UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 29

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**

POST-HEARING BRIEF OF COLUMBIA UNIVERSITY

Columbia's focus throughout this representation proceeding has been to ensure that eligible voters could freely decide whether to be represented by Petitioner, and that all eligible voters - and only eligible voters - had the opportunity to vote in an atmosphere free of intimidation or confusion. Unfortunately, events that occurred during the election created for many if not most voters an atmosphere that may not have been conducive to free choice, and left substantial doubt as to whether all who were eligible were allowed to vote, as well as to whether only eligible voters voted. For those reasons, Columbia filed these objections.

During the hearing, Columbia presented evidence substantiating its objections to the conduct of the election and to conduct affecting the results of the election held on December 7 and 8, 2016. Those objections require that the election be set aside because they concern conduct that has been identified as objectionable by the National Labor Relations Board and Federal Courts of Appeals, and because such conduct had the tendency to interfere with voters' free choice. Indeed, the presence of known Union agents – including the Union's President – in the lobby of Earl Hall for more than six hours during the voting, and Region 2's refusal to require identification from voters, affected an overwhelming majority of voters; each alone could have changed the election results. Without question, such conduct – in addition to other conduct described at the hearing – destroyed the laboratory conditions necessary for a free and fair election.

The Board examines a number of factors to determine whether "the alleged misconduct, taken as a whole, warrants a new election because it has 'the tendency to interfere with employees' freedom of choice' and 'could well have affected the outcome of the election.'" *Mek Arden, LLC*, JD(SF)-26-16, 2016 WL 3035966 (Div. of Judges, May 27, 2016) (citing *Cedars-Sinai Medical Ctr.*, 342 NLRB 596, 597 (2004)). These factors include:

> (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and, (9) the degree to which the misconduct can be attributed to the party.

Cedars-Sinai Med. Ctr., 342 NLRB at 597. Under this standard, Columbia need not prove that the objectionable conduct *did* affect the votes; it must prove only that the objectionable conduct *could* have affected enough votes to alter the election results. *See id.* at 609 (overturning election based on Union threats to two employees in a very large unit because "at least" 34 employees might have heard about the threats, and their votes "could have changed the results of the election" and therefore the election did not "reflect[] the employees' free choice....").[1]

At the hearing, Columbia University adduced evidence to show that the proven conduct, taken individually or cumulatively, was objectionable under Board law and affected a number of voters sufficient to conclude that the outcome of the election could have been affected.

I. VOTERS AT EARL HALL WERE FORCED TO PASS KNOWN UNION AGENTS MOMENTS BEFORE VOTING.

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.

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[1] Courts of Appeals have consistently held that the relevant inquiry is whether the *cumulative effect* of the objectionable conduct could have affected the results of the election. *See Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 359 (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.") (citations omitted); *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1046 (11th Cir. 1983) (denying enforcement of Board's order dismissing objections and holding that "[w]e recognize our responsibility to assess the *cumulative effect* of these allegations on the validity of the proceedings") (emphasis added); *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 399 (5th Cir. 1969) ("Concerning the *cumulative facts* proved in the instant case and in the light of the 'laboratory conditions' standard and the express directions contained in our original decision on remand, the Board order is unsupportable on the record considered as a whole.") (emphasis added).

See, e.g., *Nathan Katz Realty, LLC v. N.L.R.B.*, 251 F.3d 981 (D.C. Cir. 2001). In *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 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 Board and Courts of Appeals have set aside elections where agents stationed themselves in a location that voters *must* pass in order to vote because such conduct destroys the laboratory conditions necessary for a free and fair election. *See, e.g., 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*.) (emphasis 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.").

The uncontroverted testimony demonstrates that Maida Rosenstein, well-known and easily-recognized as president of Local 2110, Hyacinth Blanchard, Assistant Director of

organizing for the United Auto Workers, and other Union agents were present in the foyer of Earl Hall, the polling place for more than 3,100 (or 73%) of the approximately 4,200 eligible voters, for at least 6 hours over the course of the two day election. (*See* Hr'g Tr. 33: 15-20; 289: 21-24. *See also* Hr'g Tr. 104: 19-21; 187: 8-11; 358: 16-18; 359: 20-22). And there is no dispute that these union agents were stationed in a place each Earl Hall voter had to pass to access the polling place on the third floor. The testimony showed that, "[w]hen [a voter] walks 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." (Hr'g 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 (Hr'g 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. (Hr'g Tr. 183: 17-19). In fact, the place in the foyer where the Union agents were stationed was merely 65 feet from the actual polling place. (Hr'g Tr. 183: 16).

Hyacinth Blanchard described how she and other Union agents (including Ms. Rosenstein) filed into this small room every two hours and remained there for approximately forty minutes each time. (*See* Hr'g 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. (Hr'g Tr. 286: 20-24; 289: 12-16). 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. (*See* **Petitioner's Exhibit 4**). On each occasion, the Union officials would station themselves in the foyer, such that they could see, and could be seen by, voters. (Hr'g 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. (Hr'g 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). These facts are alone sufficient to show that a number of voters large enough to affect the outcome of the election clearly were *not* afforded laboratory conditions during the final minutes before they voted. *See Milchem, Inc.*, 170 NLRB 362 (1968) (addressing voters waiting on line to vote, "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible.").

To the extent Petitioner relies on *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), we note that Columbia does not allege the type of electioneering discussed in that case, but alleges instead that the presence of well-recognized Union agents in a place where every Earl Hall voter had to pass constituted coercive surveillance that requires a new election. Indeed, the Court of Appeals for the D.C. Circuit has already rejected the argument Petitioner is likely to make in this case. In *All Seasons Climate Control, Inc. v. N.L.R.B.*, 236 F. App'x 636, 637 (D.C. Cir. 2007), the Court explained that "in *Boston Insulated Wire & Cable Co.,* 259 N.L.R.B. 1118 (1982), and *J.P. Mascaro & Sons,* 345 N.L.R.B. No. 42 (2005)" the election was not overturned because "the union officials *did not surround the only entrance to the polling place*," which, the Court noted, is precisely what happened in "*Electric Hose & Rubber Co.,* 262 N.L.R.B. 186

(1982), *Performance Measurements Co.,* 148 N.L.R.B. 1657 (1964), and *Nathan Katz Realty, LLC v. NLRB,* 251 F.3d 981 (D.C.Cir.2001)." Columbia relies on those latter cases in which the election was set aside because, here too, union agents surrounded the only entrance to the polls.

The repeated and prolonged presence of known Union agents where every voter had to pass to vote, exacerbated by the fact that many voters waited on line in plain view of the Union's President, had the tendency to interfere with employee free choice and could well have affected the outcome of the election. For this reason alone the Hearing Officer should recommend that the election be set aside.

II. THE FAILURE TO REQUIRE VOTER IDENTIFICATION, AND THE REGION'S SHIFTING POSITIONS CONCERNING VOTER ID, COULD HAVE AFFECTED THE OUTCOME OF THE ELECTION.

The Region's course changes before and during the election on the issue of voter identification caused significant confusion and raised considerable doubt about the outcome of the election. *See Rheem Mfg. Co.*, 309 NLRB 459 (1992) (the Board is prohibited from deviating from procedure where the failure to follow procedure "raised a reasonable doubt as to the fairness and validity of the election."). Apart from its shifting positions on voter identification, the Region had an affirmative duty to require identification in an election with over 4,000 voters unknown to the observers who oversaw the process. *See Avondale Indus., Inc. v. N.L.R.B.*, 180 F.3d 633 (5th Cir. 1999). Therefore, the election should be set aside.

A. The Region Was Required to Follow its Original Order Requiring Identification

"A Board agent's failure to follow the Board's case handling guidelines will not necessarily warrant setting aside an election in the absence of a showing that the deviations from the guidelines raised a reasonable doubt as to the fairness and validity of the election." *Rheem*

Mfg. Co., 309 NLRB at 463 n.9. Two provisions of the Casehandling Manual apply to Observers requesting identification. First, Section 11312.4 states that, "[i]n sufficiently large or complex elections, the Board agent should explore with the parties in advance of the election the identifying information to be utilized by voters as they approach the checking table (Sec. 11322.1)." Second, Section 11322.1 states that the "Procedure at the Checking Table" includes voters being asked "for other identifying information, as necessary."

Here, contrary to Petitioner's contention that the Regional Director retained discretion regarding identification, the Regional Director and all parties agreed on November 21st, 2016, that either Columbia or Government issued identification would be required to vote in the election. (*See* Stipulation 1, **Joint Exhibit 1**). The Regional Director then reversed that decision in an email from Nicholas Lewis to Bernard Plum and Thomas Meiklejohn on December 6, 2016, the day before the election. (*See* Stipulation 2, **Joint Exhibit 1**). Mr. Lewis' email stated that "voter ID will not be a requirement in order to vote[,]" but that ID could be "encouraged." *Id.*

During the election, the procedures for requesting (or requiring) identification were further abrogated when Board Agents began informing observers that they could no longer request identification. At the beginning of the election, observers were told they could not challenge voters if they failed to show identification. (Hr'g Tr. 115: 22-24). At approximately 3:30 p.m. on December 7th, Ms. Gorman was told by a Board Agent at Earl Hall that she "could no longer request identification from the students." (Hr'g 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." The Board Agent's statement –

which oddly conflated the processes for national elections and union elections under the Act – stands in direct contrast to the Casehandling Manual, to the November 21st agreement *requiring* voters to provide identification, and to the December 6th order permitting observers to *request* identification. (Hr'g Tr. 193: 9-14). 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: "no one can ask for IDs.". (Hr'g Tr. 135: 14-15; 136: 1-6).

These muddled procedures caused individuals to vote under different requirements, at different sites, at different times. It seems likely if not certain that in some instances, eligible voters were prevented from casting a ballot because a prior voter with the same or similar name was allowed to vote without being required to show identification. Ms. Gorman, for instance, testified that at the table directly next to her a voter was unable to vote "because when he went to present his identification, his name has already been checked off[,]" even though he had not showed up to vote previously and the Board Agent noted that this "is the person, [and] this is his ID[.]" (Hr'g Tr. 212: 16-22). Another voter's ballot was impounded at the vote count because her name had already been checked off as having voted. (*See* Stipulation 3, **Joint Exhibit 1**). Indeed, 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." (Hr'g Tr. 114: 21-25).

These procedural flaws clearly rise to the level of conduct that raises "a reasonable doubt as to the fairness and validity of the election" for three primary reasons. *Rheem Mfg. Co.*, 309 NLRB at 463 n.9. First, on any given day, Observers had no idea what procedures to use when processing voters. The confusion over whether to require or request identification raised doubts

as to the validity of the election as different identification procedures were required at different times and voters were treated inconsistently. Second, given the complexity of the eligibility rules, there is no way to know how many ineligible students voted improperly, even if innocently, because they had the same name as an eligible voter. (Hr'g Tr. 113: 6-18). Third, the confusion had tangible consequences. At least two eligible voters had to vote under challenge because their names were previously checked off on the eligible voter list. The fact that eligible voters had to vote under challenge because of this confusion raises reasonable doubts as to the Region's implementation and shifting of the voter identification requirement.

B. Case Law Required Using Identification in this Election

Regardless of the confusion over whether to require or request identification, the fact remains that the Region had a duty to *require* identification in this election. In *Avondale Indus., Inc. v. N.L.R.B.*, 180 F.3d 633 (5th Cir. 1999), where "approximately 4,000 employees[,]" were members of the bargaining 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." *Id.* 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, reviewing these procedures, followed the same standard applied in *Rheem*:

> 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.*[2] confirm this common sense notion and equally condemn the unthinking adoption of "standard practice" for a multi-thousand employer like Avondale.

Id. at 637 (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).

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[2] *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.

As in *Avondale*, this election involved approximately 4,000 eligible voters at multiple polling sites; observers could not identify all voters;[3] 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 regardless of 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, the Board should have consistently required identification throughout the election. The failure to do so requires that the results be set aside and the election be rerun.

III. UNION SUPPORTERS CREATED AN IMPRESSION OF SURVEILLANCE FOR VOTERS AT EARL HALL.

Third-party conduct requires that an election be set aside if it creates a "general atmosphere of fear and reprisal rendering a free election impossible." *See Westwood Horizons Hotel*, 270 NLRB 802, 804 (1984) ("[w]here there is no evidence of union involvement in the misconduct, the test to be applied is whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible."). Courts have held that misconduct by union supporters on an election day can destroy the required laboratory conditions where the Board "acquiesced" to the conduct. *See Home Town Foods, Inc. v. N. L. R. B.*, 416 F.2d 392, 399–400 (5th Cir. 1969) ("Because in the instant case *the Board acquiesced in pre-election misconduct by the union supporters* and in election day misconduct by the union agent, union supporters and the Board agent…the requisite laboratory conditions (were) not present, and the

[3] 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." (Hr'g Tr. 138: 20 – 23; 224: 13-14).

experiment must be conducted over again.") (emphasis added).

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." (Hr'g 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. (Hr'g Tr. 184:4-10). 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. 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.

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. (Hr'g 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. (Hr'g Tr. 341: 19-20). 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 but, as a review of **Joint Exhibit 6** and the attached screenshot shows, made no attempt whatsoever 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. These instances of surveillance, especially coupled with a Board Agent's knowing disregard of surveillance inside Earl Hall, constitute objectionable conduct that requires a rerun election.

IV. COLUMBIA'S OBSERVER WAS DISMISSED AT CUMC IN FRONT OF VOTERS.

Board law is clear that observers should not be dismissed during voting, and that actions by Board Agents that show partiality towards one party destroys the integrity and neutrality necessary for an election. *See Browning-Ferris Indus. of California, Inc.*, 327 NLRB 704, 705 (1999) (ordering a rerun election where Board Agent barred two Union observers the day before the election); *Athbro Precision Eng'g Corp.*, 166 NLRB 966 (1967) (election set aside where Board Agent was seen drinking a beer with a Union representative and holding that although the act did not have "any effect upon the four employees who later voted[,]"the election was set aside because "[t]he Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.").

The record shows that a Board Agent at Columbia University Medical Center ("CUMC") dismissed Tshaye Meaza, Assistant Director for Financial Operations and Administration in front of students waiting to vote on December 7th. Ms. Meaza does not supervise anyone or interact with any students. (Hr'g Tr. 150: 11-16). Upon being challenged by the Board Agent, Ms. Meaza told the Agent that she was "not a manager" (Hr'g Tr. 153: 13-19), to which the Agent responded that she "didn't like" the answer and "it sounds like [you're a] supervisor." (Hr'g Tr. 153: 21-23). The Board Agent then told another observer to "call someone," presumably to replace Ms. Meaza. (*See* Hr'g Tr. 153: 22-23). Ultimately, Patricia Catapano arrived, at which point the Board Agent stated that she would "rather have [Catapano as] an observer than [Ms.

Meaza.]" (Hr'g Tr. 155: 6-9). The conversation occurred in the presence of four to six voters. (Hr'g Tr. 31: 6-9).

This blatant violation of the procedure required by *Browning-Ferris*, supra at 12, prevented Ms. Meaza from serving as an observer in front of eligible voters did not protect the required "integrity and neutrality" of the Region's procedures, and and could well have destroyed confidence in the Region's election process. *Id.* The failure to follow Board procedures, and the fact that the dismissal of a Columbia observer occurred at the polling site in front of voters destroyed the laboratory conditions and impermissibly gave voters an impression of partiality by the Board.

V. BOARD AGENTS SUSPENDED VOTING AT CUMC BY CLOSING THE DOORS TO THE POLLING PLACE AND RUNNING OUT OF CHALLENGE BALLOTS.

Board law is clear that suspension of voting destroys the "laboratory conditions" necessary for a free election. *See Whatcom Security Agency*, 258 NLRB 985 (1981) (election set aside because there was "doubt and uncertainty as to the results of the election" after doors to the polling place were inadvertently locked "particularly since the large number of nonvoters could have affected the election results...."); *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972) (election set aside because "laboratory conditions have been disturbed" where polls closed 20 minutes early); *Garda World Sec. Corp.*, 356 NLRB 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.").

As Carrie Marlin testified, the Board Agent closed the door to the polling site, ostensibly

because a line that had formed for challenge envelopes. (Hr'g Tr. 67: 6-8). Although the Union observer disputes that the Board Agent closed the door, there is no dispute that the door was closed for three to ten minutes. (Hr'g Tr. 67: 6-8; 236: 19-20). Moreover, given the Union observer's obvious interest in the outcome of these proceedings, Ms. Marlin is a truly disinterested observer whose testimony should be given more weight. It is also undisputed that the polling place looked "like a construction site" because there was "brown paper taped up" on the doors and windows of the room. (Hr'g Tr. 66: 15-18). Voters, therefore, could easily have turned away from voting at the site when the door was closed.

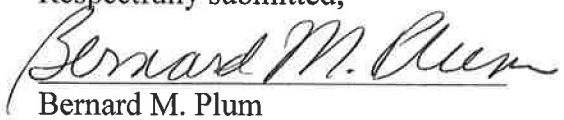
Finally, there is no dispute that the Board Agent ran out of challenge ballots for approximately 90 minutes. (Hr'g Tr. 32: 3-4; 63: 7). There was testimony that at least eight to ten voters were turned away and told to come back later, and it is certain that every voter who was not on the list was treated similarly. (Hr'g Tr. 46: 14-15). While some voters did return, there is simply no way to know how many did not, which means by closing the door and running out of challenge envelopes the Board Agent destroyed the laboratory conditions necessary for an election.

VI. CONCLUSION

The objectionable conduct, taken together or separately, constitutes conduct which had the tendency to interfere with voters' freedom of choice, destroyed the "laboratory conditions" necessary for a free and fair election, and could have affected the results of the election. For these reasons, the results of the election should be set aside and a new election should be held in which the 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
February 1, 2017

Respectfully submitted,



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Date of Filing: February 1, 2017

AFFIDAVIT OF SERVICE OF: Post-Hearing Brief

I hereby certify that, on the 1st day of February 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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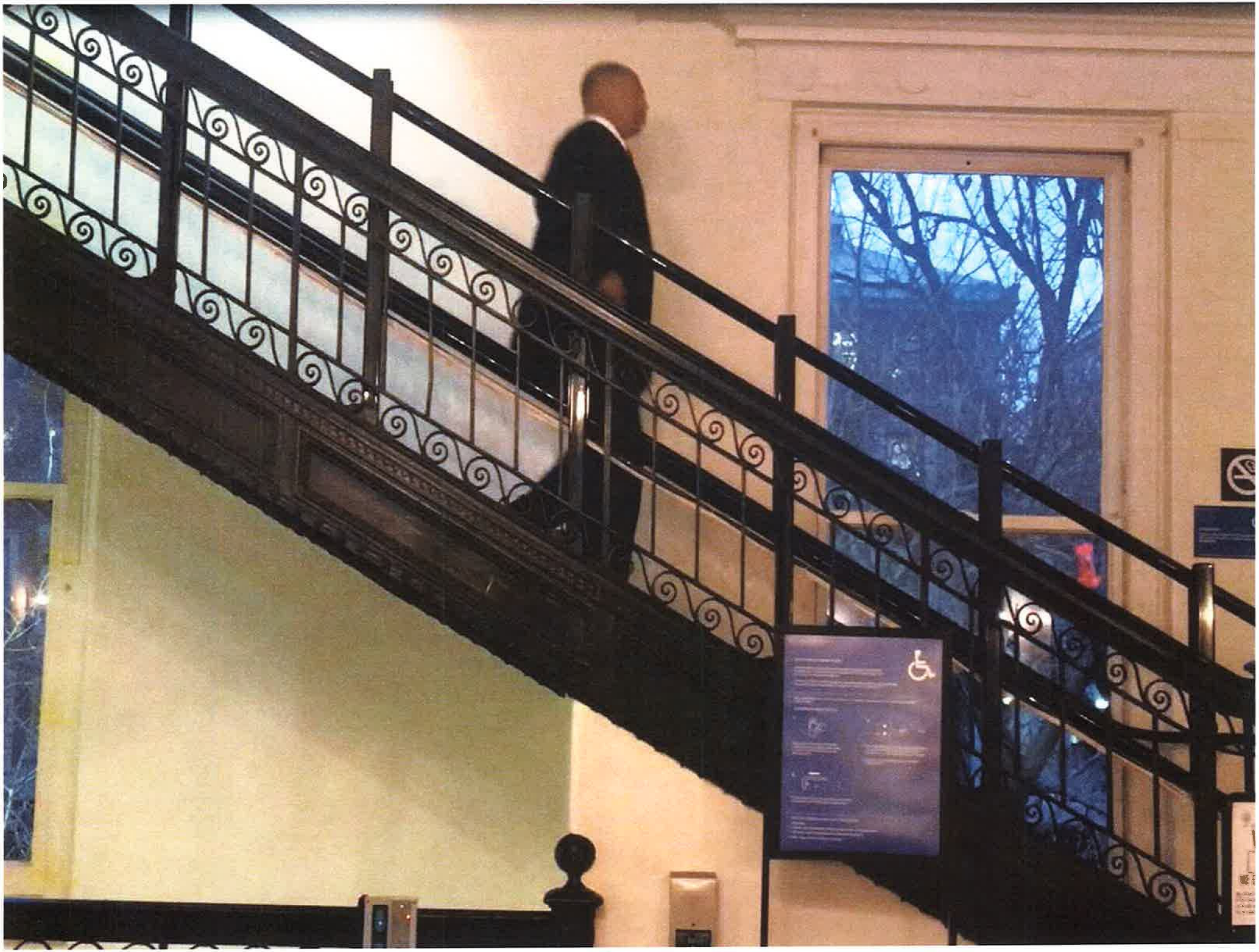
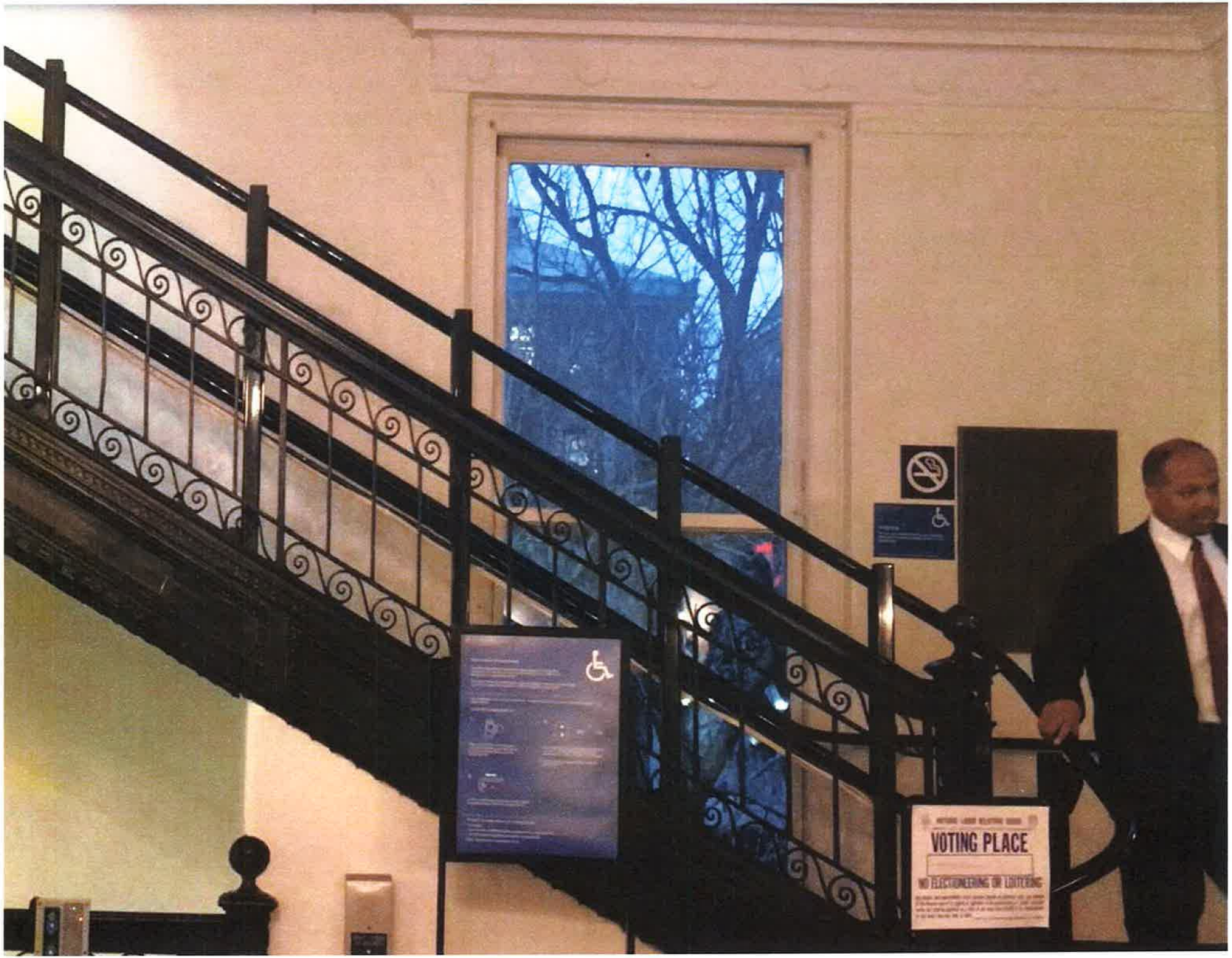
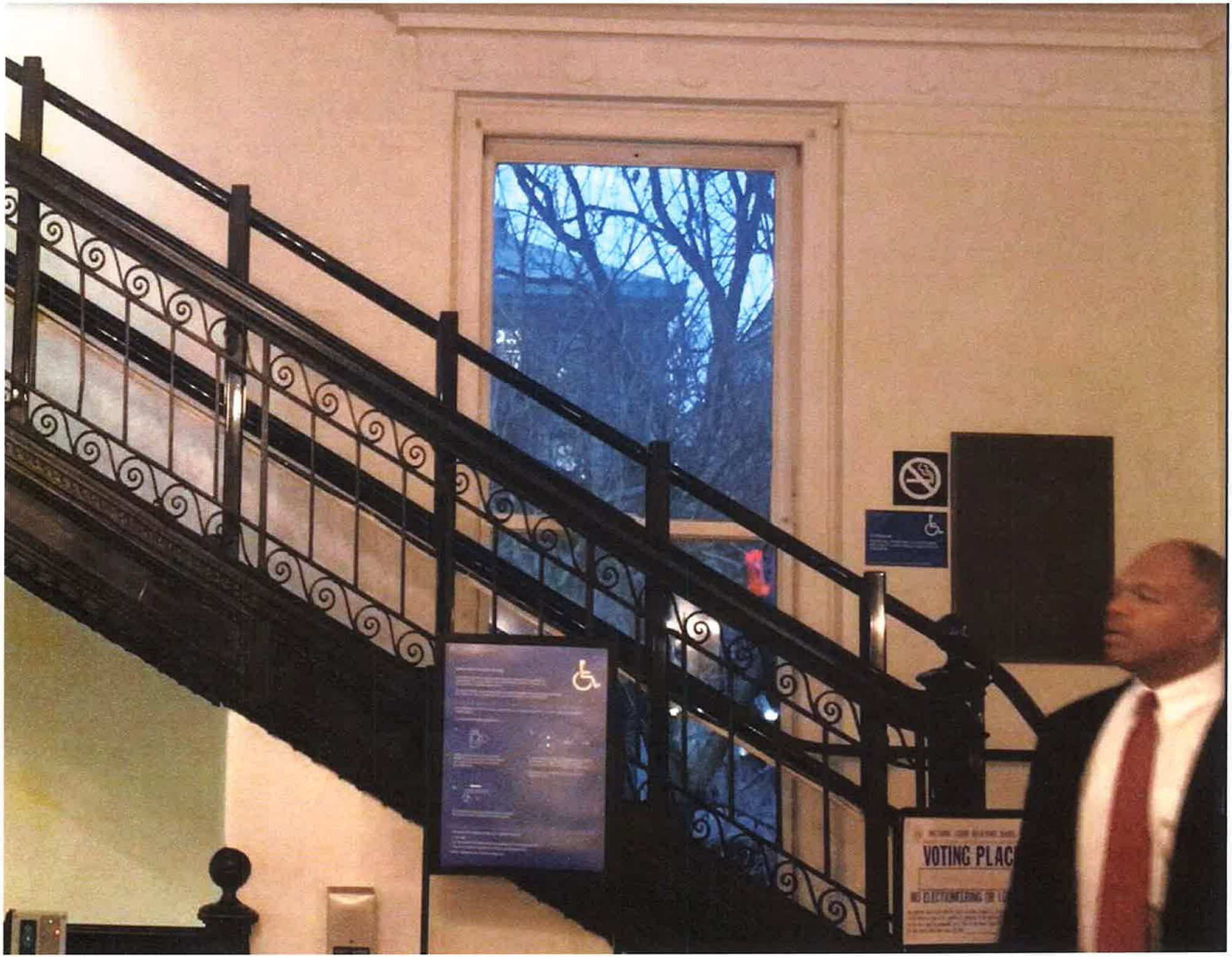
Post-Hearing Brief

Joint Exhibit 6
Screenshots




VOTING PLACE
NO ELECTIONEERING OR LOITERING


VOTING PLAC