UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE NEIMAN MARCUS GROUP, INC., D/B/A/ BERGDORF GOODMAN, EMPLOYER, and LOCAL 1102 RETAIL, WHOLESALE DEPARTMENT STORE UNION, PETITIONER.	)	CASE 02-RC-076954

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND HR POLICY ASSOCIATION
IN SUPPORT OF RESPONDENT EMPLOYER

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337
SKawka@USChamber.com
RConrad@USChamber.com

Counsel for Chamber of Commerce
of the United States of America

G. Roger King (Counsel of Record)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215-2673
Tele: (614) 281-3939
rking@jonesday.com

R. Scott Medsker
JONES DAY
51 Louisiana Ave., N.W.
Washington D.C. 20001-2113
(202) 879-3939
rsmedsker@jonesday.com

Counsel for *Amici Curiae* Chamber Of
Commerce of the United States of America
and HR Policy Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENTS OF INTEREST

Amici incorporate by reference the statement of interests as contained in the attached Motion for Leave to File a Brief *Amici Curiae* In Support of Respondent Employer.

INTRODUCTION & SUMMARY OF ARGUMENT

This case involves a particularly troubling and expansive application of the National Labor Relation Board's ("NLRB" or "Board") recent decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011). This matter involves the Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman ("Bergdorf Goodman" or "Employer") and its retail location at 754 Fifth Avenue, New York, New York. Local 1102 of the Retail, Wholesale Department Store Union ("Local 1102" or the "Union") on March 20, 2012, petitioned to represent a unit at such Employer's location consisting of the following employees:

> All full time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department employed in Employer's retail store located at 754 Fifth Avenue, New York, New York.

Excluded from the petitioned-for unit were all other employees at such location, including selling and non-selling employees that are traditionally included under NLRB case law decisions in store-wide and all selling units in the retail industry. The NLRB Regional Director from Region 2 issued a Decision and Direction of Election (hereinafter "D&D") in which she found the petitioned-for unit to be appropriate. Thereafter, the Employer filed the instant Request for Review.

Amici Curiae Chamber of Commerce of the United States of America and HR Policy Association ("*Amici*"), in their respective roles as public policy advocacy organizations and on behalf of their members have repeatedly voiced their concerns that the Board's decision in *Specialty Healthcare* would lead to unions filing for these types of fragmented units and the

Board, and its Regional Directors, approving same. *See* Brief of *Amici Curiae* Coalition For A Democratic Workplace and HR Policy Association In Support of Respondent Employer, *Specialty Healthcare & Rehabilitation Center of Mobile*, 15-RC-8773 (Mar. 8, 2011) (hereinafter "HR Policy NLRB *Amicus* Br."); Proposed *Amicus* Brief of HR Policy Association, Society for Human Resource Management, and the National Association of Manufacturers Supporting Petitioner Cross-Respondent's Petition for Review and Denial of Enforcement, *Kindred Nursing Centers East, LLC v. NLRB*, Case Nos. 12-1027/1174 (6th Cir. Apr. 23, 2012) No. 006111283048 (hereinafter "HR Policy 6th Cir. *Amicus* Br."); Brief of *Amicus Curiae* Chamber of Commerce of the United States of America, *Specialty Healthcare & Rehabilitation Center of Mobile*, 15-RC-8773 (Mar. 8, 2011) (hereinafter "Chamber NLRB *Amicus* Br."); Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, Urging Reversal of an Order of The National Labor Relations Board, *Kindred Nursing Centers East, LLC v. NLRB*, Case Nos. 12-1027/1174 (6th Cir. Apr. 23, 2012) ENo. 006111283179 (hereinafter "Chamber 6th Cir. *Amicus* Br."). While the Board continues to assert that its *Specialty Healthcare* decision "did not create a new test" for unit appropriateness, Brief of The National Labor Relations Board, *Kindred Nursing Centers East, LLC v. NLRB*, Case Nos. 12-1027/1174 (6th Cir. June 7, 2012, refiled June 16, 2012) No. 006111329234, at 18, the instant decision clearly demonstrates a fundamental shift in what constitutes "an appropriate unit" for purposes of the National Labor Relations Act ("NLRA" or "the Act"). In fact, if the rationale of the Regional Director is affirmed in this case, retail employers such as Bergdorf Goodman could end up having a multiplicity of separate bargaining units, including perhaps even a separate unit for employees in a men's luxury sportswear shoes or a women's sunglasses department. *See* Employer Ex. 1.

Indeed, in the months since the Board issued its *Specialty Healthcare* decision, both the Board and its Regional Directors have expanded the new and novel "overwhelming community of interest test" for initial unit determinations in various troubling ways. *See Northrop Grumman Shipbuilding, Inc.*, 357 N.L.R.B. No. 163 at 3 (Dec. 30, 2011) (approving unit of technicians on the basis that they focused on radioactive safety, rather than technical production, while employees shared same salary structure, benefits, personnel policies, breaks, etc.); *DTG Operations, Inc.*, 357 N.L.R.B. No. 175 (Dec. 30, 2011) (approving unit limited to employees of car rental agency who staff the desk and engage in other customer-service based interactions). Such decisions—and the instant decision—are particularly troubling since they (1) apply the new overwhelming community of interest rule that prohibits an employer from adding employees to a petitioned-for unit unless it can establish that such additional employees share an "overwhelming community of interest" with the petitioned-for employees, (2) disregard the apparent minimal limitation the Board established in *Specialty Healthcare* to prohibit the establishment of "fragmented" units and (3) remove well-established industry-specific unit determination precedent that the Board stated in *Specialty Healthcare* it did not intend to disturb. *See Specialty Healthcare*, 357 N.L.R.B. No. 83 at 13 n.29 (Aug. 26, 2011).

Finally, to the extent that the Board is going to continue to apply its "overwhelming community of interest test" in unit determination cases—a position which *Amici* submit constitutes clear legal error[1]—it should clarify its position, as previously stated in its *Specialty Healthcare* decision, that it does not intend to disturb traditional industry unit determination standards and to clearly state that such industry standard unit determination precedent will

[1] *Amici* have asserted in their briefs to the U.S. Court of Appeals for the Sixth Circuit that the Board's *Specialty Healthcare* decision is unlawful for a number of reasons, including that the *Specialty Healthcare* standard violates Sections 9(b) and 9(c)(5) of the Act. *Amici* incorporate those legal arguments here by reference and encourage the Board to reverse its holding in *Specialty Healthcare*.

continue to be followed.[2] For example, if the Board is considering deviating from the traditional retail industry unit standards in this case, it should clearly state such intention to all interested parties and permit such parties to file comments and briefs regarding this issue.

Amici fully support the argument of the Respondent Employer and submit that the Board should set aside the Regional Director's Decision and Direction of Election.[3]

ARGUMENT

I. The Regional Director's D&D Demonstrates The Impact Of The Board's *Specialty Healthcare* Decision In Fragmenting Bargaining Units And Undermining The Act's Policy Of Promoting Effective Collective Bargaining.

Amici and other *amici* involved in the *Specialty Healthcare* litigation have stressed that the Board's decision fails to effectuate the Act's policy of promoting efficient collective bargaining by encouraging unions to engage in piece-meal unionization. *See* Chamber NLRB *Amicus* Br. at 4-5, 17-19; Chamber 6th Cir. *Amicus* Br. at 8-12; HR Policy NLRB *Amicus* Br. at 10-14; HR Policy 6th Cir. *Amicus* Br. at 19-21. Indeed, among the important objectives of the Act is to not only "encourag[e] the practice and procedure of collective bargaining," 29 U.S.C. § 151, but also to promote "the policy of *efficient* collective bargaining." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165, *reh'g denied*, 313 U.S. 599 (1941) (emphasis added); *see also Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) (same). Accordingly, the Board, when exercising its Section 9(b) obligations to ensure that a petitioned-for unit is appropriate, is required to ensure that the unit selected is one that will

---

[2] Footnote 29 in *Specialty Healthcare* stated: "While our dissenting colleague criticizes the standard we articulate above, he does not parse the language in our prior cases addressing this precise issue or offer any alternative standard consistent with those cases. We note that the Board has developed various presumptions and special industry and occupation rules in the course of adjudication. Our holding today is not intended to disturb any rules applicable only in specific industries other than the rule announced in *Park Manor*." 357 N.L.R.B. No. 83 at 13 n.29.

[3] *Amici* are aware of the Board's position that it will not decide the issue of whether the Board, as currently constituted with two purported recess appointees, satisfies the NLRA's three-member quorum requirement. *See Center for Social Change, Inc.*, 358 N.L.R.B. No. 24 (Mar. 29, 2012). Because the Board has declined to address that issue, *Amici* have not raised it here. *Amici*'s participation in this case, however, should not be viewed as a waiver of any objection to the currently-constituted Board's authority to decide this case.

promote this federal labor policy. *Id.* The Supreme Court has recognized that a unit that effectuates the Act's goals of efficient collective bargaining is a unit made up of "employees who have substantial mutual interests in wages, hours, and other conditions of employment," *Allied Chemical*, 404 U.S. at 172, because "such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining . . . ." *Id.* at 172-73 (internal quotation omitted).

A. The Regional Director's Decision and Direction of Election Improperly Approved A Fractured Unit.

The Board and its Regional Directors, both before and after *Specialty Healthcare*, have recognized that fractured units—units that are not "sufficiently distinct" from excluded employees or that have no rational basis for excluding other employees from the unit—are impermissible. For instance, the Board in *Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127 (Aug. 27, 2010), refused to approve a unit limited to poker dealers, finding that they did not have a community of interest separate and distinct of craps, roulette, and blackjack dealers—that is, other casino gaming employees responsible for customer interactions, albeit on different games. *Id.* at 1 n.2. Specifically, the Regional Director, in *Wheeling Island Gaming*, concluded that "[w]hile there are some factors which would support finding the petitioned-for unit appropriate, such as separate immediate supervision, absence of daily interchange and the relatively small number of employees who have moved from one group to the other," those factors were insufficient to determine that the poker dealers, alone, could constitute an appropriate unit. *Id.* at 7; *accord Specialty Healthcare*, 357 N.L.R.B. No. 83 at 13 ("some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries.").

Likewise, the Board in *Odwalla, Inc.*, 357 N.L.R.B. No. 132 (Dec. 9, 2011), applied *Specialty Healthcare* but nonetheless rejected the petitioned-for unit. The Board quoted *Specialty Healthcare*'s explanation that:

> Employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a "fractured" unit. A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit. "[T]he Board does not approve fractured units, i.e., combinations of employees that . . . have no rational basis."

357 N.L.R.B. No. 132 at 5 (quoting *Specialty Healthcare*, 357 N.L.R.B. No. 83 at 13) (citation omitted). The parties in *Odwalla* stipulated to a unit covering multiple job classifications but disputed the inclusion of five merchandisers. *Id.* at 1. The Board concluded that "none of the Board's traditional community-of-interest factors sugges[t] that all the employees in the recommended unit share a community of interest that the merchandisers do not equally share . . . ." *Id.* at 5. Accordingly, the Board ruled that the merchandisers must be included in the unit, notwithstanding the fact that the amended unit would then include employees with varying compensation plans, including some on base salary and others receiving hourly wages and widely varying bonus and incentive plans. *Id.* at 2-4. *Compare* D&D at 13-14 (excluding employees based on percentage point differences in commission).

For the reasons stated in Employer's Brief In Support Of Its Request That The Board Reverse The Regional Director's Decision And Direction Of Election (hereinafter "Resp't Br."), the Regional Director erroneously determined that two non-contiguous selling departments in a multi-department retail clothing store constituted an appropriate unit. *See* Resp't Br. at 2-4, 10-12, 21-33. While the Regional Director's Decision should be overturned based on decades of pre-*Specialty Healthcare* Board law, the Decision is inconsistent even with post-*Specialty* decisions from the Board. For instance, the Regional Director's determination in *Home Depot*,

endorsed by the Board, clearly establishes that a union may not cherry-pick certain departments from a multi-department store, or a subset of only the merchandising departments, without articulating a rational basis for establishing jurisdictional walls around that unit. *See* Decision & Direction of Election, *Home Depot U.S.A., Inc.*, Case No. 20-RC-067144 (Nov. 18, 2011); Order Den. Req. For Review, Case No. 20-RC-067144 (May 31, 2012). Indeed, the union's petitioned-for unit here, which is limited to *two* particular departments, appears even more fractured than the unit rejected in *Home Depot*.

Further, the Board's decision in *Wheeling Island Gaming* clearly establishes that limiting a petitioned-for unit to one particular job classification does not make the unit presumptively appropriate—indeed, the Board rejected that proposition, advanced by former Member Becker in his dissent. The Union's contention in this case that employees are sufficiently distinct because they sell shoes as opposed to other products is no different than the rejected position that poker dealers were sufficiently distinct from other employees who oversaw other games. As the Regional Director concluded in *Home Depot*, all of the employer's employees were "engaged in various aspects of selling the Employer's products to customers." *Home Depot U.S.A., Inc.*, Case No. 20-RC-067144, D&D, at 13; *see also Levitz Furniture Co. of Santa Clara, Inc.*, 192 N.L.R.B. 61, 62 (1971) (rejecting subset of retail employees where "[t]he entire store activities are devoted *to all phases* of selling merchandise.") (emphasis added). Even *Specialty Healthcare* recognized that "some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." 357 N.L.R.B. No. 83 at 13. The Regional Director's D&D in this case failed to even consider *Wheeling Island Gaming*'s application to the current case and made her decision based almost solely on differences "too slight or too insignificant" to justify placing the employees in a separate unit.

Finally, here, as in *Odwalla*, the Union seeks to represent employees who share only certain community of interests, but also have differing terms and conditions of employment, including supervision. *See* Resp't Br. at 8-9 (noting that 2nd Floor Shoe Salon and 5th Floor Contemporary Shoe Department have different management; employees only have common management at Vice President of Operations level, who oversees entire store). The employees in the petitioned-for unit also have differing compensation arrangements. *See* D&D at 13. In those circumstances, the Board must determine whether the interests of excluded employees sufficiently overlap with the interests of employees included in the unit. *See Odwalla*, 357 N.L.R.B. No. 132 at 4-5 & n.28. For instance, given that the petitioned-for employees only share management at the store-wide level, all other non petitioned-for employees in the store appear to have the same common management, suggesting here that the petitioned-for employees' "community of interests" at least in part, "overlap" with employees throughout the store. Likewise, given that there is a difference in compensation among the petitioned-for employees, other excluded employees who also have different compensation arrangements should also be included in the unit, especially since the compensation differences among all sales associates are not significant. D&D at 5-6. For the reasons stated in the Respondent's Brief, the Regional Director erred in failing to undertake this analysis and instead rubber-stamped the petitioned-for unit.[4]

B. *Specialty Healthcare*'s Promotion Of Overly-Narrow Units Undermines The Act's Policy Of Efficient Collective Bargaining

Amici encourage the Board to carefully review the Regional Director's application of *Specialty Healthcare* and the risk it creates in this and other cases by encouraging unions to

[4] For the reasons stated in *Amici's* briefs to the U.S. Court of Appeals for the Sixth Circuit, this is an example of where *Specialty Healthcare* has set the union's burden so low that the extent of union organizing has effectively become the controlling factor in determining the unit that will be found appropriate. *See* Chamber 6th Cir. *Amicus* Br. at 8-12; HR Policy 6th Cir. *Amicus* Br. at 9-15.

petition for overly-narrow or fragmented bargaining units. The impact of the Regional Director's D&D on Respondent Employer's operations and employees demonstrates the practical realities of allowing overly-narrow units—a result *Amici* repeatedly predicted from the Board's *Specialty Healthcare* decision. *See* Chamber NLRB *Amicus* Br. at 4-5, 17-18; Chamber 6th Cir. *Amicus* Br. at 8-12; HR Policy NLRB *Amicus* Br. at 11-12; HR Policy 6th Cir. *Amicus* Br. at 20-21. If the Regional Director's Decision and Direction of Election is correct and the Board's decision in *Specialty Healthcare* continues to be applied to allow employees in the retail sector working in non-contiguous selling departments to constitute an appropriate unit employers will face a virtually unlimited number of potential bargaining units. For the reasons discussed below, such a result frustrates both the policies of the Act and the interests of employers and employees alike.

First, the proliferation of numerous overly-narrow units creates the risk that one subset of employees could halt the employer's operations if their demands were not met. *See Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090 (7th Cir. 1984) ("The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike"). Further, an employer with multiple units—in this case, apparently any combination of Bergdorf Goodman's 20 departments or 15 support classifications—is burdened with the cost of negotiating separately with different unions as well as the inherent risk of work disruptions. D&D at 23. *Amici* reiterate that this is exactly the kind of conflict from multiple interest groups that Section 9(b) and the community of interest test as applied for decades prior to *Specialty Healthcare* were intended to avoid. *See* Chamber 6th Cir. *Amicus* Br. at 11-12; HR Policy NLRB *Amicus* Br. at 12; *Oakwood Care Ctr.*, 343 N.L.R.B. 659, 662-63 (2004).

Second, allowing Regional Directors to approve overly-narrow units negatively impacts employees both included in and excluded from the unit by encouraging unions to petition for only the unit they have organized, regardless of how narrow the unit may be or what similar interests may be excluded. *See NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995) (recognizing that "the union will propose the unit it has organized" and invalidating a rule that presumed the organized unit appropriate); *accord Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991). For employees included in the unit, allowing as many units (and thus as many collective bargaining agreements) as there are departments will erect barriers that will limit the rights of employees. *See* Chamber 6th Cir. *Amicus* Br. at 11; HR Policy NLRB *Amicus* Br. at 12-13. Specifically, differing agreements with differing provisions on promotions, transfers, work hours, seniority, position posting, etc., will make it extremely difficult—if not impossible—for an employee whose unit is limited to his or her particular department or floor to develop his or her career. *Id.* For employees who are excluded from the petitioned-for unit, the promotion of overly-narrow units invites a union to disenfranchise employees who, although they share a community of interest with the petitioned-for employees, appear to be more difficult to organize. *See* HR Policy 6th Cir. *Amicus* Br. at 15-19; *Indianapolis Glove Co. v. NLRB*, 400 F.2d 363 (6th Cir. 1968).[5]

Accordingly, *Amici* respectfully submit that the Regional Director's decision failed correctly to apply the Board's precedent by approving a unit that was a fractured unit of employees who shared an overwhelming community of interest with excluded employees. For that reason and those below, *Amici* support Respondent Employer's request that the Board reverse the D&D in this case.

[5] As explained more fully in the briefs filed by *Amici* with the U.S. Court of Appeals for the Sixth Circuit, the Board's *Specialty Healthcare* rule is unlawful in that it violates Section 9(b) of the Act by abdicating the Board's responsibility "to assure employees the fullest freedom in exercising the rights guaranteed" by the Act. *See* Chamber 6th Cir. *Amicus* Br. at 4-5; HR Policy 6th Cir. *Amicus* Br. at 15-19.

II. The Retail Industry's Long-Standing Presumption That Store-Wide Units Are Appropriate Applies To This Case And Requires That The Petitioned-For Unit Be Rejected.

Although the Board's erroneous decision in *Specialty Healthcare* and the Regional Director's misapplication of such decision are reasons enough to reverse the D&D, the Decision & Direction of Election should be reversed on an additional basis: the Regional Director erred in finding that "exceptions to the wall-to-wall retail presumption" warranted finding the petitioned-for unit appropriate. D&D at 23. *Amici* respectfully submit that the Board should take this opportunity to (1) reaffirm—to the extent *Specialty Healthcare* continues to be the position of the Board—that it did not intend, in such decision, to disturb "various presumptions and special industry and occupation rules [developed] in the course of adjudication," 357 N.L.R.B. No. 83 at 13 n.29, and (2) reverse the Regional Director's rejection of the wall-to-wall presumption in this case as contrary to well-established Board precedent.

A. *Specialty Healthcare* Prohibits The Board And Its Regional Directors From Relying On *Specialty Healthcare* To Deviate From Long-Established Industry-Specific Standards On Unit Appropriateness Determinations.

The Board in *Specialty Healthcare* clearly stated that it did not intend to "disturb any rules applicable only in specific industries other than" the nonacute health care industry at issue in that decision. 357 N.L.R.B. No. 83 at 13 n.29. One such industry-specific standard is a presumption that, in the retail industry, a single store wall-to-wall unit is a presumptively appropriate unit. *See, e.g., Charrette Drafting Supplies Corp.*, 275 N.L.R.B. 1294 (1985); *Wickes Furniture*, 231 N.L.R.B. 154 (1977); *Levitz Furniture Co.*, 192 N.L.R.B. 61 (1971); *Haag Drug Co., Inc.*, 169 N.L.R.B. 877 (1968); *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962); *I. Magnin & Co.*, 119 N.L.R.B. 642 (1957); *A. Harris & Co.*, 116 N.L.R.B. 1628 (1956) ("Recognizing that a community of interests exists among all the employees in department stores, the Board frequently has approved storewide units in this industry."). While the

presumption often arises where an employer seeks to include employees from multiple locations into one unit, *see, e.g.*, *Charrette*, 275 N.L.R.B. 1294, it also applies where, as here, a union seeks a subset of employees at one location and the employer seeks (1) to add additional employees at the same location to the unit, (2) a wall-to-wall unit at that location, or (3) dismissal of the petition based on the inappropriateness of the unit. *See, e.g.*, *Levitz Furniture Co.*, 192 N.L.R.B. 61; *I. Magnin*, 119 N.L.R.B 642; *Home Depot U.S.A., Inc.*, 20-RC-067114.[6]

The Board has, in numerous decisions, rejected a union's request for a subset of employees in the retail sector. *Charrette*, 275 N.L.R.B. 1294 (rejecting petition for only operations department employees at one store); *Levitz Furniture Co.*, 192 N.L.R.B. 61 (rejecting petition for units of only warehouse non-selling employees and separate unit of truckdrivers and approving wall-to-wall unit at single location); *I. Magnin*, 119 N.L.R.B. 642 (rejecting unit of only four departments of shoe salesman in large department store with 105 departments). In those situations, the Board stated that it will only approve a subdivision of a single retail store where it can be established that the petitioned-for employees have a community of interest "sufficiently distinct from other employees to warrant a separate . . . unit." *Charrette*, 275 N.L.R.B. at 1296; *Levitz Furniture Co.*, 192 N.L.R.B. at 62-63; *I. Magnin*, 119 N.L.R.B. at 643 ("sufficiently different").

This standard is still the applicable standard for unit appropriateness determinations in the retail industry, even after *Specialty Healthcare*. The Board's decision in *Specialty Healthcare* explicitly stated that it did not disturb any other industry-specific unit appropriateness standards,

[6] It would appear that, contrary to the Regional Director's conclusion, the two Bergdorf Goodman locations constitute one store. When the Board published a Notice of Proposed Rulemaking on Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146 (Sept. 28, 1995), it noted that cases where the locations "are less than one mile apart" would be "single location" cases decided by adjudication and not subject to the rule dealing with employers possessing multiple locations. *See id.* at 50,156 n.10. Thus, the fact that Bergdorf Goodman locations are across the street suggests that the Regional Director should have treated this as a single location store, rather than a case where an employer is attempting to rebut a presumption for a single-location unit in favor of a multi-location unit.

357 N.L.R.B. No. 83 at 13 n.29, and the Board has long recognized the special nature of the single-location presumption in the retail industry. *See, e.g.*, Notice of Proposed Rulemaking, Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146, 50,149 (noting that the retail industry presumption recognizes "the single location unit as normally constituting the appropriate unit") (Sept. 28, 1995) (emphasis added). Accordingly, even after *Specialty Healthcare*, a union seeking to represent a subsection of a retail store's workforce retains the burden of establishing that the petitioned-for unit has a community of interest "sufficiently different" from excluded employees "to warrant establishing separate units." *See, e.g., Stern's, Paramus & Dist. 65*, 150 N.L.R.B. 799, 802 (1965); *Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127 at 1 n.2 (noting that "[t]he Board has a long history of" requiring "interests of the group sought [to be] *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.").

Indeed, proper application of the Board's retail industry standard is even more appropriate given the policy concerns that would arise if the Board or its Regional Directors improperly applied the *Specialty Healthcare* decision to large retail stores, as the Regional Director did here. The Board has repeatedly recognized the homogenous nature of employees working in a retail department store. *Charrette*, 275 N.L.R.B. at 1295-96; *Levitz Furniture Co.*, 192 N.L.R.B. at 62 (focusing on nature of work as being "devoted to all phases of selling"); *Haag Drug Co.*, 169 N.L.R.B. 877, 877-78. Applying the Board's *Specialty Healthcare* decision—and its attendant risk of balkanizing the "homogenous nature" of employees working at retail stores—undermines the Board's responsibility to "assure to employees the fullest freedom" in exercising their Section 7 rights—the very national labor policy the retail industry standard is meant to protect. *See Haag Drug Co.*, 169 N.L.R.B. at 877-78.

Likewise, if the Board deviated from the retail industry standard and instead allowed unions to petition for individual departments of a retail department store (or accomplish the functional equivalent by requiring employers to satisfy the nearly unattainable *Specialty Healthcare* standard), employees would face a serious risk of being disenfranchised in the exercise of their Section 7 rights. *See* HR Policy 6th Cir. *Amicus* Br. at 15-19 (addressing risk of disenfranchisement under *Specialty Healthcare*). That risk is particularly heightened here where the Board has held that employees must be identified by a positive community of interest (i.e., an associate who sells; an associate who works in the restaurant; etc.), rather than based on their lack of interests (i.e., all associates who *do not* sell). *See Beco Industries*, 197 N.L.R.B. 1105 (1972) (noting that employees' role as "non[-]selling associates" was insufficient to form a community of interest). For example, applying the Regional Director's "rationale" here, the men's shoes sales associates and other store associates are disenfranchised by being denied the opportunity to vote and bargain with the employees they share the closest community of interest. The Board's long-standing retail-industry policy is meant to prevent exactly this scenario.

Here, the Regional Director failed to properly apply the retail industry standard and, although acknowledging the language in footnote 29 of *Specialty Healthcare*, nonetheless required the employer to establish that the excluded employees shared an "overwhelming community of interest" with the included employees. While applying *Specialty Healthcare* to employers in "limited circumstances" may not "'otherwise represent a significant departure from a well-settled area of the law,'" *Northrop Gruman Shipbuilding, Inc.*, 357 N.L.R.B. No. 163 at 3 n.8 (quoting *SNE Enterprises*, 344 N.L.R.B. 673, 674 (2005)), the Regional Director deviated from the retail industry standard despite the Board's clear language that the retail industry standard was unaffected by *Specialty Healthcare*. Because the Regional Director not only

applied the wrong burden of proof but placed it on the incorrect party, the error is a manifest injustice requiring reversal of the Regional Director's Decision & Direction of Election.

B. Neither *Specialty Healthcare* Nor *Northrop Grumman* Decisions Permit Regional Directors To Disregard The Validity Of Previously Established Industry-Specific Standards.

While footnote 29 of the Board's *Specialty Healthcare* decision stated that it did not change previously-established industry standards, such standards have come under attack in multiple cases since *Specialty Healthcare*, including this case. *See, e.g., Northrop Grumman Shipbuilding*, 357 N.L.R.B. No. 163 at 4 (employer asserting that special rules apply to units for technical employees); D&D at 22-23. The Board should not reverse the position it stated in footnote 29 of its *Specialty Healthcare* decision. Indeed, given the apparent willingness of Regional Directors to set such standards aside, it appears necessary for the Board to clarify that notwithstanding its decision in *Specialty Healthcare*, traditional industry unit determination standards should continue to be applied. *See, e.g., Northrop Grumman Shipbuilding*, 357 N.L.R.B. No. 163 at 4 (employer asserting that special rules apply to units for technical employees); *Odwalla*, 357 N.L.R.B. No. 132 at n.33 (employer seeks wall-to-wall unit based on fully integrated nature of operations).

Numerous post-*Specialty Healthcare* cases have raised issues regarding industry-specific standards, though the Board has not addressed them in every case. *See Odwalla*, 357 N.L.R.B. No. 132 at n.33. However, in *Northrop Grumman*, Chairman Pearce and Member Becker stated—in dicta—that "we question whether a general preference for combining all technical employees into a single unit can be justified given the enormous diversity of technical classifications, as well as the diversity of industries employing technical employees." 357 N.L.R.B. No. 163 at 4. As in *Odwalla*, the Board did "not reach the questions of whether a distinct test exists for technical employees or whether such a test constitutes a 'special . . .

occupation rule' . . . because we reach the same result even under the technical employee line of cases." 357 N.L.R.B. No. 163 at 4-5. As a result, Chairman Pearce's and Member Becker's "questions" about the propriety of the special rules applicable to technical employees were not necessary to the decision of the case, making them *obiter dictum*, at best, and thus they do not constitute Board precedent. *See, e.g., Black's Law Dictionary* (9th ed. 2009) (definition of "obiter dictum").

The Board should clarify that footnote 29 of *Specialty Healthcare* should be followed, despite the *dicta* in *Northrop Grumman*, in order to avoid situations where, as in this case, Regional Directors rely on the dicta as "instructive." *See* D&D at 23 (stating that "[t]he Board's approach to *Specialty*'s footnote 29 in *Northrop Grumman* is instructive."). The Regional Director went on to note that "it is clear from that case that subsets of a larger unit can comprise an appropriate unit." *Id.* No party to this case has ever contested that, *as long as* the subset unit of a single retail store has a "sufficiently distinct" community of interests from excluded employees. *See Charrette*, 275 N.L.R.B. at 1296; *Levitz Furniture Co.*, 192 N.L.R.B. at 62-63; *I. Magnin*, 119 N.L.R.B. at 643. The Regional Director then, however, stated that "the Board expressed its reservation at creating generalizations about appropriate industry units." D&D at 23. Of course, the Regional Director here was not being asked to "creat[e] generalizations" about what might be an appropriate unit but, instead, to apply a well-settled principle of law that the Board has applied in the retail industry for over five decades. *See A. Harris & Co.*, 116 N.L.R.B. 1628 (1956).

While neither the Board in *Northrop Grumman* nor the Regional Director in this case specifically reversed a special industry rule, *see* 357 N.L.R.B. No. 83 at n.29, *Amici* encourage the Board to clarify that neither its *Specialty Healthcare* footnote nor its *dictum* in *Northrop*

Grumman should be viewed as an invitation to reverse decades of Board law based on mere "questions" or "concerns." Indeed, the Board has, within the last two weeks, been reversed for "fail[ing] to give a reasoned justification for departing from its precedent." *E.I. Du Pont De Nemours & Co. v. NLRB*, --- F.3d ----, 2012 WL 2053577 (D.C. Cir. 2012). Accordingly, here it is important, if the Board is departing from the substantial store-wide unit precedent in the retail sector, to fully state its reasoning and justification for such change of position. While we respectfully submit that the Regional Director appears to have again committed that error with respect to her unexplained departure from *I. Magnin*, *see* Section II. C., *infra*, we encourage the Board to refrain from overturning any of the previously-established industry standards. If the Board were to entertain the possibility of upsetting industry standards in the retail, transportation, manufacturing, technical, or any other industry, at a minimum the Board should afford all potentially-affected parties notice and the opportunity to submit their positions.

C. The Regional Director's Conclusion That A Single-Store Unit Was Inappropriate Is Erroneous And Should Be Reversed.

The Regional Director, beyond applying the incorrect standard for determining whether a subset of employees within a single retail store constituted an appropriate unit, also broke new ground when she found two non-contiguous selling departments within a single retail store to be appropriate as a stand-alone unit. *See* Resp't Br. at 35, 39-40 (noting that "as far as [Respondent] can determine the Board has never permitted a petitioning union [to] carve out just a few selling departments, or a single selling department," with one distinguishable exception). The Regional Director's decision is contrary to both explicit Board precedent holding that a unit of only shoe salespersons within a department store is not an appropriate unit and the rationale underlying other Board decisions refusing to find appropriate a subset of retail store employees.

As explained in the Respondent's brief, *I. Magnin* is directly on point with the facts of this case. While the Regional Director's decision attempts to distinguish *I. Magnin* on its facts, D&D at 21, the holding of the case is much broader than a case-specific review of the record. *See I. Magnin*, 119 N.L.R.B. at 642. The Board's holding in *I. Magnin* noted that "the record . . . fails to establish" that shoe salesmen had "skills, duties, interests, and conditions of employment . . . sufficiently different from those of other employees to warrant their establishment in a separate unit or any other basis." *Id.* at 643. The Board reached this finding on facts similar to those present here, including that there were no restrictions prohibiting shoe salesmen from making sales elsewhere; that shoe salesmen were compensated differently from other employees; and that the skills *among the shoe salesmen themselves* were similar—regardless of whether those skills were the same as other selling employees. *Id.* Further, the Board found that a separate unit was not appropriate despite a history of separate bargaining—a fact not present here. *Id.* Thus, based on the facts and as explained more fully by Respondent Employer in its brief, it is doubtful that *I. Magnin* is distinguishable from the instant fact situation.

I. Magnin is more than a factual finding regarding unit appropriateness. For example, after the Board noted that there was not "any other basis" for finding that shoe salesmen *could* be an appropriate unit, it included the following footnote: "To the extent that our decision herein is inconsistent with the Board's prior holding in *The May Department Stores Co.*, 39 NLRB 471, 477, that shoe salesman *may* constitute a separate bargaining unit, that case is hereby overruled." 119 N.L.R.B. at 643 n.5 (emphasis added). The Board's decision in *The May Department Stores Co.*, relied on many of the same principles cited by the Regional Director in this case, including that the shoe department was operated as a separate business and that the skills necessary to sell shoes were distinct from selling other items. *The May Department Stores Co.*, 39 N.L.R.B. 471,

477 (1952). Thus, when *I. Magnin* reversed *The May Department Stores Co.* and concluded that shoe salesmen within a retail department store could not constitute a separate bargaining unit as a matter of law, it foreclosed the Regional Director's decision in this case.

Further, numerous other Board decisions refuse to find appropriate a subset of retail store employees for reasons justified by the record in this case. In *Levitz Furniture Co.*, the Board refused to find appropriate (1) a unit of all nonselling employees; (2) a unit of all truckdrivers and truckdrivers' helpers; or (3) a unit combining those two classification but excluding all other employees. 192 N.L.R.B. at 61. The Board noted that: included and excluded employees shared immediate supervisors; the only difference between included employees and excluded salesmen was the provision of a commission to salesmen; and "[t]he entire store activities are devoted *to all phases* of selling merchandise." *Id.* at 61-62 (emphasis added). Likewise, here, the primary difference in compensation is the differences in percentages on a commission scheme, D&D at 13-14;[7] the included and excluded employees share common immediate management, Resp't Br. at 8-9; and the proper focus is on selling merchandise at "all phases," rather that impermissibly focusing on the exact product sold the majority of the time.

Likewise, in *Charrette*, the Board rejected a union's petitioned-for unit of only operations department employees, who conducted inventory control, stocking, receiving, order pulling, order packing, shipping and delivery functions, at one of the employer's two locations. 275 N.L.R.B. at 1294. As in *Levitz Furniture* and this case, the included and excluded employees shared common management. 275 N.L.R.B. at 1296. The wages and benefits for sales, retail, and operations employees (i.e., excluded and included employees), were "approximately the same." *Id.* And, like here, the Board found that the operations department employees had "a great deal of interaction and communication" with sales associates. *Id.* at 1295; Resp't Br. at 15

[7] It should be noted that even non-shoe sales associates are eligible for commission at Bergdorf Goodman. D&D at 5-6. The Regional Director drew a distinction merely based on the form of the commission. *Id.* at 13.

(noting that selling assistants "[h]ave [c]onstant [c]ontact" with sales associates—including shoe associates—to assist customers).

While the record clearly supports Respondent's alternative position that a store-wide unit would be appropriate, at a minimum the unit should include all other selling employees because either (a) they share an overwhelming community of interest with the shoe associates under *Specialty Healthcare* or (b) the shoe associates do not have a "sufficiently distinct" community of interests from all other selling associates under the traditional retail industry standards. Even if the Board were to conclude that a wall-to-wall unit was inappropriate, the Board has traditionally approved units no more narrow than units drawn along functional lines of selling and nonselling associates. *See Wickes Furniture*, 231 N.L.R.B. 154 (declining wall-to-wall unit in favor of unit including all salespersons); *Stern's, Paramus*, 150 N.L.R.B. 799 (declining storewide unit in favor of units of selling, nonselling, and restaurant employees along functional lines); *A. Harris & Co.*, 116 N.L.R.B. 1628 (finding appropriate a unit of all warehouse department employees and declining to add other selling employees). The Board's Outline of Law and Procedure in Representation Cases supports this conclusion, noting that where the Board has approved department-specific units, they are engaged in a function other than selling. *See* Resp't Br. at 39 (noting exceptions for alterations department employees, bakery employees, carpet workroom employees, display department employees, etc.). The Regional Director's conclusion that two specific subdepartments of a retail store's retail operations constitute an appropriate unit simply cannot be squared with decades of the Board's jurisprudence in the retail industry and, therefore, should be reversed.

CONCLUSION

For the foregoing reasons, and for those reasons further stated in Respondent's Brief, *Amici* support Respondent's request that the Board reverse the Regional Director's Decision And Direction Of Election in the instant case.

Respectfully submitted,

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337
SKawka@USChamber.com
RConrad@USChamber.com
Counsel for Chamber of Commerce
of the United States of America

G. Roger King (Counsel of Record)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215-2673
(614) 281-3939
rking@jonesday.com

R. Scott Medsker
JONES DAY
51 Louisiana Ave., N.W.
Washington D.C. 20001-2113
(202) 879-3939
rsmedsker@jonesday.com

Counsel for *Amici Curiae* Chamber of
Commerce of the United States of America
and HR Policy Association

Dated: June 15, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2012, a true and correct copy of the foregoing brief was electronically filed with the National Labor Relations Board and was served by First Class mail, postage prepaid, upon:

Richard Greenspan
Eric Laruffa
RICHARD M. GREENSPAN, P.C.
220 Heatherdell Road
Ardsley, New York 10502-1304

Counsel for Petitioner

Michael Cooper
JACKSON LEWIS LLP
666 Third Avenue, 29th Floor
New York, NY 10017

Counsel for Respondent

/s/ G. Roger King
G. Roger King