stincone, Labor Relations.
Board Agent was named either Scott or Mike and he was new.

Thinks 10-15 challenges
About 70 voters

G. Wong Lee on the list and the person's name was G. Wong. Jessica Lee. Allowed to vote without challenge.

Alex Rigas Table M - N
Traffic was constant.
There were approximately 40-50 challenges.
No disruptions except that brd.agent at his table was curious about undergrads voting. Obviously did not know unit description.
There were no ID issues.

There were some bio first years, maybe 15-20 NOL
Brd.agents did not adhere to strict ID rules if name was on the ballot.

Josephine Caputo **Table O-Z**
Traffic constant; at least 5 on line at a time
There were 30 nol
No disruptions except for university personell and brd.agent grumbled about being there
University personnel were specific about not recognizing anyone so did not understand why they had to observe
They were both associate counsel from general counsel's office
All challenges were nol
Total of 130 voted with 30 of those being nol.

Hyacinth

EMPLOYER
EXHIBIT 6

ER6

IN

2:00 PM Report

Shewanna House - Q-Z table
Board Agent: she thinks it was Paul? I think it was Zach
University Observer: Camille Nicholson - she's a confidential HR secy
10 NOL challenges - approximate
No university challenges
54 unchallenged voters - she thinks that's exact
Camille kept asking for ID. She was then instructed by Steve Berger that ID's were not required and she then stopped asking for them.
Steve had to tell Camille to put her cell phone away.

Theresa Smith -G-L
Board Agent: Paula Gomes
University Observer: Patrice from General Counsel
Li Yupik - 2 students on the list who could only separated by address. She said which one she was and they let her vote without challenge.
About 12 challenges
No university challenges
40 unchallenged voters
Franciska (sp?) Landes - she was supposed to vote at Lamont - they let her vote at Earl but as a challenge ballot
Maida

Sayantani Mukherjee
A-F
46 regular votes
17 NOL
3 Lamont
No id issues
Student last name Wilson came to vote but someone with the same name had already voted. Worker realized there were different middle initials making him NOL and declined to vote
No distruptions
Phones:
2 University observers were using phones throughout
Took photo of book on objective feminism and other stuff
Claire Lachow- IT specialist was one closest to union observer. The other was at the next table.

Taarini Mookerjee
M-P
24 regular votes
4 NOL
No distruptions
1 voter who is a library assistant was NOL/ when advised decided not to vote
No id issues
Hyacinth

EMPLOYER
EXHIBIT 7

E.7

2:00 PM debrief of Rene Casiano

56 voted unchallenged
32 challenges were voted properly
About 20-30 challenges turned away and told to come back because there were no more envelopes
Plus another 3-4 were told to go to Earl to vote

Traffic was intermittent - 1 at a time then 6-7 all at once - probably class schedule
Lingerers were told to leave

Board Agent called to get more envelopes approximately 12:45-1. As of 2:00 when Rene left, there were no new envelopes.

An assistant director was sent by Troy Eggers to observe - NLRB determined she was as assistant director so told her she couldn't stay and observe - Troy Eggers is in the Business school, unknown where the asst dir sent to be observer was from.

One person didn't have ID and was allowed to vote - their name was on the list - not challenged. No one was made to show ID but most people did show it

JOINT
EXHIBIT 1

(J.1)

that the Region would

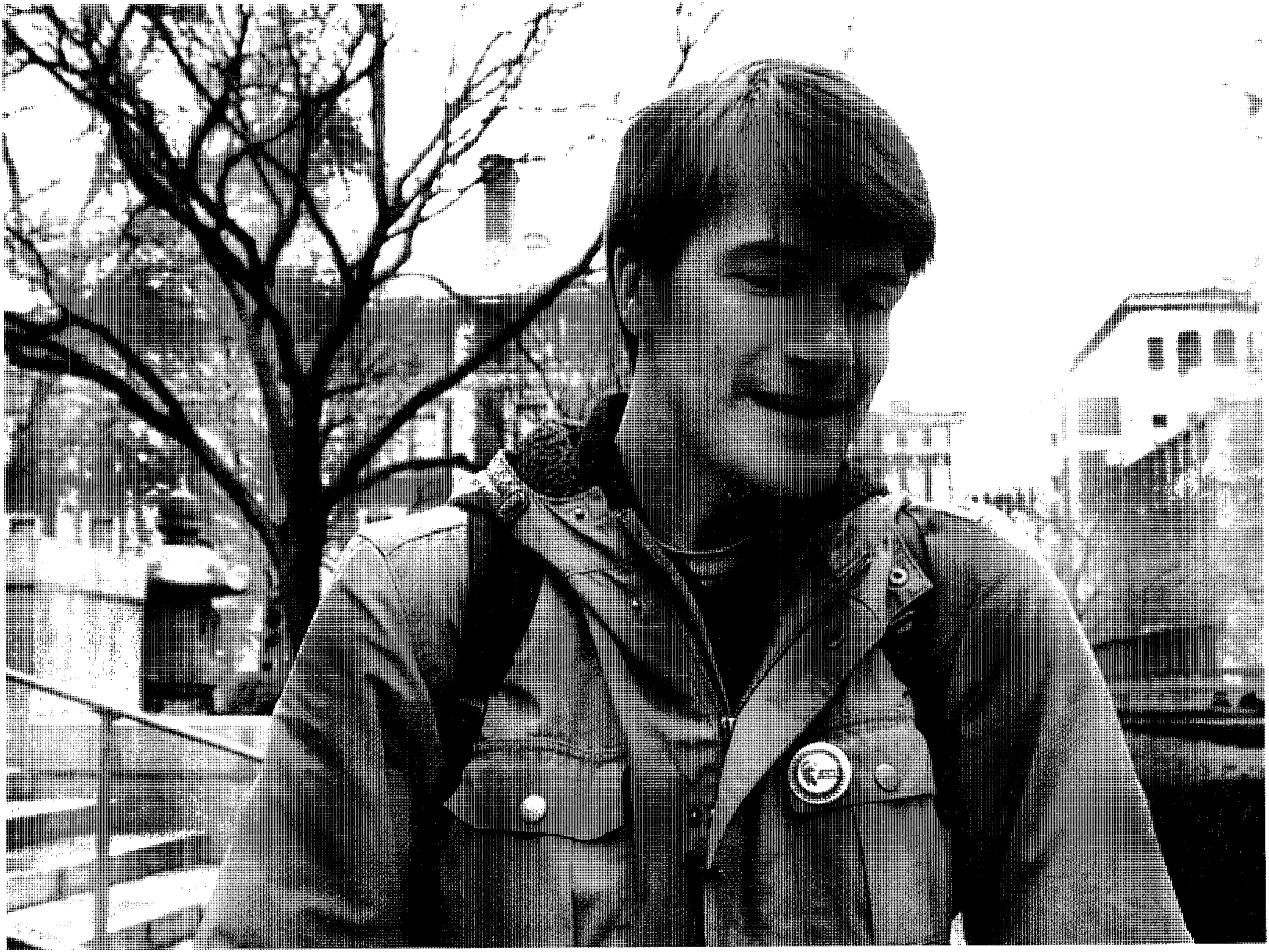
List of Stipulated Facts

I. During November 21, 2016, conference call with the Union and the Board, all parties agreed ~~to~~ require either "Government of Columbia issued ID" at the election.

II. In an Email dated December 6, 2016, at 11:23 AM, Nicholas Lewis, the Assistant Regional Director, stated "This is to confirm that presentation of voter ID will not be a requirement in order for an individual to vote. As the presentation of identification was not included in either the Supplemental Decision or Notice of Election, the RD has concluded it cannot be made to be a requirement."

III. At the vote count on December 9, 2016, one challenge ballot was impounded because the person with the exact same name had already been checked off as having voted at another polling place.

JOINT
EXHIBIT 6(a)



JOINT
EXHIBIT 6(b)

JOINT
EXHIBIT 6(c)

VOTING PLACE

VOTING PLAC

PETITIONER
EXHIBIT 4

Shift	Location	Name	Department	Phone #	Training	Notes
10AM-12PM	Morningside	Theresa Smith		2110 [redacted]	done	text sent
10AM-12PM	Morningside	Josephine Caputo		2110 [redacted]	done	text sent
10AM-12PM	Morningside	Shewanna House		2110 [redacted]	done	text sent
10AM-12PM	Morningside	Alex Rigas	Philosophy	[redacted]	done	text sent
10AM-12PM	CUMC	Booker Washington		2110 [redacted]	done	text sent
10AM-11AM	Lamont	Michael Sandsrom		2110 [redacted]	done	
11-1PM	Lamont	Jada Young	Medcenter	[redacted]	done	
1-PM-2PM	Lamont	Dominick Wendell	History	[redacted]	done	
12PM-2PM	Morningside	Melissa Abler	APAM	[redacted]	done	text sent
12PM-2PM	Morningside	Ben Serby	History	[redacted]	done	text sent
12PM-2PM	Morningside	Esmeralda McCormick		2110 [redacted]	done	text sent
12PM-2PM	Morningside	Nick Croggon	Art History	[redacted]	done	text sent
12PM-2PM	CUMC	Rene Casiano		2110 [redacted]	done	text sent
2PM-3PM	Lamont	Alejandra Barunda		[redacted]	done	
2PM-4PM	Morningside	Theresa Smith		2110 [redacted]	done	text sent
2PM-4PM	Morningside	Daniel Kressel	History	[redacted]	done	text sent
2PM-4PM	Morningside	Sandra Chritescu	German	[redacted]	done	text sent
2PM-4PM	Morningside	Ben Serby	History	[redacted]	done	text sent
2PM-4PM	CUMC	Seth Prins	Mailman	[redacted]	done	text sent
4PM-6PM	Morningside	Brian Bartell	English	[redacted]	done	text sent
4PM-6PM	Morningside	Esmeralda McCormick		2110 [redacted]	done	text sent
4PM-6PM	Morningside	Josephine Caputo		2110 [redacted]	done	text sent
4PM-6PM	Morningside	Shewanna House		2110 [redacted]	done	text sent
4PM-6PM	CUMC	Rene Casiano		2110 [redacted]	done	text sent
6PM-8PM	Morningside	Gary Hill		2110 [redacted]	done	text sent
6PM-8PM	Morningside	Theresa Smith		2110 [redacted]	done	text sent
6PM-8PM	Morningside	John Stobo		2110 [redacted]	done	text sent
6PM-8PM	Morningside	Sandra Chritescu	German	[redacted]	done	text sent
6PM-8PM	CUMC	Booker Washingtn		2110 [redacted]	done	text sent

Shift	Location	Name	Department		E-mail	Phone #	Training		Notes
10AM-12PM	Morningside	Montserrat Fernandez-Pinckney		2110		[redacted]			
10AM-12PM	Morningside	Josephine Caputo		2110		[redacted]	done		
10AM-12PM	Morningside	Phil	Philosophy			[redacted]	done		
10AM-12PM	Morningside	Alex Rigas	Philosophy			[redacted]	done		
Backup until 4	Morningside	Joscelyn Jurich	Communication			[redacted]			
10AM-12PM	CUMC	Booker		2110		[redacted]	done		
10AM-12PM	Nevis	Zeinab Azarbadegan	History		Redacted	[redacted]	done		SMS p/u 118th and Amsterdam
12PM-2PM	Morningside	Sayantani Mukherjee	History			[redacted]	Done		will be 10 min late
12PM-2PM	Morningside	Shewanna House		2110		[redacted]	done		
12PM-2PM	Morningside	Taarini Mookherjee	English			[redacted]	done		Text her about two hours before h
12PM-2PM	Morningside	Theresa				[redacted]			
12PM-2PM	CUMC	Seth Prins	Mailman		Redacted	[redacted]			
2PM-4PM	Morningside	Sandra Chiritescu		2110		[redacted]			
2PM-4PM	Morningside	Danielle Drees	English			[redacted]	done		
2PM-4PM	Morningside	Akio Mokuno		2110		[redacted]			
2PM-4PM	Morningside	Joe				[redacted]		2-3	
2PM-4PM	CUMC	Booker		2110		[redacted]			
4PM-6PM	Morningside	Shari Wilson		2110		[redacted]			
4PM-6PM	Morningside	Theresa Smith				[redacted]			
4PM-6PM	Morningside					[redacted]			
4PM-6PM	Morningside	Montserrat Fernandez-Pinckney				[redacted]			
4PM-6PM	CUMC	Seth Prins	Mailman		Redacted	[redacted]		2	
6PM-8PM	Morningside	Montserrat Fernandez-Pinckney		2110		[redacted]			
6PM-8PM	Morningside	Zeinab Azarbadegan				[redacted]	done		
6PM-8PM	Morningside	John Stobo		2110		[redacted]			
6PM-8PM	Morningside	Sayantani Mukherjee	History			[redacted]	done		will be 10 min late
6PM-8PM	CUMC	Booker		2110		[redacted]			

EXCEPTIONS
EXHIBIT A

Dec. 7, 2016 – LAMONT

Opening:

Board Staff: Jeff Dunham and Ruth Basantes – very friendly and competent. They immediately started covering windows, etc. Ruth actually interned at LSSA through the Murphy Institute back in 2012-13.

CU sent in two observers, Board only permitted one, so they were going to split the shift. No CU rep or administrator or lawyer came.

Jeff Dunham denied my request to use Lisa Jessup as a backup observer if someone did not show. He said at one point, "do you really want to risk the whole election over a non-employee observer at a site with a small number of voters?"

Our **10 AM and 11 AM** observers showed up, and our 2 PM one has already checked in with me.

Michael, our 10 AM observer came to me at 11 and reported that 10 people from the list had voted and that there were two additional challenged ballots. They were not on the Lamont list, he did not know if they were on a list for another location.

11:00-12:00

Jada reports nothing unusual during voting.

About 25 people from the list voted + 7 who were not on the list, and they voted subject to challenge.

Dominick 12:00-1:45 reported 5 voters from the list and no challenged ballots. No unusual occurrences.
Alejandra relieved Dominick early at 1:45 PM. She will be in there till close at 3:00 PM.

1:45 PM to 3:00 PM
Alejandra reports 14 more voters. No one challenged. That puts our count at 54 from list and 9 challenged ballots.

Alejandra did say she quickly counted the list at closing and thought there were 59 voters. So either she or our count are off by a few.

Nothing unusual to report.

Poll closed. Jeff Dunham is taking the sealed box home to NJ for the night and to Region 2 in the morning.

Scott Sommer

December 7, 2016 CUMC HAMMER

Hammer building 9:00 AM

Ellen, Bev & Donna there for setup at 9:00 AM. Board agent arrived approximately 10:55. Bev heard the agent say she wasn't early because of transportation issues.

Donna called facilities to have the overlooking windows from the library and computer lab covered. Called 305HELP to get the facilities department and spoke to the woman who answered the phone. Windows were covered.

Donna called security at 305-8100 and spoke to Lt. Johnson to have the camera in the voting room 104 covered. They covered it.

Booker Washington, our observer, introduced Donna to the management observer. He introduced himself as Peter Gamalier (Gamaliel?) and said he was the Director of Financial Services in the School of Nursing. He had a lanyard that said "delegate" on it, and Donna and Booker asked what that meant. He said that they go to all student functions, and that meant things like rallies. At rallies, he said if students were getting unruly, that they go up to the student and tell them that they could get in trouble for what they are doing.

Board agent arrived at 10:55. She asked Bev to hang up voting location board notices near voting location, room 104. The signs did not indicate the room number – she just asked that they be hung up from the elevator to the room. She showed Ellen the list of voters for that location. Ellen asked for master list. She indicated she only had the location list. The University observer had a list of his own and started to compare it to her list. She told Ellen she will use the NLRB list. After she went through her things she had the master list. Ellen explained that if people show up here to vote and are not on the location list, but are on the master list, can they make a note of that challenge is the wrong location so it can be easily cleared. After hastily setting up the voting booth, she opened the poll at 10:01 a.m. We had to leave. On our way out Ellen indicated that the observers had not even been trained. She said they will be trained, but we had to leave and union didn't know how that was going to happen. At that time there were no voters waiting to vote.

First thing the board agent did when she arrived was to pull out the list for us to check. Then she put the ballot box together without notifying anyone in the room. We did not get to see whether any observer was able to sign the seals on the ballot box. We were not asked to sign the seals. Bev saw her set up the box.

12:00 Debrief of Booker Washington 20-30 people plus challenges
Board agent told Booker that the union was supposed to but didn't sign the ballot box. She didn't have Booker sign it either. (We were never invited to sign the box.)
Their observer that we objected to was replaced at around 10:30 after a call to HR, who spoke to their general counsel's office. The Board agent stated that if the observer stayed, it would likely be a challenge, but she didn't advise them what to do. They sent a woman to replace Gamaliel- Booker didn't catch her name. On the internal Columbia website, Gamaleil is listed as Gamaliel Vallejo. Booker confirmed that it was his real name. Booker said Gamaleil had no visible lists and didn't take notes. Gamaleil's replacement arrived before "no more than 5 or maybe no one" (Booker's words) had voted. Booker said the agent trained the observers on procedures, and on what cannot be done by observers and voters.
Approximately 5-6 people who were not on the location list, but were on the master list slated to vote at Earl Hall all voted subject to challenge.
Approximately 6 people were not on the location list nor the master list, and voted subject to challenge.
At around 11:00, there was a large influx of voters.
At one point, the board agent had to tell people who had voted not to linger in the room.
Also, some students came in to use the stapling machine that was in the room, but the agent got them out quickly. They didn't wait in the voting line, but they didn't make it past the sign-in table before the agent turned them out.

1:15 PM

Michael Belt, organizing staff, came in and said workers had told Seth Prins that they were told they should come back another time to vote. The Board Agent ran out of challenge ballot envelopes and told them to come back another time. We know of approximately 8 people who have told us this at the Hammer location.

We are collecting names of people that we know of:

From Jason Resnikoff, whose cell is **Redacted**

- Tiara Ahmad, phone **Redacted**
- Sarah Klemstein (hard to read the writing of last name, may be a bit incorrect)
- Ruth Springer

2:00 PM debrief of Rene Casiano

56 voted unchallenged
32 challenges were voted properly
About 20-30 challenges turned away and told to come back because there were no more envelopes
Plus another 3-4 were told to go to Earl to vote

Traffic was intermittent - 1 at a time then 6-7 all at once - probably class schedule
Lingerers were told to leave

Board Agent called to get more envelopes approximately 12:45-1. As of 2:00 when Rene left, there were no new envelopes.

An assistant director was sent by Troy Eggers to observe - NLRB determined she was as assistant director so told her she couldn't stay and observe - Troy Eggers is in the Business school, unknown where the asst dir sent to be observer was from.

One person didn't have ID and was allowed to vote - their name was on the list - not challenged. No one was made to show ID but most people did show it

Debrief of Seth Prins at 4:00:

Board agent grilling each person not on the list, Seth felt they were being discouraging [Total challenges for the day up to this point is 100 per his estimate]

22 voters unchallenged
40 challenges not on either list this shift

NLRB agent gave someone the incorrect eligibility information - told them they had to be working last semester not this semester - Seth had to correct her

They were both being challenging to voters

A voter asked if there was a difference voting here or downtown and NLRB agent didn't answer the question and the voter left to go to Morningside. Other voters were a bit in limbo and Seth was worried that the voters would leave, so Seth had to tell the agent they wanted to vote to ensure they didn't get discouraged.

Audrey and Simon are the 2 agents

Asking every challenge ballot person lots of questions

Seth thought people were pissed but doesn't think anyone walked away.

Voters were concerned that voting was in pencil not pen. Board agent said use a pen if you have one.

Audrey at least once told a voter that the eligibility criteria is on the sign outside and Seth had to tell Audrey that the voter can still vote.

Not explaining challenge ballots at all to people.

6:00 debrief with Rene

34 voted unchallenged
19 voted subject to challenge

They counted the list in front of Rene, 95 challenged + 19 while he was there
They started writing names on the list when people were voting subject to challenge, as well as giving them a challenge ballot with the appropriate envelope.

Rene remembers 5 people who were sent away earlier but came back who came in to vote during this time slot.

When Rene left at 2, the ballot box was located inside the voting booth where it may have been all day to that point.

When Rene came in at 4, the ballot box was moved to a table out in the open. There was a Board Agent standing next to the moved ballot box.

*Both the list for that location as well as separate lists for each location were on the table, and the observers would look at all of the lists. If someone wasn't on the list for this voting location, the observers would check the other lists before sending the person to the board agent.
*At the 12-2 shift for Rene, he remembers 2 people who came in and were on another location's list, but the board agent told them to vote at the other location and they left.

8:00 Debrief with Booker

15-20 voted plus
12-13 challenged ballots voted

Only Board Agent Simon was there for the whole time period.

No issues arose.

Booker noted that one woman who came in and voted said this was her third attempt because she had been told to come back twice. She successfully voted this time.

Donna Becotte

MAIN CAMPUS 12/7/2016

Opening:

University observers:

Karen Hui, associate general counsel/lawyer from the General Counsel

Manama Gopal, associate general counsel from the General Counsel

Mirian Stincone, Asst Director, Employee Relations, Human Resources. She's a labor relations specialist who handles grievances for the university. She may be a lawyer -- most of them are. She was seated right next to Theresa Smith -- no Board Agent in between -- who is a 2110 steward who works in the same building as MIrian and who has faced her across the table. I have grievance decisions signed by Mirian Stincone.

An Associate Dean from the School of Professional Studies came. She was very new to the university. I told her that if she was a manager or supervisor, she couldn't observe. She called her office and then came back and said the only person she supervised was a non-union Coordinator. I told her that didn't matter. She called her office back and then left, saying someone else would come over. Another woman -- young, white -- came over and I didn't get a chance to ask her who she was because we had to leave. The Associate Dean told me she was told to speak to Karen Hui. I pointed out Karen Hui but she never talked to her.

Hyacinth told the Board Agent that the university observers were managers.
I then told Berger who they were.

I told Karen Hui, Manasa and Mirian that I did not think they should be observers because of their managerial/supervisory authority and that we were not waiving our right to object. Later the Board Agent, Steve Berger, came over to them with me and told them they were proceeding at their own peril. Karen said she understood.

Hyacinth told Steve Berger that several of the voting booths did not have the instructions about not signing the ballot. Several had a notice posted up saying don't sign the ballot but at least two did not. Berger told her they ran out. She offered to make copies and he said no.

I thought the signage to the 2nd floor was bad and an Earl Hall staffer came up to say that he didn't know where to tell people to go and wanted to know if he should direct people to the auditorium. The Board Agent then put up one additional small sign on the door. In the 2002 election, the signage was enormous. Huge signs were posted on the landing that you could see as soon as you came in the door.

Windows - Berger refused to pull the shade on one of the windows in which people could directly look in from windows in Dodge or Lewisohn Hall.

10-12 Union Observer - Shewanna House Table A-F

University observer was from the Provost's Office. She doesn't remember name but thinks she was an assistant to the Vice President. She was aggressive about grabbing the list and then finally, the Board Agent said she, the Board Agent, would keep the list. Shewanna thought that this person did not have a clue about why she was there. She's only been at Columbia a year. She asked what the difference was between Petitioner and Employer.

Board Agent was Susanna Ringel.

Challenges -- at least 10 people who were not on the list.

# of non-challenged voters - estimated 30-40

Some had Columbia ID. Some drivers license. If she couldn't find their name on the list, the Board Agent would instruct them.

Shewanna had to tell the Board Agent that the university observer was on her cell phone.
University didn't challenge anyone extra.
No disruption.

Shewanna remembers the following names: Brath or Barth (last name, male), Molly (?) Az, Fang, Fund, Chung, Foxworth (?)

They had to switch boxes because they were putting challenges in the same box as unchallenged voters. Several people -- she thinks 3-5 people -- said they were first year students when they were challenged.

She thought there were 30-40 people on the challenge line.

Theresa Smith Table G-L

University Observer was Mirian Stincone, Labor Relations.
Board Agent was named either Scott or Mike and he was new.

Thinks 10-15 challenges
About 70 voters

G. Wong Lee on the list and the person's name was G. Wong. Jessica Lee. Allowed to vote without challenge.

Alex Rigas Table M - N
Traffic was constant.
There were approximately 40-50 challenges.
No disruptions except that brd.agent at his table was curious about undergrads voting. Obviously did not know unit description.
There were no ID issues.

There were some bio first years, maybe 15-20 NOL
Brd.agents did not adhere to strict ID rules if name was on the ballot.

Josephine Caputo **Table O-Z**
Traffic constant; at least 5 on line at a time
There were 30 nol
No disruptions except for university personell and brd.agent grumbled about being there
University personnel were specific about not recognizing anyone so did not understand why they had to observe
They were both associate counsel from general counsel's office
All challenges were nol
Total of 130 voted with 30 of those being nol.

Hyacinth

12:00 – 2:00

Esmeralda Singh - Q - Z table

Thinks about 110 voted
Doesn't have numbers on challenges but thinks there were a lot

For a very short time, she filled in for Ben Serby at M-R and counted 7 people

University observer was Alicia from the Office of the General Counsel. Did not want to be there but said she had to come over because "they found out they couldn't use supervisors."

She doesn't remember who the Board Agent was -- thought she was young and in her early 30's. Whoever it was told people that they did not need ID.

There was one person who came to the table after she had voted under challenge and asked why she wasn't on any list. The Board Agent went into explaining that sometimes there were mistakes and the challenges will be reviewed.

She thought their line (Q-Z) was the busiest line.

She heard the Board Agent say there were 4000 people on the list.

Nick Croggan - G-L table

Estimated 78

Didn't count challenges but there a lot -- he thinks one every 5 votes

Board Agent was a youngish guy. He did not sit between the two observers. He stayed off to the side, often standing and was completely detached from looking at the list.

University observer was Idina Gorman, Director of Labor Relations. -- He says she is staying until 4 pm.

Everyone showed ID's and the two observers were checking the list. the Board Agent did not look at the list at all. Only Nick and Idina looked at the list and checked off son the list. Idina was very aggressive about saying that people were not on the list and Nick thought that there might be people who could show that they were on the list with a different ID than their Columbia ID.

NO disruption.

Idina had a phone in her handbag and she checked it a few times.

Nick thinks if you showed him the list, he could recognize names.

Several "LI" voted but couldn't remember first names.

He knows the following people voted: Alma Ingra, Elizabeth Gornick, Annie K (Art history from Bulgaria).

Someone whose first name was Timothy was listed as Tomothy and ended up being challenged. Nick thinks he could recognize the name if you showed him a list.

Melissa Abler refused to debrief with Hyacinth.

Ben Serby doing double shift so no numbers from him yet.

4:00 PM Daniel Kessler - A-F table

Board Agent - Rachel Feinberg. She told Daniel she thought that there were no more than 100 challenges.
University observer - someone from Provost's office. African-American. Had worked 16-17 years in the Provost's office. He couldn't remember her name. Worked at airport.
Rachel didn't do any checking on the list.
Kevin Chen and Kevin Cheng - they mistakenly checked Kevin Cheng off as Kevin Chen so when Chen showed up, he voted under challenge but the Board Agent wrote up a memo which Daniel signed.
10 challenges - NOL
No challenges by the university
Estimated 150 people - he thinks a third of those in that alphabet section had voted.

4:00 PM Elliot Cairns - G-L table

Board Agent - someone who is bald but not Steve Berger 2nd one was Bert Pearlstone
University observer - Idina Gorman, Director of Labor Relations
Idina was asking for ID's, then the Board instructed them not to ask for ID's.
One ID problem - Margo Kristjansson. She had her name legally changed to Margaux but on the list her name was Michael. So she ended up being challenged.
One that was a Med Center person who voted down here.
10-15 challenges - all NOL
No university challenges
A bunch of undergrad workers came over together
He thought course assistants came into vote and were not on the list
Estimated 73 non-challenged voters
Whoever was posted at the door wasn't on top of everything and when the university relief people came, they had to pause voting and keep people waiting on line so that the Board Agent could explain things.
A lot of Klms and Lis and South Asian names - thought there was a big international turnout.
Remembers Yubo Han voting

2-4pm Theresa Smith observer Table R-Z

Traffic was constant during that time.
60-70 regular votes and
10 NOL
No disruptions
Agents did not ask for IDs
Agents were Nicky and Rachel
The university did not challenge anyone

12-4:00 Ben Serby-observer Table M-P

104 voted regular
Maybe 10-15 NOL
Brd did not ask for ids
There was a 2pm switch w/NLRB agents. Observer noted that the 1st brd agent seemed more invested 2nd agent-Greg- was somewhat sloppy about how the names were being checked off and at some point the university observer got a little aggressive about keeping the list. Ben stood his ground and got access to the list but bc of agents style thought that the situation could have been problematic. Ultimately nothing bad happened.
Ben also said that there was an instance where a friend/colleague came up to Ben and engaged in conversation. Ben advised her that he could not talk to her but she just kept talking so Greg was somewhat stern with them about it. Ben insists he did not engage w/ the colleague.
Largest turnout was at around 12:15 and seemed to increase on the hour.

Hyacinth

4:00 to 6:00

Brian Bartell, M-P table

Board Agent - Greg Davis
University observer - white man in his '60's. Thought maybe gsas. Having knee surgery. Seemed clueless. He asked for ID a lot because he had trouble understanding non-Anglophone names.

Thinks half the people showed ID and half just gave name. The Board Agent in charge told Brian that you can't require it.

An Emily Mohr came, who was NOL, and was told to go to challenge table.

8 NOL challenges
No university challenges
33 voters

No disruption

Brian saw a lot of people he knew.

Shewanna House, A-F table

Board Agent - Karen _____
University Observer - Natasha from General Counsel
6 NOL challenges
No university challenges
Approximately 30 voters

Remembers a guy named Christopher Brown voting.

There was one med school voter that she remembered who was Asian

Esmeralda McCormick
G-L
Approximately 100 voted
40 on list
60 NOL
The ID issue became problematic as a student with last name "Chen" was challenged as NOL. Esmeralda pointed out that her name may be spelled "Xiang" which would mean she was in the wrong alphabet. Board agent Burt Perlstone got her point but unclear if board will change the ID policy.
Adam Levine and Nelson Gomez both voted (names she remembered).

Josephine Caputo
Q-Z
125 voted total
100 voted regular

25 voted NOL
No ids required
A couple of voters were anxious about having to vote challenged.

8:00 PM **John**
G-L
25 regular votes
5 NOL
No disruptions
Pretty straightforward
Some people were upset about having to vote challenged

Sandra Chiritescu
M-P
20 regular
3 NOL
No disruptions

Gary Hill
42 ppl
6 challenge NOL
R-Z

University agent is Terri possibly

Board agent looked for the names. Observers checked it off.

Didn't ask for ID not required and not in notice of elections.

Staggered voting.

Theresa Smith
Between 30-40 ppl
About 7 votes challenged. 1 wrong Location. Others NOL
A-F

University observer: former Columbia student now works as a temp for the School of the Arts. He said his supervisor was going to come over but she did not in the end.

Board Agent: Steve

Observers were looking up the names. All agent did was hand out the ballots. If the name was not on the list, the agent would double check the list to make sure.

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December 8, 2016
NEVIS:

I arrived at Nevis shortly before 9:00 AM w/Zeinab from History. Place was pretty much abandoned. A few minutes later the admin arrived and took us to the voting room, it says "Library" on the door.

Around 9:40 AM an observer for CU arrived and introduced herself as Patsy (Patricia Catapano). I saw her badge said she was from the GC's office. Inquired as to whether she was a supervisor and she said no, she did admit to being an attorney, upon being asked. Here is her profile page from the CU website, which includes that she does Labor and Employment law matters (http://ogc.columbia.edu/patricia-s-catapano). Nasty, cold, edge. She said she observed on Tuesday at CUMC starting at noon w/o objection. I asked if they knew she was an attorney in the GC's office and she said, no, no one asked, they only asked if she was a supervisor.

At 9:59 AM Jackie Tekyi, formerly of Levy Ratner (https://www.linkedin.com/in/jacqueline-tekyi-03511b73), from the NLRB came rushing in, very apologetic. Said she had been driving around for a ½ hour trying to find the place. I will cut her slack that the place is not easy to find and GPS takes you to the wrong place. I made my objection to Catapano as an observer, she said she will note it and put it in her report, she continued that Board practice was to not exclude the observer, but to advise the employer that they might want to send someone else in order to avoid the objection. Catapano refused.

I stated that anyone who votes at Nevis who is not on the Nevis list should be allowed to vote subject to challenge and to have "wrong location" written on the envelope. Tekyi agreed that was the process she would follow.

I then asked that the parties be given a copy of the challenge list at the close of the polls, so the parties can start working on clearing challenges before the count. Catapano immediately said the university did not join in that request, I suggested that she might want to check with back with university on that, as it was in our mutual interest. She glared at me, she is evil. She must be best friends with Libby from Harvard.

Tekyi permitted me to stay for the assembling of the ballot box and told me where it and the voter booth would be placed. She opened the poll at 10:02 a.m., and said it would close at 12:02 p.m. no one had come to vote by the time I walked out at 10:03 a.m.

10 – 12 1 voter

Scott

Hammer:

Hammer building notes
Board agent Simon arrived around 9:00. Board agent Juniry arrived by 9:30. Simon won't be staying at the polling location, just staying until he can be sure that things are going smoothly. Juniry will be staying until 3:00. She thought her replacement might be McCauley.

We told Simon that about yesterday's problems with running out of envelopes and sending voters to Earl if not on the Hammer list. We reiterated that we want everyone to vote. We want envelope to reflect wrong location or NOL. The Board agents agreed They have a full box of challenge envelopes. They will give us copies of challenge names from yesterday and tonight we will also copy today's challenge names if we can get a code to use xerox machine in library. Booker will see if his will work all after the polls close.

The company observer is Laura McDonough, Executive Administrative Assistant in the Provost's Office. She will be there until 12:00.
Booker is our observer for the 10-12 shift.
A second company observer, Lamarr, came in at 9:45. Board agent Simon told them to work it out between them. Lamarr said he was leaving.
When we left so the polls could open at 10:00, Lamarr was sitting just outside the polling location door. Ellen asked Simon to have him move. Simon asked him to move, Lamarr said he would only be there a short while. We left.

Debrief Booker from 10-12

Estimated 35 voters in all – of those about 25 were challenged not on list

6 voters were supposed to vote at Morningside but voted challenge here and board agent noted that on the envelope

Harvard's second observer Lamar who showed up in the morning was not outside any longer

Three people at one time came to use equipment and were told to leave.

Simon and Junerie are still there from the morning as board agents.

Kristin Politi said that the male board agent was standing right behind her – like 4 feet away when she was voting. In addition to Kristin the other woman Aleksandra Bukojicic - Aleksandra is the stronger voter if we want to speak with someone

They didn't know who he was and felt he could see how they voted. They were very upset.

Debrief Seth from 10- 2:30

12 votes unchallenged
23 NOL
2:30 Debrief Seth
12 voted on list
23 challenges
Seth said that there were a total of 43 challenges for the day so far
Seth noted that most people on training grants and MD PhD's are not on the list.
Someone peeked in and said they were there to vote. Both agents "blocked" the door and pointed to the criteria outside the door, asking if she met the criteria. She left.
Agent Simon is "hovering" near the voting booth. It is close to the voting booth.
The management observer is Manoah Finston. His title is Student Affairs Manager in GSAS. Unsure of his supervisory status. His title is supervisory sounding, but that might not mean much. Below is what I found online.

Student Affairs

107 Low Library, MC 4304
535 West 116th Street
New York, NY 10027

gsas-studentaffairs@columbia.edu
(212) 854-4932

Julissa Peña
Academic Affairs Manager

Redacted

Redacted

Manoah Finston
Student Affairs Manager

Redacted

Redacted

Stephanie Wolfe
Student Affairs Coordinator

Redacted

Redacted

Kei Phillip
Academic Affairs Coordinator

Redacted

Redacted

Thalyana Stathis
Academic Affairs Coordinator

Redacted

8. Complete All Pre-Arrival Tutorials

GSAS students are expected to exhibit the highest level of personal and academic integrity as members of the Columbia University community. Accordingly, GSAS asks that you familiarize yourself with Columbia's core community values and policies on **Academic Integrity and Responsible Conduct of Research** and **Sexual Respect**.

Incoming Master's and Doctoral students in Arts and Sciences must complete several online tutorials in these areas **prior to arrival on campus:**

GSAS Academic Integrity Online Tutorial

University Life Tutorial 1: Welcome to Columbia

University Life Tutorial 2: Haven Plus (Part One only)

Failure to complete all of these tutorials prior to arrival on campus may have an impact on your ability to register for courses, gain access to Columbia University facilities, and participate in classes. It is therefore imperative that you complete these requirements as soon as possible. If you require an accommodation or have any other questions, please contact Manoah Finston in the GSAS Office of Student Affairs.

6:00 debrief of Seth

15 voted from list
40 challenges

No issues reported.

Board agents there were Zack and Nicole. Zack left at 5:30, Ben replaced him.
Company observer is Bryant (first name) from the Office of Student Life.

8:00 Debrief with Booker

15-20 voted plus
12-13 challenged ballots voted

Only Board Agent Simon was there for the whole time period.

No issues arose.

Booker noted that one woman who came in and voted said this was her third attempt because she had been told to come back twice. She successfully voted this time.

MORNINGSIDE/EARL December 8, 2016

Josephine Caputo - Q-Z

Board Agent: Zach
University Observer - Mirian Stincone
Most people automatically showed ID because of spelling
If they were NOL, Board Agent asked for ID. If not on list, Board Agent wrote the names at the end of the list with a "C". Both observers would then check hand written name and then the person would be sent to challenge table to vote.
One voter asked why we were not asking for ID and she said she felt uncomfortable that ID's were not required - it was a woman named Zhang

13 NOL challenges - she remembers this exactly
37 voters who were not challenged - she thinks this is exact

Josie asked Zach to explain the challenge vote to people who were challenged.

Montserrat Fernandez-Pinkley - M-P table

Board Agent: Darma Wilson
University Observer: Juliana Utley, Student Services, Law School - Montse thought she was named Lisa
They were told not to ask for ID unless they were NOL. No incidents around that
They did the challenge process similar to above except that the Board Agent told the observers to write the names of the challenges down.

6 NOL challenges - Montse remembers exactly
No university challenges
20 voters who were not challenged - Montse remembers exactly

Was quiet and mellow.

Phil Yaure
Morning side
G-L
32 regular
6 NOL
37 overall NOL
No wrong locations for his table
No disruptions

Alex Rigas
25 voted regular
7 NOL
No wrong locations
Brd agent was Joseph the intern

No disruptions

Hyacinth

2:00 PM Report

Shewanna House - Q-Z table
Board Agent: she thinks it was Paul? I think it was Zach
University Observer: Camille Nicholson - she's a confidential HR secy
10 NOL challenges - approximate
No university challenges
54 unchallenged voters - she thinks that's exact
Camille kept asking for ID. She was then instructed by Steve Berger that ID's were not required and she then stopped asking for them.
Steve had to tell Camille to put her cell phone away.

Theresa Smith -G-L
Board Agent: Paula Gomes
University Observer: Patrice from General Counsel
Li Yupik - 2 students on the list who could only separated by address. She said which one she was and they let her vote without challenge.
About 12 challenges
No university challenges
40 unchallenged voters
Franciska (sp?) Landes - she was supposed to vote at Lamont - they let her vote at Earl but as a challenge ballot
Maida

Sayantani Mukherjee
A-F
46 regular votes
17 NOL
3 Lamont
No id issues
Student last name Wilson came to vote but someone with the same name had already voted. Worker realized there were different middle initials making him NOL and declined to vote
No distruptions
Phones:
2 University observers were using phones throughout
Took photo of book on objective feminism and other stuff
Claire Lachow- IT specialist was one closest to union observer. The other was at the next table.

Taarini Mookerjee
M-P
24 regular votes
4 NOL
No distruptions
1 voter who is a library assistant was NOL/ when advised decided not to vote
No id issues
Hyacinth

4:00 PM
Joe Sheppard Q-Z
34 regular
11 NOL
No disruptions
No id issues
Zach/Jacob both nlrb used phones and said they were ok with phones being used
Camila was from Columbia and used her phones
Joe did not

Daniel Rees
18 voted regular
10 NOL
Notes to follow

Akio Mokuno - K-M
6-7 NOL
No university challenges
About 28 non-challenged voters
University observer was using their cellphone but Board Agent told her not to do so

Sandra Chiritescu - M-P
Board Agent - Darma Wilson, Chelsea?
University Observer - ____ Ng
5 NOL challenges - this # is exact
No university challenges
About 20 voters that were not challenged
University Observer used her cell phone - took it out periodically to check emails during down time.
Preskill Steven - older man in the MFA program (60's) who was NOL and was upset about it.
She thought that 80-90% of the M-P list was checked off

6:00 PM

Shewanna House - Q-Z

Board Agent - Zach?

University Observer - Brandi Barlow, university labor relations (4-5 pm), Mac (Mary Ann Carlese - she's a labor relations director and a lawyer and I've negotiated with her definitely a lawyer)

8-10 NOL challenges

No university challenges

58 voters

Shari Wilson - G-L

Board Agent - Rachel Feinberg

University Observer - Susan from General Counsel - she's a lawyer

20-25 NOL challenges

30 people voted without challenge

Theresa Smith - M-P

Board Agent - Kristen

University Observer - Pam Kelly (she was Theresa's former supervisor - Theresa Smith had to observe next to her former boss!). She's now in Social Work

The Board Agent turned him away because she asked him if he was a teaching assistant or a research assistant and did not allow him to vote under challenge. Theresa asked her if he could vote under challenge and she said no.

The pencils at the challenge box were completely broken

Someone came in a wheelchair and could not come up because of the lift so Kristen sent Pam and Theresa downstairs and came down with the box, etc. and had the person vote in the lobby

8-12 NOL challenges

30 voters

8:00 PM

John Stobo
M-P
25 regular votes
14 NOL
1 Lamont
No disruptions

Monserrat Fernandez-Pinkley
A-F
4pm-8pm
54 regular votes
27 NOL
2 Lamont

Zeinab Azarnadegan
Q-Z
38 regular votes
10 NOL (1 Lamont)

On the entire q-z list over the 2 days
624 regular votes
55 NOL

Admin was counting so Zeinab did also; her name was Marianne.

Nlrb agent checked off green when our observer was in the bathroom
One red on the union list that was from previous.

Sayantani Mukherjee
G-L
33 total; 5 NOL
No disruptions
Union observer had to probe agent to write challenged names down; none were missed.

(Less than 1/2 of Chinese names voted on her list)