No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

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

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BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 28.2.1 and 29.2, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also discloses the following:

Retail Litigation Center, Inc. is not a publicly held corporation or other publicly held entity; Retail Litigation Center, Inc. has no parent corporation; and no publicly held company owns 10% or more stock in Retail Litigation Center, Inc.

National Retail Federation is not a publicly held corporation or other publicly held entity; National Retail Federation has no parent corporation; and no publicly held company owns 10% or more stock in National Retail Federation.

Respectfully submitted,

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RULE 29(c)(5) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* disclose the following:

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

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INTRODUCTION

For decades, the National Labor Relations Board has recognized that the unique nature of the retail industry strongly favors a whole-store presumption for bargaining units. This presumption reflects the distinct characteristics of retail stores, where all employees share a common goal of providing integrated customer service throughout the store, regardless of the department to which an employee is principally assigned. The presumption also tracks the actual experience of retail employees, who commonly share managers, benefits, employee handbooks, and even breakrooms with all other employees at a specific store. Here, however, the panel erroneously accepted the Board's unreasoned decision to dispense with this well-settled presumption.

As Macy's explains in its petition—and *amici* heartily second—the panel's decision conflicts with over fifty years of Board precedent, the law of this Circuit, and the National Labor Relations Act ("NLRA"). The decision will also have significant and far-reaching implications for the entire retail industry (and other industries). The Board's approach to approving sub-store units will encourage unions to propose gerrymandered units that stack the deck in their favor. This outcome harms not only employers, who will face the significant administrative costs of tailoring policies and benefits to multiple units of employees within the same store, but also employees, who in many cases will be denied an opportunity to exercise their right to determine whether or not they want union presence in their workplace. These "micro-units" will also limit all employees' opportunities for skill-development and advancement by imposing artificial restrictions on their

ability to take on duties inside or outside of a contrived bargaining unit's scope. And these units will decrease customer satisfaction as employees become less equipped to provide a seamless shopping experience across departments. Finally, as formerly uniform pay and policies disintegrate into a more Balkanized system, the Board's new approach will pit employees against each other, weakening employee morale and bargaining power overall. The Board's prior, well-reasoned approach comports with the law and avoids all of these undesirable consequences; *en banc* review is therefore necessary to force the Board to course-correct and comply with the law.

STATEMENT OF INTEREST

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

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's

largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's *This is Retail* campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

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

ARGUMENT

I. The Panel's Decision Eviscerates The Vital And Traditional "Whole-Store" Presumption For The Retail Industry.

For over fifty years, the Board has recognized a consistent presumption in favor of whole-store bargaining units in the retail industry. *See*, *e.g.*, *Bullock's, Inc.*, 119 NLRB 642, 643 (1957); *Haag Drug Co.*, 169 NLRB 877, 877 (1968); *Charrette Drafting Supplies Corp.*, 275 NLRB 1294, 1297 (1985). In *Haag Drug*, for example, the Board explained that "a single store in a retail chain . . . is

presumptively an appropriate unit for bargaining" because employees at a given store "form a homogenous, identifiable, and distinct group," "generally perform related functions under immediate supervision apart from employees at other locations," and have "problems and grievances [that] are peculiarly their own." 169 NLRB at 877-78.

Even the Board's decision in *Specialty Healthcare*, which created the newfound "overwhelming community of interest" test, expressly acknowledged that the Board had "developed various presumptions and special industry and occupational rules in the course of adjudication," and announced that its decision was "not intended to disturb any rules applicable only in specific industries." 357 NLRB 934, 936 n.29 (2011). In keeping with that ruling, the Board shortly thereafter declined to review a decision in which a Regional Director rejected a cherry-picked bargaining unit in a retail store, on the basis that all employees "work at the same situs with common supervision, require no particular background or experience, come into contact on a daily basis, and overlap in many duties, despite assignment to a particular department." *Home Depot U.S.A., Inc.*, Case 20-RC 067144, at 14 (NLRB Nov. 18, 2011). The Board's unreasoned and sudden departure from its prior position in this case and others is arbitrary and capricious and should receive no deference. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

To be sure, the traditional whole-store presumption could always be overridden in appropriate cases, when a petitioner showed that employees within a proposed unit "constitute a functionally distinct group with special interests

sufficient to warrant their separate representation." *Levitz Furniture Co.*, 192 NLRB 61, 63 (1971). At bottom, however, this fact-specific analysis simply confirms the logic of the Board's longstanding presumption: The very nature of a single retail store reflects a community of interests that, *in most cases*, represents the most natural bargaining unit.

At retail stores, every employee shares a single, overriding task: To provide a seamless and hassle-free experience to customers interested in purchasing the employer's goods. Accomplishing that purpose requires substantial integration of employees at any given store. It is common for *amici*'s members to hire employees into a specific sales department, for instance, yet ask those employees to help customers look for any item, in any department. Retail employees at a store thus must be willing and able to answer customers' questions and respond to requests regardless of whether they relate to an employee's assigned department. Indeed, even non-sales employees are frequently required to assist customers in this fashion, such as when a stockroom employee stops refilling the dairy case to show a customer where to find the hot sauce. To this end, members frequently cross-train employees across a variety of sales departments. Members' employees also regularly pick up shifts in other departments, switch departments during a shift as necessary to meet customer needs, and transfer permanently in and out of various departments.

This integration in job functions, training, and expectations—regardless of any formal distinctions between sales departments—is often reflected in common management and supervision more generally. Members typically provide all of

their full-time and part-time non-exempt employees in a given store with comparable compensation scale, health benefits, and fringe benefits. All employees at a single store also generally share a single shift-scheduling process, timekeeping systems, evaluation and disciplinary procedures, and employment policies. And because a single store is typically a physically open environment, employees share a common workspace and necessarily have frequent exchanges with other employees. They usually share break rooms, lockers, entrances, and time clocks—regardless of department. All of these factors confirm the rationale for the Board's longstanding position that a unit smaller than a single store is ordinarily inappropriate because it rends apart a group of employees that otherwise would function together.

Indeed, the setup of the specific store here further underscores this reasoning. The cosmetics and fragrance employees that make up the petitioned-for unit at the Saugus store work alongside all other sales employees. ROA.15-16, 85-86, 442. Macy's employees—like any other retail employees—are required to assist where needed and to help a customer with any product or question. ROA.35, 50-51, 104. And sales employees in the store as a whole regularly transfer between departments: Almost a quarter of the employees in cosmetics and fragrance (nine of 41 employees) transferred from other departments in the two years since the Regional Director's approval of the unit. ROA.443. These employees share common management with all other employees at the store, and all sales employees receive the same benefits, are evaluated using the same criteria, are scheduled for work using the same computerized system, share an employee

handbook, attend the same daily meetings, participate in the whole-store semi-annual inventory, and use the same entrance, break room, and time clock. ROA.439, 443, 466. In other words, Macy's cosmetics and fragrance employees function as a single unit with the rest of the store's sales team. It thus makes no sense to artificially cut these employees off from the rest of the store in violation of longstanding Board precedent.

II. The Panel's Decision Warrants *En Banc* Review Because The Board's New Rule Will Cause Significant Harm To Retail Employers And Employees.

Here, the panel approved the Board's decision to ignore the factual realities of the retail sphere and cast aside its longstanding presumption favoring whole-store bargaining units. As Macy's explains, this decision cannot be squared with this Court's precedent—nor, for that matter, with the NLRA. Pet. 10-15. And as the facts of this case demonstrate, the decision to abandon a preference for bargaining units comprised of an entire store's employees, if allowed to stand, would have far-reaching implications for the retail industry. Although the panel made much of those differences that do exist between cosmetics and fragrance employees and other Macy's sales employees, it (like the Board) did not explain why those differences are legally significant. Pet. 4-6. Moreover, the panel allowed the Board to minimize the much greater *similarities* between all sales employees at the store, and to all-but ignore the differences *within* the cherry-picked unit as well.[1]

[1] Some cosmetics and fragrance employees, for instance, are located on the first

The result of this new rule is an open invitation to gerrymander the workplace. A union that believes it has the votes to organize some employees, but not all, may slice a retail sales force into whatever unit it believes will support the union—with little regard for whether those employees constitute a practical bargaining unit. That is exactly what happened here: The Regional Director first (correctly) approved a unit made up of the entire store, but when the employees rejected unionization, the Board redrew the unit to consist of cosmetics and fragrance employees only. On this logic, the Board could just as easily have approved a unit of *women's* cosmetics and fragrance employees and women's shoes employees (as those departments are adjacent to each other on one floor of the store), and another unit of *men's* cosmetics and fragrance employees and men's clothing employees (who work next to each other on another floor). The union could have crafted common-interest justifications very similar to those it advanced here for either or both units, and Macy's—as well as employees swept up in those groups who oppose unionization—would be hard pressed to object that other employees share a sufficiently "overwhelming community of interests" to defeat the union's contrived "units."

Moving beyond the irrationality of these new subunits, cobbling together units in the retail workspace in this fashion will also, like Frankenstein's monster,

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floor of the store, and others on the second; some, but not all, are assigned to particular product lines; and some, but not all, wear uniforms associated with those product lines. ROA.85-86, 440-42, 450.

cause significant, unintended consequences. Retail employers like *amici* members have already started to feel the effects of being hamstrung in their efforts to provide seamless customer service and expanded opportunities for their employees. For example, while retail employers generally train employees to assist customers looking to purchase goods located anywhere in their stores, unions typically insist that members of a unit retain exclusive rights to perform their work duties and establish rigid work rules to make clear what tasks bargaining-unit members can and cannot perform. These rules would prevent employers from cross-training employees, and the loss in flexibility would hurt customers, employers, and employees alike. An employee in cosmetics and fragrance, for example, may not be able to walk a customer to women's accessories and assist her with a purchase to complete an outfit for the same event—much less cover for an absent employee in the shoe department. Nor could an employee in household appliances be easily assigned on a temporary basis to electronics to cover a staffing need or simply to earn additional wages. Limited to their own departments or sets of tasks, employees would also enjoy fewer skill-development opportunities and scheduled hours as employees lose the ability to rotate into other departments and face increased hurdles to promotions and transfers.

Arbitrary units that do not track the organization of the employer's business also inherently exclude employees who are similarly situated to those within the unit. Here, excluded sales employees have significant shared interests with members of the new unit, yet nonetheless will have no opportunity to vote on whether those interests should be made subject to collective bargaining. Courts

have not hesitated to strike down laws that make such arbitrary distinctions about who can and cannot exercise the right to vote. *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). And if the union succeeds in organizing the cosmetics and fragrance employees, the rest of the sales force will be excluded from negotiations over matters that affect all employees equally (such as benefits and pay), thus encouraging the union to sacrifice the interests of excluded employees in favor of those within the unit. Any resulting disparity in benefits and pay between employees performing materially identical jobs in adjacent work spaces could drastically undermine morale.

The tension among workers that would result from the Balkanization of sales teams may not only cripple an employer's business, but will also significantly weaken employees' overall bargaining power. Some units within a single store would possess more economic leverage than others simply by virtue of their individual function, and those units would be able to negotiate more favorable terms and conditions of employment. Units without that strong bargaining power, however, could see their benefits sacrificed to make up the difference. Here, for instance, cosmetics and fragrance employees could shut down the *entire* store by going on strike, which would leave those employees who were left out of the unit and had no say in the strike vote temporarily without a job. Moreover, divisions between employees would leave a sales force, in the aggregate, with less bargaining power, as employees would bargain separately over even *shared* interests, rather than presenting a unified front. Retailers, including some of *amici*'s members, have already begun to feel these impacts of the Board's

abandonment of its longstanding whole-store presumption as they face actual or threatened petitions from units made up of only a subset of employees.[2]

Congress did not intend this result when it directed the Board to determine "*the* . . . appropriate" unit for collective bargaining—not "*a*" unit with some indicia of common interests. 29 U.S.C. § 159 (emphasis added). In fact, the legislative history reveals Congress's concern to avoid precisely the situation threatened here, where, "by breaking off into small groups," employees could "make it impossible for the employer to run his plant." *Hearing on S. 1958 Before the S. Comm. on Educ. & Labor*, 74th Cong. 82 (1935) (testimony of Francis Biddle, Chairman, NLRB). A unit that threatens conflict between employees, decimates morale, hinders customer service, slashes productivity, and multiplies administrative difficulties is a far cry from the Act's purpose of advancing the "friendly adjustment of industrial disputes" and the "free flow of commerce." 29 U.S.C. § 151. *En banc* review is necessary to correct these far-reaching effects of the Board's atextual and prejudicial decision.

CONCLUSION

This Court should grant Macy's petition for rehearing *en banc*.

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[2] Indeed, *Specialty Healthcare*'s impact is not limited to the retail industry alone, but has spawned micro-units across other industries as well. *See*, *e.g.*, *DTG Ops., Inc.*, 357 NLRB No. 175 (Dec. 30, 2011) (approving micro-unit at rental car company); *Guide Dogs for the Blind, Inc.*, Case 20-RC-018286 (NLRB July 13, 2013) (approving micro-unit at guide dog breeding company).

Dated: August 10, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I caused the foregoing Brief For *Amici Curiae* Retail Litigation Center, Inc. and National Retail Federation In Support of Petition For Rehearing *En Banc* to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I further certify that on August 10, 2016, an electronic copy of the foregoing brief was served electronically by the Notice of Docket Activity on counsel for all parties.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 2,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2.

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

Dated: August 10, 2016

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