Statement of Eugene Scalia

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for Retail Industry Leaders Association

before the

House Appropriations Subcommittee

on Labor, Health and Human Services,

Education, and Related Agencies

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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on behalf of the Retail Industry Leaders Association ("RILA") at this hearing on "Regulatory Approaches to Foster Economic Growth." RILA shares the Subcommittee's commitment to fostering sound regulatory approaches that free employers to build their businesses, develop and implement new ideas, and create jobs and grow the economy. There is, of course, an important role for the federal government in regulating employment and other economic activities. However, as a former Solicitor for the U.S. Department of Labor and as an attorney in private practice with substantial experience advising clients on regulatory compliance and the labor and employment laws, I have witnessed first-hand the ways in which federal regulatory overreach can impose unnecessary costs and stifle economic growth.

RILA, a trade association composed of the world's largest and most innovative retail companies, has long been at the forefront in advocating a pro-growth regulatory agenda. RILA's members include more than 200 retailers, product manufacturers, and service suppliers, who together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA promotes consumer choice and economic freedom through public policy initiatives and by participating as a party or "friend of the court" in litigation that has a direct impact on its members. I am honored to have the opportunity to speak on RILA's behalf today.

I would like to focus my remarks on a legal development that poses a significant threat to the American retail industry—a development embodied in a series of decisions issued over the past two years by the National Labor Relations Board. In the lead case, *Specialty Healthcare & Rehabilitation Center of Mobile*,[1] the Board abandoned the traditional "community of interest" test that it previously used to determine whether two groups of employees were sufficiently distinct to permit one of them to seek union representation separately, as a distinct bargaining unit. In its place, the Board adopted a test whereby a proposed unit will be certified as long as it constitutes an identifiable group of employees, unless the employer demonstrates an "overwhelming" community of interest between excluded employees and employees within the unit. This new test has since been applied to permit individual departments or loosely-affiliated departments within large retail stores to form their own bargaining units, in direct conflict with a half-century of Board precedent that has consistently recognized a presumption in favor of a whole-store or "wall-to-wall" unit.

RILA supports legislative efforts—such as H.R. 3094, which passed the House last Congress—to overturn *Specialty Healthcare* and restore the traditional presumption in favor of the whole-store unit. Apart from being inconsistent with the text of the National Labor Relations Act and Board precedent, the Board's *Specialty Healthcare* decision threatens a proliferation of so-called "micro-unions" that comprise small and arbitrarily-drawn portions of an employer's workforce, with adverse effects for customers, employers, and employees. Recognition of micro-unions makes it more difficult for employees who oppose unionization efforts to have their voices heard, and risks a balkanization of the retail workforce, whereby employees working

[1] 357 NLRB No. 83 (2011).

side-by-side in similar positions could earn different wages and benefits and have widely divergent relationships with their employer—producing distrust and discord. It will also increase costs for employers, who may have to deal with multiple bargaining units in the same store. Finally, micro-unions will almost certainly adversely affect customer service at retail stores, as unionized employees may be limited by the terms of collective bargaining agreements from assisting customers outside of their specific departments.

In short, *Specialty Healthcare* risks making retail stores less friendly for consumers, more costly for employers, and less fair for employees. The decision is mistaken as a matter of law and policy, and should be overturned.

1. *Specialty Healthcare* Cannot Be Reconciled With The National Labor Relations Act

As an initial matter, the Board's *Specialty Healthcare* decision cannot be reconciled with the text of the National Labor Relations Act, and legislative intervention is warranted for that reason alone.

In section 9(b) of the Act, Congress provided that the Board (not a petitioning union) is to select "the unit appropriate for the purposes of collective bargaining."[2] *Specialty Healthcare*, however, grants unions broad discretion to organize any portion of the employer's workforce as they define it. An approach to selecting "the" appropriate unit for collective bargaining that approves virtually any configuration proposed by a union cannot be squared with the language of the statute.

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[2] 29 U.S.C. § 159(b).

Such a unit also cannot be squared with Congress's direction, in section 9(c)(5) of the Act, that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."[3] The U.S. Court of Appeals for the Fourth Circuit made this very point the last time the Board attempted to replace its longstanding approach to unit determination with an "overwhelming community of interest" standard.[4] The court explained that, "[b]y presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization," in violation of the Act.[5]

The Board is required to approve a unit that is "appropriate" in light of the employer's organization. In requiring selection of the "appropriate" unit, Congress intended to prevent artificial units of the sort that have been approved following *Specialty Healthcare*. Unless Congress or the courts act to overturn that decision, the Board will continue to approve units that lack operational significance and make sense only as a subset of employees likely to vote for unionization. That is not what Congress intended and, as I will explain, it conflicts both with the Board's prior case law and with sound public policy.

2. *Specialty Healthcare* Departs From Longstanding Precedent

Under its longstanding approach toward determining the proper bargaining unit, the Board considered it paramount that proposed units not unduly fragment the employer's workplace. The Board explained that defining the appropriate unit "necessarily" involves the

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[3] 29 U.S.C. § 159(c)(5).

[4] *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581-82 (4th Cir. 1995).

[5] *Id.* at 1581.

question "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."[6] And in the retail context, the Board consistently applied that test to invalidate units that would fragment a single store into multiple units. Thus, for instance, as early as 1957, the Board rejected a proposed unit limited to a department store's shoe salespeople, explaining that the Board "has long regarded a storewide unit of all selling and nonselling employees as a basically appropriate unit in the retail industry."[7] Other cases have likewise rejected units consisting of a small subset of employees at a retail location, including proposed units for back-office "operations" employees,[8] "warehouse" employees,[9] and even for truck drivers who transport merchandise from a retail store.[10] The Board explained that, in the retail industry, "employees in different departments assist[ ] each other and overlap[ ] in their job functions in order to serve the customers."[11] And, the Board found, "a high degree of compartmentalization" is incompatible with a "viable" retail operation, which instead requires "flexibility of job functions in support of a sole objective."[12]

The *Specialty Healthcare* decision upset these longstanding precedents by providing that, so long as the employees within a proposed unit share a minimal community of interest, the proposed unit will not be rejected unless the employees in the unit share an "*overwhelming*

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[6] *Newton-Wellesley Hospital*, 250 NLRB 409, 411 (1980).

[7] *I. Magnin & Co.*, 119 NLRB 642, 643 (1957).

[8] *Charrette Drafting Supplies Corp.*, 275 NLRB 1294 (1985).

[9] *Sears Roebuck & Co.*, 191 NLRB 398 (1971).

[10] *Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61 (1971).

[11] *Charrette Drafting Supplies*, 275 NLRB at 1296.

[12] *Sears Roebuck & Co.*, 191 NLRB at 404.

community of interest" with excluded employees.[13] This is a demanding standard for employers, and the Board and its Regional Directors have applied it to approve a number of units that would be unimaginable under prior law. In one recent case, a Regional Director applied *Specialty Healthcare* to approve a unit consisting of "full-time and regular part-time women's shoe associates in the 2nd Floor Designer Shoe Department and in the 5th Floor Contemporary Shoes Department" at the Bergdorf Goodman in New York—effectively the same unit the Board *rejected* in 1957.[14] And another recent decision approved a unit limited to cosmetics and fragrances employees at a Macy's location, but excluding all other store employees.[15] *Specialty Healthcare* has been applied to approve dubious and artificial units in other industries as well; for example, one Board decision used the "overwhelming" community of interest test to approve a unit consisting of only a small subset of employees at a shipyard where the employer constructs, overhauls, and refuels nuclear-powered submarines and aircraft carriers for the Navy.[16] These cases all represent an about-face from the precedents that previously informed the Board's unit determinations.

3. *Specialty Healthcare* Will Result In A Damaging Proliferation Of Micro-Unions

The practical effect of *Specialty Healthcare* will be to encourage a proliferation of micro-unions, as unions have a strong incentive to propose fractured bargaining units in order to maximize their chances of winning elections. The recent Regional Director decision approving a

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[13] *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 1 (emphasis added).

[14] *Bergdorf Goodman Group, Inc.*, No. 02-RC-076954 (R.D. May 4, 2012).

[15] *Macy's, Inc.*, No. 01-RC-091163 (R.D. Nov. 8, 2012).

[16] *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011); *see also Huntington Ingalls Inc.*, No. 358 NLRB No. 100 (2012).

unit of cosmetic and fragrances employees at a Macy's store illustrates the point: The union had previously petitioned to represent the whole store, but employees voted to reject unionization.[17] The union *only then* determined that employees in the cosmetics and fragrances departments ought to be carved out from the entire store. The possibilities for similar manipulation of the election process are endless: A union that believes it has the votes to organize greeters, but not cashiers, might only seek to organize the greeters. A union may limit a proposed unit to labor-enthusiasts in 2nd floor designer men's clothing, or 3rd floor televisions. Or, a union might simply try to organize the entire 3rd floor of a store, merely because that is where it enjoys its strongest support. Under *Specialty Healthcare*, unions face little obstacle to organizing by cherry-picking a small subset of employees with little regard for whether those employees constitute a practical bargaining unit, and with little regard to whether the designated subset of employees has organizational significance within the employer's business.

While this will be an effective organizing strategy for unions in many instances, it will not further the interests of retailers or their employees and customers.

The workforce in a typical retail store is highly integrated, with employees working under common management, common policies, and similar working conditions. A single store is typically an open environment, where even backroom employees come into frequent contact with sales employees as they move inventory into the store. Sales employees from different departments work in even closer proximity, and necessarily have frequent contact and interaction with each other throughout the day. Retail employees also generally have similar skill sets and

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[17] *Macy's*, slip op. at 8.

training; although some employees may have more experience in a particular role or with certain products, few if any have special education directed to their job, and all are ultimately exercising the shared skills of salesmanship and customer service.

The fragmentation of retail employees into micro-unions not only runs counter to these business realities, but also conflicts with the overriding purpose of a retail establishment, which is to provide seamless and effective customer service throughout the store. A retail employee must be able to respond to questions outside her particular area of expertise, and cannot effectively operate within an artificial bubble, isolated from coworkers. For this reason, the Board has long understood (prior to *Specialty Healthcare*) that a unit smaller than a single store is generally inappropriate because it creates barriers within a group of employees that naturally function as a single unit.

It is a basic feature of unionization that unions insist on their members having exclusive rights to perform the work of the unit, and establish work rules that determine what tasks bargaining-unit members can and cannot perform. This, in turn, affects the work that employees outside the unit can perform. These rules and practices would hamstring retail employers who benefit from a flexible workforce, with employees filling in for coworkers in other departments or rotating as necessary to fill pressing or unexpected needs. Small units would also hurt the employees who could benefit from the opportunities (such as additional shifts or overtime) that arise when rotation and reassignment are possible. Depending on the terms of a micro-union's bargaining agreement, an employee in women's handbags might not be able to walk a customer to her next destination in designer shoes and help her make a purchase in that area. An employee in household appliances might be prohibited from accepting a temporary reassignment to

electronics to cover a short-term staffing need or to earn additional wages. Limited to their own departments, employees would also have fewer opportunities to develop their knowledge and skills; rigid terms of employment could limit promotions and transfers. Employees seeking additional scheduled hours may be unable to do so, because they would be barred from rotating into other departments.

RILA believes that all of these constraints would increase costs for retailers and ultimately for their customers, and would negatively affect customers' experiences at retail stores. The cost of doing business would rise in other ways as well. Managers of a single store could conceivably be required to administer separate collective bargaining agreements with cashiers, greeters, backroom employees, men's casualwear, women's business attire, dishware, sporting goods, or baby products—to name just a few possibilities. These agreements could impose different or conflicting work rules, pay scales, benefits, bargaining schedules, grievance procedures, and layoff and recall procedures. Tracking and adhering to these varying requirements would be an immense, and costly, administrative undertaking.

A proliferation of bargaining units would also create tension among workers. A unit of cashiers, for instance, might shut down an entire store by going on strike, leaving the rest of the employees temporarily unemployed. Rolling work stoppages in various departments would make running the business more difficult, and would impose economic hardship on workers in non-striking departments.

These were not the results Congress intended when it instructed the Board to determine "the . . . appropriate" unit for collective bargaining.[18] To the contrary, the legislative history of the Act reflects Congress's concern that employees could, "by breaking off into small groups, . . . make it impossible for the employer to run his plant."[19] An approach to determining the bargaining unit that threatens to spark conflict among employees, erode morale, hamper customer service, reduce productivity, and raise administrative costs does not further the Act's purpose of advancing the "friendly adjustment of industrial disputes" and the "free flow of commerce,"[20] and is not "appropriate" in any sense of the word.

Thank you again for extending me this invitation to testify on behalf of RILA. I would be happy to answer the questions of the Members of the Committee.

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[18] 29 U.S.C. § 159(b).

[19] Hearing on S. 1598 Before the S. Comm. on Educ. & Labor, 74th Cong. 82 (1935) (testimony of Francis Biddle, Chairman, NLRB).

[20] 29 U.S.C. § 151.