

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

**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF BY THE
COALITION FOR A DEMOCRATIC WORKPLACE, U.S. CHAMBER OF
COMMERCE, INTERNATIONAL FOODSERVICE DISTRIBUTORS
ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS,
NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS,
NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND NATIONAL
RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER CROSS-
RESPONDENT MACY’S, INC.**

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COUNSEL FOR *AMICI CURIAE*

To the Honorable Court:

Pursuant to Federal Rule of Appellate Procedure 29(b) and Fifth Circuit Rule 29.1, the *Amici Curiae* listed below respectfully request leave to file the attached brief in support of the Petitioner Cross-Respondent Macy's, Inc. and would respectfully show the Court the following:

INTEREST OF *AMICI CURIAE*

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 National Labor Relations Board (“Board”) to determine appropriate bargaining units under the National Labor Relations Act (“Act”).

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 *amici* brief because the standard for bargaining-unit determinations applied by the Board in this case, which is the standard established in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), is problematic in all industries covered by the Act. 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., *Nestle Dreyer's Ice Cream Co. v. NLRB*, Nos. 12-1684 & 12-1783 (4th Cir. July 10, 2012) (same).

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 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 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.

The National Restaurant Association (“NRA”) is the leading business association for the restaurant and food service industry. The industry is comprised of one million restaurant and food service outlets employing 14 million people. The food service industry is the nation’s second largest private-sector employer, employing approximately 10 percent of the U.S. workforce.

RELEVANCE OF *AMICI CURIAE* BRIEF

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 the Board applied in this case, and 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 (2011).

As set forth more fully in their accompanying brief, the *Amici* respectfully submit that the Board wrongly decided *Specialty Healthcare* and the decision

should be overruled. Among other things, the Board's decision in *Specialty Healthcare* violates Section 9(b) of the Act in several respects and constitutes a prejudicial abuse of discretion because it unlawfully promulgates a generally applicable standard that should have been accomplished (if at all) through rulemaking. Furthermore, the *Specialty Healthcare* standard will overturn decades of Board precedent as it is extended to the retail industry. Given these seminal legal issues, other courts have accepted *amicus curiae* briefs on the *Specialty Healthcare* standard in similar cases. See *Kindred Nursing Ctrs. East, LLC v. NLRB*, Case Nos. 12-1027, 12-1174 (6th Cir.); *Nestle Dreyer's Ice Cream Co. v. NLRB*, Case Nos. 14-2222, 14-2339 (4th Cir.).

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that the Court grant them leave to file the attached brief in support of Petitioner Cross-Respondent Macy's, Inc. The *Amici Curiae* further request that the Court deem the brief to be properly filed without the need for any further action on the part of the *Amici Curiae*.

Respectfully submitted,

/s/ Todd C. Duffield
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CERTIFICATE OF SERVICE

I certify that on April 27, 2015, 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.

/s/ Todd C. Duffield

Todd C. Duffield

Attorney of Record for *Amici Curiae*