Case No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED,
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner

Petition for Review from NLRB Order dated January 7, 2015
NLRB Case No. 01-CA-137863

AMICI CURIAE BRIEF BY THE COALITION FOR A DEMOCRATIC WORKPLACE, U.S. CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER CROSS-RESPONDENT MACY'S, INC.'S PETITION FOR REHEARING EN BANC

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STATEMENT OF IDENTITY AND INTEREST OF THE *AMICI*[1]

As set forth in detail in their contemporaneous motion, the Coalition for a Democratic Workplace ("CDW"), the Chamber of Commerce of the United States of America ("the Chamber"), the National Federation of Independent Business ("NFIB"), and the National Restaurant Association ("Restaurant Association") are each nation-wide associations consisting, collectively, of more than a million employers, businesses, and state, local, and industry associations as members. Their members employ tens of millions of individuals and they do business in every state and in virtually every business sector of the economy. All are subject to the National Labor Relations Act ("NLRA") and are directly affected by the manner in which the National Labor Relations Board ("NLRB" or "Board") makes bargaining-unit determinations. Thus, their members have a significant interest in ensuring that the standards articulated by the NLRB in its bargaining-unit determinations are consistent with the language and purposes of the NLRA and also are sound, practical, and responsive to the realities of today's workplace. CDW, the Chamber, NFIB and the Restaurant Association all previously appeared as *amici* in this matter before the panel in its review of the NLRB's decision. All

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned state that no party's counsel authored this brief in whole or in part. No party or its counsel or other person (other than the *amici*, their members, and counsel) contributed money intended to fund the preparation or submission of this brief.

regularly appear as *amici* at the administrative and federal appellate level in conjunction with important decisions under the NLRA.

INTRODUCTION

The NLRB's decision in *Specialty Healthcare*[2] overturned more than a half century of precedent regarding how the Board configures appropriate collective-bargaining units. Under *Specialty,* any given work force is now far more likely to be subdivided into numerous smaller separate bargaining units. The present case is emblematic of this troublesome balkanization of the collective-bargaining process. The NLRB approved a bargaining unit of forty-one cosmetics and fragrance department employees that were carved out of a total complement of approximately 150 employees in a single Macy's department store in Saugus, Massachusetts. *Macy's Inc.* 361 NLRB No. 4 (2014), at 1. Applying the *Specialty* analysis, there are at least *eleven additional units* in this single 150-employee store, any one of which, or all of which, the Board would unquestionably find an appropriate bargaining unit.

In the wake of *Specialty,* the result here is by no means unusual. Rather, it is the "new normal." Most recently, for example, a Board majority in *DPI Secuprint, Inc.*, 362 NLRB No. 172 (2015), at 1, applying the principles of *Specialty*, found appropriate a unit of thirteen employees, carved out of a total employee

[2] 357 NLRB No. 83 (2011).

complement of twenty, in a highly integrated printing business. Just like the potential division into eleven additional units in this case, the twenty-person workforce in *DPI* was subject to being subdivided into at least *four separate bargaining units. Id.*[3]

Since, post *Specialty*, a petitioning union, with very rare exception,[4] can proceed undeterred to a union-representation election in its hand-picked truncated bargaining unit, the likelihood of a vote in favor of unionization is now exponentially increased. However, the likelihood of electoral success is not the yardstick by which the "appropriateness" of a requested unit is measured under the NLRA; the efficacy of a unit determination turns on whether or not the configuration is "appropriate" *for the purposes of collective bargaining.* In its attempts to justify the *Specialty* rubric, the current NLRB majority has repeatedly

[3] *DPI* is but the latest in a chain of post-*Specialty* decisions to the same effect. *See Amici*'s Brief in Support of Macy's Petition for Review, at 7-10, discussing *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151 (2013) (unit of thirty-three employees carved from a workforce of approximately seventy-five engaged in dog breeding and training); *DTG Operations, Inc.* 357 NLRB No. 175 (2011) (unit of thirty-one rental agents in integrated 109-employee rental car concession at Denver Airport appropriate); *Northrop Grumman Shipbuilding Co.*, 357 NLRB No. 163 (2015), (subset of 223 technical employees in 2400-employee technical group appropriate); *Fraser Engineering*, 359 NLRB No. 80 (2013) (twenty-six employees of a clear "single employer" appropriate despite exclusion of thirteen additional employees performing identical work).

[4] The only instances, post-*Specialty*, in which the Board has rejected a union's requested unit are *Odwalla, Inc.*, 357 NLRB No. 132 (2011), and *Neiman Marcus Group, Inc.*, 361 NLRB No. 11 (2014). In both instances the NLRB rejected the units under the first prong of *Specialty* because they did not track departmental or employee classification lines, and thus did not constitute a "readily identifiable group." The Board has never rejected a unit request under the second "overwhelming community of interest" prong of *Specialty.* It thus appears clear that as long as a petitioner confines itself to a classification, or departmental unit or similar grouping, the Board will find its request appropriate regardless of how many potential bargaining units such an analysis would yield in any given workplace.

failed to explain why the balkanized workforce—and the multiplicity of bargaining units which it has spawned—is beneficial to the collective-bargaining process. Indeed, the *Specialty* rubric is antithetical to that process because it contravenes a core purpose of the NLRA and impedes stable and productive bargaining relationships. The *amici* thus respectfully urge *en banc* review by the Court.

ARGUMENT

I. The panel decision creates serious practical impediments to productive bargaining and efficient operation.

The collective-bargaining process—even under the best circumstances—is neither simple nor quick.[5] *Specialty*, which further complicates the process by adding time-consuming inefficiencies, obstructs the NLRA's central aspirational goal of productive collective bargaining. Yet this is the exact and predictable result of artificially multiplying the number of bargaining units in a single workplace:

> The proliferation of … bargaining units can only create instability from internal jurisdictional disputes, from the costs and burdens of multiunit bargaining and the administration of multiple separate contracts (including, for example, separate benefit plans), from conflicting, irreconcilable demands from separate units, and from the potential that one unit will disrupt production with unique demands that burden all employees.

DPI, 362 NLRB No. 172, at 12 (Board Member Johnson, dissenting).

Slicing and dicing the workforce in Macy's Saugus store into some twelve

[5] *See First Contract Statistics: From Recognition to Ratification*, a Bureau of National Affairs Survey, Bloomberg BNA (2014) (citing survey data indicating it takes an average of 379 days from the date of a Board representation election to reach an agreed-upon initial collective-bargaining agreement).

separate bargaining units creates manifold obstacles to productive collective bargaining. First, the time, energy and resources devoted to contract negotiation and administration among twelve bargaining units poses a significant impediment. Basic matters like overtime, vacation accrual, sick time or other paid time off, seniority, and leave would have to be calculated under twelve different negotiated sets of rules—not to mention that twelve different group health and benefit plans could govern the employees at the Saugus store alone. Second, as the collective-bargaining agreements would likely all have different expiration dates, the store would face an unending negotiation cycle and an ever-present risk of a single unit engaging in a work stoppage that would disrupt the entire operation. Third, continuous negotiations with different unions representing employees that all work together would result in whipsawing and leap-frogging in which unions seek to outdo one another in successive rounds of negotiations. Because no employer can continually acquiesce to such demand escalation, the *Specialty* framework virtually guarantees the breakdown of productive collective bargaining. This is hardly the type of "stability" or "industrial peace" that the NLRA was enacted to achieve. Finally, a proliferation of units would inevitably lead to discrete employee work-rule and benefit silos designed to minimize the exposure of their members to layoff, and maximize their opportunity for advancement within the department. Although restrictive seniority provisions, for example, might achieve these ends

within each silo, they also decrease the opportunity for employee movement between seniority silos. This not only limits lateral and upward mobility for employees, it greatly diminishes the workforce flexibility needed for employers to address changing staffing needs and business priorities.

These, and a host of other practical collective-bargaining problems, are the inevitable consequence of *Specialty*, and they directly impact millions of people employed by the *amici*. The practical results here and elsewhere are so disruptive, costly, burdensome, and contrary to the NLRA that they merit *en banc* review.

II. The panel decision is antithetical to the core purposes of the NLRA.

"The basic purpose of the National Labor Relations Act is to preserve industrial peace." *N.L.R.B. v. Fin. Inst. Employees of Am., Local 1182*, 475 U.S. 192, 208 (1986). The NLRA highlights this purpose by establishing a framework specifically designed to reduce "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by impairing the efficiency … of the instrumentalities of commerce." 29 U.S.C. §151. The NLRA embodies "the policy of the United States" to "mitigate and eliminate these obstructions … by encouraging the practice and procedure of collective bargaining." *Id.*

The panel decision affirming the Board's application of *Specialty* creates bargaining inefficiencies that obstruct commerce and thus contradict the purpose

and policy of the NLRA. "The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace." *N.L.R.B. v. Draper Corp*., 145 F.2d 199, 202-03 (4th Cir. 1944). Permitting small subdivisions of employees to unilaterally classify themselves as independent bargaining units merely because they share some common interests unnecessarily carves up an employer's workforce and eliminates the efficiencies and benefits of collective bargaining. The panel decision affirms an insuperably high bar for employers to expand petitioner-created mini bargaining units—even when excluded employees share common interests with that bargaining unit. The result will be schisms and several different overlapping collective-bargaining agreements at a single location, which promote workplace strife and unrest, not stability and efficient commerce.

The NLRA's goal is "the promotion of industrial peace through faithful performance of collective bargaining agreements." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 511 (5th Cir. 1982). But that goal can only be achieved through rational and productive collective bargaining between employers and an appropriate representative unit of employees. It was "Congress' determination that to improve the economic well-being of workers, and thus to promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their

co-workers." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 735 (1981). This framework eliminates obstructions to commerce by encouraging broad collective bargaining, which ensures "less frequent and less costly negotiations." *N.L.R.B. v. L.B. Priester & Son, Inc.*, 669 F.2d 355, 360 (5th Cir. 1982). The panel's affirmance of the Board's decision turns that policy on its head by requiring piecemeal bargaining between employers and multiple employee bargaining units from the same workplace—even though individuals from the various bargaining units work side by side and share common interests and duties.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Rehearing En Banc, and deny enforcement of the Board's decision.

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Respectfully submitted,

/s/ Gavin S. Martinson

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CERTIFICATE OF SERVICE

I certify that on July 25, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which caused a copy to be delivered to counsel of record.

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