No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Macy's, Inc.,

Petitioner/Cross-Respondent,

-v-

National Labor Relations Board,

Respondent/Cross-Petitioner.

On Petition for Review of an Order of the National Labor Relations Board and Cross-Application for Enforcement of Same

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BRIEF FOR *AMICI CURIAE* RETAIL ASSOCIATIONS

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INTRODUCTION

This case represents yet another attempt by the National Labor Relations Board (the "Board") to apply and expand its erroneous decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), *enf'd sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). ("*Specialty Healthcare*"). In that case, the Board eviscerated longstanding precedent for determining who votes in an initial union election, and created a novel standard that places a thumb on the scale in favor of unions and conflicts with the text of the statute and decades of Board decisions. Now, in this case, the Board has extended that unlawful standard to the retail industry, abandoning the Board's half-century-old presumption in favor of whole-store bargaining units and wreaking havoc on the retail workplace.

The Board's new "overwhelming community of interest" test, in which the Board effectively defers to the scope of the unit proposed by the union, is designed to facilitate a pro-union outcome—the union proposes only those gerrymandered units that it can win, and the test prevents the inclusion of other employee voters who should be in the unit. This case is a picture-perfect example of *Specialty Healthcare*'s pro-union effect: After the union lost an election for a storewide unit, the union was able to hand-pick a unit of *only* cosmetics and fragrance sales employees who

ultimately voted for unionization. *See Macy's, Inc.*, 361 NLRB No. 4, at 6 (July 22, 2014).

From the middle of the 20th century until now, the Board had recognized that the unique nature of a retail store requires a presumption in favor of a wall-to-wall bargaining unit instead of multiple fractured units at each store. The reasoning is straightforward: At any retail store, the single overriding task of every employee is to provide a seamless, hassle-free experience to customers interested in purchasing the employer's goods. As a result, employees are cross-trained in different departments, assist customers shopping for any item regardless of the department, and are subject to the same core employment conditions. This retail model is in effect at the Macy's store at issue here, and in retail stores of all shapes and sizes across the country.

The Board's decision in *Macy's* to cast aside the Board's longstanding whole-store unit presumption for the retail industry—despite promising not to do so in its *Specialty Healthcare* decision—ignores the realities of the retail workplace and causes untold harm to the retail industry. The Board's new test encourages a single store's workforce to be dissected into small, fractured bargaining units—like the Macy's store here—which hamstrings retail operations and customer service, multiplies administrative costs, and limits opportunities for employees who could be denied the chance for advancement or additional work because of arbitrary union line-drawing.

The Board's decision is not just illogical, imprudent, and unprecedented, but also contrary to the National Labor Relations Act. As the Fourth Circuit held in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), an "overwhelming community of interest" standard like the one adopted by the Board in *Specialty Healthcare* and applied by the Board here violates Section 9(c)(5) of the National Labor Relations Act (the "Act"), which mandates that "the extent to which the employees have organized shall not be controlling" in making unit determinations. 29 U.S.C. § 159(c)(5). The Board's decision also disregards Section 9(b) of the Act by outsourcing its congressionally designated duty to make unit determinations to unions and by ignoring the rights of those employees left out of the gerrymandered unit.

The Board has run amok at imposing the unlawful "overwhelming community of interest" test—approving fractured unit after fractured unit, just like it did here. The Board approved a unit consisting of *only* cosmetics and fragrance sales employees at a Macy's department store, but left out all other sales employees who have the same core job duty, work closely with the employees in the unit, enjoy identical benefits and similar wages, and are subject to the same terms and conditions of employment. This slice-and-dice approach to bargaining units disenfranchises employees, interferes with employer rights, and disrupts workplaces.

This case presents an opportunity for this Court to reaffirm the Board's well-established, and well-grounded approach to evaluating bargaining units—particularly

as to the retail industry—and rein in the Board's *ultra vires* agency action. For these and other reasons, this Court should grant Macy's petition and deny enforcement of the Board's order.

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's *This is Retail* campaign highlights the industry's

opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

The retail associations strongly disagree with the National Labor Relations Board's newfound "overwhelming community of interest" approach to bargaining-unit determinations, which adversely affects the associations' members and their businesses, complicating labor relations, threatening to embroil customers and other members of the public in labor disputes, and increasing the delay and costs associated with the Board's current representation process. The unit determination standards used by the Board have a significant impact on the associations' members because most, if not all, fall under the jurisdiction of the Act. *Amici curiae* thus submit that they have a significant interest in the Board's activities in this area that justifies participation in this case. The parties to this case have consented to the retail associations' participation as *amici curiae*.

ARGUMENT

For decades, the Board has recognized that the unique nature of the retail industry requires a presumption in favor of a whole-store bargaining unit. Because the fundamental task of each retail employee is to seamlessly assist customers seeking to purchase items from the store, regardless of whether the employee is assigned to a specific sales department or given primary responsibility over a specific category of items, the Board has long preferred wall-to-wall bargaining units for retail stores. In

Macy's, the Board abandoned that presumption and extended its unlawful "overwhelming community of interest" standard from *Specialty Healthcare* to the retail industry, despite promising in that case to maintain all industry-specific presumptions. The Board's decision causes substantial harm to the retail industry, violates several provisions of the Act, and should be rejected by this Court.

I. The Board's Decision In *Macy's* Eviscerates The Vital And Traditional "Wall-to-Wall" Presumption For The Retail Industry, Causing Significant Harm To Retail Employers And Employees

A. The Board's Longstanding Whole-Store Presumption For Retail Bargaining Units Is Grounded In The Unique Nature Of The Retail Workplace

For over a half-century, the Board has consistently recognized a presumption in favor of the whole-store unit in the retail industry, given the unique nature of the industry. *See, e.g.*, *I. Magnin & Co.*, 119 NLRB 642, 643 (1957); *Haag Drug Co.*, 169 NLRB 877, 877 (1968); *Levitz Furniture Co.*, 192 NLRB 61, 63 (1971); *Kushins & Papagallo*, 199 NLRB 631, 631–32 (1972); *Charrette Drafting Supplies Corp.*, 275 NLRB 1294, 1297 (1985). As early as 1957, the Board recognized that it had "long regarded a storewide unit of all selling and nonselling employees as a basically appropriate unit in the retail industry." *I. Magnin & Co.*, 119 NLRB at 643. In *Haag Drug*, the Board explained the rationale for the Board's policy that "a single store in a retail chain . . . is presumptively an appropriate unit for bargaining":

> The employees in a single retail outlet form a homogenous, identifiable, and distinct group, physically separated from the employees in the other

> outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own . . . .

Haag Drug Co., 169 NLRB at 877–78. In other words, a single retail store—by its very nature—inherently reflects a presumptive community of interest and represents the most natural and efficient bargaining unit. A smaller unit would only be appropriate where a petitioner could show that employees within the proposed unit "constitute a functionally distinct group with special interests sufficient to warrant their separate representation." *Levitz Furniture Co.*, 192 NLRB at 63; *see also I. Magnin*, 119 NLRB at 643 (employees in proposed unit must be "sufficiently different from those of other employees to warrant their establishment in a separate unit").

Apart from its storied pedigree, the presumption in favor of the whole-store unit is also justified by the characteristics of the retail industry. The traditional appropriate unit analysis—prior to the Board's reversal of course in *Specialty Healthcare* and its progeny—examined multiple factors, such as whether employees are "separately supervised"; have distinct "terms and conditions of employment"; are "functionally integrated" with other employees; have "frequent contact with other employees"; have distinct job functions and perform distinct work; and "have distinct skills and training." *United Operations, Inc.*, 338 NLRB 123, 123 (2002). Application of this well-established community-of-interest test in the retail context yields the conclusion

that the appropriate unit will, generally speaking, be the entire store, hence the Board's preference for units encompassing a single store.

A close examination of the retail workplace—and specifically the experiences of *amici* retail associations' members—illustrates the rationale for the centuries-old whole-store presumption. At *amici* members' stores—indeed, at any retail store—the single, overriding task of every employee is to provide a seamless, hassle-free experience to customers interested in purchasing the employer's goods. That overriding task requires substantial integration of employees within a single store. Although members typically hire their employees into a specific sales department, once on the sales floor, their employees are nonetheless responsible for assisting customers looking for any item, in any department. As one member described it, this integration is "critical" to its business strategy; in fact, at its stores, employees are required "to *walk* the customer to the product regardless of its location in the store." For this reason, employees must be willing and able to answer customers' questions and respond to customers' requests regardless of whether they technically fall within the employees' assigned department. To that end, members typically cross-train their employees across a variety of sales departments. Members' employees also regularly pick up shifts in other sales departments, provide on-the-spot coverage to departments that are short-staffed, and transfer in and out of different sales departments.

The reality of the retail workplace is thus that all sales employees naturally function as one integrated unit, regardless of any formal distinctions between sales departments. Members' employees are typically subject to common management and supervision, both day-to-day and more generally. Their employees generally have similar skill sets and training; although some employees may have more experience in a particular role or with certain products, few if any employees have special education directed to their job, and all are ultimately exercising the shared skills of salesmanship and customer service. Members also typically provide all of their employees, regardless of specific department, the same compensation scale, health benefits, and fringe benefits. All employees in a store also usually share the same shift-scheduling process, timekeeping system and policies, evaluation and disciplinary procedures, and other employment policies and practices.

A single store is also typically a physically open environment; employees share a common workspace, and even backroom employees come into frequent contact with sales employees as they move inventory into, out of, and around the store. Sales employees work in even closer confines, and they necessarily have frequent contact and interchange with other employees. Sales employees also typically share break rooms, lockers, entrances, time clocks, and other employee spaces, regardless of their specific sales department. In sum, a unit smaller than a single store is ordinarily

inappropriate because it rends apart a group of employees that otherwise would naturally function as a single unit.

The specific facts in this case further highlight the rationale for the Board's longstanding whole-store presumption. In the Macy's store here, the cosmetics and fragrances sales employees that make up the petitioned-for-unit work alongside and are integrated with all other sales employees. Just as in any store, Macy's employees are required to "help out wherever needed" and to "service any customer with any product." Their workspaces are adjacent to other sales departments, depending on the specific department—for example, men's fragrances are on one floor, adjacent to men's clothes, while cosmetics and women's fragrances are on a separate floor, adjacent to fine jewelry and women's shoes. Sales employees in the store also regularly transfer between the cosmetics and fragrance department and other departments. In just the two years prior to the Regional Director's approval of this unit, nine of the 41 sales employees in this department permanently transferred from other departments within the store. The cosmetics and fragrances employees also share common management with other employees on a whole-store level, and all sales employees receive the same benefits, are evaluated using the same criteria, are scheduled for work using the same computerized system, share an employee handbook, attend the same daily meetings, participate in the whole-store semi-annual inventory, and use the same entrance, break room, and time clock. In other words,

like all retail stores, the sales employees at this Macy's store—including the petitioned-for-unit of cosmetics and fragrance employees—function as a single unit.

Just a few years prior to its decision in *Macy's*, the Board recognized the community of interest between employees in a single store in the context of addressing a petitioned-for-unit at a Home Depot store. *Home Depot U.S.A., Inc.,* Case 20-RC 067144 (NLRB Nov. 18, 2011). The Board declined to review a decision by a Regional Director rejecting a unit consisting of just some employees and instead approving a single-store unit, based on the nature of the retail workplace: All employees "work at the same situs with common supervision, require no particular background or experience, come into contact on a daily basis, and overlap in many duties, despite assignment to a particular department." *Id.* at 14. Moreover, "all Associates in each department play a role in selling the Employer's goods to customers, and all of the Associates interface with Associates from other departments." *Id.* The same is true of the typical retail store, and of the Macy's store here.

B. The Board's Decision Disregards Its Longstanding Precedent And The Factual Realities On Which That Precedent Is Based

In its decision here, the Board ignored these factual realities of the retail workplace and cast aside its longstanding presumption in favor of whole-store bargaining units. The Board expanded the overwhelming-community-of-interest standard, recently adopted in *Specialty Healthcare*, to the retail industry—despite the

fact that the Board in *Specialty Healthcare* expressly preserved any industry-specific presumptions, like the whole-store presumption in the retail industry. In *Specialty Healthcare*, the Board acknowledged that it had "developed various presumptions and special industry and occupational rules in the course of adjudication," and announced that its decision was "not intended to disturb any rules applicable only in specific industries." 357 NLRB No. 83, at 13 n.29. The Board reiterated this limitation in *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011), stating that "to the extent that the Board has developed special rules applicable to" a particular industry or type of employee, those existing "rules remain applicable" even after *Specialty Healthcare*. *Id.* at 5.

Although the Board paid lip-service in *Macy's* to its traditional retail presumption—the presumption "complements" *Specialty Healthcare*, the Board said—the real import of the Board's decision in *Macy's* was to abandon the logical preference for bargaining units composed of all employees in a single store. The facts of this case demonstrate this point: It makes no sense that cosmetics and fragrance employees are an appropriate unit to the exclusion of other employees subject to the same employment policies and compensation structures, working for the same supervisors, and responsible for selling similar products. 361 NLRB No. 4, at 1–4. It is likewise illogical to cobble together these employees to the exclusion of all others. What these employees have in common is also shared with the other employees in the

rest of the store. On the other hand, within the cherry-picked unit, the employees conditions of employment differ. Cosmetics and fragrance employees are assigned to different counters with different counter managers. Some sell fragrances, while others sell cosmetics; some are located on the first floor, and others on the second; some are assigned to particular product lines, but others are not; some wear uniforms associated with their product lines, but others wear plain clothes in accordance with the common dress code applicable to the entire store. By approving such a unit, the Board signaled the demise of its wall-to-wall retail presumption.[1]

C. The Board's Decision Significantly Harms Retail Employers And Employees Alike

The Board's decision is an open invitation to the gerrymandering of the workplace and the resulting proliferation of multiple small, fractured units within a single store, just as in this case. The possibilities are endless. A union that believes it has the votes to organize some employees, but not others, need only seek to organize those employees who support the union. Unions now face little impediment to organizing by cherry-picking a small subset of employees with little regard for whether those employees constitute a practical bargaining unit, and with little regard

[1] The Board's decision in *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11 (July 28, 2014), was likewise not a reaffirmation of the traditional retail presumption. In that case, the Board declined to approve a petitioned-for-unit of women's shoe sales associates in the "Salon" and "Contemporary" shoe departments, not in reliance on the wall-to-wall presumption for retail stores, but because the Board concluded that the two departments at issue did not share a community of interest. *Id.* at 2–4; *see also id.* at 2 n.2.

as to whether the designated subset of employees has organizational significance within the employer's business. The Board's decision here illustrates the point. The Regional Director previously approved of a unit made up of the entire store, but the employees rejected unionization. Only then did the union propose—and the Board approve—a unit consisting exclusively of cosmetics and fragrance employees. *See* 361 NLRB No. 4 at 6.

This gerrymandering of the retail workplace causes significant and untold harm to the retail industry by hamstringing employers and curtailing opportunities available to their employees. Retail companies—*amici* members included—generally strive to enable employees to assist customers seeking to purchase goods located anywhere in the store. Unions, however, typically insist that members of a unit have exclusive rights to perform their work and establish rigid work rules that establish what tasks bargaining-unit members can and cannot perform (which in turn affects the work that employees outside the unit can and cannot perform). These rules would prevent the employer from cross-training employees and, therefore, meeting customer expectations. Flexibility would suffer to the detriment of customers, employers and employees. For example, an employee in women's handbags could not walk a customer to her next destination in designer shoes and help her make a purchase in that area; nor could the employee cover for an absent employee in men's formal apparel. An employee in household appliances could not be temporarily reassigned to

electronics to cover a short-term staffing need or to earn additional wages. Selling employees could not be assigned non-selling tasks, and vice versa, in order to meet the needs of the business. Productivity and customer service would decline. Limited to their own departments or set of tasks, employees would also enjoy fewer skill-development opportunities, while rigid barriers would limit promotions and transfers. The Balkanization of retail stores would also result in fewer scheduled hours for most employees, because they would not be permitted to rotate into other departments or conduct various tasks.

Arbitrary units that do not track the organization of the employer's business also inherently exclude employees who are similarly situated to those within the unit. Here, excluded sales employees have significant interests in common with the members of the unit, but nonetheless will have no opportunity to vote as to whether those interests should be made subject to collective bargaining. And if the union succeeds in organizing the cosmetics and fragrance employees, the remaining sales employees will also be excluded from negotiations over benefits, pay, and other matters that equally affect all employees, thus effectively encouraging the union to sacrifice the interests of excluded members in favor of those who fall within the unit. Any resulting disparity in benefits and pay between employees performing similar jobs in close proximity could drastically undermine morale.

The tension among workers that will result from a proliferation of bargaining units can cripple an employer's business, while simultaneously weakening employees' bargaining power. Some units would possess more economic leverage than others simply by virtue of their individual function, and those units would be able to negotiate more favorable terms and conditions of employment. Other units, lacking such bargaining power, could see their benefits sacrificed to make up the difference. At Macy's, for example, cosmetics and fragrance employees could shut down the entire store by going on strike[2]—leaving the sales employees who were left out of the unit and had no say in the strike vote temporarily without a job. Multiple little units could also strike consecutively, which could cripple a store that had five or ten microunits (not an unlikely outcome, given that some of *amici* members' stores have over ten different sales departments). Moreover, divisions between employees would leave the workforce, in the aggregate, with less bargaining power, as employees would be unable to present a united face and instead have to bargain separately, even over shared interests. Yet frequent strikes and stoppages by the various warring units would also make running the store practically impossible, and would impose economic hardship on workers in non-striking departments.

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[2] *Cf. Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090 (7th Cir. 1984)("[D]ifferent unions may have inconsistent goals, yet any one of the unions may be able to shut down [an] employer's operations (or curtail its operations) by a strike.").

Retailers, including some of *amici* retail associations' members, have already begun to feel the impact of the Board's abandonment of its longstanding whole-store presumption.[3] In addition to *Macy's* here, other retailers have already faced actual or threatened petitions from units made up of only a subset of sales employees, rather than a unit composed of the whole store. And more fractured units are on their way if this Court licenses the Board's harmful, unprecedented, and unlawful adoption and expansion of the "overwhelming community of interested" standard to the retail industry.

This was not the result intended by Congress when it instructed the Board to determine "the . . . appropriate" unit for collective bargaining. 29 U.S.C. § 159. To the contrary, the legislative history of the Act reflects Congress's concern that employees could, "by breaking off into small groups . . . make it impossible for the employer to run his plant." *Hearing on S. 1598 Before the S. Comm. on Educ. & Labor*, 74th Cong. 82 (1935) (testimony of Francis Biddle, Chairman, NLRB). A unit that threatens to spark conflict between employees, decimate morale, hamper effective

[3] The impact of *Specialty Healthcare* and its progeny is not just limited to the retail industry, as the Board's new, upside-down standard has led to the approval of micro-units across a host of industries. *See, e.g.*, *DTG Operations, Inc.*, 357 NLRB No. 175 (Dec. 30, 2011) (approving unit of rental car agents, but excluding agency's return, lot, service, fleet, and exit booth agents, drivers, mechanics, and other employees); *Guide Dogs for the Blind, Inc.*, Case 20-RC-018286 (NLRB July 13, 2013) (approving unit of canine welfare technicians and instructors at a guide dog breeding and training company, but excluding employees from the breeding, puppy-raising, kennel, admissions, and veterinary departments).

customer service, slash productivity, and compound administrative difficulties does not further the Act's purpose of advancing the "friendly adjustment of industrial disputes" and the "free flow of commerce," 29 U.S.C. § 151, and is not "appropriate" in any sense of the word.

II. *Specialty Healthcare*—And The Board Decision Expanding *Specialty Healthcare* To The Retail Industry Here—Contravenes The National Labor Relations Act

The "overwhelming community of interest" standard for bargaining-unit determinations that the Board adopted in *Specialty Healthcare*, and expanded to the retail industry here, is not just divorced from the factual realities of the retail workplace, but also conflicts with several key provisions of the Act.[4]

A. The Overwhelming-Community-Of-Interest Standard Is Contrary To Section 9(c) Of The National Labor Relations Act

The Board's "overwhelming community of interest" standard contravenes the mandate of Section 9(c)(5) of the Act that "in determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." The Fourth Circuit reached this precise conclusion in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), after the Board's prior attempt to apply such a standard.

[4] Even if the Board's decision in *Specialty Healthcare* is lawful (it is not), the Board's unreasonable departure from that precedent in *Macy's* is unlawful (*see supra* Part I).

In *Lundy Packing*, just as in this case (and *Specialty Healthcare*), the Board applied an "overwhelming community of interest" standard in approving a fractured unit consisting of only a subset of an employer's workers. *Id.* at 1579–82. The Fourth Circuit, however, held that this new standard—which eschewed the traditional principles used in making unit determinations—violated Section 9(c)(5): "By presuming the union-proposed unit proper unless there is an overwhelming community of interest with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because the union will propose the unit it has organized." *Id.* at 1581 (internal quotation marks and citations omitted). The "overwhelming community of interest" standard, the Court concluded, is a "classic § 9(c)(5) violation." *Id.*

The Court's reasoning in *Lundy Packing* is consistent with the intent of Congress in enacting Section 9(c)(5). That provision, Congress explained,

> strikes at a practice of the Board by which it has set up units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which employees have organized as ground for holding such units to be appropriate . . . While the Board may take into consideration the extent to which employees have organized, *this evidence should have little weight*, and . . . is not to be controlling.

H.R. Rep. No. 80-245, at 37 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 328 (1948) (emphasis added). In short, Section 9(c)(5) is intended to prevent artificial units of the sort at issue in this case and

others like it. It prevents the Board from approving a proposed unit that lacks significance within the employer's organization, and that makes sense only as a division of employees likely to vote in favor of union organization. The Board, instead of deferring to the unit proposed by the union, must authorize the unit that is "appropriate" in the context of the employer's organization. In the retail industry, as the Board had long held (until recently) that appropriate unit will usually be the employer's entire store. *See infra* Part I.

Because the decision below follows the lead of *Specialty Healthcare* and approves an arbitrary unit proposed by the union, the Board has not "operate[d] within statutory parameters," *Lundy Packing*, 68 F.3d at 1580, and therefore, this Court should reject the Board's decision and grant Macy's petition.[5]

B. The Overwhelming-Community-Of-Interest Standard Is Contrary To Section 9(b) Of The National Labor Relations Act

The *Specialty Healthcare* standard, applied by the Board in this case, also cannot be squared with Section 9(b) of the Act, which mandates that the Board "decide in each case whether, in order to assure to employees the fullest freedom in

[5] In *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Sixth Circuit affirmed the Board's decision in *Specialty Healthcare*. Even if that case was correctly decided—and *amici curiae* believe it was not, in part because it relied primarily on the D.C. Circuit's incorrect decision in *Blue Man Group*, *see infra* at 25-27—the Sixth Circuit did not address the propriety of the Board's expansion of the overwhelming-community-of-interest test outside the narrow facts of that case. On that point, *Lundy Packing* reflects the only persuasive, relevant authority.

exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). That is true for several reasons.

First, *Specialty Healthcare* contradicts the Act's mandate that "*the Board*" (not a union petitioning for a unit) select "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). Congress specifically chose the Board to resolve disagreements about the appropriateness of a unit, instead of "leav[ing] the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991). The overwhelming-community-of-interest standard, however, effectively grants employees who favor organization—or unions—unfettered discretion to organize any portion of the employer's workforce, in direct contravention of the statutory mandates. As long as the proposed unit of employees shares some minimal set of common characteristics, it will be approved unless the employer can show an "almost complete" overlap between employees within the unit and the rest of the appropriate workforce unit or facility. *Specialty Healthcare*, 357 NLRB No. 83, at 11. An approach to selecting "*the*" appropriate unit for collective bargaining that results in the approval of almost any selection of employees proposed by a union cannot be squared with the language of the statute: By requiring the Board to identify "*the*" appropriate unit, Congress intended that some proposed units should be deemed *inappropriate*.

Second, the *Specialty Healthcare* standard is inconsistent with the statutory requirement that the unit approved by the Board constitute a "craft, employer, or plant unit, or some subdivision thereof." 29 U.S.C. § 159(b). Self-selected units of employees—such as the fragrance and cosmetics sales employees here—do not necessarily share a "craft"; they do not constitute the entire workforce of the employer; and they do not constitute the entire workforce of the store. *See* 29 U.S.C. § 159(b); *see also Specialty Healthcare*, 357 NLRB No. 83, at 7 nn.16, 17. Nor can such gerrymandered units be justified as "subdivisions" of such an organizational unit. The term "subdivision" is a term of art, also used, for example, in the Secretary of Labor's wage and hour regulations, and refers to a group of employees with "a permanent status and continuing function"—not "a mere collection of employees." 29 C.F.R. § 541.103(a). That term cannot be used to refer to cobbled-together groups of employees united only by the fact that they wish to organize together.

Third, the *Specialty Healthcare* test defies the statutory mandate that the Board assure the "fullest freedom," 29 U.S.C. § 159(b), in the exercise of *all* rights guaranteed by the Act, including the right to refrain from supporting a union, *id.* § 157. *See Specialty Healthcare*, 357 NLRB No. 83, at 8 ("right to self-organization" is the "first *and central* right set forth in Section 7 of the Act") (emphasis added). The Board's approach to the right to organize in *Specialty Healthcare* places the right to organize ahead of the right to *refrain* from organizing and thus undermines the policy

decision made by Congress to accord the right to refrain *equal* status—not second-class treatment. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 7, 61 Stat. 136, 140; *see also* H.R. Rep. No. 80-510, at 47 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 551 (1948) (Congress's amendment of the Act in 1947 "emphasized that one of the principal purposes of the [Act] is to give employees full freedom to choose *or not to choose* representatives for collective bargaining") (emphasis added). Indeed, the freedom to associate, or not, is one of the core freedoms of our nation. *See* U.S. CONST. amend. I.

The Board's *Specialty Healthcare* approach also ignores the very same "central" organizational right the decision claims to secure, as employees who are excluded from a petitioned-for-unit based on a narrow unit determination test will be disenfranchised even if they share a community of interest with the narrower unit—merely based on a union's practical perspective on the difficulty of organizing a broader unit. *See Indianapolis Glove Co. v. NLRB*, 400 F.2d 363, 368 (6th Cir. 1968); *see also NLRB v. Meyer Label Co.*, 597 F.2d 18, 22 (2d Cir. 1979) (expressing concern that employees excluded from a unit "might be adversely affected because they might have their conditions set by a union which does not represent them"). "All statutory employees," however, "have Section 7 rights, whether or not they are initially included in the petitioned-for-unit," and *Specialty Healthcare*'s deference to

units hand-picked by the union infringes these rights. *Macy's*, 361 NLRB No. 4, at 32 (Member Miscimarra, dissenting).

C. The Overwhelming-Community-Of-Interest Standard Is A Radical Departure From Longstanding Board Precedent

The Board's overwhelming-community-of-interest test not only contravenes the National Labor Relations Act, but also constitutes a radical, unreasoned departure from decades of the Board's own precedent. Prior to *Specialty Healthcare*, in assessing the appropriateness of a unit, the Board applied a community-of-interest test in which it looked to "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Newton-Wellesly Hosp.*, 250 NLRB 409, 411 (1980). Grounded in the statutory mandates of Section 9, *see supra* Part I and II, the "Board's [pre-*Specialty Healthcare*] inquiry into the issue of appropriate units . . . never addresse[d], solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Id.*[6] The Board instead properly focused "on a careful examination of what interests are shared *within* and *outside the proposed unit*." *Macy's Inc.*, 361 NLRB No. 4, at 31 (July 22, 2014) (Member Miscimarra, dissenting) (citing *Wheeling Island Gaming*, 355 NLRB 637, 641–42 (2010)).

[6] The Board has applied and reaffirmed this standard over the course of several decades. *See, e.g.*, *Publix Super Mkts., Inc.*, 343 NLRB 1023, 1024 (2004); *Seabord Marine, Ltd.*, 327 NLRB 556, 556 (1999); *United Foods, Inc.*, 174 NLRB 91, 91 (1969).

The Board in *Specialty Healthcare*, however, flipped on its head that longstanding, sensible community-of-interest test, which was well grounded in the statutory mandate. Under *Specialty Healthcare*, a petitioned-for-unit of employees who share a community of interest is deemed to be an appropriate bargaining unit *unless* the employer demonstrates that employees in a larger unit "share an overwhelming community of interest with those in the petitioned-for-unit." 357 NLRB No. 83, at 13. Even if a larger unit would be "more appropriate," it will be rejected unless the employer can meet this demanding standard. *Id*.

The only decision prior to *Specialty Healthcare* of which *amici* are aware in which the Board purported to apply an "overwhelming community of interest" standard to an initial unit determination was in *Lundy Packing Co.*, 314 NLRB 1042 (1994). As noted above, the Fourth Circuit overturned that prior decision as inconsistent with Section 9(c)(5) of the Act. *Lundy Packing*, 68 F.3d at 1581; *see also supra* Part II.A. In *Specialty Healthcare*, the Board adopted virtually the same standard that was overturned by the Fourth Circuit. The result is that employees with similar interests are prevented from voting on whether to unionize and, if so, how to collectively bargain.

As support for its overwhelming-community-of-interest standard, the Board in *Specialty Healthcare* relied on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). The D.C. Circuit, however, impermissibly borrowed the standard it used

in *Blue Man Vegas* from accretion cases, in which employers seek to add new employees into a preexisting unit without an election—for example, employees from a newly acquired department store. *See id.* at 422. In accretion cases, the right to vote is paramount, and employees can *only* be disenfranchised if they share an overwhelming community of interest with an already-established union. In contrast, in the case at hand and similar cases being decided under *Specialty Healthcare*, employees excluded from a fractured unit are presumed to be disenfranchised *unless* an overwhelming community of interest can be shown. In other words, in accretion cases, employees are disenfranchised if they *are* included in the bargaining unit without getting to vote; but in certification cases, like the one at hand, employees are disenfranchised if they *are not* included in the bargaining unit because they do not get to vote. *Blue Man Vegas* thus provides scant support for the Board's application of the overwhelming-community-of-interest test in the certification context.[7]

The Board's unreasoned departure from its own longstanding precedent alone warrants rejection of the Board's decisions adopting and applying the *Specialty Healthcare* standard, including the Board's decision in *Macy's*. *See Lundy Packing*,

[7] The only Board decisions cited in *Blue Man Vegas* from the initial representation context are plainly inapposite. *See Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976) (describing *employer's characterization* of two groups of employees as sharing an "overwhelming community of interest"); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (applying traditional community-of-interest analysis to include concierges in unit of hotel employees, while noting that shared interests in that case were "overwhelming").

68 F.3d at 1583 ("While the Board may choose to depart from established policy, it must explicitly announce the change and its reasons for the change."); *see also Energy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 208-11 (5th Cir. 2001) (rejecting enforcement of Board order unreasonably reversing its prior precedent).

* * *

The Board's continued treatment of *Specialty Healthcare*—in this case and a host of others—as effectively sweeping away the Board's prior precedents makes clear that the decision is being used by the Board to approve arbitrary, fractured units across varied workplaces, and will continue to be unlawfully applied and expanded unless the Court takes action to rein in the agency. By placing a thumb on the scale in favor of unions, gerrymandered units will proliferate, causing particular harm to the retail industry, the unique characteristics of which led the Board to apply a whole-store presumption for several decades, until now. The Court should use this case as an opportunity to stop the steady accretion of error by the Board and reject *Specialty Healthcare*'s overwhelming-community-of-interest test, or, at a minimum, limit it to the special healthcare context of that case and reject its expansion to the retail industry.

CONCLUSION

For the foregoing reasons, the Court should grant Macy's petition for review and deny the Board's cross-application for enforcement.

Dated: April 27, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,653, as determined by the word-count function for Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: April 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I caused the foregoing Brief For *Amici Curiae* Retail Associations to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I further certify that on April 27, 2015, an electronic copy of the foregoing Brief For *Amici Curiae* Retail Associations was served electronically by the Notice of Docket Activity on counsel for all parties.

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