UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

REQUEST FOR SPECIAL PERMISSION TO FILE
BRIEF OF *AMICUS CURIAE*
NATIONAL RETAIL FEDERATION

Dated: December 28, 2012

Eric S. Clark
THOMPSON HINE LLP
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 352-6555
Fax: (513) 241-4771
E-mail:Eric.Clark@ThompsonHine.com

Matthew R. Kissling
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 566-5586
Fax: (216) 566-5800
E-mail:Matthew.Kissling@ThompsonHine.com

Counsel for Amicus Curiae
National Retail Federation

The National Retail Federation ("NRF") respectfully requests special permission to file the attached amicus brief.

As explained in full in the attached amicus brief, NRF is the world's largest retail trade association and serves as the voice of retail worldwide. NRF's global membership includes retailers of all sizes, formats and distribution channels, including department stores, chain restaurants and industry partners, from the United States and more than 45 countries abroad. In the United States alone, NRF represents a retail industry that operates more than 3.6 million establishments, and which directly and indirectly account for approximately 42 million jobs. This constitutes one in four American jobs. With a total annual gross domestic product of $2.5 trillion, the retail industry serves as a daily barometer for the livelihood of the American economy. As the representative of this vast retail industry, NRF actively promotes a campaign that emphasizes the economic importance of retail, and encourages a national policy designed to boost economic growth and job creation in the United States.

NRF strongly disagrees with the Regional Director's decision in this case certifying a bargaining unit comprised solely of fragrance and cosmetic department employees in a single retail store. Instead, NRF believes that the Board's longstanding presumption in favor of storewide or "wall-to-wall" bargaining units in the retail industry strikes the appropriate balance between the interests of employees and unions in organizing, as well as the interests of employers in productively managing their business and guaranteeing the highest standards of customer service in the retail industry. Any change in the presumption would do nothing more than serve to fracture and balkanize the structure of the retail employer's business, and will adversely affect NRF's members and their businesses, complicate labor relations and collective bargaining, completely frustrate and destroy the basic concepts of customer service, threaten to

embroil customers and other members of the public in labor disputes, and create delay and increased costs in the Board's currently fair and efficient representation process. NRF and its members are thus concerned that affirmance of the Regional Director's decision in this case will cause a massive disruption in their industry without any necessary precipitating purpose.

Because most, if not all, of NRF's members fall under the jurisdiction of the National Labor Relations Act, the bargaining unit determination standards used by the Board have a significant impact on these individual retail companies. NRF thus submits that it has a significant interest in the Board's activities and decisions in this area. For these reasons, NRF respectfully requests special permission to file the attached amicus brief.

Dated: December 28, 2012

Respectfully submitted,

THOMPSON HINE LLP

/s/Eric S. Clark
Eric S. Clark
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 352-6555
Fax: (513) 241-4771
E-mail:Eric.Clark@ThompsonHine.com

Matthew R. Kissling
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 566-5586
Fax: (216) 566-5800
E-mail:
Matthew.Kissling@ThompsonHine.com

Counsel for Amicus Curiae
National Retail Federation

CERTIFICATE OF SERVICE

The undersigned certifies that on this 28th day of December, 2012, a copy of the foregoing Request for Special Permission to File Brief of *Amicus Curiae* National Retail Federation, as well as the proposed Brief of *Amicus Curiae*, was filed using the National Labor Relations Board's E-Filing Program. Copies of the foregoing Request and Brief were also served by e-mail upon the following counsel:

William Joy
MORGAN BROWN & JOY, LLP
200 State Street, 11th Floor
Boston, MA 02109-2605
WJoy@morganbrown.com

Counsel for Macy's, Inc.

Warren Pyle
PYLE ROME EHRENBERG P.C.
18 Tremont Street, Suite 500
Boston, MA 02108-2301
wpyle@pylerome.com

Counsel for Local 1445, United Food and Commercial Workers Union

Courtesy copies of the Request and Brief were also served by ordinary U.S. Mail upon:

Jonathan B. Kreisberg
Regional Director
National Labor Relations Board
Region 1
10 Causeway Street, 6th Floor
Boston, MA 02222-1072

/s/Eric S. Clark
Eric S. Clark

880225.1

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 OF *AMICUS CURIAE* FOR NATIONAL RETAIL FEDERATION

Dated: December 28, 2012

Eric S. Clark
THOMPSON HINE LLP
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 352-6555
Fax: (513) 241-4771
E-mail:Eric.Clark@ThompsonHine.com

Matthew R. Kissling
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 566-5586
Fax: (216) 566-5800
E-mail: Matthew.Kissling@ThompsonHine.com

Counsel for Amicus Curiae
National Retail Federation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Other Authorities

Amicus Curiae National Retail Federation respectfully submits this brief in support of Macy's, Inc., in the present matter before the National Labor Relations Board.

STATEMENT OF INTEREST

The National Retail Federation ("NRF") is the world's largest retail trade association and serves as the voice of retail worldwide. NRF's global membership includes retailers of all sizes, formats and distribution channels, including department stores, chain restaurants and industry partners, from the United States and more than 45 countries abroad. In the United States alone, NRF represents a retail industry that operates more than 3.6 million establishments, and which directly and indirectly account for approximately 42 million jobs. This constitutes one in four American jobs. With a total annual gross domestic product of $2.5 trillion, the retail industry serves as a daily barometer for the livelihood of the American economy. As the representative of this vast retail industry, NRF actively promotes a campaign that emphasizes the economic importance of retail, and encourages a national policy designed to boost economic growth and job creation in the United States.

The National Labor Relations Board's ("Board") decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), is poised to have a significant impact on NRF's retail members. Specifically, the majority opinion 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" would cause significant harm to the retail industry. *Specialty Healthcare*, 357 NLRB No. 83, at 1.

The *Specialty Healthcare* standard is under review in the United States Court of Appeals for the Sixth Circuit. *See Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th

Cir.). Nevertheless, the standard was applied by the Regional Director in this case to approve a bargaining unit consisting solely of fragrance and cosmetic workers at Macy's department store in Saugus, Massachusetts. *See Macy's, Inc.*, Case No. 01-RC-091163 (R.D. Nov. 8, 2012). The standard has been similarly applied in other circumstances by the Board including by a Regional Director to approve a unit limited to the shoe department employees of a New York department store. *See Bergdorf Goodman*, Case No. 02-RC-076954 (R.D. May 4, 2012).

Like the dissent in *Specialty* Healthcare, and many *Amici* in various other cases, the NRF submits that *Specialty Healthcare* was wrongly decided and should be overruled by the Board. In particular, the Board's decision in *Specialty Healthcare* violates Sections 9(b) and 9(c)(5) of the National Labor Relations Act (the "Act") because it dramatically tips the balance in favor of unions and paid union organizers at the expense of employees who have a statutory right to refrain from collective activities. While the NRF agrees that the *Specialty Healthcare* decision gives controlling weight to the union's extent of organization, NRF's position goes beyond this and says it puts employees at a disadvantage relative to the union organizers. Moreover, the *Specialty Healthcare* standard encourages bargaining unit gerrymandering, which also frustrates an employee's ability to refrain from collective activities.[1]

Even absent these legal deficiencies, the *Specialty Healthcare* standard will overturn a half-century of Board precedent if extended to the retail industry. In short, the NRF contends that the *Specialty Healthcare* standard should not be applied outside of the specific healthcare context in which it was established, and in particular it should not apply to the retail industry which has long benefitted from a "various presumptions and special industry and occupation

[1] NRF also adopts by reference the arguments made in the amicus briefs filed by the Coalition for a Democratic Workplace, *et al.*, in *Bergdorf Goodman*, Case No. 02-RC-076954, and *Specialty Healthcare Rehab. Ctr. of Mobile*, Nos. 12-1027 & 12-1174 (6th Cir.), which provide further explanation as to why *Specialty Healthcare* was wrongly decided.

rules in the course of adjudication" which were not affected by the decision in *Specialty Healthcare.* FN 29. These presumptions have existed in the retail setting because micro-unions and the resulting jurisdictional disputes, rolling strikes, and the associated effects on customer service would be the death knoll for a retail industry whose livelihood depends on the quality of service that it provides to its customers and clients.

ARGUMENT

I. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTIONS 9(b) AND 9(c)(5) OF THE ACT.

The Board should reverse its decision under *Specialty Healthcare* because: 1) the Board's decision failed to consider an employee's right to refrain from union activity, especially in the context where a union, and not the employees, is the party that petitions for representation, and 2) the Board's decision gives controlling weight to the extent of organization when making bargaining unit determinations.

A. Contrary to Section 9(b) of the Act, the *Specialty Healthcare* Standard Fails to Consider All of the Rights Guaranteed by the Act.

i. The Language of Section 9(b) Expressly Requires the Board to Consider an Employee's Right to Refrain From Union Activities.

Section 9(b) of the Act expressly instructs the Board to "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 in 1947 when Congress amended the Act, and specifically replaced the prior dictate that the Board was to guarantee that unit determinations gave employees "the full benefit of their right to self-organization and collective bargaining." Wagner Act, ch. 372, § 9(b), 49 Stat. 449, 453 (1935). Section 7 of the Act includes "the right to refrain from any and

all such activities." Taft-Hartley Act, sec. 101, § 7, 61 Stat. 136, 140 (1947). As a result, the Board must consider the full range of employee rights when making bargaining unit determinations. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 280 (1973) (noting that courts must respect "the statutory right of employees to resist efforts to unionize a plant"); *NLRB v. Okum Bros. Shoe Store, Inc.*, 825 F.2d 102, 107 (6th Cir. 1987) (recognizing "the employees' rights to refrain from union activities guaranteed by the National Labor Relations Act"). Permitting micro-unions, like the one at issue in this case permits the union to gerrymander the largest possible unit where the union has a majority. The result is that many employees who prefer to not be represented by the union are forced to become part of the bargaining unit. In contrast, if a larger, storewide unit was required - gerrymandering would be impossible.

Thus, in order to guarantee an employee's right to "fairly and freely choose bargaining representatives," Section 9(b) expressly requires the Board to fully consider all of an employee's protected rights, and to prohibit gerrymandering of units.

ii. Where a Union Petitions to Organize a Unit of Employees, the Board Must Apply a Standard That Embraces An Employee's Right to Refrain.

The importance of the Board's statutory obligation to consider an employee's right to refrain is particularly highlighted in situations where employees are not the party petitioning for representation. Under Section 9(c)(1) of the Act, a petition for representation may be filed "by an employee or group of employees or any individual or labor organization acting on their behalf." 29 U.S.C. § 159(c)(1)(A) (emphasis added). Section 9(c)(1) specifically differentiates between employee petitions and union petitions, and "authorizes both individuals and labor organizations to file … a petition for certification." *Schultz v. NLRB*, 284 F.2d 254, 256 (1960). This is a consistent approach throughout the Act, where "it is quite apparent from the manner in which the terms 'individual' and 'labor organization' are disjunctively used." *Id.* Thus, the Act

requires the Board to recognize the difference between a representation petition filed by employees and a petition filed by a union.

One of the overarching considerations that the Board must make in bargaining unit determinations "is to give employees" but not labor unions "the 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). Included in this freedom is an employee's right to refrain from union activities. *See Savair*, 414 U.S. at 280; *Okum Bros.*, 825 F.2d at 107. Where a union is the party petitioning for representation, there is no guarantee that employees have been given the opportunity to exercise this right. Instead, there is the ever present risk that the union will attempt to cherry-pick a small subset of employees to avoid union opposition from the larger workforce. As a result, it is imperative that the Board give full consideration to an employee's right to refrain when making bargaining unit determinations.

As recognized by the Regional Director, the union, and not the employees, filed a petition in March 2011 to represent a wall-to-wall unit at the Macy's store in Saugus, Massachusetts. *Macy's, Inc.*, Case No. 01-RC-091163, at 8 (R.D. Nov. 8, 2012). In the subsequent election, however, the union lost and was therefore not certified as the wall-to-wall bargaining representative. *Id.* In other words, a majority of the employees at the Saugus store freely exercised their right to refrain from union activities by voting against union representation. However, the union is now taking a second-bite at the apple, and has drastically narrowed its proposed bargaining unit to only include employees in the fragrance and cosmetics department. Once again, it is the union and not the employees who is requesting representation. By drastically limiting their proposed unit, the union is effectively engaging in bargaining-unit

gerrymandering, and is attempting to thwart the employee's decision against unionization. The employees of Macy's cosmetic department are caught in the middle. If even a single employee of the cosmetics department is against the union – the employee will be forced to join the union (if the union prevails) even though a majority of the storewide unit voted against the union. Such a result is not permitted by Section 9 of the Act.

While this friend of the Board disagrees with the *Specialty Healthcare* standard in all circumstances, it is particularly hostile to employee rights when the union and not the employees petition for representation. The Board must consider all of the employees' protected rights when making bargaining unit determinations, and give the same weight to both the right to self-organize and the right to refrain. Accordingly, the Board must adopt and apply bargaining unit standards that equally balance these various employee rights. Otherwise, the Board will extend an open invitation for unions to engage in gerrymandering whenever they file petitions to represent groups of employees. By directly filing the petition themselves, the unions (not employees) will be able to pick-and-choose the desired members of their bargaining units, and thereby include employees who wish to refrain and would be in the majority but for the gerrymandering.

B. By Giving Controlling Weight to the Extent of Organization, the Board's Decision in *Specialty Healthcare* Violates Section 9(c)(5) of the Act.

Section 9(c)(5) provides that "[i]n determining whether a unit is appropriate for the purposes specified in [Section 9(b)] the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). The Fourth Circuit has found that 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)).[2] Thus, Section 9(c)(5) is designed to prevent exactly what the *Specialty Healthcare* standard allows – bargaining units that, except in the rarest of cases, will match what the petitioning union requested based on the union's extent of organization.

It should be noted that the Board in *Specialty Healthcare* did recognize that a bargaining unit would be inappropriate under Section 9(c)(5) if its members did not "perform distinct work under distinct terms and conditions of employment." *Specialty Healthcare*, 357 NLRB No. 83, at 13 n.31 (citing *Wal-Mart Stores, Inc.*, 328 NLRB 904 (1999)). The Board also recognized that "some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." *Id.* at 13. Nevertheless, the Board's application of considerations is too strict and the result in *Specialty Healthcare*, *Bergdorf* and in this case is the certification of a unit that Section 9(c)(5) was intended to prevent.

The Regional Director's decision in this case is particularly dangerous. The proposed unit of the fragrance and cosmetic department employees at Macy's store in Saugus, Massachusetts, is nothing more than an artificial, gerrymandered grouping of employees with effectively nothing in common that distinguishes them from other store employees, except that they are responsible for selling cosmetics and fragrances to department store customers. The Regional Director recognized that these employees "are subject to the same work rules and policies," "are evaluated on the same matrix," and "share a similar wage structure" to all other Macy's employees, yet he still carved out this group based solely on the types of products at issue. *Macy's, Inc.*, Case No. 01-RC-091163 (R.D. Nov. 8, 2012). The mere fact that the

[2] NRF adopts by reference the arguments made in the amicus brief filed by the Coalition for a Democratic Workplace, *et al.*, in *Bergdorf Goodman*, Case No. 02-RC-076954, which thoroughly explain why the Board mistakenly relied on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), to distinguish the Fourth Circuit's holding in *Lundy Packing*.

cosmetic and fragrance employees sell different types of products is precisely the type of distinction that is "too slight or too insignificant" to separate these employees from the rest of the store. As a result, this proposed bargaining unit is nothing more than an arbitrary subset of a true community of interests.

The facts of this case provide a perfect illustration of what *Specialty Healthcare* allows – the formation of an employee unit that makes sense only as a division of employees likely to vote in favor of union organization. The inescapable conclusion is that, by permitting these types of bargaining units, the *Specialty Healthcare* standard presumptively requires the Board to give controlling weight to the extent of employee organization. Accordingly, the *Specialty Healthcare* standard is contrary to Section 9(c)(5) of the Act and should be overruled.

II. BOARD PRECEDENT AND THE REALITIES OF THE RETAIL INDUSTRY DICTATE THAT THE *SPECIALTY HEALTHCARE* STANDARD SHOULD NOT BE APPLIED TO THE RETAIL INDUSTRY.

Notwithstanding the legal deficiencies of the *Specialty Healthcare* decision, the Board's own established precedent dictates that the *Specialty Healthcare* standard should simply not be applied to bargaining unit determinations in the retail industry. Instead, the Board should reaffirm the traditional whole-store presumption that it has applied to the retail industry for nearly 60 years. Such a result is entirely consistent with the Board's decision in *Specialty Healthcare*, which expressly recognized the continuing viability of presumptions applied outside of the healthcare industry.

A. The Board Has Long Held That a Whole-Store Unit is the Presumptively Appropriate Bargaining Unit for Retail Stores.

For nearly 60 years, the Board has consistently recognized a presumption in favor of the wall-to-wall whole-store unit in the retail industry. In 1957, the Board stated that it "has long regarded a storewide unit of all selling and non-selling employees as a basically appropriate unit

in the retail industry." *I. Magnin & Co.*, 119 NLRB 642, 643 (1957). In subsequent decisions, the Board has recognized that "a storewide or overall unit is presumptively appropriate for the purposes of collective bargaining." *Montgomery Ward & Co.*, 150 NLRB 598, 600 (1964) (emphasis added); *see also Charette Drafting Supplies Corp.*, 275 NLRB 1294, 1297 (1985) (holding that in retail context "the Board finds a single-facility unit presumptively appropriate").

In fact, the Board has expanded its retail industry approach and recognized a "unit policy in department store cases." *U.S. Shoe Retail, Inc.*, 199 NLRB 631, 631 (1972) (emphasis added). There are only limited exceptions to this policy, where the Board must find that a smaller unit is "comprised of craft or professional employees" or consists of departments "composed of employees having a mutuality of interests not shared by other store employees are involved." *I. Magnin*, 119 NLRB at 643. The Board's undisputed precedent has established a presumption that a wall-to-wall unit is the appropriate bargaining unit for the retail industry.

The Board's decision in *Specialty Healthcare* does not require a departure from this long-standing presumption in the retail industry. To the contrary, the Board expressly recognized the continued validity of existing bargaining unit presumptions throughout its decision in *Specialty Healthcare*. At the outset of its analysis, the Board recognized that "[t]he Act itself does create a set of presumptively appropriate bargaining units and the Board has created other such presumptions." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, at 7 (2011). As examples of these "presumptively appropriate" units, the Board noted that single-facility units are proper for the transportation and utilities industries. *See id.* at 7 n.17 (citing *Colorado Interstate Gas Co.*, 202 NLRB 847, 848–49 (1973), and *Groendyke Transport*, 171 NLRB 997, 998 (1968)). Even after laying out its unit-determination standard for non-acute healthcare facilities, the Board recognized that the *Specialty Healthcare* decision was not

intended to alter existing presumptions. In particular, the Board stated: "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 in specific industries." *Id.* at 13 n.29 (emphasis added).

In subsequent cases, the Board has continued to recognize that the *Specialty Healthcare* standard does not displace existing bargaining unit presumptions in other industries. For example, in *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011), the Board considered whether to apply *Specialty Healthcare* to a proposed unit of technical employees in the shipyard industry. The Board expressly noted that "the holding in *Specialty* was 'not intended to disturb any rules applicable only in specific industries' other than in the non-acute care healthcare industry." *Northrop*, 357 NLRB No. 163, at 4 (quoting *Specialty Care*, 357 NLRB No. 83, at 13 n.29) (emphasis added). As a result, the Board concluded that "to the extent that the Board has developed special rules applicable to technical employees … those rules remain applicable." *Id.* (emphasis added). Likewise, in *DTG Operations, Inc.*, 357 NLRB No. 175 (2011), the Board considered whether to apply *Specialty Healthcare* to the rental car industry. Once again, the Board expressly noted that it "will also apply established presumptions" that exist in specific industries for bargaining unit determinations. *DTG*, 357 NLRB No. 175, at 4 n.16. Because there "are no unique presumptively appropriate units in the rental car industry," the Board proceeded to apply *Specialty Healthcare*. *Id.*

Thus, *Specialty Healthcare* and its progeny expressly recognize that the Board does not intend to supplant existing bargaining unit presumptions for industries outside of the non-acute care healthcare industry. In the retail industry, nearly 60 years of Board precedent establish that such a presumption exists, where a "storewide or overall unit is presumptively appropriate" for a

retail store. *Montgomery Ward*, 150 NLRB at 600. As a result, the retail industry has precisely the type of "special rules" that the Board has found are not displaced by the *Specialty Care* standard. Thus, in order to be consistent with both *Specialty Care* and its own past precedent, the Board should not apply the *Specialty Care* standard to the retail industry.

B. The Board Has Explicitly Rejected Single Department Units.

In order to select a unit that is not the presumptively appropriate storewide or wall-to-wall unit in the retail industry, the petitioner must request a bargaining unit composed entirely of "craft or professional employees," or that consists of a group having mutual interests not shared by other store employees. *I. Magnin*, 119 NLRB at 643.

This burden is a fairly strenuous one and it is designed to avoid certification of "a small unit that excludes employees with common skills, attitudes, and economic interests," which may "generate destructive factionalization and in-fighting among employees." *NLRB v. Purnell's Pride*, 609 F.2d 1153, 1156 (5th Cir. 1980).

The Board has expressly rejected a bargaining unit that sought to make a limit on membership to a single department. In *I. Magnin & Company*, 119 NLRB 642 (1957), the petitioner sought "a unit of salespeople in the Employer's shoe department." The Board noted the following details:

> All employees are hired through the personnel department and, while a different method of compensation obtains in the shoe departments, all salespeople work the same number of hours and enjoy the same benefits. Also, the skills employed by all the salespeople are of the same general type. The Employer does not require prior experience of all shoe department personnel and employees from other departments have been assigned to work as shoe salesmen. Shoe salesmen are not restricted to selling shoes but are encouraged to make sales of items throughout the store.

Id. In light of these facts, the Board determined that the shoe department employees were not an appropriate bargaining unit. The Board recognized that it "has long regarded a storewide unit …

as a basically appropriate unit in the retail industry," and further noted that smaller units are only appropriate: (1) "when comprised of craft or professional employees"; or (2) "where departments composed of employees having a mutuality of interests not shared by other store employees are involved." *Id.* The Board found that the shoe department employees failed to establish either standard. First, the Board noted that the employees did not possess "any craft or professional skills." *Id.* Second, the Board found that the "skills, duties, interests, and conditions of employment of those employees" were not sufficiently different from the other sales employees at the department store. *Id.* Accordingly, the Board in *I. Magnin* rejected the bargaining unit of shoe department employees.

Similarly, in *U.S. Shoe Retail, Inc.*, 199 NLRB 631 (1972), the Board rejected a proposed unit that only included employees of one shoe brand department at a retail store, but excluded employees from a second shoe brand department. The Board acknowledged that employees in the two departments sold different types of products, were paid in different manners, and received different benefits. *Id.* at 631. However, the departments shared a common delivery area at the store, had a common central manager, received the same discounts, and shared the same facilities. *Id.* Based on these facts, the Board found "no basis for excluding the Papagallo division employees from the unit." *Id.* The Board reasoned that "the employees of both divisions are employed by a single corporate entity, and operations of the two divisions at the [retail] store are performed in essentially the same manner as a traditional department store." *Id.* Accordingly, the Board found that the traditional "unit policy in department store cases" applied and it rejected the smaller bargaining unit. *Id.*

While the Board has approved smaller bargaining units in the department store setting, these units have been much broader and included <u>all</u> of the employees of a job group. For

example, in *Montgomery Ward & Co.*, 150 NLRB 598 (1964), the Board approved a bargaining unit consisting of all of the retail store's service department employees. The Board recognized this as an appropriate alternative to the storewide presumption because the service department employees exercised different skills, worked in a separate area, had entirely separate supervision, and performed no selling functions. *Id.* at 601. As a result, the service department workers were "sufficiently homogeneous, identifiable, and distinct from the other departments." *Id.* In a subsequent decision, the Board similarly approved a bargaining unit comprised of all sales employees at a furniture store. *Wickes Furniture*, 231 NLRB 154 (1976). The Board reasoned that employees in the sales job group "have a sufficiently distinct community of interest apart from other store employees to warrant their establishment as a separate appropriate unit." *Id.* at 154.

Thus, while an entire category of employees may be an appropriate unit in the retail industry, the Board has repeatedly disapproved of single-department bargaining units in retail department stores. *See U.S. Shoe*, 199 NLRB at 631; *I. Magnin*, 119 NLRB at 643.

The Regional Director's decision in this case ignores the Board's consistent recognition that the *Specialty Healthcare* standard is not intended to displace existing bargaining unit presumptions in industries outside of the non-acute healthcare industry. *Specialty Healthcare*, 357 NLRB No. 83, at 13 n.29. Instead, the Regional Director summarily rejected the traditional presumptions with a statement that the cases invoking it "are all pre-*Specialty Healthcare* cases applying a different standard than the Board currently applies." *Macy's, Inc.*, Case No. 01-RC-091163 (R.D. Nov. 8, 2012).

Relying entirely on the *Specialty Healthcare* decision, the Regional Director approved a bargaining unit comprised solely of the fragrance and cosmetic department employees at Macy's

department store in Saugus, Massachusetts. The Regional Director first found that the employees in the proposed unit share a community of interest. Macy's did not dispute this finding, and neither does NRF. However, where the Regional Director went astray, and where *Specialty Healthcare* conflicts with the Board's past precedent, was shifting the burden to Macy's to show that additional employees "share an 'overwhelming community of interest' with the petitioned-for employees." *Id.* at 9. While recognizing that all sales employees "are subject to the same work rules and policies," "are evaluated on the same matrix," "share a similar wage structure," "receive the same benefits," "attend the same daily store meetings," and "use the same store entrance, break room, and time clock," the Regional Director concluded that these similarities did not satisfy the "overwhelming" requirement. *Id.* at 7, 9. Instead, the Regional Director emphasized that some employees received commissions, while others received bonuses, as well as the different topics of training that individual employees received. *Id.* at 9–10. As a result, the Regional Director concluded that "although there are some similarities between the petitioned-for employees and other sales employees, it cannot be said that there is such complete overlap between the two groups … that inclusion of sales employees from throughout the store is required." *Id.* at 10.

The Regional Director's analysis and conclusion highlight the inherent problems with applying *Specialty Healthcare* to the retail industry. First, the requirement that there must be "complete overlap" to warrant "inclusion of sales employees from throughout the store" is directly contrary to the Board's well-established presumption in favor of a storewide bargaining unit for retail stores. The Board itself recognized this risk of conflict in *Specialty Healthcare*, and expressly noted that "[o]ur holding today is not intended to disturb any rules applicable in specific industries." *Id.* at 13 n.29 (emphasis added). Second, the similarities that the Regional

Director found insufficient to create an "overwhelming community of interest" would be more than enough to defeat a petitioner's challenge to the presumptive appropriateness of the storewide bargaining unit. The Board has expressly found that employees who share similar core job duties, wage structures and benefits, and work rules and conditions, as their fellow retail employees cannot be separated into an individual bargaining unit. *U.S. Shoe Retail, Inc.*, 199 NLRB 631, 631 (1972); *I. Magnin & Company*, 119 NLRB 642, 643 (1957).

Instead, cases applying the storewide presumption have relied upon these very types of common interests to conclude that a whole-store unit is the appropriate bargaining unit in the retail setting. First, the Regional Director found that the cosmetic and fragrance employees "are subject to the same work rules and policies" as other employees. *Macy's*, Case No. 01-RC-091163, at 9. As stated above, the Board has repeatedly found that common work rules and conditions weigh in favor of a storewide bargaining unit. *U.S. Shoe*, 199 NLRB at 631; *I. Magnin*, 119 NLRB at 643. The same is true where the proposed bargaining unit employees enjoy substantially the same benefits as their co-workers elsewhere in the store. *Id.*; *see also Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61, 63 (1971) (applying whole-store presumption where employees "enjoy substantially the same benefits"). Once again, the Regional Director found that all employees at the Saugus store share the same benefits. *Macy's*, Case No. 01-RC-091163, at 7.

The Regional Director also observed that the cosmetic and fragrance employees "attend the same daily store meetings" as other employees. The Board has found the storewide unit to be appropriate where there are "regularly scheduled meetings for all salesmen and a monthly meeting for all employees." *Sears, Roebuck & Co.*, 191 NLRB 398, 405 (1971). Moreover, where a retail store's employees all share the same facilities, the Board has concluded that the

whole-store bargaining unit is appropriate. *U.S. Shoe*, 199 NLRB at 631. The Regional Director similarly found that all employees at the Saugus store "use the same store entrance, break room, and time clock." *Macy's*, Case No. 01-RC-091163, at 7. Thus, all of the similarities observed by the Regional Director in this case overwhelmingly support the conclusion that a storewide bargaining unit continues to be the appropriate bargaining unit in the retail industry. In his decision, however, the Regional Director ignored both these overwhelming facts and the well-established line of Board cases supporting the storewide presumption.

C. Under the Board's Own Precedent for Applying Bargaining Unit Standards, the *Specialty Healthcare* Decision Must Be Limited to Its Own Facts and Cannot Be Applied to the Retail Industry.

Even absent *Specialty Healthcare*'s express limitation on its own applicability, the Board's case precedent establishes that the standard should not be applied to the retail industry. In bargaining unit cases where a standard or test has been established for determining the appropriate unit, the Board has held that such a standard should not be applied outside of the specific industry at issue in the case. *See A. Russo & Sons, Inc.*, 329 NLRB 402 (1999); *Esco Corp.*, 298 NLRB 837 (1990). In particular, the Board has historically recognized that the retail industry is different.

For example, in *A. Harris & Co.*, 116 NLRB 1628 (1956), the Board established a standard for determining whether warehouse employees in a retail department store could be certified as a bargaining unit separate from the other employees in the store. While recognizing the presumption in favor of a wall-to-wall bargaining unit in retail stores, the Board set forth a three-part test for creating a separate unit of warehouse employees. *A. Harris*, 116 NLRB at 1631. The Board found that a warehouse employee unit is appropriate if: (1) the employer's warehousing operations are geographically separated from the retail store operations; (2) the warehousing employees have separate supervision; and (3) there is no "substantial integration"

among the warehouse employees and the other store employees. *Id.* at 1631–32. If a warehouse unit satisfies all three criteria, it is an appropriate bargaining unit. *Id.*

In subsequent decisions, however, the Board has expressly held that the type of standard set forth in *A. Harris* does not apply outside of the retail industry. For example, in *Esco Corp.*, the Board considered whether to apply the *A. Harris* test in a non-retail industry. 298 NLRB at 840. In concluding that *A. Harris* does not apply, the Board emphasized that "the facts in *A. Harris* were limited to a retail operation and nothing in the decision indicates that it was intended to apply to nonretail warehouses. *Id.* (emphasis added). The Board also found it significant that prior Board decisions had recognized that *A. Harris* "set forth restrictive criteria governing the establishment of warehouse units in retail department stores only." *Id.* at 841 (quoting *Lily Tulip Cup Corp.*, 124 NLRB 982, 984 n.2 (1959)) (emphasis in original). Finally, the Board held that applying the *A. Harris* criteria to the non-retail setting "would be inconsistent with the Board's usual approach to unit determinations in other industries." *Id.* For all of these reasons, the Board in *Esco Corp.* concluded that the *A. Harris* test does not apply outside of the retail industry.

D. Applying *Specialty Healthcare* to the Retail Industry Will Result In a Highly Factionalized Workplace That Will Render Quality Customer Service Impossible, and Will Cause Substantial Harm to the Retail Industry.

The potential fall-out from the standard announced in *Specialty Healthcare* will be particularly devastating to the retail industry. The recognized danger of permitting the designation of small, discrete bargaining units "that excludes employees with common skills, attitudes, and economic interests … may generate destructive factionalization and in-fighting among employees." *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980) (emphasis added). This is particularly true in the retail industry, where department store employees constantly work in close proximity to one another and interact with the same group of customers on a daily basis.

In today's dynamic and technology-driven retail industry, the benchmark of a successful retail establishment is the quality of customer service that it provides. For retail department stores in particular, where the same brands of products are generally sold in different shopping environments, the level of customer service is the critical characteristic that distinguishes a positive shopping experience from a negative experience. The paramount importance of customer service is consistently recognized throughout the retail industry. For example, a recent industry survey noted as follows:

> Customers complain that associates are not very knowledgeable about the products they sell and, even worse, they don't really seem to care about helping customers. The store associates that the customer interacts with are obviously a significant part of the shopping experience for the customer. A bad experience due to associate neglect or indifference can easily chase a customer down the street to the competition or another retailer's website.

LakeWest Group, *10th Annual POS Benchmarking Survey: Successful Retailers Get Creative*, at 3 (2009) (emphasis added). As a result, an individual retail store's employees "play a large role in the retailer's differentiating equation," and successful retailers must recognize that "most of their customers value customer service as an important part of their shopping experience." *Id.*

This is especially true for retail department stores, where a myriad of different product departments are consolidated within a single retail store location. In this type of shopping environment, retailers strive to enable employees to assist customers seeking to purchase goods located anywhere in the store. This assistance can be as basic as a fragrance department employee giving a customer directions to the women's shoe department. However, this employee flexibility also enables customers to receive a personal shopping experience, where the employee assists them customer in selecting a combination of complementing products from a number of different departments. For example, this personal experience can begin with a sales associate from the men's suit department helping a customer select a desired style of suit. In

response to the customer's inquiry about dress shirts to accompany the suit, the sales associate can either direct the customer to the men's shirt department or personally assist the customer in selecting a shirt. Finally, if the customer desires to purchase cuff-links to accompany the suit and shirt, the sales associate may lead the customer to the appropriate department and assist them in their purchase. While this type of one-on-one customer interaction does not occur during every shopping experience, it occurs regularly and highlights the importance of enabling retail employees to venture outside the confines of their own specific department. Whether it involves a personal shopping experience, or is limited to merely providing directions, the quality of customer service is critical to a positive shopping experience and is a benchmark for success in the retail industry.

Applying the *Specialty Healthcare* burden shifting analysis to the retail industry threatens to eliminate this customer service flexibility in the retail industry. If a bargaining unit is limited to the employees of a specific retail department, such as the unit approved by the Regional Director in this case, flexibility will suffer to the detriment of customers, employers, and employees. Under a typical collective bargaining agreement, unions insist that members of the bargaining unit have exclusive rights to perform their area of work. In addition, unions typically establish strict work rules that dictate what tasks bargaining-unit members can and cannot perform in the workplace. These rules also directly affect the type of work that employees outside of the bargaining unit can perform. These types of rules will prevent a retail employer from cross-training employees in different product categories, and more importantly these rules will frustrate the very basic concepts of customer service.

Furthermore, the existence of multiple individual bargaining units within a single retail store could lead to rivalry and tension amongst store employees, not to mention disputes between

competing unions. These rivalries and disputes are precisely the dangers that accompany small, isolated bargaining units, where they "may generate destructive factionalization and in-fighting among employees." *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980). For example, suppose separate unions represent the employees of the fragrance, shoe and men's clothing departments of a retail store. If the individual collective bargaining agreements for each department provide for different salaries and benefits, the fragrance and shoe department employees could become dissatisfied after comparing their wages and benefits to those of the men's suit department. These dissatisfied workers could severely cripple the overall operation of the retail store by engaging in work stoppages, and will create a situation where a union representing only a handful of employees can threaten the economic well-being of the remaining store employees.

In summary, the basic realities of the retail industry demonstrate the destructive impact that will result if *Specialty Healthcare* is applied to retail stores. The bargaining-unit proliferation and balkanization that will result from *Specialty Healthcare* will do nothing more than obliterate the standards of customer service that are the backbone of the retail industry. All that will be left is a highly fractured workplace wrought with destructive in-fighting among employees. The inevitable result is that all parties will suffer, from customers to employees to the retail industry as a whole. For these reasons, the Board should not apply *Specialty Healthcare* to the retail industry.

CONCLUSION

For the foregoing reasons, the Board should overrule its decision in *Specialty Healthcare*. In the alternative, the Board should at a minimum conclude that *Specialty Healthcare* does not apply to the retail industry, and instead reaffirm the traditional bargaining-unit standards and presumptions for retail stores that existed before *Specialty Healthcare*.

Dated: December 28, 2012.

Respectfully submitted,

THOMPSON HINE LLP

By: /s/Eric S. Clark
Eric S. Clark
312 Walnut Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 352-6555
Fax: (513) 241-4771
E-mail:Eric.Clark@ThompsonHine.com

Matthew R. Kissling
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 566-5586
Fax: (216) 566-5800
E-mail:
Matthew.Kissling@ThompsonHine.com

Counsel for Amicus Curiae
National Retail Federation

CERTIFICATE OF SERVICE

The undersigned certifies that on this 28th day of December, 2012, a copy of the foregoing Brief of *Amicus Curiae* National Retail Federation was filed using the National Labor Relations Board's E-Filing Program. Copies of the foregoing brief were also served by e-mail upon the following counsel:

William Joy
MORGAN BROWN & JOY, LLP
200 State Street, 11th Floor
Boston, MA 02109-2605
WJoy@morganbrown.com

Counsel for Macy's, Inc.

Warren Pyle
PYLE ROME EHRENBERG P.C.
18 Tremont Street, Suite 500
Boston, MA 02108-2301
wpyle@pylerome.com

Counsel for Local 1445, United Food and Commercial Workers Union

A courtesy copy of the Brief of *Amicus Curiae* was also served by ordinary U.S. Mail upon:

Jonathan B. Kreisberg
Regional Director
National Labor Relations Board
Region 1
10 Causeway Street, 6th Floor
Boston, MA 02222-1072

/s/Eric S. Clark
Eric S. Clark