UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOTEL & LODGING ASSOCIATION, HR POLICY ASSOCIATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALE-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing 300,000 direct members and having an underlying membership of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community. The Chamber submits this *amicus* brief because the standard for bargaining-unit determinations applied by the Acting Regional Director in this case, which is the standard established by the National Labor Relations Board ("Board") in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), is problematic in all industries covered by the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 151-169. Because the Chamber represents employers in nearly every industry covered by the Act, the Chamber is uniquely qualified to articulate the business community's concerns with the *Specialty Healthcare* standard. *See, e.g.*, Br. *Amicus Curiae* of Chamber of Commerce of U.S., *Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir. Apr. 23, 2012) (challenging *Specialty Healthcare* standard); Br. *Amici*

Curiae of Chamber of Commerce of U.S. et al., *Huntington Ingalls Inc. v. NLRB*, Nos. 12-2000 & 12-2065 (4th Cir. Oct. 17, 2012) (same); Br. *Amici Curiae* of Chamber of Commerce of U.S. et al., *Nestlé Dreyer's Ice Cream Co. v. NLRB*, Nos. 12-1684 & 12-1783 (4th Cir. July 10, 2012) (same).

The Coalition for a Democratic Workplace ("CDW"), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. CDW has advocated for its members on several important legal questions, including the one implicated by this case: the standard used by the Board to determine appropriate bargaining units under the Act.

The American Hotel & Lodging Association ("AH&LA") is the only national trade association representing all segments of the lodging industry. The mission of AH&LA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

The HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The HR Policy Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of the HR Policy Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry with 58,288 members worldwide, 48,000 in the United States. ICSC has nearly 5,600 retailer members in the United States. Other members include developers, owners, lenders, and others that have a professional interest in the shopping center industry. Shopping centers account for more than $2.3 trillion in retail sales per year and generate $138 billion in state sales tax revenue. More than 12 million people rely on America's shopping center related industries for employment, making shopping centers one of the largest economic forces in the nation.

The International Foodservice Distributors Association ("IFDA") is the non-profit trade association that represents more than 135 companies in the foodservice distribution industry. Its members are found across North America and internationally and include leading broadline, system, and specialty distributors who operate more than 700 distribution facilities and represent annual sales of more than $110 billion. These companies help make the food-away-from-home industry possible, delivering food and other related products to restaurants and institutions, ranging from casual to formal dining local restaurants to foodservice in nursing homes and hospitals to military mess halls and school cafeterias. IFDA provides research, educational opportunities, and business forums to its members that make them more competitive. In the United States, IFDA also provides important representation on Capitol Hill and before government agencies, sharing the perspective of leading foodservice distributors with lawmakers and federal officials to shape the legislative and regulatory process.

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. Celebrating over 50 years of excellence, education, and advocacy, IFA works through its government relations and public policy, media relations,

and educational programs to protect, enhance, and promote franchising. Through its media awareness campaign highlighting the theme, *Franchising: Building Local Businesses, One Opportunity at a Time*, IFA promotes the economic impact of the more than 825,000 franchise establishments, which support nearly 18 million jobs and $2.1 trillion of economic output for the United States economy. IFA members include franchise companies in over 300 different business format categories, individual franchisees and companies that support the industry in marketing, law, and business development.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 States. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Association of Wholesaler-Distributors ("NAW") is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms, which collectively total approximately 40,000 companies with locations in every State in the United States. NAW members are a constituency at the core of our economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. Industry firms vary widely in size, employ millions of American workers, and account for over $4 trillion in annual economic activity.

The National Council of Chain Restaurants ("NCCR") is the leading trade association exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that best serves the interests of restaurant businesses and the

millions of people they employ. NCCR members include the country's most-respected quick-service and table-service chains.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and (a) to be a recognized world leader in human resources management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) to be the voice of the profession on human resources management issues; (d) to facilitate the development and guide the direction of the human resources profession; and (e) to establish, monitor, and update standards for the profession.

Each of the *Amici* has been actively engaged in addressing the significant legal questions presented by the Board's splintered decision in *Specialty Healthcare*, which has great potential impact on the employer members of each of the *Amici*. In *Specialty Healthcare,* a majority of the Board held that "in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to

demonstrate that the excluded employees share an overwhelming community of interest with the included employees." 357 NLRB No. 83, slip op. at 1. The legality of the *Specialty Healthcare* standard remains subject to considerable doubt pending the outcome of the *Specialty Healthcare* employer's appeal and the Board's cross-application for enforcement. *See Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir.) (oral argument held January 23, 2013); *see also Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011) (applying *Specialty Healthcare* standard), *cross-appeals pending sub nom. Huntington Ingalls Inc. v. NLRB*, Nos. 12-2000 & 12-2065 (4th Cir.) (oral argument scheduled for March 22, 2013); *Nestlé Dreyer's Ice Cream Co.*, No. 31-RC-66625, 2011 WL 6835227 (NLRB Dec. 28, 2011) (declining to review Regional Director's application of *Specialty Healthcare* standard), *cross-appeals pending sub nom. Nestlé Dreyer's Ice Cream Co. v. NLRB*, Nos. 12-1684 & 12-1783 (4th Cir.) (oral argument not yet scheduled).

As set forth below, the *Amici* respectfully submit that *Specialty Healthcare* was wrongly decided and should be overruled. Among other things, the Board's decision in *Specialty Healthcare* violates Section 9(b) and 9(c)(5) of the Act, unlawfully promulgates a generally applicable standard that should have been accomplished (if at all) through rulemaking, and will overturn decades of Board precedent as it is extended to the retail industry. *See also Neiman Marcus Group, Inc.*, Case No. 02-RC-076954 (NLRB June 29, 2012) (granting many of the *Amici* leave to file a brief addressing the foregoing issues in a similar case pending before the Board).[1]

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[1] The United States Court of Appeals for the District of Columbia Circuit recently held that the Board lacks a lawful quorum because of invalid recess appointments. *See Noel Canning v. NLRB*, --- F.3d ---, Nos. 12-1115 & 12-1153, 2013 WL 276024, at *8-23 (D.C. Cir. Jan. 25, 2013). The *Amici* believe *Noel Canning* was decided correctly and that the Board should cease issuing decisions. However, the Board has announced that it disagrees with *Noel Canning* and that it will continue to issue decisions. *See* Press Release, NLRB, Statement by Chairman Pearce (continued)

ARGUMENT

I. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT

Congress significantly amended Section 9(b) of the Act in 1947. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 9(b), 61 Stat. 136, 143. In doing so, however, Congress left certain key language unchanged. Both the changed and unchanged portions are crucial to the correct understanding of Section 9(b).

A. The New Rule Enunciated in *Specialty Healthcare* Contravenes the Obligation of the Board Under Section 9(b) of the Act to Decide the Appropriate Unit "In Each Case"

In the Taft-Hartley Act, Section 9(b)'s key instruction that the Board "shall decide" the appropriate unit "in each case" was not changed from the original language of Section 9(b) enacted in 1935. In its current form, Section 9(b) commands that the Board "*shall decide in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." 29 U.S.C. § 159(b) (emphasis added). The words "shall decide in each case" mean that "whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. . . . Congress chose not to enact a general rule that would require plant unions, craft unions or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991).

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on Recess Appointment Ruling (Jan. 25, 2013). The Board has also declined to rule on the issue of the validity of recess appointments. *See Ctr. for Soc. Change, Inc.*, 358 NLRB No. 24 (2012). The *Amici* therefore submit this brief in light of the Board's announcement that it will continue deciding cases in spite of the appellate court's ruling. By submitting this brief, none of the *Amici* waive any right or argument they may have with respect to the recess-appointment issue.

The legislative history of Section 9(b) demonstrates Congress's belief that the Board must have discretion to determine unit issues based on the circumstances before it. Section 9(b) is based on Section 2(4) of the Railway Labor Act of 1934 ("RLA"), which provides that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have a right to determine who shall be the representative of the craft or class for the purpose of this act." *Comparison of S. 2926 and S. 1958*, at 30 (Comm. Print 1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949) ("*1935 Legislative History*").

Importantly, however, the RLA provision is different from what became Section 9(b) of the Act in a highly critical respect: the RLA does *not* contain language mandating a decision by the National Mediation Board ("NMB") as to the appropriate unit "in each case." Congress explained this fundamental difference between the RLA and the Act in its comparison of Senate Bill 2926 (the original Senate bill proposing what was to become the Act) to Senate Bill 1958 (what ultimately was enacted as the Act): "The same necessity for unit determinations is embraced in the definition of majority rule in the [RLA] as set out above, *although in that industry the nature of the department or craft alinement* [sic] *is so clearly defined as to require no express elaboration*." *Id.* (emphasis added), *reprinted in* 1 *1935 Legislative History* 1356.

In this distinction between the RLA and the Act, Congress recognized that the range of employers and areas of commerce that fall under the jurisdiction of the Act are, in any number of material respects, vastly broader than and different from the railroad (and now airline) industry. Unlike the RLA, the Act covers virtually unlimited types of businesses, employing individuals with myriad levels of skill sets, ranging in size from but a few employees to hundreds of thousands of employees, employed at a single location or at hundreds or thousands of locations

around the country, all following multiple lines of ownership, organization, and business purpose.

In sum, Congress recognized that while a "one size fits all" approach to bargaining-unit determination might be acceptable in the more homogeneous business types covered by the RLA, such an approach would be neither possible nor desirable for the far broader range of employers and employees in the industries subject to the Act. For that reason, the Board was directed to make its determinations not on the basis of a simplistic formula, but to consider the factors making up an appropriate unit "in each case."

The specific role of the Board in making a decision "in each case" pursuant to Section 9(b) was part of a larger debate over the wisdom of majority elections, another mechanism borrowed from the pre-Act labor boards, including the NMB. This "majority rule" debate naturally led to a discussion of why the Board needed to decide *who* among the employees should be allowed to vote:

> The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and *gerrymandering the units would defeat the aims of the statute*. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, *by breaking off into small groups, could make it impossible for the employer to run his plant*.

The Labor Management Relations Act, 1947: Hearings on S. 1958 Before the S. Comm. on Educ. & Lab., 74th Cong. 82 (1935) (statement of Francis Biddle, then-Chairman of the precursor to

the Board) (emphasis added), *reprinted in* 1 *1935 Legislative History* 1458. The rule in *Specialty Healthcare* is contrary to concerns raised by Congress in investing the Board with the authority and obligation to make unit determinations, as we will demonstrate below.

B. The New Rule Enunciated in *Specialty Healthcare* Contravenes the Obligation of the Board Under Section 9(b) of the Act to Consider All of the Rights Guaranteed By the Act

1. Key Language Added to Section 9(b) by the Taft-Hartley Act Requires the Board to Consider Not Only the Rights to Organize a Union, But the Right to Refrain From Doing So As Well

Section 9(b) of the Act instructs that the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the *rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b) (emphasis added). This key language was added by the Taft-Hartley Act, sec. 101, § 7, 61 Stat. at 140, replacing the earlier formulation that the Board's unit decisions were to insure to employees "the full benefit of their right to self-organization and collective bargaining." National Labor Relations Act (Wagner Act), ch. 372, § 9(b), 49 Stat. 449, 453 (1935).

The language in Section 9(b) was changed consistent with amendments made by the Taft-Hartley Act to the rights of employees set out in Section 7, 29 U.S.C. § 157. Section 7 contains the core rights guaranteed under the Act, including the right to join, form, or assist a union and the right to engage in concerted activities for mutual aid and protection. The Taft-Hartley Act added an additional right, "the right to refrain from any and all such activities . . . ." Taft-Hartley Act, sec. 101, § 7, 61 Stat. at 140. This change is striking and important because it requires the Board to broaden the considerations taken into account in making unit determinations to include all the rights guaranteed under Section 7 of the Act, 29 U.S.C. § 157.

Accordingly, Congress's modification of the Act in 1947 "emphasized that one of the principal purposes of the [Act] is to give employees full freedom to choose *or not to choose* representatives for collective bargaining." H.R. Rep. No. 80-510, at 47 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 551 (1948) (emphasis added). By guaranteeing "in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so," Congress believed it would "result in a substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice." *Id.*

Thus, Section 9(b)'s language requiring full consideration of the "rights guaranteed by this subchapter" must include—as Section 7 makes unflinchingly clear—not only the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," but also—importantly—the "right to refrain from any or all" of the foregoing activities. *Id.* We submit that the Board has breached that obligation in both deciding and applying *Specialty Healthcare.*

2. In Devising and Applying *Specialty Healthcare*'s Generally Applicable Standard for Determining Appropriate Bargaining Units, the Board Has Ignored the Right to Refrain

Claiming that the "right to self-organization" is the "first *and central* right set forth in Section 7 of the Act," *Specialty Healthcare*, slip op. at 8 (emphasis added), the Board explained that employees "exercise their [Section] 7 rights not merely by petitioning to be represented, but by petitioning to be represented in a particular unit," *id.* at 8 n.18. "A key aspect of the right to 'self-organization,'" the Board believed, "is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Id.* The Board therefore ignored

Section 9(b)'s command that the Board must "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter" when making bargaining-unit determinations. Instead, the Board decided to pick and choose among the "rights guaranteed by the subchapter," and to consider only those which assure employees the fullest freedom in exercising the "right to self-organization" by protecting the "right to choose whom to associate with, when we determine whether their proposed unit is an appropriate one." *Id.*

At no point in devising its new standard for determining appropriate bargaining units in *Specialty Healthcare* did the Board ever consider the right of employees to *refrain* from activities protected by the Act. Instead, as noted above, the language of the Board's *Specialty Healthcare* decision demonstrates that the Board elevated the "right to self-organization" above all other Section 7 rights. That policy decision, however, was and is not for the Board to make. In adding the right to refrain to the Act and enacting a facially neutral unit-determination standard 66 years ago, Congress made a policy decision that the Board is bound to respect. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (explaining agencies "may play the sorcerer's apprentice but not the sorcerer himself," the latter role being Congress's sole prerogative).

In view of the importance that Congress attached to the right to refrain and its relevance during the unit-determination process, it is telling that nowhere did the Board address how this right might be affected by the rule announced. Nor is it difficult to see how the rule announced could adversely impact the right to refrain.

For example, under the Board's traditional, pre-*Specialty Healthcare* standard for determining appropriate bargaining units, a union seeking to organize would have to contend with the fact that a majority of individuals in a presumptively appropriate unit might not want to be represented by a union that would, if elected, become their exclusive agent for purposes of collective

bargaining. The union could respond to this reality either by foregoing the organizing effort or by initiating a campaign to win over those employees who did not wish to be represented.

Under the regime announced by the Board in *Specialty Healthcare* and applied by the Acting Regional Director in this case, however, the union now has a third option: organize in a gerrymandered unit in which the union knows it has majority support. In such a gerrymandered unit, the union does not have to worry about convincing those individuals who may wish to exercise their right to refrain, because they are outnumbered. The rule established in *Specialty Healthcare* thus relegates those individuals to an artificial minority position, much as exists in political gerrymandering. Congress enshrined the right to refrain in the Act itself so that it would be recognized and protected by the Board, particularly during the unit-determination process. The Board's failure in *Specialty Healthcare* to even consider, much less address, how the right to refrain may be impacted by its new rule, demonstrates why the *Specialty Healthcare* standard is not in accordance with law and should be overruled.

II. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTION 9(c)(5) OF THE NATIONAL LABOR RELATIONS ACT

Section 9(c)(5) of the Act, 29 U.S.C. § 159(c)(5), provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." This provision "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995) (citing *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978)). Thus, the Act specifically prohibits what *Specialty Healthcare* establishes as a rule, i.e., Board "determined" bargaining units that in

all but the rarest of cases will be the exact one requested by the petitioning union on the basis of the union's extent of organizing.

A. The Fourth Circuit's Decision in *Lundy Packing* Demonstrates How and Why the Rule Enunciated in *Specialty Healthcare* Contravenes Section 9(c)(5) of the Act

In *Lundy Packing*, certain quality-control and industrial-engineering employees had been excluded from the unit requested by the union. The excluded employees were nevertheless allowed to vote under challenge in the representation election. After the election, the Board's Regional Director conducted an investigation and determined that the challenged ballots should be counted, and that the formerly excluded employees should—based on their shared community of interest—be included in the unit.

The union appealed to the Board, which reversed the Regional Director. The Board presumed that the petitioned-for unit was appropriate and applied an "overwhelming community of interest" test to the quality-control and industrial-engineering employees. The Board ruled that their ballots should not be counted because they did not meet the "overwhelming community of interest" test, notwithstanding that they nevertheless, as found by the Regional Director, shared a community of interest with the employees included in the unit.

On review in *Lundy Packing*, the Fourth Circuit held that the Board had run afoul of Section 9(c)(5) when it found a bargaining unit proposed by the union appropriate primarily because the Board had given "controlling weight" to the extent of union organization within the employer's facility. 68 F.3d at 1579. In rejecting the Board's analysis, the appellate court stated:

> By presuming the union-proposed unit proper unless there is "an overwhelming community of interest" with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because "the union will propose the unit it has organized."

Id. at 1581 (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). The court of appeals observed that the Board's ruling made it "impossible to escape the conclusion that the . . . ballots [of the quality-control and industrial-engineering employees] were excluded [by the Board] 'in large part because the Petitioners do not seek to represent them.'" *Id.* (quoting underlying Board decision). Thus, according to the Fourth Circuit, the Board's ruling bore "the indicia of a classic [Section] 9(c)(5) violation." *Id.*

We submit that the Board's decision in *Specialty Healthcare* violates Section 9(c)(5) in the same way as *Lundy Packing.* Apparently the Board understands this, because it attempted to distinguish what it did in *Specialty Healthcare* (and continues to do so in other cases), as discussed below.

B. The Board's Reliance on the District of Columbia Circuit's Decision in *Blue Man Vegas* to Distinguish *Lundy Packing* Is Misplaced

In *Specialty Healthcare*, the Board attempted to distinguish *Lundy Packing* by relying on the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). In *Blue Man Vegas*, the D.C. Circuit distinguished *Lundy Packing* as follows:

> The Fourth Circuit there objected to the combination of the overwhelming-community-of-interest standard and the presumption the Board had employed in favor of the proposed unit: 'By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization.' . . . As long as the Board applies the overwhelming community-of-interest standard *only after the proposed unit has been shown to be prima facie appropriate*, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight.

Id. at 423 (quoting *Lundy Packing*, 68 F.3d at 1581) (citation omitted and emphasis added). Thus, on its face, *Blue Man Vegas* contemplates that the Board must first find a "*prima facie* appropriate unit" before imposing the "overwhelming community of interest" standard.

In *Specialty Healthcare*, the Board seized on this passage, but in a way that does not fulfill the requirement that the Board first find a "*prima facie* appropriate unit." Instead, the Board announced a new, shorthand test for determining a *prima facie* appropriate unit, stating:

> We . . . take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of *employees who are readily identifiable as a group* . . . and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned for unit.

Slip op. at 12-13 (emphasis added and footnote omitted).

This test announced in *Specialty Healthcare*, therefore, requires a unit to meet two criteria. First, it must be composed of "employees who are readily identifiable as a group." Second, it must be established that the employees in the group share a community of interest with one another. We submit that these criteria are not formulated, nor would they lead (except by coincidence), to the finding of a *prima facie* appropriate unit, as required by *Blue Man Vegas*, because the criteria effectively gives controlling weight to the "employees . . . identifiable as a group." This is because *no* unit could be appropriate in which its members did not share a community of interest. The concept of "employees . . . identifiable as a group" has no relevance, *unless the phrase refers to the group petitioned for by the union on the basis of the extent of their organization*. Put another way, because any appropriate unit must contain employees who share a community of interest, what really governs the appropriate unit under *Specialty Healthcare* is the employees "identifiable as a group," one almost certainly chosen by the union on the basis of the extent of organization. Upon what other basis would a readily identifiable group of employees be chosen?

Under *Specialty Healthcare*, this question is never asked and never answered. Instead, the union's extent of organization is elevated to controlling status save only if an employer (or another petitioner) can show an overwhelming community of interest of non-included employees. We submit that under these circumstances, the group identified by the union is nothing more than a subterfuge for the extent of union organization. At the very minimum, the Board should require that a petitioner—who will have near-exclusive control of the evidence on this point—demonstrate that the "employees readily identifiable as a group" are constituted on the basis of factors other than the extent of union organization. In making this determination, the Board should also keep in mind the principle that "extent of union organization" does not mean unanimity, but merely that the group was chosen on the basis that the union believed it had sufficient strength, as demonstrated by cards or other means, to win an election in that group. Where this is the only basis for the petitioned-for unit, which under *Specialty Healthcare* may not be overcome by anything other than an overwhelming community of interests, then the group identified by the petitioner (i.e., the extent of union organization) is accorded controlling weight. Thus, *Specialty Healthcare* necessarily results in a violation Section 9(c)(5).

The facts of this case demonstrate the foregoing in the starkest of terms. In 2011, Petitioner Local 1445, United Food and Commercial Workers Union (the "Union") filed a petition to represent a wall-to-wall unit of employees at the Macy's department store in Saugus, Massachusetts. *See* Decision & Direction of Election at 8. The Regional Director found the wall-to-wall unit to be appropriate. *Id.* Importantly, however, a majority of the employees in the wall-to-wall unit voted *against* Union representation. *Id.* Only after its election defeat in 2011 did the Union seek to represent the gerrymandered unit at issue here: namely, a bargaining unit limited to the

Saugus store's cosmetics and fragrances employees. In doing so, the Union announced that it was unwilling to proceed to an election in any other unit. *Id.* at 2 n.3.

A "*prima facie* appropriate" unit has not been historically determined by the Board simply on the basis of whether the employees in the unit share a community of interest among themselves. Instead, historically, the Board has considered factors in addition to community of interest, including the desires of the employees, any relevant bargaining history, and the employer's organizational and administrative structure. Further, the Board has identified numerous presumptively (not conclusively) appropriate units in various industries, based on the experience gained through the application of such factors over many years and in myriad factual contexts.[2] All of this requires, as we have demonstrated above, wholly consonant with the requirement of Section 9(b) of the Act, that the Board engage in a holistic approach that considers "in each case" the interests not only of those in the petitioned-for unit, but all of the factors necessary to vindicate "the rights guaranteed by this subchapter," and make collective bargaining real and practical, and not burdened by proliferating units, union whipsawing and rivalry, employee balkanization, and endless administrative headaches for the employer. It is those considerations that caused Congress to enact Section 9(c)(5) in the first place.

For the same reason, whatever may be the validity of the D.C. Circuit's formulation in *Blue Man Vegas* regarding when the "overwhelming community of interest" may properly be

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[2] For example, in the retail industry involved in this case, for nearly a half-century the presumptively appropriate unit has been "the single store unit unless countervailing factors were present." *Haag Drug Co.*, 169 NLRB 877 (1968); *see also Sav-On Drugs,* 138 NLRB 1032 (1962) (abandoning policy of multi-store units determined by geographic-area/employer administrative-division). As discussed below in Section IV, the application of *Specialty Healthcare* in this case undermines this longstanding presumption and is particularly harmful to the retail industry.

imposed as a barrier by the Board, *see Specialty Healthcare*, slip op. at 19 n.17 (Member Hayes, dissenting) (concluding that *Blue Man Vegas* was wrongly decided), it is clear that the appellate court conditioned it on the Board's having *first* made a proper finding of a *prima facie* appropriate unit. However, the test mandated by *Specialty Healthcare* is not formulated to, and except by coincidence will not, result in the finding of a *prima facie* appropriate unit, but instead a unit resulting from the extent of union organization.

In sum, the rule enunciated in *Specialty Healthcare* begins with a presumption that the petitioned-for unit—one likely based on the extent of union organizing—is appropriate based solely and exclusively on one factor: that the members of the unit share a community of interests among themselves, without regard to any other factors. It then effectively insulates that unit from challenge by erecting the "overwhelming community of interest" barrier. Dissenting Board Member Hayes accurately described the effect of the new standard on the Board's establishment of bargaining units in *Specialty Healthcare*, explaining:

> This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units. Next, by proposing to revise the rules governing the conduct of representation elections to expedite elections and limit evidentiary hearings and the right to Board review, the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation.

Specialty Healthcare, slip op. at 19 (footnote omitted).[3] This is the same problem that the *Lundy Packing* court recognized as a "classic [Section] 9(c)(5) violation." In light of the decision in

[3] The proposed rules referenced by Member Hayes were the subject of the Notice of Proposed Rulemaking issued by the Board on June 22, 2011, 76 Fed. Reg. 36,812, which advocate significant changes to the current procedures for holding secret-ballot elections. The Board attempted to issue the Final Rule on December 22, 2011, 76 Fed. Reg. 80,138, but that attempt was set aside because a quorum of the Board did not participate in the vote to do so, *Chamber of*
(continued)

Lundy Packing, a proper reading of the decision in *Blue Man Vegas*, and Member Hayes's dissent in *Specialty Healthcare* itself, the Board should overrule *Specialty Healthcare*.

III. THE BOARD ABUSED ITS DISCRETION IN *SPECIALTY HEALTHCARE* BY USING ADJUDICATION INSTEAD OF RULEMAKING TO PROMULGATE A NEW, GENERALLY APPLICABLE STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS

The new standard announced by the Board in *Specialty Healthcare* holds that any identifiable group of employees sought by the union, who share a community of interest, is an appropriate unit, save only for those rare situations in which an employer can show that excluded employees share an overwhelming community of interest with the included employees. *Specialty Healthcare*, slip op. at 12-13. The Board asserted that it was only clarifying the law in this area. *Id.* at 1. However, the asserted clarification is in reality an entirely new, sweeping standard that has since been applied to alter decades of Board precedent across a multitude of industries. We submit that the change wrought in *Specialty Healthcare* should have been accomplished, if at all, through notice-and-comment rulemaking, and that the rule announced in *Specialty Healthcare* is contrary to law.

There is no question that the "choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1973). However, like all grants of discretion, the Supreme Court has acknowledged that there "may be situations where the Board's reliance on adjudication [instead of rulemaking] would amount to an abuse of discretion or a violation of the Act." *Id.* Although the Supreme Court has not examined the issue further, the dissenting Board Member in *Specialty Healthcare* believed that the

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Commerce of U.S. v. NLRB, 879 F. Supp. 2d 18, 28-29 (D.D.C. 2012), *appeal pending*, No. 12-5250 (D.C. Cir.).

majority had overstepped the "bounds of its discretion in making sweeping changes to established law through this adjudication, without adhering to any approximation of a rulemaking procedure that would comply with requirements under the Administrative Procedure Act (APA) designed to safeguard the process by ensuring scrutiny and broad-based review." *Specialty Healthcare*, slip op. at 15 (Member Hayes, dissenting). As set forth below, dissenting Board Member Hayes was correct.

A. Rulemaking Versus Adjudication Generally

Congress has given the Board the authority to "make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the Act]." NLRA § 6, 29 U.S.C. § 156. First enacted in 1946, the APA was seen as a "strongly marked, long sought, and widely heralded advance in democratic government." Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at iii (1946) (statement of Sen. McCarran). Central to that advance in democratic government were the APA's rulemaking requirements, which "assure fairness and mature consideration of rules of general application." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005) (internal quotations and citation omitted). The APA's rulemaking requirements also ensure that "affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *United States v. Utesh*, 596 F.3d 302, 310 (6th Cir. 2010) (internal quotations and citation omitted).

The APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is broadly defined as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." § 551(4). To engage in rulemaking, an agency must

first publish a notice of proposed rulemaking in the *Federal Register*. § 553(b). Among other things, that notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The agency must then give interested persons an opportunity to participate in the rulemaking "through submission of written data, views, or arguments with or without opportunity for oral presentation." § 553(c).

"After consideration of the relevant matter presented," the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* Importantly, the product of the rulemaking process constitutes final agency action usually subject to immediate, broad-based judicial review by anyone aggrieved by the rule. *See, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (addressing pre-enforcement challenge of Board regulations brought by trade association on behalf of its members).

Adjudication is something altogether different. As defined by the APA, "adjudication" means the agency process for formulating an "order," 5 U.S.C. § 551(7), which the APA defines as the "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing," § 551(6). The APA's procedural protections for adjudication do not govern proceedings for the "certification of worker representatives." § 554(a)(6). Moreover, the agency's final order in an adjudication is not subject to immediate, broad-based attack by persons or entities who are not parties to the adjudication. Instead, one must wait until the agency order is applied to it personally or, as in this case, participate as an *amicus* in a third party's legal challenge.

B. Federal Appellate Courts Have Found Agency Abuses of Discretion Under Circumstances Similar to *Specialty Healthcare*

Numerous federal courts have articulated standards for when an agency should engage in rulemaking rather than use adjudication. We submit that because the Board did not follow these

standards, its decision in *Specialty Healthcare* is contrary to law and ought not be applied in this or any other cases.

For example, in *First Bancorporation v. Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984), a bank holding company argued that federal regulators had abused their discretion by using an adjudication of the bank holding company's application to offer two types of accounts at certain of the company's holdings as a means for establishing a general rule of widespread application without having to engage in rulemaking. *Id.* at 435. In granting the holding company's petition for review, the court of appeals acknowledged that, under *Bell Aerospace*, agencies have discretion in choosing whether to use adjudication instead of rulemaking. *Id.* at 437. However, "like all grants of discretion," it could be abused. *Id.* In finding federal regulators had abused their discretion, the court of appeals paid particular attention to how federal regulators had applied the orders under review in subsequent proceedings involving different companies. *Id.* Noting that on at least three occasions federal regulators had cited the orders in question as having decided whether banks could offer both types of accounts, the appellate court concluded that the orders under review were "merely a *vehicle by which a general policy would be changed*." *Id.* (emphasis added). Therefore, the court of appeals determined that federal regulators had abused their discretion by using adjudication instead of rulemaking. *Id.* at 438; *see also Matzke v. Block*, 732 F.2d 799, 802-03 (10th Cir. 1984) (finding agency's planned use of adjudication instead of rulemaking would constitute an abuse of discretion).

The Ninth Circuit reached a similar conclusion in *Pfaff v. United States Department of Housing & Urban Development*, 88 F.3d 739 (9th Cir. 1996). The respondent-agency in *Pfaff* alleged that the petitioner-landlords violated federal housing laws by having a policy of refusing

to rent a particular home to families of more than four people. *Id.* at 743. An administrative law judge found in favor of the respondent-agency, using a burden-shifting scheme not unlike that at issue here. Once the agency presented a *prima facie* case that a landlord's policy had a disparate impact on families, the landlord had to demonstrate a "compelling business necessity" for the policy. *Id*. This burden-shifting scheme had been established by a recent agency decision in another case known as "*Mountain Side*." *Id.* at 747.

The court of appeals granted the landlords' petition for review and vacated the agency's order. *Id.* at 750. Recognizing that it was an "established principle of administrative law that 'the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion,'" *id.* at 747 (quoting *Bell Aerospace*, 416 U.S. at 294) (brackets supplied by *Pfaff* court), the appellate court found that "[j]ustice" dictated the "general rule of deference to announcements of law by adjudication have its exceptions," *id.* at 748. The court explained that such a situation may present itself where, among other things, the "new standard, adopted by adjudication, *departs radically* from the agency's previous interpretation of the law" and "is very broad and general in scope and prospective in application." *Id.* (emphasis added). Finding that the agency had abused its discretion, the court of appeals explained that there could be "no question that the *Mountain Side* [burden-shifting] standard is broad, general, and prospective in application." *Id.*; *see also Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (explaining that "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application"); *Curry v. Block*, 738 F.2d 1556, 1564 (11th Cir. 1984) (finding agency's planned use of adjudication instead of rulemaking would constitute an abuse of discretion).

C. The Dissenting Board Member in *Specialty Healthcare* Correctly Concluded that the Majority Abused Its Discretion

There is no question that, when the circumstances are considered in their totality, the Board in *Specialty Healthcare* abused its discretion by deciding to issue a rule of general applicability via adjudication instead of rulemaking. The Board would only compound its error by applying *Specialty Healthcare* to the facts of this case.

First and most fundamentally, the Board majority in *Specialty Healthcare* raised *sua sponte* the issue whether to devise a new, generally applicable standard for determining appropriate bargaining units in all industries. In its call for *amicus* briefs, the majority asked third parties to brief the following issue, among numerous others:

> Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. *Should such a unit be presumptively appropriate as a general matter*.

Specialty Healthcare & Rehab. Ctr. of Mobile, 356 NLRB No. 56, slip op. at 2 (2010) (emphasis added).

As highlighted in an atypical dissent from the Board's call for *amicus* briefs, none of the parties asked the Board to revise the general standard for making bargaining-unit determinations. "This was a simple case," the dissenting Board Member explained. *Id.* at 4 (Member Hayes, dissenting). "The majority, however, . . . seizes upon this case as an occasion for reviewing not only . . . the standard for unit determinations in nonacute health care facilities, but also for reviewing the procedures and standards for determining whether proposed units are appropriate in all industries." *Id.* (internal quotations omitted). As a consequence, the dissent concluded, "[t]his is no longer a simple case." *Id.*

Second, as is clearly demonstrated by this case involving a petitioned-for unit limited to cosmetics and fragrances employees working in a single Macy's store, it cannot be denied that in *Specialty Healthcare* the Board created a rule of general applicability designed to implement policy outside the narrow factual context presented by that case involving a skilled nursing facility, thereby making the majority's decision in *Specialty Healthcare* a "rule," not an "order." *See* 5 U.S.C. § 551(4), (6). Indeed, the Board has issued a number of published decisions relying on the governing "principles" established in *Specialty Healthcare*. *See DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 3 (2011) (explaining, in the context of a bargaining-unit dispute involving a rental-car facility: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in cases like this one."); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011) (explaining, in the context of a bargaining-unit dispute involving technicians at a defense contractor making submarines and aircraft carriers: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in this type of case."); *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 4 (2011) (explaining, in the context of a bargaining-unit dispute involving a producer of juice drinks and fruit bars: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in cases like this one.").[4]

[4] The Board has done the same thing in numerous unpublished orders. *Compare, e.g.*, *Grace Indus., LLC*, Nos. 29-RC-12031 & 29-RC-12043, 2011 WL 6122778 (NLRB Dec. 8, 2011) (granting request for review in bargaining-unit dispute involving road construction company and remanding for reconsideration in light of *Specialty Healthcare*); *and Performance of Brentwood LP*, No. 26-RC-63405, 2011 WL 5288439 (NLRB Nov. 4, 2011) (doing same in bargaining-unit dispute involving car dealership), *with Prevost Car U.S.*, No. 03-RC-71843, 2012 WL 928253 (NLRB Mar. 15, 2012) (denying bus manufacturer's request for review because majority believed request did not present substantial issues in light of *Specialty Healthcare*); *Nestle Dreyer's Ice Cream*, No. 31-RC-66625, 2011 WL 6835227 (NLRB Dec. 28, 2011) (denying review in bargaining-unit dispute involving ice cream manufacturer); *and 1st Aviation Servs., Inc.*, No. 22-RC-61300, 2011 WL 4994731 (NLRB Oct. 19, 2011) (doing same in bargaining-unit dispute involving aviation company).

That these published decisions involved rental cars, submarines, aircraft carriers, juice drinks, and fruit bars has been of no consequence to the Board. *Specialty Healthcare*, the Board majority explained, established a rule of general applicability that was to be obeyed. That, in turn, is a hallmark of rulemaking, not adjudication. *See First Bancorporation*, 728 F.2d at 437 (finding agency abused its discretion in using adjudication instead of rulemaking where federal regulators had cited the orders under review as having definitively decided a broad question, such that the court concluded that the orders were "merely a vehicle by which a general policy would be changed").

Third, that the Board utilized adjudication in *Specialty Healthcare* while engaging in rulemaking on various other important issues supports the conclusion that the Board majority abused its discretion by spurning rulemaking on this question. At the time of the Board's decision in *Specialty Healthcare*, the Board had recently issued proposed rules altering significantly the Board's procedures for conducting representation elections and requiring employers to post notices regarding employees' rights under the Act. *See* Proposed Rule, Representation—Case Procedures, 76 Fed. Reg. 36,812 (June 22, 2011); Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (Dec. 22, 2010). Thus, despite invoking rulemaking contemporaneously on two other issues of widespread importance that drew tens of thousands of public comments, *see, e.g.*, Final Rule, Representation—Case Procedures, 76 Fed. Reg. 80,138, 80,140 (Dec. 22, 2011) (explaining that the Board received over 65,000 public comments), the Board—for reasons known only to it—chose adjudication in *Specialty Healthcare* to alter the general standard for determining appropriate bargaining units. That, we submit, constituted an abuse of discretion, as does the continued application of the *Specialty Healthcare* rule in this and other cases. *See Pfaff*, 88 F.3d at 748 (finding agency

abused its discretion in using adjudication to promulgate a burden-shifting standard that was "broad, general, and prospective in application," and then applying that standard in subsequent cases); *Ford Motor Co.*, 673 F.2d at 1010 (finding agency abused its discretion in using adjudication and citing agency's recent rulemaking as opportunity to use same instead of adjudication).

Therefore, the dissenting Board Member in *Specialty Healthcare* correctly concluded that the majority abused its discretion by choosing to use adjudication to promulgate a new, generally applicable rule for determining appropriate bargaining units in all industries. As in *Pfaff*, the Board will compound its abuse of discretion by applying the *Specialty Healthcare* standard in this and future cases. Accordingly, *Specialty Healthcare* should be overruled.

IV. APPLYING *SPECIALTY HEALTHCARE* WILL HAVE A PARTICULARLY UNWARRANTED, ADVERSE IMPACT ON THE RETAIL INDUSTRY AND ITS EMPLOYEES

The adverse impact of the rule announced in *Specialty Healthcare* raises particularly serious issues for retail employers and their employees, undermining decades of precedent demonstrating that the presumptively appropriate unit in the retail industry is the single-store unit. *See* n.2, *supra.* Board precedent prior to *Specialty Healthcare* allowed for smaller, discrete units in the retail setting only in situations where specialized skills were involved; but even in these cases consideration is given to various factors. *See, e.g.*, *Super K Mart*, 323 NLRB 582, 586, 588 (1997) (Regional Director concluded meat department unit was appropriate because 40 percent of the employer's meat sales derived from fresh meats requiring traditional meatcutting skills; Regional Director specifically noted Board's evolution from a presumption that a meatcutting unit was appropriate, noting "it is incumbent on the Board to consider the actual work performed by the meatcutters in order to determine whether they continue to exercise substantial, traditional meatcutter skills"); *Foreman & Clark, Inc.*, 97 NLRB 1080, 1082 (1951) (alteration employees

deemed separate unit due to high skill); *W & J Sloane, Inc.*, 173 NLRB 1387, 1389 (1968) (same for display employees); *Stern's Paramus*, 150 NLRB 799, 806 (1965) (employer consisted of 130 departments spread across five floors, yet Board adopted three separate broad units of selling, nonselling and restaurant employees, noting that the "specific facts of these cases, the current bargaining pattern in the industry, the history of bargaining in the area and a close examination of the composition of the workforce in the industry require a recognition of the existing differences in work tasks between the selling and nonselling employees in department stores").

These are but a few examples of the thoughtful, deliberate analysis employed by the Board in determining appropriate bargaining units in the retail industry "in each case," as required by Section 9(b). These analyses all reflect the experience gained by the Board through decades of unit determinations in the retail industry, taking into account the realities of the retail business in all of its diverse forms, products, structures, sizes, and locations. There was no deviation from the presumptive single-store unit unless the Board had conducted a thorough investigation and analysis and had determined that the facts before it deemed such a change necessary. All parties can look at this body of law and determine with reasonable certainty what the appropriate bargaining unit should look like in the retail industry. Importantly, none of the analyses used the "overwhelming community of interest" standard.

Now, as dramatically illustrated by this case and *Neiman Marcus Group, Inc.*, Case No. 02-RC-076954, all of this is thrown into doubt by the *Specialty Healthcare* decision. The adverse impact of the new rule in *Specialty Healthcare* is potentially devastating. For example, where the Board found three broad units of selling, nonselling, and restaurant employees appropriate in a retail department store setting in *Stern's Paramus*, it is now possible that with respect to the employer in this case, unions could seek dozens of separate units, one for each department. This

could be repeated in thousands of other retail settings, resulting in a proliferation of separate bargaining units that would cripple a retail employer with endless multiple negotiations, conflicting union demands and contract obligations, and burdensome administrative duties.

Specialty Healthcare now enables unions to organize by cherry-picking a bargaining unit composed of a small subset of employees with little regard for whether those employees constitute a practical bargaining unit. All they need be is a readily identifiable group of employees. As a result, unions will often organize by forming smaller bargaining units based on the extent of their organization, creating a proliferation of units with no limiting feature other than that they all are identifiable groups.

The facts of this case provide a prime example. As noted above, in 2011, the Union failed to garner majority support within the presumptively appropriate wall-to-wall bargaining unit at Macy's Saugus store that the Union itself had petitioned to represent. In 2012, the Union chose ground for its second battle where, presumably, the Union knew it had the upper hand based on the extent of its organizing efforts. This time, the Union only petitioned to represent the Saugus store's cosmetics and fragrances employees, refusing to proceed to an election in any other bargaining unit. The Acting Regional Director granted the Union's petition after applying the *Specialty Healthcare* standard. No amount of makeup or perfume, however, can mask the Union's gerrymandering effort in this case. Under this same approach, any number of unions may organize any number of the other departments, resulting in the problems noted above.

Allowing the Acting Regional Director's decision to stand in this case will, further, have a negative impact on employee skill development that is easy to envision. Currently, in most retail settings, employees perform tasks in a variety of different departments and settings in order to develop their skills and knowledge base and to provide a high level of customer service

throughout the store. In a situation where a business is faced with multiple units as contemplated under *Specialty Healthcare*, each perhaps represented by a different, competing union, union rules will prevent—or at a minimum greatly complicate—the ability to cross-train employees and meet customer and client expectations via flexible staffing, as employees generally may not and cannot perform work assigned to another unit. Employees would be limited to micro-units and the job duties assigned to that particular unit, thus reducing skill building, training, and job opportunities as cross-training, promotions, and transfers would be hindered by barriers created by multiple smaller bargaining units.

Employees and employers would also lose flexibility as workers from one store location or one department could not pick up shifts at another if different units represented the different departments or stores in the different locations. For example, those working as a fitting-room associate could not be reassigned to the sales floor, if that was where more staff was needed. A greeter could not cover for an absent cashier if they were in separate units. Similarly, hardware store workers assigned to the gardening center might not be able to service customers in the plumbing department if such work is assigned to a different bargaining unit. The impact of this on business productivity and competitiveness would be significant. Today's economic environment is challenging enough for workers without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

Under *Specialty Healthcare*, in addition to multiple balkanized units, retail businesses will have to contend with multiple collective bargaining agreements (e.g., different agreements for cashiers and stockers, employees in men's shoes, women's shoes, men's clothing, women's clothing, etc.), in which the unions may insist on different or conflicting work rules, pay scales, benefits, bargaining schedules, grievance processes, and layoff and recall procedures. Juggling

the administrative tasks associated with multiple bargaining agreements could overwhelm businesses in retail, where a store may have dozens of departments and—under *Specialty Healthcare*—possibly dozens of different bargaining units.

Finally, multiple unions representing multiple bargaining units within a single store could lead to rivalry and tension among employees, not to mention rivalry among competing unions. Dissatisfied workers comparing salaries and benefits could cripple the business with work stoppages, creating a situation where a union representing only a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families. For example, if the cashiers go on strike, the rest of a store might be shut down, leaving all employees without work.

In sum, under *Specialty Healthcare*, the bargaining-unit proliferation and balkanization that Congress discouraged is now a reality that will unnecessarily and improperly impact the retail industry to the detriment of both employers and employees, and the economic well-being of families and communities who depend on them. It is impossible to conceive that this is the labor peace that Congress intended to foster in passing the Act.

CONCLUSION

For the foregoing reasons, the Board should overrule *Specialty Healthcare*. In the absence of the foregoing, the Board should at a minimum return the retail industry to the traditional bargaining-unit standards that existed before *Specialty Healthcare.*

Dated: February 27, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this twenty-seventh day of February, 2013, he caused the foregoing Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, American Hotel & Lodging Association, HR Policy Association, International Council of Shopping Centers, International Foodservice Distributors Association, International Franchise Association, National Association of Manufacturers, National Association of Wholesale-Distributors, National Council of Chain Restaurants, National Federation of Independent Business, and Society for Human Resource Management to be filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by e-mail upon the following counsel of record for the parties:

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