UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

MACY'S, INC., Employer, and LOCAL 1445, UNITED FOOD AND COMMERCIAL WORKERS UNION, Petitioner.	:	Case No. 01-RC-091163

REQUEST FOR SPECIAL PERMISSION TO FILE BRIEF OF *AMICI CURIAE* RETAIL INDUSTRY LEADERS ASSOCIATION AND RETAIL LITIGATION CENTER

Dated: January 11, 2013

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The Retail Industry Leaders Association ("RILA") and Retail Litigation Center ("RLC") respectfully request special permission to file the attached *amicus* brief.

As explained in full in the attached amicus brief, RILA is a membership association consisting of the largest and fastest growing companies in the retail industry—retailers, product manufacturers, and service suppliers—which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers located both domestically and abroad. RILA promotes consumer choice and economic freedom through public policy discussions on issues of importance to its members.

The RLC is another membership association of leading companies in the retail industry that was formed to provide courts with retail industry perspectives on significant legal issues, and to highlight the potential industry-wide consequences of legal principles that may be decided in pending cases.

RILA and RLC (collectively "*amici*") strongly disagree with the Regional Director's decision in this case certifying a bargaining unit of the cosmetics and fragrances department in a single retail store. Instead, *amici* believe that the Board's longstanding presumption in favor of whole-store or "wall-to-wall" units in the retail industry strikes the appropriate balance between the interests of employees and unions in organizing, as well as the interest of employers in productively managing their business. Any change in the presumption would serve to balkanize the structure of the employer's business, adversely affecting *amici*'s members and their businesses, complicating labor relations and collective bargaining, threatening to embroil customers and other members of the pubic in labor disputes, and building in delay and increased costs in the Board's currently fair and efficient representation process. *Amici* and their members are thus

concerned that affirmance of the Regional Director's decision will cause a massive disruption in their industry without any necessary precipitating purpose.

The unit determination standards used by the Board have a significant impact on *amici*'s members because most, if not all, fall under the jurisdiction of the Act. *Amici* thus submit that they have a significant interest in the Board's activities in this area. For these reasons, *amici* respectfully request special permission to file the attached *amicus* brief.

Respectfully Submitted,

Dated: January 11, 2013

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I. INTRODUCTION

The Regional Director in this case approved a fragmented unit consisting of the cosmetics and fragrances employees at the Macy's location in Saugus, Massachusetts, notwithstanding that all selling employees at Macy's 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. Approval of this fractured unit amply demonstrates the harm that has been caused by *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). The Board in *Specialty Healthcare* indicated that its decision was not intended to override industry-specific presumptions, including the whole-store presumption that has traditionally governed the retail industry. *Id.* at 13 n.29. Yet *Specialty Healthcare* has had precisely that effect.

If allowed to stand, this application of *Specialty Healthcare* will fragment the retail workforce. If two small segments of a store's employees may be plucked from the whole to form a bargaining unit, there will be no reason to deny similar treatment to other collections of salespeople from different departments. Such fragmentation is fundamentally at odds with the central purpose of a retail establishment, which is to provide seamless and effective customer service throughout the store. A retail employee must be ready and able to respond to questions outside her particular area of expertise, and cannot effectively operate within a narrow operational fiefdom. The workforce in a typical retail store is therefore highly integrated. Employees work in close proximity under common management, common policies, and common working conditions. For precisely this reason, a half-century of Board precedent has consistently recognized a presumption in the retail context in favor of the whole-store unit.

Nothing in this case justifies a departure from the Board's traditional approach to retail bargaining unit determinations. To the contrary, a proliferation of similar bargaining units would hamstring retail operations, while also undermining the policy of the National Labor Relations Act ("NLRA" or "the Act") to promote stable labor relations and the free flow of commerce. Administrative costs would multiply. A single store's workforce could be dissected into dozens of bargaining units, with the number of units increasing dramatically across a retail chain. Segregation of the workforce would reduce flexibility and hamper customer service, as well as limit opportunities for employees who could be denied the chance for advancement or additional shift work because of union line-drawing. The introduction of multiple bargaining units in a single store would set employees against each other, prompt competition for benefits, impair employee morale, and increase the risk for disruptive labor disputes ostensibly involving small pockets of employees, but which would envelop all store employees. Employers would face substantial administrative and practical impediments to fulfilling their fundamental statutory obligation to "meet . . . and confer in good faith" with employees "with respect to wages, hours, and other terms and conditions of employment"—the core purpose of the NLRA. 29 U.S.C. § 158(d).

There is no good reason to inflict such discord and disruption on the retail industry, whose importance to the U.S. economy cannot be overstated. Therefore, the Board should reverse the unit determination of the Regional Director, and take this opportunity to affirm the longstanding presumption in favor of the whole-store unit in the retail context.

II. STATEMENT OF INTEREST

The Retail Industry Leaders Association ("RILA") promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include the largest and fastest growing companies in the retail industry—retailers, product

manufacturers, and service suppliers—which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers located both domestically and abroad.

The Retail Litigation Center ("RLC") was formed to provide courts with retail industry perspectives on significant legal issues, and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. Its membership includes many of the country's largest and most innovative retailers.

RILA and RLC ("*amici*") strongly disagree with the Regional Director's decision certifying a bargaining unit consisting solely of employees in a store's cosmetics and fragrances departments. Instead, *amici* believe that the Board's longstanding presumption in favor of whole-store or "wall-to-wall" units in the retail industry strikes the appropriate balance between the interests of employees in exercising their right to choose whether to organize and the interest of employers in productively managing their business. Any change in the presumption would balkanize the organization of retail stores, adversely affecting *amici*'s members and their businesses, complicating labor relations and collective bargaining, threatening to embroil customers and other members of the public in labor disputes, and building in delay and increased costs in the Board's current representation process.

The unit determination standards used by the Board have a significant impact on *amici*'s members because most, if not all, fall under the jurisdiction of the Act. *Amici* thus submit that they have a significant interest in the Board's activities in this area that justifies participation in this case.

III. ARGUMENT

Longstanding Board precedent makes this an easy case. The Regional Director's decision must be reversed because it does not comport with the well-established rule creating a

presumption in favor of the whole-store unit in the retail context. This whole-store presumption has been repeatedly applied, across the past half-century, to reject far more inclusive proposed units of retail employees than the cosmetics and fragrances employees at issue in this case. Once the Board has established such a policy through adjudication, "subsequent decisions must be reasonably consistent with the expressed policy." *Consol. Papers, Inc. v. NLRB*, 670 F.2d 754, 757 (7th Cir. 1982); *see also Westvaco, Va., Folding Box Div. v. NLRB*, 795 F.2d 1171, 1173 (4th Cir. 1986); *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995).

Even in the absence of the Board's longstanding precedent, the Regional Director's decision would have to be reversed. The decision cobbles together disparate employees into a unit that has no relationship to the categories of units permitted by section 9(b) of the Act. *See* 29 U.S.C. § 159(b). Because the decision approves an arbitrary unit proposed by the union, it violates the requirement of 9(c) that the Board not give controlling effect to the extent of organization by the union. *Id.* § 159(c)(5). The decision will compound the administrative costs of the retail business, reduce employee opportunities, and effectively disenfranchise similarly-situated workers excluded from the approved unit. Such a rule has no basis in law or policy.

A. The Regional Director's Decision Impermissibly Departs From A Half-Century Of Board Precedent Establishing A Presumption In Favor Of Whole-Store Units In The Retail Context.

Applying a standard drawn from *Specialty Healthcare*, 357 NLRB No. 83 (2011), and ignoring *Specialty Healthcare's* express statement that it should not be read to upset settled industry presumptions, *id.* at 13 n.29, the Regional Director erroneously concluded that a whole-store unit was not required because it could not find that "sales employees share such an overwhelming community of interests with the cosmetics and fragrances employees that there is no legitimate basis to exclude the latter from a larger unit of sales employees." Op. at 9. Yet, for over a half century, the Board has recognized a presumption in favor of whole-store units in the

retail context, and has required unions seeking a narrower bargaining unit to justify departure from that baseline. The Regional Director's importation of the *Specialty Healthcare* standard to disrupt the traditional retail industry presumption effectively reversed this longstanding approach, requiring the employer to establish an overwhelming community of interest among all employees in the store in order to avoid recognition of a narrower bargaining unit.

1. *Specialty Healthcare* Was Flawed And Should Either Be Reversed Or, At Minimum, Cabined To Its Specific Facts.

As an initial matter, the overwhelming community of interest test adopted by the Board in *Specialty Healthcare* to determine the appropriate size of an initial bargaining unit constitutes a radical, unreasoned departure from decades of precedent. The *test* is inconsistent with the statutory commands in Sections 9(b) and 9(c)(5) of the Act that *the Board* "in each case" determine the appropriate unit and that it not be created according to the extent of union organization.[1] Especially when applied outside the non-acute healthcare context in which it arose, this test threatens to cause substantial damage to labor relations and the economy, including to the vitality and operation of the retail industry.

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

[1] The 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*, slip op. 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 that right ahead of the right to refrain by inviting harmful gerrymandering. It also ignores the statutory mandate of equal protection and decades of precedent in the retail context establishing a presumption in favor of wall-to-wall units. Conversely, 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).

determination was in *Lundy Packing Co.*, 314 N.L.R.B. 1042 (1994). The Fourth Circuit, however, overturned this decision as inconsistent with the NLRA. The court reasoned that "[b]y 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." 68 F.3d at 1581. "This is because the union will propose the unit it has organized." *Id.* (internal quotation marks omitted). 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 in the same store 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 relied on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). The D.C. Circuit, however, impermissibly borrowed this standard 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. These accretion cases, whose purpose is to preserve the right of employees to vote on whether or not to unionize under different, narrow circumstances, are plainly inapposite here. 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. 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").

Blue Man Group thus provides scant support for the Board's overwhelming community of interest test, and certainly provides no support for applying that test to trump the longstanding "wall-to-wall" presumption in the retail industry. Because *Specialty Healthcare* was wrongly decided and inconsistent with key provisions of the NLRA, the Board should take this opportunity to revisit the damage caused by the decision and, at minimum, confirm that it is limited to the nonacute healthcare context in which it arose.

2. The Board Should Reaffirm Its Traditional Whole-Store Presumption.

For over a half-century, the Board has consistently recognized a presumption in favor of the whole-store unit in the retail industry. 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 642, 643 (1957). The Board further explained that it has a "policy" favoring units that "encompass all store employees." *Kushins & Papagallo*, 199 NLRB 631, 631–32 (1972). Indeed, "a single store in a retail chain . . . is *presumptively* an appropriate unit for bargaining." *Haag Drug Co.*, 169 NLRB 877, 877 (1968); *see also Charrette Drafting Supplies Corp.*, 275 NLRB 1294, 1297 (1985) ("[T]he Board finds a single-facility unit presumptively appropriate."). 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 61, 63 (1971); *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").

The Board in *Specialty Healthcare* recognized that it had "developed various presumptions and special industry and occupational rules in the course of adjudication" and stated that its decision was "not intended to disturb any rules applicable only in specific industries." 357 NLRB at 13 n.29. And, in *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011), the Board reiterated that "to the extent that the Board has developed special rules applicable to" a particular industry or type of employee—as it indisputably has in the retail context—those existing "rules remain applicable" even after *Specialty Healthcare*. Slip op. at 5. Yet the Regional Director in this case found no need to separately "address" cases applying the whole-store presumption, as they "are all pre-*Specialty Healthcare* cases." Op. at 12 n.38. The Regional Director's treatment of *Specialty Healthcare* as effectively sweeping away these prior precedents makes clear that the decision has been and could continue to be used by Regional Directors and the Board to approve arbitrary, fractured units in a host of industries unless the Board clarifies the parameters of the decision. *See, e.g.*, *Prevost Car U.S.*, Case 03-RC-071843 (NLRB Mar. 15, 2012); *DTG Operations, Inc.*, Case 27-RC-8629 (NLRB Dec. 30, 2011). The Board should use this case as an opportunity to stop the steady accretion of error under *Specialty Healthcare*, reject *Specialty Healthcare*'s overwhelming community of interest test, and, at a minimum, reaffirm clearly and unmistakably the application of traditional industry presumptions, including the traditional retail whole-store presumption.

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 appropriate unit analysis is guided by multiple factors, which look to whether employees are "separately supervised"; have distinct "terms and conditions of employment"; are "functionally integrated" with other employees; are "organized into a separate department"; have "frequent contact with other employees"; have

"distinct job functions and perform distinct work"; and "have distinct skills and training." *Specialty Healthcare*, slip op. at 9 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). The ultimate question guiding the application of these factors is "whether the employees share a 'community of interest.'" *Id.* (quoting *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 491 (1985)). 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.

In the retail industry, the single, overriding task of every employee in a store 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. 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. 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. A single store is also, generally, under common management. Retail 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. 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.

As the Board explained in *Haag Drug Co.*, 169 NLRB at 877–78: "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 . . . ."

In the wake of *Specialty Healthcare*, the Board declined to review a decision by a Regional Director that reaffirmed the connection between the whole-store presumption and the community-of-interests test. *See Home Depot U.S.A., Inc.*, Case 20-RC-067144 (R.D. Nov. 18, 2011). In that case, the Regional Director explained that the "Board has long favored wall-to-wall bargaining units in the retail industry." Slip op. at 12. The Regional Director emphasized the community of interest between employees in a single store: They "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.* For these reasons, the petitioned-for unit in that case, which included some jobs at the store but excluded others, was a "fractured unit," or "an arbitrary grouping of employees in [the] retail store setting." *Id.* at 15; *see also Odwalla, Inc.*, 357 N.L.R.B. No. 132 (Dec. 9, 2011) (rejecting unit under overwhelming community of interest test because unit was a "fractured unit"). Given these factors, the Regional Director correctly concluded that all the employees in the store shared an overwhelming community of interest, and the only appropriate unit for the store was a whole-

store unit. For the same reason, the Board should overturn the Regional Director's decision in the instant case.

The whole-store unit presumption is also consistent with the Board's recognition that an appropriate unit will generally track organizational structures put in place by the employer. *See Specialty Healthcare*, slip op. at 9 n.19. As the Board has recognized, "the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace." *Id.* This focus ensures "that bargaining will occur within boundaries that make sense in the employer's particular workplace." *Id.* In the retail context, the retail store is the unit according to which employers generally structure the workplace. The presumption in favor of the whole-store unit ensures that this basic organizational premise remains undisturbed, thus avoiding unnecessary disruption of the employer's business and the free flow of commerce.

3. Petitioners Cannot Justify Departure From A Whole-Store Unit In Favor Of A Unit Consisting Of Cosmetics and Fragrances Departments.

Applying the presumption in favor of a whole-store unit, it is evident that the Regional Director erred by approving the cosmetics and fragrances department unit here. While the presumption in favor of a whole-store unit can be rebutted, the Board has never approved a proposed bargaining unit that departed from the whole-store presumption as dramatically as the unit endorsed by the Regional Director in this case. *See, e.g.*, *An Outline of Law and Procedure in Representation Cases* § 15-254 (cataloguing and summarizing cases not applying wall-to-wall retail presumption; no support for separate cosmetic and/or fragrance unit).

The Board's precedents set out a test to rebut the whole-store presumption that cannot be satisfied here. In *A. Harris & Co.*, 116 NLRB 1628 (1956), the Board set out three conditions under which a unit smaller than a whole store would be appropriate: (1) when the proposed unit is "geographically separate" from the rest of the retail store; (2) when there is "separate

supervision" of the proposed unit; and (3) when there is "no substantial integration" among the employees in the proposed unit and those in the rest of the store. *Id.* at 1631–32; *see also Home Depot U.S.A., Inc.*, at 12–13 (explaining that the Board in *A. Harris* "set forth three conditions under which it would make an exception for finding a subsection of employees of a retail store operation (in that case a warehouse unit) in the retail industry appropriate").

Not one of those conditions is met in this case. The cosmetics and fragrances departments are not "geographically separate" from the rest of the Saugus Macy's store. Nor are the cosmetics and fragrances departments separately supervised from the rest of the store, except at the intermediate level; rather, the entire store is under common management. And, finally, petitioners have failed to demonstrate a lack of "substantial integration" between cosmetics and fragrances employees and the rest of the store. Nine employees have permanently transferred into the cosmetics and fragrances departments from other departments over the past two years—a number that assumes particular significance in light of the fact that the cosmetics and fragrances departments only have forty-one employees. Moreover, all selling 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. The Regional Director's decision effectively disregarded these commonalities, and thus "gave insufficient weight to the uniformity of treatment of the Company's personnel." *NLRB v. Meyer Label Co.*, 597 F.2d 18, 22 (2d Cir. 1979).

It is, of course, possible to point to differences between the employees of the fragrances and cosmetics departments and employees of other departments within the store—for one thing, cosmetic and fragrances department employees primarily sell either cosmetics or fragrances—

but a review of the Board's precedents makes it amply clear that the mere presence of such differences has never been enough to justify carving a sales department of retail employees out from the rest of the store. To the contrary, the Board has rejected proposed units that are either similarly fragmented or even broader than the unit approved by the Regional Director here.

The Board's decision in *I. Magnin*, for example, cannot be meaningfully distinguished from this case. 119 NLRB 642. There, a proposed unit would have consisted solely of employees of a department store's four shoe departments. Despite observing that employees in the shoe department were paid according to "a different method of compensation," the Board concluded that a separate bargaining unit was not appropriate because the skills of the various salespeople were "of the same general type." *Id.* at 643. The shoe department employees were not "craft or professional employees," or otherwise "sufficiently different . . . to warrant their establishment in a separate unit." *Id.* Neither petitioners nor the Regional Director can explain why, if a unit of shoe department employees was inappropriate in *I. Magnin*, a unit of cosmetic and fragrances employees is appropriate here. *See Burrows & Sanborn*, 81 NLRB 1308, 1309 (1949) (including cosmetic demonstrators in broader unit where employees occasionally transferred into cosmetic department and were subject to store rules and same conditions as other store employees); *R.H. Macy's and Co.*, 81 NLRB 186 (1949) (including cosmetic demonstrators in broader unit); *cf. also Macy's East*, 1999 NLRB Lexis 796, at *3 n.1 (Davis, ALJ 1999) (union filed petition and election conducted in unit of all sales employees including fragrance department employees).

Similarly, in *Sears, Roebuck & Co.*, the Board rejected a proposed division of a Sears retail establishment into three separate units—one for drivers and others employed at the warehouse; a second for installers employed at the service station connected with the store; and a

third for "store and service station salesmen, store clericals, and maintenance employees." 191 NLRB 398, 398, 404 (1971). The Board credited the employer's contention that "in order to make this kind of retail operation viable, a high degree of compartmentalization cannot be utilized." *Id.* at 404. "To the contrary, in all phases of the operation, there must be a direct line of communication and supervision, coupled with flexibility of job functions in support of a sole objective." *Id.* The Board therefore concluded that the "only appropriate unit should consist of all employees of the service station, warehouse, and retail store," *id.*—in other words, the entire retail establishment. Given the Board's disapproval of a unit encompassing *all* sales, clerical, and maintenance employees in the circumstances of *Sears, Roebuck & Co*., it is impossible to imagine how a unit consisting only of cosmetics and fragrances employees could be appropriate.

The Board's decision in *Charette Drafting Supplies* also illustrates the point. 275 NLRB at 1294. There, the Board rejected a proposed unit limited to the "operations department employees" of a single retail store. *Id.* at 1294. Although "much of the operations employees' work is performed in the basement," those employees also spent "a substantial amount of time on the street level" and occasionally "answer sales employees' questions" regarding the location of stock or the scheduling of deliveries. *Id.* at 1295–96. This level of integration was sufficient for the Board to conclude that the "operations department employees do not have a community of interest sufficiently distinct from other employees to warrant a separate operations unit." *Id.* at 1296. If the backroom employees at issue in *Charette Drafting Supplies* could not be separated from the store's sales employees under the circumstances of that case, it cannot possibly be appropriate to carve employees of Macy's cosmetics and fragrances departments out from the remainder of the store.

Likewise, in *Levitz Furniture*, the Board rejected a proposed unit that would have consisted of truckdrivers and truckdriver helpers employed at a single retail store. 192 NLRB 61. Observing that "[t]he entire store activities are devoted to all phases of selling merchandise," *id.* at 62, the Board concluded that truckdrivers and truckdriver helpers shared a "community of interest [with] all of the employees at the Employer's store" and that they did not possess "special interests sufficient to warrant their separate representation." *Id.* at 63. It was true that members of the proposed unit spent "a majority of their time away from the plant," but the Board nevertheless found sufficiently "regular and frequent interchange" between the members of the proposed unit and other employees "as to warrant a finding that they do not constitute a separate identifiable unit." *Id.* Again, if truckdrivers and their helpers who spend a "majority" of their time outside the store were not sufficiently distinct in *Levitz Furniture* to form a separate bargaining unit within a retail establishment, how can a unit limited to cosmetics and fragrances employees possibly be appropriate? *See also Saks & Co.*, 204 NLRB 24, 25 (1973) (rejecting petitioned-for unit of non-selling employees, based on shared community of interests with selling employees).

In those cases where the presumption in favor of a whole-store unit *has* been rebutted, the proposed unit has been far more distinct than a unit cobbling together those employees assigned to sell cosmetics and fragrances. Generally, these cases have divided employees in selling versus non-selling roles. In *A. Harris*, the Board approved a unit of "drivers, helpers, and delivery employees," many of whom worked out of warehouses physically separate from the retail store. 116 NLRB at 1628, 1630. In *Allied Stores of New York, Inc.*, the Board approved "separate units for the selling employees and the nonselling employees." 150 NLRB 799, 806 (1965). And in *Wickes Furniture*, the Board approved a unit consisting of "[a]ll salespersons" employed at a

single retail location. 231 NLRB 154, 155 (1977). Where the Board has approved units limited to particular retail departments, they have typically been units engaged in a function other than selling—for instance, alterations department employees, bakery employees, carpet workroom employees, or display department employees. *See An Outline of Law and Procedure in Representation Cases* § 15-254. Or, such cases involve units of craft or professional employees. *See, e.g.*, *Foreman & Clark, Inc.*, 97 NLRB 1080 (1951) (tailor shop unit appropriate; employees highly skilled); *Super K Mart*, 323 NLRB 582, 586, 588 (1997) (meat department unit appropriate as unit work required traditional meat-cutting skills). These selling versus non-selling or craft-specific unit cases provide no support whatsoever for a unit consisting solely of the cosmetics and fragrances departments of a single retail store to the exclusion of employees selling any other kinds of products within the same store.

Indeed, cases applying the whole-store presumption have relied upon the types of interests shared between selling employees in the cosmetics and fragrances departments and employees in the remainder of the store. The following are just a few commonalities. The employees "enjoy substantially the same benefits." *Levitz Furniture*, 192 NLRB at 63; Request for Review at 7. They "spend a substantial portion of their time working alongside, or in close proximity with, other employees." *Levitz Furniture*, 192 NLRB at 63; Request for Review at 9. "Supervision is set up to provide fairly direct control by the store manager . . . over almost all phases of activities" at the store. *Sears, Roebuck & Co.*, 191 NLRB at 404; Request for Review at 2, 11. There are "regularly scheduled meetings for all salesmen." *Sears, Roebuck & Co.*, 191 NLRB at 405; Request for Review at 9. "All employees participate in taking inventory . . . ." *Levitz Furniture*, 192 NLRB at 62; Request for Review at 7. And, the "operation is highly integrated, with employees in different departments assisting each other and overlapping in their

job functions in order to serve the customers." *Charette Drafting Supplies*, 275 NLRB at 1296; Request for Review at 10-11. If these similarities required a whole-store bargaining unit in previous cases decided by the Board, then there is no way that the Regional Director could justify a unit consisting of only the cosmetics and fragrances departments in this case.

Departure from this longstanding line of precedent to ratify the proposed unit of cosmetics and fragrances department employees, without adequate reasoning and without notice and comment, would offend due process, would be arbitrary and capricious, and would not comport with the requirement of consistency that governs the Board's adjudicative decisionmaking.

B. The Regional Director's Decision Will Fragment The Retail Workforce And Is Arbitrary, Unlawful, And Unworkable.

The selling employees who comprise the Regional Director's approved unit have been cobbled together notwithstanding significant differences in the conditions of their employment. Cosmetics and fragrances 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 dress code applicable to the entire store. Much of what these employees *do* have in common they *also* share in common with the other employees of the entire Macy's Saugus location.

The logical consequences of approving such an arbitrary, cobbled-together unit are easy to imagine. If fragrances and cosmetics can form a bargaining unit, what is to stop each of the counters or product lines *within* the fragrances and cosmetics departments from forming even smaller bargaining units? Why not also separate units for casual men's apparel, women's

summer dresses, and designer jeans? Why not a unit comprised of consumer electronics and home appliances? Paper products and detergents? This splintering of the retail store into arbitrary bargaining units unconnected with the actual business structure cannot be squared with the text of the Act, will undermine the operation of the retail business, interferes with employee rights and opportunities, and invites impermissible gerrymandering of bargaining units in order to manipulate the results of elections.

1. The Unit Approved By The Regional Director Is Inconsistent With The Text Of The National Labor Relations Act.

The arbitrary unit approved by the Regional Director cannot be squared with the text of the Act, which limits the ability of unions to artificially construct units that do not have a basis in the organizational structure of the employer's business.

The Regional Director's decision fails to comply with the directive of section 9(b) that *the Board* (not a petitioning union) select "the unit appropriate for the purposes of collective bargaining." *See* 29 U.S.C. § 159(b). The rule adopted by the Regional Director effectively grants 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 store. Op. 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 be deemed *inappropriate*. Moreover, the decision effectively delegates the selection of the appropriate unit to the union, in contravention of Congress's determination that such selection is properly made by the Board.

Nor is the unit approved by the Regional Director consistent with the requirement that the unit approved by the Board constitute a craft, employer, or plant unit, or some subdivision thereof. *See* 29 U.S.C. § 159(b). The employees of the cosmetics and fragrances departments do not share a "craft"; they do not constitute the entire workforce of the employer; and they do not constitute the entire workforce of the plant, or store. *See id.*; *see also Specialty Healthcare*, slip op. at 7 nn.16, 17. Nor can such a gerrymandered unit be justified as a "subdivision" 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 sell either cosmetics or fragrances.

Such a unit also cannot be squared with Congress's direction, in section 9(c)(5), that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). That provision is intended to prevent artificial units of the sort at issue in this case. It prevents a union from proposing a 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. *See, e.g.*, *Lundy Packing Co.*, 68 F.3d at 1581–82. The Board must, instead, authorize a unit that is "appropriate" in the context of the employer's organization. In the context of the retail industry, that appropriate unit will usually be the employer's entire store.

Recognizing (although ultimately disregarding) these considerations, the Board explained in *Specialty Healthcare* that a unit would be inappropriate if its members did not "perform distinct work under distinct terms and conditions of employment." Slip op. at 13 n.31 (citing

Wal-Mart Stores, Inc., 328 NLRB 904 (1999)). And, the Board observed, "some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." *Id.* at 13; *see, e.g.*, *I. Magnin*, 119 NLRB at 643. This is such a case. The proposed unit of the cosmetics and fragrances departments is an artificial, gerrymandered collection of employees, with effectively nothing in common that distinguishes them from other store employees except that they are charged with selling either cosmetics or fragrances as part of their overall common mission to provide seamless and effective customer service throughout the store. This is nothing more than an arbitrary subset of a true community of interests.[2]

2. The Regional Director's Decision Threatens To Overwhelmingly Complicate Store Administration And To Limit The Opportunities Of Employees.

The proliferation of bargaining units threatened by the Regional Director's decision would hamstring retail employers and curtail opportunities available to employees. Retailers 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 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. 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

[2] For this reason, even if the Board retains the illogical test adopted in *Specialty Healthcare*, it should recognize that cosmetic and fragrance department employees share an overwhelming community of interest with the rest of the store's employees. *See* Macy's Br. 1, 10-18, 23.

or to earn additional wages. Productivity and customer service would decline. Limited to their own departments, 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.

Administrative costs would also proliferate. Managers of a single store could conceivably be required to administer separate collective bargaining agreements with cashiers, greeters, backroom employees, men's designer clothing, women's business attire, sheets and towels, dishware, sporting goods, or baby products—to name just a few possibilities. These agreements could impose different or conflicting work rules, pay scales, benefits, bargaining schedules, grievance procedures, and layoff and recall procedures. The administrative difficulties involved would become overwhelming.

The tension among workers that will result from a proliferation of bargaining units could also cripple the employer's business, while simultaneously weakening employees' bargaining power. Some departments would possess more economic leverage than others simply by virtue of their individual function, and those departments would be able to negotiate more favorable terms and conditions of employment. Other departments, lacking such bargaining power, could see their benefits sacrificed to make up the difference. Cashiers, for instance, might shut down an entire store by going on strike[3]—leaving the rest of the employees temporarily without a job—whereas a strike by children's designer shoes might have little impact on the business, and therefore might win little in the way of concessions from the employer. The resulting disparity

[3] *Cf. Continental 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.").

in benefits and pay between employees performing similar jobs in close proximity would drastically undermine morale. Divisions between employees would leave the workforce of the store, in the aggregate, with less bargaining power, as employees would be unable to present a united face and could be played off against each other in the course of negotiations. Yet frequent strikes and stoppages by the various warring departments would also make running the business practically impossible, and would impose economic hardship on workers in non-striking departments.

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 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.

3. The Regional Director's Decision Invites Harmful Gerrymandering.

The Regional Director's approval of such an artificial unit is also an open invitation to gerrymandering. The possibilities are endless. A union that believes it has the votes to organize greeters, but not cashiers, need only seek to organize the greeters. A union may limit a proposed unit to labor-enthusiasts in 2nd floor designer men's socks, or 3rd floor televisions. Or, a union might simply try to organize the entire 3rd floor of a store, merely because that is where it enjoys its strongest support. Unions will 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 to whether the designated subset of employees has organizational significance within the employer's business.

This case illustrates the point. In March 2011, the union filed a petition to represent a wall-to-wall unit in this *same* Macy's location, and the regional director approved the unit. Op. 8. An election was held on May 20, 2011, and the entire store voted to *reject* unionization. *Id.* The union *only then* determined that employees in the cosmetics and fragrances departments ought to be carved out from the entire store, and that this smaller subset of employees would constitute an effective bargaining unit.

Not only is such bargaining unit manipulation harmful to the employer, it inappropriately deprives employees of a meaningful election and their right of free choice. *See Meyer Label Co.*, 597 F.2d at 22 (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"). The Fourth Circuit has explained that "[t]he predilections of employees are often revealed during early organizational efforts, and the inclusion or exclusion of certain employees may thus determine which party will prevail." *Lundy Packing Co.*, 68 F.3d at 1579. That is particularly true here, where the union very recently lost a whole-store election, and is seeking to represent a group of employees that it evidently believes will be more likely to support unionization.

Moreover, if the union succeeds in organizing the cosmetics and fragrances departments, employees outside the unit will also be denied union representation in negotiations over benefits, pay, and other matters that equally affect all store employees, thus effectively encouraging the union and the employer to sacrifice the interests of excluded members in favor of those who fall

within the unit. There is absolutely no reason to permit such a result, which runs contrary to the directive of the Act to determine "the . . . appropriate" bargaining unit, as well as longstanding Board precedent that holds, again and again, that units smaller than an entire store generally are not appropriate in the retail industry.

IV. CONCLUSION

In short, the proliferation of bargaining units encouraged by the Board's *Specialty Healthcare* rule will have harmful consequences for retail companies and their employees. The workforce at a retail store is likely to be carved up into a multiplicity of gerrymandered and fragmented units. These "cherry-picked" units will often be too small for effective bargaining, but they will compete with each other at the bargaining table, cause frequent strikes, prevent cross-training and employment opportunities, and drain a company's resources by requiring it to deal with an unmanageable number of labor unions and bargaining committees.

For the foregoing reasons, the Board should conclude that a unit composed of the cosmetics and fragrances departments is not an appropriate unit for collective bargaining, reverse the decision of the Regional Director, and utilize this opportunity to affirm that the Board's decision in *Specialty Healthcare* does not erase the Board's longstanding precedent regarding the appropriate analysis for bargaining unit determinations in retail stores.

Respectfully Submitted,

Dated: January 11, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013, I caused a true and correct copy of the foregoing Request for Special Permission to File Brief of Amicus Curiae, as well as the proposed Brief of Amicus Curiae, to be served via electronic filing through the National Relations Board's website on the following:

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Copies were also served on counsel of record for Local 1445 UFCW; counsel of record for Macy's, Inc.; and the Acting Regional Director for Region One via Federal Express at the following addresses of record:

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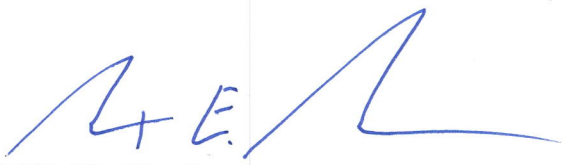

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