No. 16-___

IN THE

Supreme Court of the United States

MACY'S INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 1445, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Labor Relations Board concluded that a group of cosmetics-and-fragrances sales employees at a single Macy's store was a "unit appropriate for collective bargaining." 29 U.S.C. § 159(b). It did so by considering those employees in isolation, and without explaining why meager differences between their interests and those of other Macy's sales staff were significant in the context of collective bargaining. While the Fifth Circuit approved the Board's action, the Second Circuit recently rejected exactly this approach to unit determinations by the Board.

The question presented is:

Whether the National Labor Relations Board must explain the legal significance of factual distinctions between included and excluded employees when deciding if a petitioned-for "unit [is] appropriate for collective bargaining." 29 U.S.C. §159(b).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Macy's, Inc., was the Petitioner Cross-Respondent in the U.S. Court of Appeals for the Fifth Circuit. Macy's, Inc. is a publically traded corporation. No publicly held corporation owns 10% or more of its stock, and it does not have a parent corporation. Macy's, Inc. owns 100% of the stock of Macy's Retail Holdings, Inc., which owns the store at issue in this litigation.

Respondent National Labor Relations Board was the Respondent Cross-Petitioner below.

Intervenor Local 1445, United Food and Commercial Workers International Union intervened before the U.S. Court of Appeals for the Fifth Circuit after organizing the unit at issue before the agency.

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PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board ("NLRB" or the "Board") concluded that a subset of the sales employees at a single Macy's department store—the employees who sell cosmetics and fragrances—constituted a "a unit appropriate for . . . purposes of collective bargaining." 29 U.S.C. § 159(b). The Board singled out this subset as a bargaining unit despite acknowledging that *all* sales employees at Macy's Saugus, Massachusetts, location perform the same kind of work—selling merchandise. They also all operate under the same terms and conditions of employment, participate in the same benefit programs, enjoy the same training opportunities, are evaluated using the same criteria, and attend the same daily meetings. Nevertheless, a Fifth Circuit panel denied Macy's petition for review, with a "breezy analysis" that belied the errors infecting the Board's opinion. Pet.App. 152a (Jolly, J., dissenting from denial of rehearing en banc).

The notion that a single department of a single store constitutes an appropriate bargaining unit is wrong as a matter of law and common sense. The Board's discretion in making these so-called "unit determinations" is not unlimited. As the Second Circuit explained in *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016)—a case involving materially identical legal issues—the Board may not create bargaining units simply by pointing to similarities among employees that a union would like to represent. *See id.* at 794. Rather, it must *compare* the interests of those employees with the interests of others excluded from the proposed unit. *Id.* It must also explain why any *factual* distinc-

tions between included and excluded employees have *legal* significance in the context of collective bargaining, and why they outweigh interests shared among those employees. *Id.* Thus, it was not enough that all employees in one subgroup at a Constellation winery shared similar interests. The Board could not deem them an appropriate bargaining unit without first comparing their interests to those of other employees at the winery, and then explaining why any differences—e.g., physically separate work areas and separate supervisors—were legally significant. *Id.*

Here, a panel of the Fifth Circuit allowed the Board to do exactly what the Second Circuit prohibited. After the court denied Macy's petition for rehearing en banc by a 9–6 vote, the six dissenting judges explained that "the NLRB articulated and applied the wrong standard" for unit determinations. Pet.App. 159a (Jolly, J., dissenting). Rather than comparing the interests of included employees with excluded employees, the Board first considered the cosmetics-and-fragrances sales employees in isolation, finding similarities among them. *Id.* at 157a-61a. To be sure, the Board eventually listed some distinctions between cosmetics-and-fragrances sales employees and the rest of Macy's sales staff. But it never explained *why* those distinctions were relevant in the context of collective bargaining, much less why they outweighed interests shared by all employees in a single, integrated department store. *Id.* at 161a-65a.

This divide among the circuits reflects fundamentally different understandings of how to apply the framework for unit determinations articulated by the Board in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011). The standard

endorsed by the Fifth Circuit contravenes basic principles of administrative law and the National Labor Relations Act ("NLRA"). A test that allows the Board to approve bargaining units without explaining why the interests of included and excluded employees are distinct—and why those distinctions are significant in the context of collective bargaining—leaves courts with no way to assess whether the NLRB's action was arbitrary and capricious, or whether the Board fulfilled its obligation to exercise independent judgment in recognizing an appropriate bargaining unit.

Finally, the approach approved by the Fifth Circuit "contains no real limiting principle" and has far-reaching consequences. Pet.App. 151a (Jolly, J., dissenting). For Macy's and other retailers, the Fifth Circuit's decision creates the real prospect of a multiplicity of conflicting bargaining obligations. After all, the factual distinctions on which the panel and the Board relied to create a cosmetics-and-fragrances unit—separate department, separate supervision, separate workspace, and limited interaction—describe *every* department of *every* department store in the country. "[N]othing in the NLRB's rationale prevents a dozen micro-units within a retail store's salesforce—all fraught with mini-bargaining at multiple times and the possibility of disputes and mini-strikes occurring continually over the working year." *Id.* Such arrangements are hardly conducive to "promoting labor peace and stability." *Id.*

This Court's immediate review is warranted.

OPINIONS BELOW

The opinion of the National Labor Relations Board approving the petitioned-for unit is reported at 361

NLRB No. 4, 2014 WL 3613065. Pet.App. 25a. Its subsequent decision finding that Macy's refusal to bargain with that unit was an unfair labor practice is reported at 361 NLRB No. 163, 2014 WL 7723306. Pet.App. 135a. The opinion of the Fifth Circuit is reported at 824 F.3d 557, Pet.App. 1a, and its order denying rehearing en banc is reported at 844 F.3d 188, Pet.App. 147a.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 2, 2016. Pet.App. 167a. That court denied rehearing en banc on November 18, 2016. Pet.App. 147a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix G (Pet.App. 168a): 29 U.S.C. § 157; 29 U.S.C. § 159; and 5 U.S.C. § 557.

STATEMENT OF THE CASE

A. Legal Background

1. Congress tasked the NLRB with identifying "appropriate" bargaining units. 29 U.S.C. § 159(b). The Board must assess "in each case" whether a group of employees is "appropriate for the purposes of collective bargaining" and will "assure to employees the fullest freedom in exercising the rights guaranteed by th[e NLRA]." *Id.* Those rights include the right to bargain collectively through "representatives of their own choosing" and "the right to refrain from" collective bargaining. *Id.* § 157.

"The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on

whether the employees share a 'community of interest.'" *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). To that end, the Board has historically used a multi-factor test that looks to whether employees:

> are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, Inc., 338 N.L.R.B. 123, 123 (2002).

Significantly, under this analysis, the Board "never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980). Rather, the Board must assess "whether the interests of the group sought are sufficiently distinct *from those of other employees* to warrant the establishment of a separate unit." *Id.* (emphasis added); *see also Amalgamated Clothing Workers v. NLRB*, 491 F.2d 595, 598 n.3 (5th Cir. 1974) (stating that the "touchstone of appropriate unit determinations is whether the unit's members have a 'recognizable community of interest sufficiently distinct from others'").

Properly applying this community-of-interest test is an essential element of the Board's gatekeeping

function. Once the Board deems a unit appropriate, it is difficult to challenge. The Board's decisions are reviewed to determine whether they are "'arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support.'" *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1155 (5th Cir. 1980) (citation omitted). Moreover, because "employees may seek to organize 'a unit' that it is 'appropriate'—not necessarily the single most appropriate unit," *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991), the courts of appeals have generally required employers to show the Board's unit determination "'is clearly not appropriate,'" *Purnell's Pride*, 609 F.2d at 1155-56 (citation omitted).

Nevertheless, the Board's "powers [with] respect [to] unit determinations are not without limits." *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971). If the Board's "decision 'oversteps the law,' it must be reversed." *Id.* Among other things, "[w]hen the Board . . . exercises the discretion given to it by Congress," it must adhere to basic principles of administrative law. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 443 (1965). In other words, "it must 'disclose the basis of its order,'" "'give clear indication that it has exercised the discretion with which Congress has empowered it,'" *id.* (citation omitted), and "supply a reasoned analysis for [any] change" from prior precedent," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also* 5 U.S.C. § 557(c) (requiring agencies to provide "the reasons or basis" for their decisions). Congress has also forbidden the Board from allowing a union's

choice of unit to have a "controlling" effect on its determination. 29 U.S.C. § 159(c)(5).

2. Recently, the Board adopted a new two-step test for unit determinations in cases where an employer challenges the propriety of a union-proposed unit. *Specialty Healthcare,* 357 N.L.R.B. 934. At step one, the Board assesses whether the requested unit is prima facie appropriate. To make that determination, the Board first asks whether the employees in the petitioned-for unit are "readily identifiable as a group." *Id.* at 945. If so, the Board proceeds to "apply [the] traditional community of interest factors" (described above) to determine whether the employees "share a community of interest." *Id.* at 941-43. Provided these preliminary inquiries are satisfied, the Board will "find the petitioned-for unit to be an appropriate unit." *Id.* at 945. At that point, if an objecting employer contends that the unit "is nevertheless inappropriate because it does not contain additional employees," *id.* at 944, the Board proceeds to step two. There, "the burden is on the [employer] to demonstrate that the excluded employees share an *overwhelming* community of interest with the included employees." *Id.* at 934 (emphasis added). To make this showing, the employer must prove that the interests of employees excluded from the proposed unit "overlap almost completely" with the interests of the employees the union has petitioned to represent. *Id.* at 944.

B. Factual Background

This case involves the efforts of Local 1445, United Food and Commercial Workers Union (the "Union"), to unionize a single department—cosmetics and fra-

grances—at a single Macy's store in Saugus, Massachusetts. That store is divided into eleven sales departments across two floors, with each department directly adjacent to the next. Pet.App. 29a. The store employs 120 selling employees and 30 non-selling employees; 41 of those sales employees work in cosmetics and fragrances. *Id.* at 28a.

The interests of cosmetics-and-fragrances sales employees are virtually indistinguishable from those of sales associates in all other departments. All selling employees function as part of an integrated store designed to provide customers with a single location at which to purchase an array of products from knowledgeable salespeople. All are subject to the same employee handbook, receive the same benefits, participate in the same dispute resolution program, and are evaluated under the same criteria. *Id.* at 40a. All staff the same shifts, use the same entrances, share the same breakrooms, attend the same daily meetings, and punch in and out using the same timecard system. *Id.* No prior experience is needed for any position in the store; Macy's trains all employees in customer service and selling techniques, and coaches them to encourage customers to purchase items from different departments. *See id.* at 40a-41a.

C. The Proceedings Below

1. Despite the commonalities among all sales employees, the Union sought a unit limited to cosmetics-and-fragrances sales employees. *Id.* at 28a, 41a. But that was not its original goal. Initially, the Union filed a petition for an election to determine whether all employees at the Saugus store should join an existing five-store unit. *Id.* at 42a. Macy's ar-

gued that such an election would be inappropriate. *Id.* The NLRB's Regional Director agreed, directing instead that the employees be allowed to vote on whether to create a single-store unit consisting of all employees at the Saugus store. *Id.* The Union lost that election. *Id.*

2. Undeterred, the Union filed a second petition. This time, it sought a unit ultimately limited to "all full-time, part-time, and on-call employees employed in the Saugus store's cosmetics and fragrances department, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances." *Id.* at 28a. Macy's objected, contending that the smallest appropriate unit would be a storewide unit of all selling employees. *Id.* at 44a-45a. The Regional Director sided with the Union. *Id.* at 42a.

Applying the *Specialty Healthcare* standard, the Board affirmed in a 3–1 decision. *Id.* at 25a-26a, 95a. At step one, the majority assessed "whether [the] employees in [the] proposed unit share[d] a community of interest." *Id.* at 49a. In doing so, it focused on similarities among employees within the cosmetics-and-fragrances department, *id.* at 48a-52a; it did not consider excluded employees until it moved on to step two, *id.* at 52a-67a. There, the Board stressed that cosmetics-and-fragrances sales employees operate in a separate department, under separate supervision, and in distinct areas of the store. *Id.* at 53a-54a. It also relied on what it perceived to be limited interaction or interchange among sales employees across departments. *Id.* at 55a-57a.

Member Miscimarra dissented. He argued that the Board "disregard[ed] wide-ranging *similarities* that exist among [all] sales employees." *Id.* at 96a (Member Miscimarra, dissenting). He argued that a cosmetics-and-fragrances unit was "irreconcilable with the structure of the work setting" and "would give rise to unstable bargaining relationships." *Id.* And he explained that the "majority's application of *Specialty Healthcare*" illustrated that the test "affords too much deference to the petitioned for unit in derogation of the mandatory role that Congress requires the Board to play 'in each case,'" and in violation of the command that the extent of union organization should not be "'controlling.'" *Id.* at 96a-97a, 130a (citation omitted).

The cosmetics-and-fragrances sales employees voted 23–18 to unionize. Record on Appeal 472 (Talley of Ballots). Consistent with the regular procedure for challenging the appropriateness of a bargaining unit, *e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001), Macy's refused to bargain with the Union. The Board then held that Macy's had thereby engaged in an unfair labor practice. Pet.App. 135a.

3. Macy's filed a petition for review in the Fifth Circuit, contending that the Board erroneously analyzed the petitioned-for unit in isolation and failed to explain *why* the purported distinctions discussed above (separate department, separate supervision, separate workspace, and limited interaction) outweighed the similarities among all sales employees. *Id.* at 12a-13a, 19a. Among other things, Macy's also maintained that the *Specialty Healthcare* standard itself violated the NLRA and was inconsistent with prior Board precedent. *Id.* at 17a.

In an opinion by Judge Dennis, a panel of the Fifth Circuit denied the petition for review and upheld the Board's unit determination. Reciting the traditional community-of-interest factors, the panel concluded that because the Board had likewise pointed to those considerations, its step-one analysis did "not look only at the commonalities within the petitioned-for unit." *Id.* at 19a-20a. As for Macy's claim that the Board failed to articulate a reasoned basis for its decision, the panel asserted (without analysis) that the Board "identified some factors that could weigh against the petitioned-for unit and explained—with citation to Board precedent—why these factors did not render the petitioned-for unit inappropriate." *Id.* at 12a-13a.

The panel also endorsed the *Specialty Healthcare* standard, finding it consistent with the NLRA and Board precedent. "Where the Board 'rigorously weighs the traditional community-of-interest factors'" at step one, application of the "'overwhelming community of interest' [test at step two] does not conflict with" 29 U.S.C. § 159(c)(5)'s prohibition on "'accord[ing] controlling weight to the extent of union organization'" or prior precedent. Pet.App. 19a (citation omitted). "That," according to the panel, "is precisely what the Board did in the instant case." *Id.*

4. Macy's filed a petition for rehearing en banc, which the court denied by a 9–6 vote. *Id.* at 147a-48a. Judge Jolly dissented, joined by Judges Jones, Smith, Clement, Owen, and Elrod. *Id.* at 148a (Jolly, J., dissenting). According to the dissent, this case "presents another example of the current National Labor Relations Board's determination to disregard established principles of labor law." *Id.*

As an initial matter, the dissent maintained that "the NLRB articulated and applied the wrong standard" "under *Specialty Healthcare*'s first prong." *Id.* at 159a. The "NLRB itself has more than a perfunctory obligation when analyzing the community of interest factors [at step one]: the NLRB must compare and contrast the employees in the group with each other *and with employees outside of the group*." *Id.* at 155a. It must also "explain why [any] purported difference[s] ha[ve] contextual substance" or are otherwise "meaningful." *Id.* at 158a. "If it does not compare employees in the petitioned for group with excluded employees in the first step or if it only identifies 'meager differences' between these employees, the NLRB 'conducts a deficient community-of-interest analysis.'" *Id.* at 157a.

Here, the "NLRB discussed similarities between employees within the petitioned-for group, but it did not discuss similarities between the included employees and the excluded employees," much less explain "how [any] distinction[s] w[ere] meaningful." *Id.* at 157a-59a. Because the panel did not "require the NLRB actually to engage [in] th[is] crucial [analysis]," the dissent concluded that it "failed to properly grasp and to apply the principles that guide step one of the *Specialty Healthcare* analysis." *Id.* at 159a.

Moreover, the NLRB "inadequately explained the reasons for its decision." *Id.* at 161a. When conducting the community-of-interest analysis "the NLRB must 'do more than simply tally the factors on either side of a proposition.'" *Id.* at 161a-62a (citation omitted). "Because '[t]he crucial consideration is the weight or significance . . . of factors relevant to a particular case,' the NLRB 'must assign a relative

weight to each of the competing factors it considers' in order 'to permit proper judicial review.'" *Id.* at 162a (citation omitted). Therefore, "the NLRB committed a 'fatal' error by not weighing the community of interest factors and explaining why the differences between the cosmetics and fragrances employees and other selling employees outweighed the similarities." *Id.* at 163a. Despite these failings by the Board, "[t]he panel summarily dismissed Macy's argument in three sentences." *Id.* at 164a.

The dissent explained that the consequence of this toothless community-of-interest analysis was a decision that lacks reasons "sufficiently articulated to permit proper judicial review," *id.* at 161a-62a, 165a, and a test that violates 29 U.S.C. § 159(c)(5), Pet.App. 161a. Indeed, the dissent described this case as "a picture perfect example of the NLRB violating the NLRA by approving a bargaining unit defined by the limited success of a union's organizational efforts in the larger and appropriate unit." *Id.* at 159a-60a. The "Union failed in two efforts to organize larger bargaining units at this store." *Id.* at 150a. "[It] was only successful on its third try: this time with a micro-unit of cosmetics and fragrances employees that evidently reflected" the "apex of the Union's organizational strength." *Id.* "The NLRB rubber-stamped [this] proffered unit by engaging in [the] callow community of interest analysis [described above]," and then "forc[ing] Macy's to satisfy an overwhelming community of interest standard [at step two]." *Id.* at 160a. "Thus, the NLRB gave excessive deference to the composition of the requested unit," "'effectively accord[ing] controlling weight to the extent of union organization.'" *Id.* at 160a-61a (citation omitted).

5. The Fifth Circuit issued its mandate immediately upon the denial of rehearing en banc. Macy's thereafter asked the court to recall and stay its mandate pending certiorari, but that motion was denied. *Id.* at 146a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three reasons. *First*, the circuits have divided on the proper application of the Board's unit determination standard. The Second Circuit's call for a robust weighing of the community-of-interest factors at step one of the *Specialty Healthcare* framework starkly conflicts with the Fifth Circuit's willingness to rubber-stamp the Board's determination. *Second*, the decision below is wrong. It approved the Board's unit determination even though the Board failed to articulate a reasoned basis for its decision, allowed the Union's choice of unit to have controlling weight, and departed from prior Board precedent without an explanation. *Third*, this issue is important because the position espoused by the Fifth Circuit creates enormous practical problems for employers and frustrates the policies underlying the NLRA.

I. THE CIRCUITS ARE DIVIDED OVER THE STANDARD THE BOARD SHOULD APPLY TO DETERMINE THE PROPRIETY OF UNION-PROPOSED UNITS

Certiorari should be granted because the circuits are divided about the approach the Board should use to make unit determinations. The Second Circuit has rejected the Board's unexplained recognition of a subset of an employer's integrated work force as a bargaining unit. By contrast, the Fifth Circuit "gave

the NLRB a pass" in materially identical circumstances. Pet.App. 152a (Jolly, J., dissenting). These fundamentally different results stem from fundamentally different understandings of the analysis required of the Board under the *Specialty Healthcare* framework.

1. Days after the Fifth Circuit denied Macy's petition for rehearing en banc, the Second Circuit issued a unanimous opinion in a case raising virtually identical legal issues (presented, even, by the same lawyers). *See Constellation*, 842 F.3d 784. Like *Macy's*, *Constellation* involved an effort to unionize a limited group of employees within a larger whole—a subgroup of employees within a Constellation winery's cellar operations department. *See id.* at 788. Like *Macy's*, the interests of employees within the petitioned-for unit overlapped almost completely with the interests of employees outside the unit. Among other things, they all had "similar 'job functions and duties,'" "'identical skills and training requirements,'" and interchangeable terms and conditions of employment. *See id.* at 794. And as in *Macy's*, the NLRB created a separate bargaining unit without explaining the significance of the factual distinctions on which it relied—e.g., separate supervisors, separate work areas, and limited interaction among employees. *See id.*

Unlike *Macy's*, however, the Second Circuit *granted* the employer's petition for review. *See id.* at 787. In doing so, the court held that step one of the *Specialty Healthcare* framework has teeth: at step one, the Board "must *analyze* . . . the facts presented to: (a) identify shared interests among members of the petitioned-for unit, *and* (b) explain why excluded em-

ployees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *Id.* at 794. In other words, the Second Circuit concluded that "[m]erely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion." *Id.* at 794-95. "Explaining *why* the excluded employees have distinct interests *in the context of collective bargaining* is necessary to avoid arbitrary lines of demarcation and to avoid making step one of the *Specialty Healthcare* framework a mere rubber stamp." *Id.* at 795 (emphases added).

Applying this standard, the Second Circuit held that the Regional Director ("RD") "did not make the step-one determination required by *Specialty Healthcare*." *Id.* at 793.[1] "Although he appropriately recited the community of interest standard, and declared that 'employees in the petitioned-for unit share distinct characteristics,' the RD did not explain *why* those employees had interests 'sufficiently distinct from those of other employees to warrant the establishment of a separate unit.'" *Id.* "Reciting the legal framework does not substitute for analysis," and while the "RD made a number of *factual* findings that tend to show that [employees in the petitioned-for unit] had interests distinct from other employees,"

[1] Where, as here, the Board denied an employer's request for review, the courts of appeals review the decision of the Regional Director. *See Rochelle Waste Disposal, LLC v. N.L.R.B.*, 673 F.3d 587, 590 n.1 (7th Cir. 2012); *see also* 29 C.F.R. § 102.67(g) ("Denial of a request for review shall constitute an affirmance of the regional director's action . . . .").

"he never explained the weight or relevance of those findings" or why they "should have outweighed other findings of similarities." *Id.* at 794. "To the extent that the RD did provide such explanations, [he] did so only at step two, i.e., only to rebut a heightened showing that the excluded employees share an 'overwhelming community of interest' with the presumptively appropriate petitioned-for unit." *Id.* That "misapplication of *Specialty Healthcare*" required the court to "deny the Board's petition for enforcement." *Id.*

2. In support of its conclusion, the Second Circuit also noted that its "sister circuits have accepted the *Specialty Healthcare* framework based on the understanding" that step one is more than "a mere rubber stamp" of a union-proposed unit. *Id.* at 794-95.

Specifically, circuit courts have emphasized that the community-of-interest analysis at step one of *Specialty Healthcare* requires *both* an explanation of the interests shared by employees within the petitioned-for unit *and* a discussion of why those interests are distinct from those of excluded employees. *See Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 499-501 (4th Cir. 2016)*; see also NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 442-43, 446 (3d Cir. 2016) (holding that the test requires the NLRB to "look[] not only at whether the employees in the petitioned-for unit [a]re similar and comprise[] a readily identifiable group, but also at whether th[o]se employees were sufficiently distinct from other employees"); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 637 (7th Cir. 2016) (stating that the "focus of [the] analysis should be on the similarity or dissimilarity in working conditions across different groups of workers . . .

rather than on the similarity or dissimilarity of the employment conditions of just one of the groups" and that the term "'community of interest'" is "unhelpful except when modified by the adjective 'distinct'"); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016) (stating that "the Board does not look at the proposed unit in isolation" when applying the "community of interest test").

For example, while ultimately finding that the Board had applied the correct approach in the specific case before it, the Fourth Circuit explicitly rejected the suggestion that the Board should consider "whether employees are appropriately excluded from the petitioned-for unit . . . *only* in step two, the overwhelming-community-of-interest analysis." *Nestle*, 821 F.3d at 500. Rather, that analysis must take place at "step one, [using] the traditional community-of-interest analysis." *Id.* To do otherwise would "constitute a significant change" in Board policy and afford "controlling" weight to the union's choice of unit because "it would mean that the Board no longer determines for itself whether employees are arbitrarily excluded from the petitioned-for unit." *Id.* "[A]t the very least," step one requires the Board to "ensure that employees are not excluded on the basis of 'meager differences.'" *Id.*

3. The Fifth Circuit's decision conflicts with the Second Circuit's reversal of the Board's action on materially identical facts, and contravenes the standard articulated by the Third, Fourth, Seventh, and Eighth Circuits.

In short, the same error that the Second Circuit condemned in *Constellation* infects the NLRB's de-

termination in *Macy's*: as the six dissenters observed, the NLRB applied "an incorrect standard for analyzing the first prong of the *Specialty Healthcare* framework" by failing "to compare employees in the petitioned-for group with excluded employees." Pet.App. 153a, 157a (Jolly, J., dissenting). While paying lip-service to the Board's obligation to avoid considering a union's choice of unit in isolation, *id.* at 20a-21a (panel opinion), the panel did nothing to account for the reality—plain "to any reasonable reader"—that the Board's actual analysis ignored this command. *Id.* at 159a (Jolly, J., dissenting). In fact, "the NLRB barely noticed how the employees in the petitioned-for group differed from excluded employees and made no effort to explain how [any] admittedly questionable difference[s] it identified w[ere] not, in fact, 'meager.'" *Id.* at 157a. Indeed, it was only after "advanc[ing] to step two" that the Board even "acknowledged Macy's contention that the cosmetics and fragrances employees' interests did not meaningfully differ from those of other sales employees." *Id.* at 158a. And in any event, at no point did the Board "assign a weight to each community of interest factor and weigh the factors," explaining "why the differences between the cosmetics and fragrances employees and other selling employees outweighed the similarities." *Id.* at 164a.

* * *

The Fifth Circuit's approach to unit determinations cannot be reconciled with those of other circuits. That split of authority warrants this Court's review.

II. THE DECISION BELOW IS WRONG

This Court should also grant certiorari because the decision below is wrong for several reasons. The panel failed to require the Board to provide a reasoned explanation for its unit determination; it contravened Congress' command that the extent of union organization not be given controlling weight; and it allowed the Board to depart from its own precedent without offering any justification.

1. An agency exercising delegated authority "must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Metro. Life Ins.,* 380 U.S. at 442-43 (citation omitted); *see also* 5 U.S.C. § 557(c). Such explanations are necessary to ensure meaningful judicial review, particularly where "an agency is applying a multi-factor test through case-by-case adjudication," *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

"This general principle of administrative law is fully applicable to unit determinations." *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984). Indeed, multi-factor tests such as the community-of-interest analysis can "lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen*, 357 F.3d at 61. Otherwise, "the 'totality of the circumstances' can become simply a cloak for agency whim," *id.*, allowing the Board to recite "differences when the union desires exclusion of employees" and "similarities when the union de-

sires inclusion." *See NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995).

For that reason, courts have required "the Board [to] do more than simply tally the [community-of-interest] factors on either side of a proposition" when ruling on the propriety of a union-proposed unit. *Purnell's Pride*, 609 F.2d at 1156, 1160. The Board must "assign a relative weight to each of the competing factors it considers" and "sufficiently justify" any conclusion that the "factors suggesting community of interest preponderates over the opposing criteria." *Id.* Indeed, a "unit determination will be upheld only if the Board has indicated clearly how the facts of the case, analyzed in light of the policies underlying the community of interest test, support its appraisal of the significance of each factor." *Id.* at 1156-57; *see also Cont'l Web*, 742 F.2d at 1092 (stating that the Board cannot simply "recite the differences in working conditions," "and then," without explanation, "tack on a conclusion that therefore the [petitioned-for group of employees] have a sufficient community of interest to be a separate unit"); *supra* pp. 12-13, 15-17.

Here, the Board failed to provide this essential analysis. While the Board ultimately identified certain factual distinctions between cosmetics-and-fragrances sales employees and employees in other departments, it failed to explain why those distinctions have legal significance in the context of collective bargaining. For example, the "distinct area[]" in which cosmetics-and-fragrance sales employees work is a patch of floorspace immediately adjacent to several other departments—not a "separate" building, as in the case cited by the Board. *Compare* Pet.App. 54a

(citing *DTG Operations, Inc.*, 3357 NLRB 2122, 2126 (2011)), *with Purnell's Pride*, 609 F.2d at 1160 (criticizing the Board for failing to explain "why the separate location of the processing plant has such significance when all of the facilities are in the same general area"). Likewise, though cosmetics-and-fragrances employees have their own supervisor, Pet.App. 54a, the Board has "long held that a difference in supervision does not necessarily mandate excluding differently supervised employees," *Hotel Servs. Grp., Inc.*, 328 N.L.R.B. 116, 117 (1999). The Board offered no explanation for why that distinction was relevant here, in the face of uniform benefits, job responsibilities, and hiring and performance standards. *See Purnell's Pride*, 609 F.2d at 1160 (questioning "why the degree of departmental supervision outweighs central determination of labor policies and plant-wide hire, dismissal, and compensation"). Similarly, the Board offered no explanation for why the transfer of nine employees into and out of the cosmetics-and-fragrances department—nearly a quarter of its employees—falls short of showing significant interchange among all sales employees. *Compare* Pet.App. 56a, *with Purnell's Pride*, 609 F.2d at 1160 ("[T]he decision does not articulate why, in the context of the particular business, the transfer of twenty employees from one department to another is so insubstantial as to tell in favor of the unit."). And finally, a departmental label may carry some weight if it reflects unique skills or qualifications—but it is undisputed that Macy's has no such requirements for employees in any department. Pet.App. 40a, 53a-54a.

In short, rather than explaining why or how these purported factual distinctions pertain to "the purpos-

es of collective bargaining," 29 U.S.C. § 159(b), the Board incanted them repeatedly as though their "weight or significance" were self-evident. *Purnell's Pride*, 609 F.2d at 1156. The result was a Board decision that reads like "'a bad law school exam,'" Pet.App. 152a (Jolly, J., dissenting), and that lacks reasoning "'sufficiently articulated to permit proper judicial review.'" *Id.* (quoting *Purnell's Pride*, 609 F.2d at 1162). This failure, in and of itself, warrants reversal. *See Metro. Life,* 380 U.S. at 442-43.

2. The manner in which the Fifth Circuit applied step one of the *Specialty Healthcare* analysis also violated § 159(c)(5). As noted above, Congress tasked the Board with making unit determinations "in each case," 29 U.S.C. § 159(b), without allowing "the extent to which the employees have organized" to be "controlling," *id.* § 159(c)(5). The Board may consider the extent of organization, but "this evidence should have little weight," H.R. Rep. No. 80-245, at 37 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act 292, 328 (1948).

Congress viewed § 159(c)(5) as essential to "assure full freedom to workers to choose, or to refuse, to bargain collectively, as they wish." *Id.* Affording controlling weight to the union's choice of unit undermines that freedom, because the union's overriding consideration is selecting a unit in which it can win a representation election. Such deference to the union's hand-picked unit undermines both the right of dissenting employees within that unit to refrain from organizing, and the right of excluded employees to engage in collective bargaining. *See* 29 U.S.C. § 157.

The application of *Specialty Healthcare* endorsed by the Fifth Circuit *ensures* that a union's choice of unit will have controlling weight. Rather than assessing the workforce as a whole, the Board looked first to the employees of the proposed unit in isolation, concluding that they shared common interests. Pet.App. 48a-52a. This, however, amounts to little more than a "rubber-stamp[,]" Pet.App. 157a (Jolly, J., dissenting), because virtually *any* group of employees—when viewed in isolation—has "employment conditions or interests 'in common,'" *Newton-Wellesley Hosp.*, 250 N.L.R.B. at 411-12.[2] For this reason, courts upholding the *Specialty Healthcare* standard have done so on the understanding that step one requires the Board to "look[] not only at whether the employees in the petitioned-for unit were similar and comprised a readily identifiable group, but also at whether these employees were sufficiently distinct from other employees." *FedEx*, 832 F.3d at 446; *supra* pp. 17-18.

To be sure, after applying this de facto presumption in favor of the proposed unit, the Board considered whether Macy's had shown that the interests of excluded employees "overlap almost completely" with those of the petitioned-for unit. 357 N.L.R.B. at 943-45. But that is too little too late. At that point, the deck has already been impermissibly stacked in favor of the union-proposed unit. *See* Pet.App. 160a-61a (Jolly, J., dissenting) (explaining that "forc[ing] Ma-

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[2] For example, half the butchers at a grocery store share common interests, as do a third of the shoe salespeople in Macy's shoe department. Crucially, however, those interests are also shared by the remainder of their colleagues.

cy's to satisfy an overwhelming community of interest standard [at step two]" after a "callow community of interest analysis" at step one, "'effectively accords controlling weight to the extent of union organization'").

As noted by the dissenting judges, this case is "a picture perfect example" of how a misapplication of step one undermines an employee's right to "refrain" from collective bargaining. Pet.App. 159a-60a (Jolly, J., dissenting). "After the Union was stymied from organizing a storewide unit to join a multi-store unit and lost an election for a stand-alone storewide unit, the Union cherry-picked a unit of only cosmetics-and-fragrances employees—the group apparently most favorable to the Union's organization efforts." *Id.* at 160a. That hand-picked unit voted 23–18 for representation. Record on Appeal 472 (Talley of Ballots). For the 18 employees who voted against the proposed unit (and who likely also voted against a storewide unit), the right to *refrain* from collective bargaining was rendered illusory when the Board allowed the Union another bite at the apple.

3. The panel also improperly allowed the Board to depart from its own precedent without explanation. While "[a]gencies are free to change their existing policies," when they do so, they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42 (same). At the very least, "the agency must . . . 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino*, 136 S. Ct. at 2125-26 (citation omitted).

Here, however, the Board did not even acknowledge that it was changing course, let alone explain the change. Though purporting to apply the "traditional" community-of-interest test at step one of the *Specialty Healthcare* framework, Pet.App. 48a-51a, the analysis conducted by the Board omitted a key element of that standard. Namely, and as noted above, it did not "proceed[] to [the] further determination [of] whether the interests of the group sought [we]re sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Newton-Wellesley*, 250 N.L.R.B. at 411; *supra* pp. 17-20. Consequently, the Board ran afoul of its own prohibition on addressing "solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Newton-Wellesley*, 250 N.L.R.B. at 411; *see also Nestle*, 821 F.3d at 500 (explaining that such an application of the community-of-interest test would "constitute a significant change" in Board policy); *FedEx Freight*, 832 F.3d at 442-32 (same).

III. THE QUESTION PRESENTED IS IMPORTANT

Certiorari should also be granted because the question presented is critically important to employers and employees alike. As the dissent in *Specialty Healthcare* noted, the proper application of the community-of-interest analysis "is not an abstract debate over legal hokum." 357 N.L.R.B. at 952 (Member Hayes, dissenting). The Board makes countless unit determinations annually, and the question of whether step one calls for a rubber stamp or a careful analysis has real-world implications.

1. In the retail industry alone, the impact of the panel's decision is significant. As noted above, the factual distinctions found sufficient to create a cosmetics-and-fragrances unit describe *every* department of *every* department store in the country. Indeed, "[o]ne is led to assume . . . that three bowtie salesm[e]n would be an appropriate bargaining unit if they sold bowties at a separate counter from other merchandise." Pet.App. 151a (Jolly, J., dissenting). In 2016, Macy's had over 800 stores nationwide, and—assuming approximately ten departments per store—could thus have been compelled to bargain with upwards of 8,000 units across the country if each department organized separately. And the Fifth Circuit's endorsement of the Board's flawed approach affects more than just retailers. For example, citing *Macy's* (and applying a strikingly similar analysis at step one), a Regional Director recently approved *nine* separate bargaining units for teaching fellows in nine academic departments at Yale University—English, East Asian Languages and Literature, History, History of Art, Political Science, Sociology, Physics, Geology and Geophysics, and Mathematics. *See* Decision & Direction of Election at 1, 30-33, *Yale Univ.*, Nos. 01-RC-183014 *et seq.* (N.L.R.B. Region 1, Jan. 25, 2017). Indeed, workforces can always be divided based on factual distinctions of one form or another. Unless the Board is required to explain why such distinctions have *legal* significance in the context of collective bargaining—and why they outweigh interests common to all employees—the end result will be an "extraordinary fragmentation of the work force," "a situation that cannot lend itself to . . . labor relations

stability." *Specialty Healthcare*, 357 N.L.R.B. at 952 (Member Hayes, dissenting).

2. The piecemeal unionization of an employer's workforce is in no one's interest. Subdividing Macy's Saugus location—or any workplace—into a dozen different bargaining units does not advance "the purposes of collective bargaining" or "assure" employees "the rights guaranteed by th[e NLRA]." 29 U.S.C. §159(b); *DPI Secuprint, Inc.*, 362 N.L.R.B. No. 172, 2015 WL 5001021, at *12 (Aug. 20, 2015) (Member Johnson, dissenting) ("The trend toward smaller units—or units comprised of employees not significantly distinguishable from their coworkers except by the extent of organizing—cannot foster labor peace.").

In such a situation, employers could be forced to address numerous—and potentially competing—collectively bargained obligations at a single location (much less among hundreds of locations nationwide). *See Cont'l Web*, 742 F.2d at 1090 ("It is costly for an employer to have to negotiate separately with a number of different unions . . . ."). Among other things, 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 or irreconcilable demands from separate units, and from the potential that one unit will disrupt production with unique demands that burden all employees." *DPI Secuprint*, 2015 WL 5001021, at *12 (Member Johnson, dissenting). "[A]ny one of the unions may be able to shut down [an employer's facility] (or curtail its operations) by a strike, thus imposing costs on other workers as well

as on the employer's shareholders, creditors, suppliers and customers." *Cont'l Web*, 742 F.2d at 1090

This problem is particularly acute in the retail context, where a "multiplicity of bargaining relationships would . . . be at odds with the Employer's overriding business objective: to attract and retain customers who purchase products throughout the store." Pet.App. 134a (Member Miscimarra, dissenting). Indeed, a department store is predicated on the ability to provide one-stop shopping for customers to purchase a variety of products in different departments. But if those departments are allowed to unionize separately, that business model quickly becomes unworkable. *Cf. NLRB v. Meyer Label Co.*, 597 F.2d 18, 22 (2d Cir. 1979) (questioning unit determination that jeopardizes a company's business model). For example, a customer swinging by the store after work to pick up a dress may find that she is not able to purchase coordinating accessories: while the women's clothing department is open until 8PM, the fine jewelry department has bargained to go home at 5PM.

Moreover, the "cost[s of] . . . negotiat[ing] separately with a number of different unions . . . are not born by the employer alone." *Cont'l Web*, 742 F.2d at 1090. "[B]reaking up a work force into many small units creates a danger that some of them will be so small and powerless that it will be worth no one's while to organize them, in which event the members of these units will be left out of the collective bargaining process." *Id.* The same collectively bargained restrictions that would make it difficult for an employer to operate an integrated department store could also stunt employees' opportunities for advancement and professional development—for example, by limiting their

ability to transfer from one unionized department to another. *See Cont'l Web*, 742 F.2d at 1090.

Finally, a standard that allows for the fragmentation of an employer's work force could encourage union gerrymanders and thereby undermine an employee's right to "refrain" from collective bargaining activities. 29 U.S.C. § 157; *NLRB v. Superior Prot., Inc.*, 401 F.3d 282, 288 n.7 (5th Cir. 2005) (stating that the right to organize and the right to refrain from organizing are to be guarded "'with equal jealousy'" (citation omitted)); H.R. Rep. No. 80-510, at 47 (1947) (Conf. Rep.), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act 505, 551 (1948) (stating that "one of the principal purposes of the [Act] is to give employees full freedom to choose or not to choose representatives for collective bargaining"). Rather than being forced to persuade dissenting employees in a broader unit, a union may simply seek out a targeted group of employees where it knows it has the upper hand. In practice, this means that "unions [will] engage in incremental organizing in the smallest units possible." *Specialty Healthcare*, 357 N.L.R.B. at 952 (Member Hayes, dissenting). This effectively disenfranchises dissenting employees who, though they may be in the majority in defeating a larger unit, find themselves marginalized within the petitioned-for unit. As noted by Judge Jolly, this case—where the Union organized the cosmetics-and-fragrances department only after failing to unionize the entire store—illustrates these concerns perfectly. Pet.App. 159a-60a (Jolly, J., dissenting).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 16, 2016

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60022

MACY'S INCORPORATED,
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner

Filed June 2, 2016

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

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Before BENAVIDES, DENNIS, and COSTA, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

The National Labor Relations Board (NLRB or the Board) certified a collective-bargaining unit consisting of all cosmetics and fragrances employees at the Saugus, Massachusetts, Macy's department

store. After Macy's refused to bargain with Local 1445, United Food and Commercial Workers Union (the Union), which was certified as the unit's bargaining representative, the Board filed an unfair labor practices order. Macy's filed a petition for review with this court, contending that (1) the Board applied a legal standard that violated the National Labor Relations Act (NLRA or the Act) and otherwise committed an abuse of discretion; and (2) under the proper legal standard as well as the incorrect legal standard upon which the Board relied, all selling employees must be included in the petitioned-for unit. [1] The Board filed a cross-application for enforcement of its order. Because the Board did not violate the NLRA or abuse its discretion in certifying the unit of cosmetics and fragrances employees, we DENY the petition for review and GRANT the Board's cross-petition for enforcement of its order.

I.

A.

Macy's operates a national chain of department stores, including one in Saugus, Massachusetts. The Saugus store is divided into eleven primary sales departments: juniors, ready-to-wear, women's shoes, handbags, furniture (also known as big ticket), home (also referred to as housewares), men's clothing, bridal, fine jewelry, fashion jewelry, and cosmetics

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[1] Although the underlying conduct occurred within the First Circuit, this court has jurisdiction because Section 10(f) of the NLRA allows review of Board decisions not only in the Circuit in which the unfair labor practice was alleged to have occurred, but also in the Circuit in which the person aggrieved by the Board's order "resides or transacts business." 29 U.S.C. § 160(f).

and fragrances. The petitioned-for unit includes all full-time, part-time, and on-call employees employed in the Saugus store's cosmetics and fragrances department, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances.

The cosmetics and fragrances department is located in two areas within the Saugus store, on the first and second floors; the two areas are connected by a bank of elevators. Each of the two selling areas is spatially distinct from the other primary sales departments. Cosmetics beauty advisors are specifically assigned to one of eight counters in the first floor cosmetics area, each of which is dedicated to selling products from one of eight primary cosmetics vendors. Cosmetics beauty advisors typically sell only one vendor's products, which they also use to give customers makeovers. Fragrances beauty advisors are assigned to either the men's or the women's fragrances counter, and they sell all available men's or women's products, regardless of the vendor. Cosmetics and fragrances beauty advisors keep lists of their regular customers, which they use to invite customers to product launches or to book appointments to give customers makeovers. Although cosmetics and fragrances employees occasionally assist other departments with inventory, the record is clear that cosmetics and fragrances employees are never asked to sell in other departments, nor are other selling employees asked to sell in the cosmetics and fragrances department.

Six of the eight cosmetics counters, the women's fragrances counter, and the men's fragrances counter each have a counter manager who, in addition to

selling products, helps organize promotional events, monitors the counter's stock, coaches beauty advisors on customer service and selling technique, ensures that the counter is properly covered by beauty advisors, and schedules visits by vendor employees, such as sprayers and makeup artists. Finally, the department has seven on-call employees who, unlike the beauty advisors, may work at any of the ten counters. There is no indication that any other primary sales department has the equivalent of counter managers, and the record is unclear as to whether the other primary sales departments have the equivalent of on-call employees.

Outside of the cosmetics and fragrances department the Saugus store has approximately thirty non-selling employees (a receiving team, a merchandising team, and staffing employees) and eighty selling employees organized within the other ten primary sales departments. Most, but not all, of the other departments have their own sales manager, and at least some of them are divided into sub-departments. Certain other primary sales departments have specialist sales employees who, like the cosmetics beauty advisors, specialize in selling a particular vendor's products; in those departments, vendor representatives monitor stock and train selling employees on selling technique and product knowledge.

Cosmetics and fragrances employees and other selling employees have some incidental contact: cosmetics and fragrances employees occasionally assist in storewide inventory, and all employees whose shifts correspond with the store's opening attend brief daily "rallies" at which management

reviews the previous day's sales figures and any in-store events that are taking place that day. In addition, all selling employees work shifts during the same time periods, use the same entrance, have the same clocking system, and use the same break room. However, the record contains little evidence of temporary interchange between cosmetics and fragrances employees and other selling employees.

Although compensation differs, all selling employees enjoy the same benefits, are subject to the same employee handbook, and have access to the same in-store dispute resolution program. All selling employees are evaluated based on the same criteria. Finally, all selling employees are coached through the same program designed to improve selling techniques and product knowledge.

B.

In October 2012, the Union filed a petition with the Board seeking a representation election among all cosmetics and fragrances employees at the Saugus store. In November 2012, the Board's Acting Regional Director (ARD) issued a Decision and Direction of Election in which he found that a petitioned-for bargaining unit of cosmetics and fragrances employees, including counter managers, employed by Macy's at its Saugus store was appropriate. Thereafter, Macy's filed a timely request for review. Macy's contended that the smallest appropriate unit must include all employees at the Saugus store or, in the alternative, all selling employees at the store. The Union filed an opposition. In December 2012, the Board granted the Employer's request for review.

In making a determination as to the appropriateness of the bargaining unit, the Board applied the "overwhelming community of interest" test set forth in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, 2011 WL 3916077 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). The Board determined that the cosmetics and fragrances employees share a community of interest, finding that all of the petitioned-for employees: work in the same department and in the same two connected, distinct work areas; have common, separate supervision; work with a shared distinct purpose and functional integration; have little contact with other selling employees; and are paid on the same basis, receive the same benefits, and are subject to the same employer policies.

The Board then addressed Macy's contention that the smallest appropriate unit must include a wall-to-wall unit of all Saugus store employees, or, alternatively, all selling employees at the store. The Board explained that *Specialty Healthcare* requires an employer to demonstrate that the excluded employees share an "overwhelming community of interest" with the employees in the petitioned-for unit, such that their community of interest factors "overlap almost completely." While acknowledging that the petitioned-for unit shared some factors with certain other selling employees, the Board concluded that a storewide unit was not required.

Finally, the Board addressed Macy's contention that *Specialty Healthcare* deviated from a line of precedent holding that a storewide unit is

"presumptively appropriate" within the retail industry. After considering the relevant precedent, the Board concluded that it has, "over time, developed and applied a standard that allows a less-than-storewide unit so long as that unit is identifiable, the unit employees share a community of interest, and those employees are sufficiently distinct from other store employees." It therefore found that the petitioned-for unit was appropriate under Board precedent even without reference to *Specialty Healthcare*.

After Macy's refused to bargain with the Union, the Board filed an unfair labor practices order. Macy's petitioned for review, arguing that the unit sanctioned by the Board was clearly not appropriate, that the Board applied a test that cannot be squared with the NLRA or prior Board precedent governing initial unit determinations, and that, even under *Specialty Healthcare*, the Board approved an inappropriate unit. The Board cross-applied for enforcement of its order.

II.

Under Section 10(e) of the NLRA, which governs petitions for enforcement of Board orders, the Board's factual findings are conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). Section 10(f), which governs petitions for review of Board orders, contains the same standard of review for factual findings. 29 U.S.C. § 160(f). As for questions of law, the Supreme Court has repeatedly held that "the NLRB has the primary responsibility for developing and applying national labor policy" and that the Board's rules should therefore be accorded "considerable deference."

NLRB v. Curtin Matheson Scien., Inc., 494 U.S. 775, 786, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990).

"This court's review of the Board's determination of an appropriate bargaining unit is exceedingly narrow." *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 572 (5th Cir. 1991) (quoting *NLRB v. S. Metal Serv.*, 606 F.2d 512, 514 (5th Cir. 1979) (internal quotation marks omitted)). This court therefore reviews unit determinations only to determine "whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in evidentiary support." *Id.* at 573. An employer who challenges the Board's determination has the burden of establishing "that the designated unit is clearly not appropriate." *Id.* at 574 (quoting *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1155–56 (5th Cir. 1980)).

III.

Section 9(a) of the NLRA provides that a union will be the exclusive bargaining representative if chosen "by the majority of the employees in a unit appropriate for" collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], 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). The Act does not, however, tell the Board how to determine whether a bargaining unit is appropriate.

In making its determination, the Board has traditionally looks at the "community of interest" of

the employees involved. *Elec. Data Sys.*, 938 F.2d at 573. As this court has explained:

> Whether employees have a community of interests is determined by looking at such factors as: similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work and other terms and conditions of employment; similarity in the kind of work performed; similarity in the qualifications, skills and training of employees; frequency of contact or interchange among employees; geographic proximity; continuity or integration of production processes; common supervision and determination of labor-relations policy; relationship to the administrative organization of the employer; history of collective bargaining; desires of the affected employees; and extent of union organization.

NLRB v. Catalytic Indus. Maint. Co. (CIMCO), 964 F.2d 513, 518 (5th Cir. 1992). This court has made clear that "[t]hese factors have no independent significance." *Purnell's Pride*, 609 F.2d at 1156. Rather, in assessing the employees' community of interests "[t]he Board must consider the entire factual situation, and its discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors." *Elec. Data Sys. Corp.*, 938 F.2d at 573 (quoting *NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir. 1986)). In addition, the Supreme Court has stated that "employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991).

Applying this standard, this court has held that where there is evidence that an alternative unit "might also [be] an appropriate bargaining unit," the unit approved by the NLRB will nevertheless be enforced unless it was "clearly not appropriate." *Elec. Data Sys. Corp.*, 938 F.2d at 574 (quoting *Purnell's Pride*, 609 F.2d at 1156).

In *Specialty Healthcare*, the Board clarified the principles that apply in cases, such as this one, where a party contends that the smallest appropriate bargaining unit must include additional employees beyond those in the petitioned-for unit. If the Board determines that the smaller unit is readily identifiable as a group—based on job classifications, departments, functions, work locations, skills, or similar factors—and the employees in the smaller unit share a community of interest according to the traditional criteria,

> the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Specialty Healthcare, 357 NLRB No. 83, at *17. Even before the Board decided *Specialty Healthcare*, the D.C. Circuit had approved an "overwhelming community of interest" standard, holding that "[i]f the employees in the proposed unit share a community of interest, then the unit is *prima facie* appropriate," and the employer bears the burden of showing that it is "truly inappropriate." *Blue Man*

Vegas, LLC v. NLRB, 529 F.3d 417, 421 (D.C. Cir. 2008). As the court explained, this burden is satisfied where there "is no legitimate basis upon which to exclude certain employees from [the proposed unit]." *Id.*; *accord Specialty Healthcare*, 357 NLRB No. 83, at *16.

A.

Macy's begins by arguing that the unit approved by the Board was clearly not appropriate because all sales employees at the Saugus store represent "a homogenous work force." Citing to *Amalgamated Clothing Workers*, 491 F.2d 595 (5th Cir. 1974), Macy's argues that a unit limited to cosmetics and fragrances employees is inappropriate because "there are no material distinctions among the sales employees in the Saugus store." In *Amalgamated Clothing Workers*, the Board had approved a unit of cutters, markers, and spreaders solely on the grounds that they were "highly skilled." *Id.* at 598. This court rejected the Board's unit determination because of "the complete lack of separate interests in any conditions of employment" that distinguished the petitioned-for unit from the rest of the employees. *Id.* at 598.

The Board's findings in this case, which are supported by substantial evidence, do not demonstrate a "complete lack of separate interests." In making its argument, Macy's simply ignores or contradicts the Board's explicit findings that illustrate the distinct interests of the cosmetics and fragrances employees. Contrary to Macy's claim that all employees "collaborate in the same integrated workplace," the Board found "little evidence of temporary interchange between the petitioned- for

employees and other selling employees." *Macy's & Local 1445*, 361 NLRB No. 4, *6 (July 22, 2014). Specifically, the Board found "no examples of (1) other selling employees actually assisting the cosmetics and fragrances department, (2) cosmetics and fragrances employees actually assisting other departments, or (3) a selling employee from one department picking up shifts in another department." *Id.* And while Macy's asserts that "[e]xtensive training and coaching opportunities are available to all sales employees," the Board in fact found that much of the training was department-specific. *Id.* at *4 ("[S]ales departments hold various seminars during the year that train employees in their departments in selling technique, product knowledge, and related topics."). Even Macy's assertion that all selling employees "perform the same basic job function of selling merchandise to customers" ignores the Board's finding that cosmetics and fragrances employees perform a unique function, that of "selling cosmetics and fragrances." *Id.* at *10.

Macy's concedes that there are distinctions between the cosmetics and fragrances sales employees and the rest of the selling staff. It acknowledges that the department is organized as a separate department, supervised by a separate sales manager, and operated primarily in distinct areas of the store. But it asserts that the Board failed to explain why these distinctions outweigh the similarities between the petitioned-for employees and the other selling employees, and it argues that, under *Purnell's Pride*, this "lack of explanation is fatal to the Board's decision." In *Purnell's Pride*, the Regional Director had simply listed the factors that guided his

unit determination. 609 F.2d at 1159–60. Finding that the Board, in upholding the Regional Director's ruling, had failed to adequately explain its weighing of the community interest factors, *see id*. at 1160, this court remanded the case to allow the Board to disclose the basis of its order, *id*. at 1162. Here, the Board satisfied *Purnell's Pride*'s requirements: the decision identified some factors that could weigh against the petitioned-for unit and explained—with citation to Board precedent—why these factors did not render the petitioned-for unit inappropriate. *Macy's & Local 1445*, 361 NLRB No. 4, *11.

Finally, Macy's advances two policy-based arguments. First, it contends that the petitioned-for unit is inappropriate because its approval by the Board will "wreak havoc in the retail industry" by disrupting employer operations and frustrating customer experience. Next, it contends that the certification of departmental units will undermine workers' rights. These arguments are unsuccessful. Macy's does not cite to any controlling authority for the proposition that the effect on an employer's business is a factor to be considered in unit determinations. And the Board's history of approving multiple units in the retail and other industries suggests that neither workers nor businesses will suffer grave consequences as a result of the Board's order. *See, e.g.*, *Teledyne Economic Dev. v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997) (enforcing Board's decision certifying two units at one employer, a Job Corps Center); *Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996) (enforcing Board order requiring employer to bargain with three different units at a printing facility); *Stern's Paramus*,

150 NLRB 799, 802-03, 806 (1965) (approving separate units of selling, non-selling, and restaurant employees at a department store; and observing that while the Board has regarded a storewide unit as the "basically appropriate" or "optimum" unit in retail establishments, it has approved "a variety" of less-than-storewide units representing various "occupational groupings" in department stores); *I. Magnin & Co.*, 119 NLRB at 643 (1957).

As we noted above, the Board may certify "'a unit' that is 'appropriate'—not necessarily the single most appropriate unit." *Am. Hosp. Ass'n*, 499 U.S. at 610, 111 S.Ct. 1539. Although the unit composition argued for by Macy's may have also been "an appropriate bargaining unit," we cannot say that the one approved by the NLRB was "clearly not appropriate" based on the employees' "community of interests." *Elec. Data Sys. Corp.* 938 F.2d at 574 (quoting *Purnell's Pride*, 609 F.2d at 1156).

B.

Next, Macy's contends that the Board's "overwhelming community of interest" test cannot be squared with the NLRA or prior Board precedent governing initial unit determinations. We disagree.

As the Supreme Court has recognized, the Board has the authority to develop rules, whether through adjudication or by the exercise of its rulemaking authority, to guide its resolution of unit determinations. *Am. Hosp. Ass'n*, 499 U.S. at 611–12, 111 S.Ct. 1539. As interpretations of the Act, such rules are subject to the principles of *Chevron* U.S.*A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

See NLRB v. UFCW, Local 23, 484 U.S. 112, 123–24, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987). Under *Chevron*, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843, 104 S.Ct. 2778. The courts must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398–99, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996) (citation omitted). This court will not disturb the Board's reading of the Act if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979). Further, the Board has authority to depart from precedent and change its rules and standards as long as it "set[s] forth clearly the reasons for its new approach." *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1160 (5th Cir. 1977). However, where the Board has not departed from a "uniform rule," the Board need not give a detailed rationale for its chosen approach. *See NLRB v. H. M. Patterson & Son, Inc.*, 636 F.2d 1014, 1017 (5th Cir. 1981).

We agree with our sister circuits that in *Specialty Healthcare* the Board "clarified—rather than overhauled—its unit-determination analysis." Nestle *Dreyer's Ice Cream Co.* v. *NLRB*, No. 14-2222, 2016 WL 1638039 (4th Cir. Apr. 26, 2016); *accord FedEx* Freight, Inc. v. NLRB, 816 F.3d 515, 525 (8th Cir. 2016) ("We conclude that the overwhelming community of interest standard articulated in *Specialty Healthcare* is not a material departure from

past precedent."); *Kindred*, 727 F.3d at 561 ("The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* ... TTT is not new."); *Blue Man Vegas*, 529 F.3d at 421 (the Board's "consistent analytic framework" includes the question whether "the excluded employees share an overwhelming community of interest with the included employees").

In *Specialty Healthcare*, the Board laid out the "traditional standard" applicable when an employer contends that the smallest appropriate unit contains employees not in the petitioned-for unit. 357 NLRB No. 83, at *15. Citing its own precedent and decisions of the D.C. Circuit and the Seventh Circuit, the Board explained: "Given that the statute requires only an appropriate unit, once the Board has determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate." *Id.* (citing *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964); *Blue Man Vegas*, 529 F.3d at 421; *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999)). In such a situation, the Board determined that its precedent requires the proponent of the larger unit to demonstrate that all employees "share 'an overwhelming community of interest' such that there 'is no legitimate basis upon which to exclude certain employees from it.'" *Id.* at *16 (quoting *Blue Man Vegas*, 529 F.3d at 421). The Board acknowledged that it "has sometimes used different words to describe this standard and has sometimes decided

cases such as this without articulating any clear standard," *id*. at 17, but an evaluation of the cited cases reveals that the newly-formulated standard was not a departure from Board precedent.

Macy's urges us to overrule *Specialty Healthcare* for several reasons. First, it asserts that the overwhelming community of interest test improperly affords controlling weight to the extent of union organization, in violation of Section 9(c)(5) of the NLRA. Second, it argues that the test departs from established Board precedent. Third, it contends that the test was improperly taken from the "accretion" context. Fourth, it claims that the Board violated the Administrative Procedure Act (APA) by promulgating the overwhelming community of interest test through adjudication rather than rulemaking. Finally, Macy's asserts that the test's application is particularly inappropriate in the retail context, where it "discard[s] decades of precedent favoring storewide bargaining units." Contending that the Board was able to find the unit of cosmetics and fragrances employees appropriate only by following *Specialty Healthcare*, Macy's argues that this court's invalidation of the overwhelming community of interest test—or its determination that the test is inapplicable in the retail context—would preclude enforcement of the Board's order. Each of these arguments is unavailing.

1. *The Overwhelming Community of Interest Test and Section 9(c)(5)*

Section 9(c)(5) of the Act provides that the Board, in making unit determinations, shall ensure that "the extent of organization shall not be controlling." 29 U.S.C. § 159(c)(5). The Supreme Court has construed

this language to mean that "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of extent of organization," but that Congress did not preclude the Board from considering organization "as one factor" in making unit determinations. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441–42, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965).

Citing *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), Macy's argues that the Board's overwhelming community of interest test contravenes Section 9(c) by "accord[ing] controlling weight to the extent of union organization" by making union-proposed units presumptively appropriate. However, the Fourth Circuit has expressly rejected this characterization of its holding in *Lundy*. *See Dreyer's*, 2016 WL 1638039. In *Lundy*, the Fourth Circuit rejected the Board's use of a standard under which "any union-proposed unit is *presumed appropriate* unless an 'overwhelming community of interest' exists between the excluded employees and the union-proposed unit." 68 F.3d at 1581 (emphasis added). In *Dreyer's*, the court explained:

> *Lundy* does not establish that the overwhelming-community-of-interest test as later applied in *Specialty Healthcare* fails to comport with the NLRA. Instead, Lundy prohibits the overwhelming- community-of-interest test where the Board first conducts a deficient community- of-interest analysis—that is, where the first step of the Specialty Healthcare test fails to guard against arbitrary exclusions.

2016 WL 1638039, at *7. Where the Board "rigorously weigh[s] the traditional community- of-interest factors to ensure that the proposed unit was proper under the NLRA," the Court concluded, the "overwhelming community of interest" does not conflict with the Act. *Id.* at *8. That is precisely what the Board did in the instant case. As a result, the test and its application do not violate Section 9(c).

2. *The Board's Unit Determination Precedent*

Macy's next argues that the *Specialty Healthcare* standard departs from established Board precedent. Macy's asserts that, contrary to Board precedent, the *Specialty Healthcare* analysis looks, "solely and in isolation," at "whether the employees in the unit sought have interests in common with one another." This argument is unconvincing. The community of interest test articulated in Specialty Healthcare and applied in this case was taken from the Board's 2002 decision in *United Operations* and was based on Board precedent going back to 1964. That test does not look only at the commonalities within the petitioned-for unit. Rather, it asks:

> whether the employees are organized into *a separate department*; have *distinct* skills and training; have *distinct* job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated *with the Employer's other employees*; have frequent contact *with other employees*; interchange *with other employees*; have distinct terms and conditions of employment; and are *separately* supervised.

Specialty Healthcare, 357 NLRB No. 83, at *14 (emphasis added). The Board's initial unit determination in *Specialty Healthcare* and in this case thus conformed to established precedent. *See, e.g., In re United Operations, Inc.*, 338 NLRB 123; *Bartlett Collins Co.*, 334 NLRB 484 (2001); *The Dahl Oil Co.*, 221 NLRB 1311 (1964). The Board did not abuse its discretion by applying the traditional community of interest test in its initial unit determination.

3. *"Overwhelming Community of Interest" in the Accretion Context*

An "accretion" is the addition of a small group of employees to an established bargaining unit without first holding an election. Michael J. Frank, *Accretion Elections: Making Employee Choice Paramount*, 5 U. Pa. J. Lab. & Emp. L. 101, 102 (2002). Because of accretion's "interference with the employees' freedom to choose their own bargaining agents," the Board does not apply the traditional community of interest test to determine whether the enlarged unit would be appropriate; rather, the Board generally finds that "[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit *that they have no true identity distinct from it*." *DMR Corp.*, 795 F.2d at 476 (citation omitted) (emphasis in original). While the structure and the underlying policy motivations of this standard resemble those of the *Specialty Healthcare* overwhelming community of interest test, Macy's contention that the latter was "improperly imported" from the accretion context fails to persuade us. As an initial matter, as the Fourth Circuit observed in *Dreyer's*, "[it is not]

unreasonable … for the Board to use the same overwhelming-community-of-interest test in this context that it has historically used in the context of accretions." 2016 WL 1638039, at *9. Furthermore, the Board has applied the overwhelming community of interest test in the initial determination context since at least 1967, when, in Jewish Hospital Association of Cincinnati, it held that a unit limited to service employees was inappropriate because of their "overwhelming community of interest" with maintenance employees. 223 NLRB at 617. Macy's premise that the overwhelming community of interest test is inappropriate when applied in an initial unit determination thus falls, and its related contention that the test is therefore inappropriate necessarily fails.

4. *The NLRB's Adjudicative Rulemaking Authority*

In *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), the Supreme Court announced that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." Yet Macy's contends that, because *Specialty Healthcare* announced "'policy-type rules or standards' to be applied in all future unit determination cases," the Board was required by the APA to resort to rulemaking and the decision should be set aside.

The Supreme Court has previously rejected a claim identical to that advanced by Macy's. In *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947), the respondent corporation argued that the Commission was required to resort to its

rulemaking procedures if it desired to promulgate a new standard that would govern future conduct, rather than applying a general standard that it had formulated for the first time in that proceeding. The Court rejected this contention, noting that the Commission had a statutory duty to decide the issue at hand in light of the proper standards and that this duty remained "regardless of whether those standards previously had been spelled out in a general rule or regulation." *Id.* at 201, 67 S.Ct. 1760. The Court concluded that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203, 67 S.Ct. 1760. Even accepting the premise that *Specialty Healthcare* announced a new standard, the contention that the Board violated the APA is therefore unavailing.

5. *Presumptively Appropriate Units*

In early cases dealing with the retail industry, the Board stated that a storewide unit was "basically appropriate," *I. Magnin*, 119 NLRB at 643, or was "the optimum unit," *May Department Stores*, 97 NLRB 1007, 1008 (1952). But even in the cases announcing that "presumption," the Board recognized that smaller units can be appropriate. *See Allied Store of New York, Inc.*, 150 NLRB 799, 803 (1965). This is consistent with the policies underlying the Board's general approach to unit determination: recognition that a unit is presumptively appropriate does not lead to a requirement that only that unit can be appropriate. As the Board explained in *Specialty Healthcare*:

> the suggestion that there is only one set of appropriate units in an industry runs counter to the statutory language and the main corpus of our unit jurisprudence, which holds that the Board need find only that the proposed unit is an appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace. 357 NLRB No. 83, at *10. Thus, even if a store-wide unit were presumptively appropriate in the retail industry—a contention to which the Board strenuously objects, *Macy's & Local 1445*, 371 NLRB No. 4, *17-22—the application of *Specialty Healthcare* to the retail context would not mark a deviation from Board precedent.

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The standard articulated by the Board in *Specialty Healthcare* does not violate the NLRA. The Board did not depart from a uniform rule by applying it, and its basis and application were cogently explained. The standard was not improperly imported from another context, and it was not adopted in violation of the APA. Finally, the application of the standard in the retail context is not inconsistent with prior Board decisions. We therefore decline to reject the *Specialty Healthcare* standard and hold that the Board did not abuse its discretion by articulating and applying this standard in the instant case.

C.

Finally, Macy's argues that, even under *Specialty Healthcare*, the Board approved an inappropriate unit because it carried its burden of showing that all

selling employees within the store share an overwhelming community of interest. However, as explained in Part III.A, *supra*, the Board's factual findings illustrate numerous distinctions between the cosmetics and fragrances employees and the other selling employees, such that it cannot be said that there is "no legitimate basis upon which to exclude [those] employees" from the unit. *Specialty Healthcare*, 357 NLRB No. 83, at *15. We therefore hold that the Board did not abuse its discretion when it determined that the other selling employees do not share an overwhelming a community of interest with the petitioned-for employees.

IV.

The Board reasonably concluded the unit of cosmetics and fragrances employees at the Saugus store was appropriate. Macy's has failed to establish that the unit is clearly not appropriate and has failed to demonstrate that the Board abused its discretion by articulating and applying the overwhelming community of interest test. The Board's cross-application for enforcement is therefore GRANTED and Macy's petition for review is DENIED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

MACY'S, INC. *AND* LOCAL 1445, UNITED FOOD AND COMMERCIAL WORKERS UNION

Case 01-RC-091163
July 22, 2014

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA, MISCIMARRA, AND SCHIFFER

On November 8, 2012, the Acting Regional Director for Region 1 issued a Decision and Direction of Election in which he found that a petitioned-for departmental unit of cosmetics and fragrances employees, including counter managers, employed by the Employer at its Saugus, Massachusetts store, was appropriate. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review. The Employer contends that the smallest appropriate unit must include all employees at the Saugus store or, in the alternative, all selling employees at the store. The Petitioner filed an opposition. On December 4, 2012, the Board granted the Employer's request for review. Thereafter, the Employer and

Petitioner filed briefs on review. Several amici curiae were also granted special permission to file briefs.[1]

The Board has carefully considered the entire record in this proceeding, including the briefs on review and amicus briefs.[2] For the reasons set forth below, we affirm the Acting Regional Director's finding that, under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013), the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, and that the Employer has not met its burden of demonstrating that the other selling and nonselling employees it seeks to include share an overwhelming community of interest with the petitioned-for employees so as to require their inclusion in the unit. Our decision today is based solely on the facts before

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[1] The National Retail Federation (NRF) filed an amicus brief. A joint amicus brief was filed by Retail Industry Leaders Association and Retail Litigation Center (RILA-RLC). A joint amicus brief was also filed by the Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, American Hotel & Lodging Association, HR Policy Association, International Council of Shopping Centers, International Foodservice Distributors Association, International Franchise Association, National Association of Manufacturers, National Association of Wholesale-Distributors, National Council of Chain Restaurants, National Federation of Independent Business, and Society for Human Resource Management (Chamber of Commerce et al.). Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Petitioner filed a postbrief letter calling the Board's attention to recent case authority.

[2] Member Johnson is recused from participating in this case, and he took no part in the consideration or disposition of this case.

us in this case, and we do not reach the question of whether other subsets of selling employees at this, or any other, retail department store may also constitute appropriate units.

FACTS

The Employer operates a national chain of department stores, including one in Saugus. Store Manager Danielle McKay is the highest executive at the Saugus store, and she oversees 7 sales managers who oversee 11 primary sales departments:[3] juniors, ready-to-wear, women's shoes, handbags, furniture (also known as big ticket), home (also referred to as housewares), men's clothing, bridal, fine jewelry, fashion jewelry, and cosmetics and fragrances.[4] Kelly Quince is the sales manager for cosmetics and fragrances.[5] Quince has no regular responsibilities

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[3] These primary sales departments are subdivided into other "departments," but these sub-departments are not separately supervised. Instead, employees in these subdepartments report to their primary sales department's sales manager. For the purposes of this decision, we use "department" to refer to the 11 primary sales departments.

[4] The ready-to-wear, home/housewares, men's, big ticket, and cosmetics and fragrances departments have their own individual sales manager. A sixth sales manager oversees women's shoes and handbags, and a seventh sales manager oversees juniors and fine jewelry. The record does not indicate which, if any, sales managers oversee fashion jewelry and bridal. In addition to the sales managers, the record refers to a selling floor supervisor "whose responsibility is also fine jewelry," but there is no additional information about how this position fits within the store's management structure.

[5] The dissent states that Quince oversees "more than one functional area" and at several points refers to the petitioned-for employees as a "combined cosmetics and fragrances group." We

for the other primary sales departments, nor do the other sales managers have any regular responsibilities for the cosmetics and fragrances department.[6] Of 150 total employees at the store, 120 are selling employees, and of these, 41 work in cosmetics and fragrances.

The Petitioned-For Unit:
Cosmetics and Fragrances Employees

The Petitioner seeks to represent all full-time, part-time, and on-call employees employed in the Saugus store's cosmetics and fragrances department, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances. The parties agree that these employees should be included in the unit.[7] Of the 41 employees in the petitioned-for unit, 8 are counter managers, 7 are on-call employees, and the remaining employees are cosmetics or fragrances beauty advisors.[8]

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emphasize that the Employer treats cosmetics and fragrances as a single primary selling department with its own sales manager.

[6] Sales managers may cover for each other due to absences, but the record does not indicate whether this happens with any frequency.

[7] The parties also agreed that the unit should exclude MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, department managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

[8] The record does not break down how many beauty advisors work in cosmetics and how many work in fragrances. It appears

The cosmetics and fragrances department is situated in two areas. The first, which consists of cosmetics and women's fragrances, is located on the first floor. It is framed on one side by the store entrance, which it faces, and on the other by escalators that lead up to the second floor. Surrounding the escalator bank on the second floor is the second area, which consists of men's fragrances. In addition to the women's fragrances counter, the first floor cosmetics area is divided into eight counters, each of which is dedicated to selling products from one of the eight primary cosmetics vendors: Shiseido, Elizabeth Arden, Chanel, Clarins, Lancome, Clinique, Estée Lauder, and Origins.[9] As shown on the store's floor plan, each of these two selling areas is spatially distinct from–although adjacent to several of–the other primary sales departments.[10]

Cosmetics beauty advisors are specifically assigned to one of the eight cosmetics vendor counters. They typically sell only that vendor's products, although from time to time they may sell other cosmetics vendors' products (for example, an Estée Lauder beauty advisor might assist customers at the

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that there are more cosmetics beauty advisors, as there are eight total cosmetics counters and two fragrances counters.

[9] There is also a cosmetics counter for MAC in this area, but that counter is staffed entirely by individuals employed directly by Estée Lauder.

[10] Although the map is not clear, it appears that the first floor cosmetics and fragrances area is adjacent to the juniors, fine jewelry, women's shoes, and ready-to-wear departments. The second floor men's fragrances counter is adjacent to men's clothing.

Clinique counter when the Clinique beauty advisor is on break). Cosmetics beauty advisors demonstrate products by giving customers makeovers and by otherwise applying products to a customer's skin. Fragrances beauty advisors are assigned to either the men's or women's fragrances counter, and sell all available men's or women's products, regardless of the vendor. The Shiseido, Chanel, Lancome, Clinique, Estée Lauder, Origins, women's fragrances, and men's fragrances counters each have a counter manager who, in addition to selling products, helps organize promotional events, monitor the counter's stock, coach beauty advisors on customer service and selling technique, ensure that their counter is properly covered by beauty advisors, and schedule visits by vendor employees (such as sprayers and makeup artists).[11] Counter managers also assist Quince in evaluating beauty advisors. Although cosmetics and fragrances beauty advisors do not usually work at each others' counters, the seven on-call employees may work at any of the ten counters.

Besides the petitioned-for employees, two types of vendor representatives–account coordinators and account executives–are frequently present in the cosmetics and fragrances department. Most of the primary cosmetics vendors have account coordinators, who are employed by Macy's.[12] Account coordinators coach beauty advisors on selling and customer service,

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[11] Sprayers, who are employed directly by fragrances vendors, dispense fragrance samples to customers. Makeup artists, who are employed directly by cosmetics vendors, train cosmetics beauty advisors and give customers makeovers at special events.

[12] Elizabeth Arden apparently does not have an account coordinator for the Saugus store.

provide in-store training for beauty advisors who work at that vendor's counter, and forward product-related training materials to their beauty advisors. The highest volume cosmetics vendors also have account executives–employed directly by the vendors–who visit the Saugus store to ensure that their beauty advisors have what they need; they also organize off-site training for beauty advisors who sell that vendor's products.[13] Fragrances vendors also have vendor representatives, but it appears that they do not visit the store as frequently as the cosmetics vendor representatives.

Account coordinators and executives are also involved in hiring cosmetics beauty advisors. Typically, a vendor representative will interview an applicant along with the Employer, and the Employer will consult the vendor representative to ensure that mutually acceptable applicants are hired. Vendor representatives are not, however, involved in hiring fragrances beauty advisors or on-call employees. With respect to the petitioned-for employees, prior experience in selling cosmetics or fragrances is desirable, but not required.

The in-store and offsite training provided to beauty advisors covers selling techniques and product knowledge. For fragrances beauty advisors, product knowledge training involves topics such as ingredients, scents, and notes.[14] For cosmetics

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[13] It is not clear in the record exactly which vendors have account executives, but the record shows that Clinique, Estée Lauder, and Lancôme do.

[14] The Employer's Brief on Review states that fragrances beauty advisors do not receive offsite training. Store Manager McKay, however, expressly testified that fragrances beauty

beauty advisors, product knowledge training mainly involves products in their vendor's line, but they also receive training in interselling so that they can assist customers at another vendor's counter. Cosmetics beauty advisors are also trained in skin tones, skin types, skin conditions, and use of color. Unlike the beauty advisors, on-call employees receive no training beyond what they learn on the selling floor.

Beauty advisors are paid an hourly wage, plus a 3 percent commission on products sold from their own counter. Cosmetics beauty advisors receive a 2 percent commission when they sell cosmetics from other counters. Counter managers also receive an hourly wage plus a 3 percent commission, as well as a .5 percent commission on all sales made at their counter. On-call employees receive a 2 percent commission regardless of what they sell. The exact mechanism by which the commission is paid depends on the vendors and is negotiated between the store and the vendor. The record does not contain any details of specific commission arrangements different vendors have with the store. Petitioned-for employees may, on occasion, ring up items from other sales departments, but they receive no commission on these items.

Cosmetics beauty advisors keep lists of their regular customers.[15] These lists are used to book appointments to give customers makeovers, to invite them to try new products, to presell products, and to

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advisors may receive onsite or offsite training from vendor representatives.

[15] The two cosmetics beauty advisors who testified estimated that they had lists of 200 and 400 clients, respectively.

notify them of special promotions or events. Customers may also contact their cosmetics beauty advisor to ask for product refills or to schedule a makeover. One cosmetics beauty advisor specified that she calls her regular customers about five times a year to tell them about new products, to ask if they need any products replenished, and to offer them free gifts. Fragrances beauty advisors also keep client lists, which they use to invite customers to new fragrance launches. The record does not indicate whether on-call employees maintain client lists.

Most of the cosmetics vendors provide distinctive uniforms for the beauty advisors who staff their counters. Clinique, Origins, Estée Lauder, Lancome, Clarins, and Elizabeth Arden beauty advisors all have their own uniforms. The remaining (Shiseido and Chanel) cosmetics beauty advisors and the fragrances beauty advisors, however, simply follow the Employer's "basic black" dress requirement.

Other Employees

The Employer argues that the only appropriate unit must include all other employees of the Saugus store, or at least all of the selling employees at the Saugus store.[16] The record contains scant evidence regarding the 30 nonselling employees employed at the store: there is a receiving team (with its own manager) and a merchandising team (with two managers), who are collectively referred to as stock employees, and there are also staffing employees.

[16] The Petitioner is unwilling to proceed in an election in any unit other than the petitioned-for unit.

The evidence concerning selling employees in other primary sales departments is also generally less specific than the evidence concerning the petitioned-for employees. There is, for example, no indication of how the 80 remaining selling employees are distributed across the 10 primary sales departments. Similarly, there is far less information on how these other selling departments are structured. In this regard, the record reveals only that most (but not all) primary sales departments have their own sales manager, and that at least some of them are divided into subdepartments, which do not have supervision separate from the sales manager. There is no indication that the other primary sales departments have the equivalent of counter managers, and the record is unclear as to whether the other primary sales departments utilize the equivalent of on-call employees.[17]

Certain other primary sales departments do, however, have some specialist sales employees who, like the cosmetics beauty advisors, specialize in selling a particular vendor's products. For instance, specialists sell Guess products in shoes and men's clothing, North Bay in shoes, and Polo in men's clothing. Levi's, Lacoste, Buffalo, and INC (the Employer's private brand) also have specialists who

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[17] The record is clear that the cosmetics and fragrances on-call employees do not work in other departments. The only other testimony about the use of on-call employees (or their equivalent) in other departments consists of Human Resources Director Gina DiCarlo's statement that there are no on-call employees "specifically assigned to those departments" that sell North Face products (which apparently include the juniors, men's clothing, and ready-to-wear departments).

sell their products. Likewise, vendor representatives operate in certain other sales departments, monitoring stock and training selling employees on selling technique and product knowledge. Guess, Polo, Buffalo, North Face, Nautica, Lacoste, and Hilfiger all have vendor representatives operating in sales departments that sell their products, and Lenox has representatives who operate in the home/housewares department. Vendors including Polo, North Face, and Levi's have conducted both in-store and offsite training for those specialists who sell their products.[18]

Aside from specialists, employees in other sales departments receive training through product information sheets, conversations with management, and offsite vendor training. Selling employees are also trained in relevant product-related matters. For example, employees who sell shoes are trained on fit, type, fabric, and color, and employees who sell dresses are trained on silhouette, fabrics, and fit. Further, other sales departments hold various seminars during the year that train employees in their departments in selling technique, product

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[18] Although there are specialist selling employees scattered across some other primary selling departments, the record does not establish how many other primary selling departments have specialist sales employees; further, there is no indication as to how many selling employees in any of those departments are specialists. Additionally, although there is evidence that selling employees (specialist and otherwise) outside of cosmetics and fragrances interact with vendor representatives, the record does not establish that a significant number of these other selling employees do so, insofar as it does not reveal the number of other specialist employees or the number of employees who interact with vendor representatives.

knowledge, and related topics. For example, juniors conducts back-to-school and newborn training seminars; big ticket has biannual training seminars where vendor representatives instruct employees on product knowledge, selling technique, clientelling, and selling protection plans; and fine jewelry conducts at least three annual seminars on product knowledge, clarity, cut, color, and weight.

In hiring, there are situations in which other sales departments consult with vendor representatives in selecting an applicant. Specifically, the Employer consults Levi's, Polo, Buffalo, and Guess vendor representatives when hiring sales specialists in those brands, and these representatives also interview applicants for specialist positions. As in cosmetics and fragrances, prior selling experience in the department's product is desirable, but not required.

Not all selling employees are paid on the base-plus-commission formula used in cosmetics and fragrances, but selling employees in the fine jewelry, men's clothing, men's shoes, and big ticket departments are paid on that basis.[19] At least some specialists in other departments also receive a base wage plus commission, but specific arrangements vary. For instance, the record suggests that Guess and Buffalo specialists are paid a base wage plus commission, but Levi's specialists receive a bonus rather than a commission, and Polo specialists receive no commission at all. As with the cosmetics beauty advisors, the precise mechanism by which a

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[19] Not all of these employees specialize in selling a particular vendor's products.

commission is paid to specialist selling employees varies by vendor.

Some selling employees outside of cosmetics and fragrances also keep customer lists. Selling employees in the fine jewelry, men's clothing, big ticket, and bridal departments all maintain such lists,[20] which are apparently used to invite customers to special events, such as a particular vendor event in the jewelry or bridal department.

Shared Community of Interest Factors and Bargaining History

There is some degree of contact between the cosmetics and fragrances department and other sales departments. As noted above, from time to time merchandise from other sales departments may be rung up in cosmetics and fragrances. But because various employees earn commission, the Employer does not "like to make a habit" of merchandise from one department being rung up in another; there is no evidence as to how frequently it occurs.[21] Although

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[20] The dissent states that these four departments have "already" used client lists to invite customers to special events. The record does not suggest that these four departments use these lists to the degree the cosmetics beauty advisors do (i.e., these other departments apparently do not use their client lists to book appointments, replenish products, or presell items). Contrary to the dissent, we do not think that Store Manager McKay's testimony suggests that there is any imminent plan to use client lists in the remaining primary sales departments

[21] In this regard, McKay testified that nobody receives commission if a cosmetics item is rung up in the shoe department. The Employer accordingly prefers to have each department ring up its own products so that commission is properly allocated.

various witnesses indicated that they had seen merchandise from other departments occasionally being rung up in cosmetics and fragrances (usually due to long lines in adjacent departments), two cosmetics beauty advisors stated that they had never seen cosmetics or fragrances rung up in a different department.[22]

There is some incidental contact between cosmetics and fragrances employees and other selling employees, given the proximity of the cosmetics and fragrances counters to other departments,[23] as well as daily morning rallies attended by all employees whose shifts correspond with the store's opening. These rallies–which review the previous day's sales figures and any in-store events taking place that day–are no longer than 15 minutes, and at times individual departments will have their own meetings in place of the rally. The record indicates that selling employees are expected to help each other out and to assist customers, and that this may lead to contact between the petitioned-for and other selling employees, but there is no indication of how often this happens or how extensive these interactions may be. Similarly, the record refers to cosmetics and fragrances personnel recruiting customers in other areas of the store (such as women's shoes), but the testimony on this count was vague and limited, so it is not clear how regularly this takes place, nor is it

[22] One beauty advisor commented that if customers want to purchase products, but also want to look in other departments, the beauty advisors will hold the cosmetics products for the customers until they are ready to check out.

[23] As noted above, the cosmetics and fragrances selling areas are adjacent to several other departments.

clear how much actual contact between petitioned-for and other selling employees results from these customer recruitment efforts.[24]

There is little evidence of temporary interchange between the petitioned-for employees and other selling employees. Petitioned-for employees are neither asked nor required to work in other departments, aside from assisting in periodic inventory.[25] Other selling employees are "not regularly" asked to work in cosmetics and fragrances, and although one witness stated that other selling employees might occasionally do so, her subsequent testimony limits such interchange to other selling employees helping out from a "recovery standpoint" or to assist a customer when a cosmetics or fragrances counter is temporarily unattended. There are no examples of (1) other selling employees actually assisting the cosmetics and fragrances

[24] It is not even clear that such activity involves petitioned-for employees. The relevant testimony begins with a discussion of sprayers–who are not among the petitioned-for employees–recruiting customers in other areas of the store, followed by the unelaborated statement that "cosmetics associates go into the shoe department to recruit."

[25] All employees participate in inventory, which consists of counting, scanning, and organizing products. Cosmetics and fragrances employees may be assigned to inventory work in other departments, or may end up conducting inventory in other departments if they finish their own inventory work early. Cosmetics and fragrances employees may, and have, requested inventory work in other departments as well. As inventory work involves no selling, cosmetics and fragrances employees receive only their base wage when performing such work. The record does not indicate the frequency of inventory work, which in any event is clearly incidental to the primary function of both the petitioned-for and other selling employees.

department, (2) cosmetics and fragrances employees actually assisting other departments, or (3) a selling employee from one department picking up shifts in another department. In the last 2 years, there have been eight permanent transfers from other areas of the store into the cosmetics and fragrances department,[26] and one permanent transfer out of the department to a supervisory position.

The petitioned-for employees as well as the other selling employees work shifts during the same time periods, use the same entrance, have the same clocking system, and use the same break room. As noted above, there is no prior experience required for any selling position. All selling employees who are present at the start of the day attend the morning rallies.

All selling employees enjoy the same benefits, are subject to the same employee handbook, and have access to the same in-store dispute resolution program. All selling employees are evaluated based on the same criteria (their "sales scorecard," customer service, and teamwork).[27] And all selling employees are coached through My Products

[26] Seven of these transfers involved an employee from another sales department transferring into cosmetics and fragrances; the eighth involved a staffing, i.e., nonselling, employee transferring to the Lancome counter.

[27] The precise evaluation forms differ from department to department, and each department has its own sales goals (which are factored into the "sales scorecard"). Within the cosmetics and fragrances department, cosmetics beauty advisors and counter managers have their own evaluation forms. The "scorecard" is less heavily weighted for counter managers (55 percent) than for other employees (70-80 percent).

Activities, a program consisting of exercises designed to improve selling techniques and product knowledge.

There is no bargaining history at the Saugus store. The Employer and Petitioner have two collective-bargaining agreements covering employees at six other stores. One agreement covers selling, support, and alterations employees at a store in Boston, but does not cover that store's cosmetics and fragrances department. The Petitioner organized the Boston store sometime before 1970, when it was a Jordan Marsh store, but the record contains no further evidence as to how that unit came into existence. The second agreement covers employees at the Employer's stores in Braintree, Natick, Peabody, and Belmont, Massachusetts, as well as one in Warwick, Rhode Island. That unit apparently has existed for decades, but was organized under Filene's, whose parent company the Employer acquired through a stock acquisition in 2005, and there is also no indication how this unit came into existence. This unit appears to include selling and support employees at the five stores, but does not cover cosmetics and fragrances employees at any of the stores,[28] with the exception of the Warwick cosmetics and fragrances employees, who had been historically excluded and voted to unionize and join the existing five-store unit in 2005 (when the store was still a Filene's location). The Warwick cosmetics and fragrances employees are now covered by the five-store contract, although the contract sets forth a

[28] Unlike the other four stores, there apparently are no cosmetics and fragrances employees at the Belmont store.

number of provisions applicable only to the Warwick cosmetics and fragrances employees.

On March 24, 2011, the Petitioner filed a petition seeking a self-determination election to determine whether Saugus employees wished to join the existing five-store unit; the petition covered all full-time and regular part-time employees at the Saugus store. See *Macy's, Inc.*, Case 01-RC-022530 (2011) (not reported in Board volumes).[29] The Employer, however, argued that adding the Saugus employees to the existing five-store unit would be inappropriate. The Regional Director agreed with the Employer, and instead directed an election to determine whether the Saugus employees wished to be represented in a single-store unit. The Petitioner agreed to move forward with the election, but lost.[30]

THE ACTING REGIONAL DIRECTOR'S DECISION

Applying *Specialty Healthcare*, supra, the Acting Regional Director first found that the employees in the petitioned-for unit are readily identifiable as a group and that they share a community of interest because the petitioned-for employees work in one of two distinct areas of the store, they work in one of two job classifications (beauty advisor and counter manager), and cosmetics beauty advisors can

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[29] Although not part of the record in this case, we take administrative notice of the Decision and Direction of Election in Case 01-RC-022530, which fully explains the nature of the unit sought in that case and the unit the Regional Director found appropriate.

[30] The Petitioner's willingness to proceed to an election in that case does not suggest that it did not believe that a separate unit of cosmetics and fragrances employees would also be an appropriate unit.

substitute for one another. Further, the Acting Regional Director found that the unit was not a "fractured" unit because it tracks a departmental line drawn by the Employer. The Acting Regional Director also found that this departmental line was further reflected by differences between the petitioned-for and other selling employees.

The Acting Regional Director then found that although the petitioned-for employees share some common interests with other selling employees, the Employer had not established that they share an overwhelming community of interest because there are "meaningful differences" between the petitioned-for employees and other selling employees. The Acting Regional Director found that the petitioned-for employees are paid differently, hired differently, trained differently, make heavier use of client lists, constitute their own department, are not functionally integrated with other selling employees, are subject to a different supervisory structure because they answer to counter managers, have little contact or interchange with other selling employees, and for the most part wear distinctive uniforms. The Acting Regional Director found that these differences distinguished this case from *Wheeling Island Gaming*, 355 NLRB 637 (2010), cited by the Employer. The Acting Regional Director also distinguished this case from a line of retail industry cases the Employer contends are relevant, stating that those cases predated *Specialty Healthcare*, applied a different standard from that in *Specialty Healthcare*, and that even before *Specialty Healthcare* the petitioned-for unit would have been appropriate as it is a departmental unit. Finally, the Acting Regional

Director stated that because any relevant bargaining history was imprecise and nonbinding, he was not basing his decision on that factor.[31]

Position of the Parties and Amici

The Employer contends that the petitioned-for employees do not constitute an appropriate unit. Regarding *Specialty Healthcare*, the Employer argues that the petitioned-for employees are not "readily identifiable as a group" and do not share a community of interest. The Employer further argues that even if the petitioned-for employees are readily identifiable as a group and share a community of interest, they share an overwhelming community of interest with selling employees in other sales departments because they are otherwise a "fractured" unit. The Employer acknowledges that there are differences between the petitioned-for employees and other selling employees, but the Employer asserts that, under *Wheeling Island Gaming*, supra, these differences are too minor to render the petitioned-for unit appropriate. Aside from *Specialty Healthcare*, the Employer contends that in the retail industry, a storewide unit is presumptively appropriate, and that although the Board has deviated from this standard to allow units of selling employees, it has never

[31] The Acting Regional Director also found that the facts of this case are ""indistinguishable" from those of Neiman Marcus Group, Inc. d/bla Bergdorf Goodman, Case 02-RC-076954 (May 4, 2012), a case that involved a petitioned-for unit of employees who sold shoes. As the Board granted review in that case on May 30, 2012, and the case remains pending before the Board, neither the Acting Regional Director's discussion of Bergdorf Goodman nor the Employer's attempts to distinguish it play any role in our analysis and conclusions in this case.

"approved a unit which departs from the storewide presumption as dramatically as the unit sought here." The Employer also suggests that by deviating from the storewide presumption, the Acting Regional Director essentially allowed the extent of organization to control his decision, in violation of Section 9(c)(5) of the National Labor Relations Act. Finally, for the first time in its brief on review, the Employer argues that the Board should overrule *Specialty Healthcare*, or at least should not apply it to the retail industry, because applying it here will allow "a proliferation of microunits" based solely on the product sold by employees, which will in turn lead to "competitive" bargaining among these small units, potentially leading to "chaos and disruption of business." The Employer therefore contends that the only appropriate unit would be a storewide unit, or else a unit of all selling employees.

The Petitioner argues that the Acting Regional Director's decision should be affirmed because the parties have treated cosmetics employees separately from other selling employees at other unionized stores, because the petitioned-for employees are readily identifiable as a group and share a community of interest, and because the petitioned-for employees share no "significant" community of interest with employees in other departments. The Petitioner contends that because the petitioned-for unit tracks an employer-created departmental line, finding it appropriate would not be out of step with pre-*Specialty Healthcare* cases involving retail department stores. Finally, the Petitioner states that decisions since *Specialty Healthcare* "have followed

the historic trend of Board decisions finding less than a wall to wall unit appropriate."

Amici curiae Chamber of Commerce et al. argue that the Board should overrule *Specialty Healthcare*.[32] In particular, they assert that applying *Specialty Healthcare* to this case will depart from Board precedent holding that a storewide unit is presumptively appropriate in the retail industry, and that applying *Specialty Healthcare* to the retail industry will result in proliferation that will in turn cause administrative burdens, allow "gerrymandering," negatively impact employee skill development and customer service, and create employee dissatisfaction that will lead to work stoppages that could "cripple" retail establishments.

Amicus curiae NRF also joins the Employer in arguing that *Specialty Healthcare* should be overruled and that the Acting Regional Director's decision is contrary to retail industry precedent. NRF concedes that the petitioned-for unit is readily identifiable as a group within the meaning of *Specialty Healthcare*, but asserts that the

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[32] All amici, as well as our dissenting colleague, contend that the standard articulated in *Specialty Healthcare* (1) runs counter to Sec. 9(b)'s requirement that the Board determine the appropriate unit "in each case"; (2) is at odds with Sec. 9(b)'s statement that unit determinations must "assure to employees the fullest freedom in exercising the rights guaranteed" by the Act because it disregards the right of employees to refrain from organizing; and (3) is contrary to Sec. 9(c)(5)'s requirement that "the extent to which the employees have organized shall not be controlling." Amici Chamber of Commerce et al. and NRF also contend that *Specialty Healthcare* represents an abuse of discretion because the standard articulated therein should have been adopted through rulemaking instead of adjudication.

overwhelming community of interest standard, as applied here, shows that *Specialty Healthcare* should not be applied to the retail industry because it contradicts the presumptive appropriateness of storewide units and will lead to "destructive factionalization" of the retail workforce.

Amici curiae RILA-RLG similarly argue that *Specialty Healthcare* should be reversed or limited to the nonacute healthcare context. RILA-RLG also suggest that the petitioned-for unit is not readily identifiable as a group, and expressly contend that the petitioned-for employees share an overwhelming community of interest with other selling employees. Finally, RILA-RLG argue that the Acting Regional Director improperly disregarded retail industry precedent, and predict that approving units like the petitioned-for unit will have a harmful effect on the retail industry by decreasing employee flexibility, increasing tension among employees, and permitting "harmful gerrymandering."

ANALYSIS

The Board's decision in *Specialty Healthcare* sets forth the principles that apply in cases like this one, in which a party contends that the smallest appropriate bargaining unit must include additional employees beyond those in the petitioned-for unit. As explained in that decision, when a union seeks to represent a unit of employees, "who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate

unit ...." 357 NLRB No. 83, supra, slip op. at 12. If the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an "overwhelming" community of interest with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community of interest factors "overlap almost completely." Id., slip op. at 11-13, fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)). Applying this framework to the particular facts of this case,[33] we find that the petitioned-for unit is an appropriate unit.

A. Cosmetics and Fragrances Employees Are a Readily Identifiable Group and Share a Community of Interest

The cosmetics and fragrances employees are "readily identifiable as a group." They are all the employees in the three nonsupervisory classifications in the cosmetics and fragrances department–beauty advisors, counter managers, and on-call employees–who perform the function of selling

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[33] This is in contrast to our dissenting colleague, who states that he "would refrain from applying *Specialty Healthcare* in this or any other case," although he acknowledges that (1) *Specialty Healthcare* was enforced by the U.S. Court of Appeals for the Sixth Circuit, see *Kindred Nursing Centers* East, supra, and (2) the D.C. Circuit has also upheld the "overwhelming community of interest" standard. See *Blue Man* Vegas, supra. In its decision, the Sixth Circuit considered arguments, similar to those presented by our dissenting colleague, that the *Specialty Healthcare* test constituted a material change in the law, and concluded that "this is just not so." 727 F.3d at 561.

cosmetics and fragrances at the Saugus store. Thus, the petitioned-for employees are readily identifiable based on classifications and function. Moreover, the petitioned-for unit is coextensive with a departmental line that the Employer has drawn. Cf. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011) (finding petitioned-for employees "readily identifiable as a group" because they belonged to the same department and performed a unique function), enf. denied on other grounds sub nom. *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), petition for writ of cert. filed, No. 13-671 (2013). Significantly, this is a primary selling department, not a sub-department within a primary selling department.

The petitioned-for employees also share a community of interest. In determining whether employees in a proposed unit share a community of interest, the Board examines:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classification; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, supra, slip op. at 9 (quoting *United Operations*, 338 NLRB 123, 123 (2002)).

Here, all of the petitioned-for employees work in the same selling department and perform their

functions in two connected, defined work areas. They have common supervision, as they are all directly supervised by Sales Manager Kelly Quince. Their work also has a shared purpose and functional integration, as they all sell cosmetics and fragrances products to customers. This functional integration is exemplified by the on-call employees, who sell both cosmetics and fragrances products throughout the department, depending on staffing needs. Further, the petitioned-for employees are the only employees who sell cosmetics and fragrances. The only regular contact the petitioned-for employees have with other employees appears to be limited to the brief morning "rallies." What other daily contact they have is incidental, as they are not expected to work in other departments, apart from periodic inventory assistance. As the Employer does not "like to make a habit" of merchandise from one department being rung up in another, it does not appear that the petitioned-for employees come into frequent contact with the products sold in other departments. Additionally, there are only nine examples of permanent transfers into, or out of, the cosmetics and fragrances department over the last 2 years. And all of the petitioned-for employees are paid on a base-plus-commission basis, receive the same benefits, and are subject to the same Employer policies.

The Employer and amici RILA-RLG contend that the petitioned-for employees are not readily identifiable as a group and do not share a community of interest, but the Employer and amici offer no support for this argument aside from pointing to the fact that the cosmetics and fragrances department is split between two separate floors and that there are

certain differences among the petitioned-for employees. It is true that the cosmetics and fragrances department is split between two floors, but the two areas that house the department are nevertheless connected by a bank of escalators. More importantly, a petitioned-for unit is not rendered inappropriate simply because the petitioned-for employees work on different floors of the same facility. See *D.V. Displays Corp.*, 134 NLRB 568, 569 (1961).[34]

Although there are some differences among the petitioned-for employees, we find, in contrast to our dissenting colleague, that they are insignificant compared to the strong evidence of community of interest that they share. On-call employees earn a slightly smaller commission than beauty advisors and counter managers, but minor differences in compensation among petitioned-for employees do not render a petitioned-for unit inappropriate. Cf. *Hotel Service Group*, 328 NLRB 116 (1999) (petitioned-for unit did not possess separate community of interest from other employees despite difference in hourly pay rates, commissions, gratuities). Beyond this insignificant difference, cosmetics beauty advisors sell one vendor's products and give makeovers whereas fragrances beauty advisors sell all vendors' products and do not give makeovers; on-call employees do not attend training events that other beauty advisors attend; most cosmetics beauty advisors wear distinct uniforms; and vendor representatives are consulted in hiring cosmetics

[34] The fact that the petitioned-for employees also work at different counters is therefore also analytically insignificant.

beauty advisors, but not fragrances or on-call employees. In most other respects, however, the interests of the petitioned-for employees are identical.[35] See *DTG Operations*, Inc., 357 NLRB No. 175, slip op. at 5 (2011); see also *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151, slip op. at 5 (2013) (petitioned-for employees readily identifiable as a group and shared a community of interest where unit consisted of all employees in two classifications of same administrative department).[36]

B. Other Employees Do Not Share an Overwhelming Community of Interest with Cosmetics and Fragrances Employees

In *Specialty Healthcare*, the Board held that two groups share an overwhelming community of interest when their community-of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, slip

[35] Unlike our dissenting colleague, we do not regard the fact that the two selling areas are adjacent to different departments as a "substantial" dissimilarity in working conditions among the petitioned-for employees. They share common supervision and function and constitute all of the selling employees within the Employer's separately-defined department.

[36] Amici RILA-RLC argue, and our dissenting colleague appears to agree, that the fact that different petitioned-for employees work under different counter managers is a "significant" difference among the petitioned-for employees. As the counter managers are included in the petitioned-for unit, that argument is meritless. Further, it is undisputed that counter managers are not supervisors, and it is also undisputed that all petitioned-for employees report directly to Sales Manager Quince. Thus, the counter managers provide no evidence of separate supervision among the petitioned-for employees. As stated above, the shared community-of-interest factors outweigh any other distinction among the petitioned-for employees that could be based on the counter managers.

op. at 11. The Employer has failed to establish that the petitioned-for employees and the nonselling employees share an overwhelming community of interest; in fact, there is virtually no record evidence concerning the nonselling employees. The Employer alternatively argues that the smallest appropriate unit must include all selling employees. Accordingly, we consider next whether the Employer has met its burden to establish that the petitioned-for employees share an overwhelming community of interest with the other selling employees. Contrary to our dissenting colleague, we find that the Employer has not done so.

It is readily apparent that there are clear distinctions between the petitioned-for employees and other selling employees. First and foremost, there is no dispute that the petitioned-for employees work in a separate department from all other selling employees and that the petitioned-for unit consists of all nonsupervisory employees in that department. The fact that the petitioned-for unit tracks a dividing line drawn by the Employer is particularly significant. See *Fraser Engineering Co.*, 359 NLRB No. 80, slip op. at 1 (2013); *Specialty Healthcare*, supra, slip op. at 9 fn. 19 (quoting International Paper Co., 96 NLRB 295, 298 fn. 7 (1951)). In the context of this case, it is also significant that the cosmetics and fragrances department is structured differently than other primary sales departments, as there is no evidence that other departments have the equivalent of counter managers.[37] Likewise, there is no evidence

[37] To be clear, and in contrast to the Acting Regional Director, we do not find that counter managers constitute a separate level of supervision.

that other departments have the equivalent of on-call employees. Second, there is no dispute that the petitioned-for employees are separately supervised by Sales Manager Quince. Although the petitioned-for employees and the other selling employees are commonly supervised at the second (and highest) level by Store Manager McKay, such common upper-level supervision can be–and in this case is–outweighed by other factors favoring a separate unit. See, e.g., *Grace Industries*, 358 NLRB No. 62, slip op. at 6 (2012).[38] Third, there is no dispute that the petitioned-for employees work in their own distinct selling areas. Cf. *DTG Operations*, supra, slip op. at 5 (finding no overwhelming community of interest where, inter alia, petitioned-for employees worked behind sales counters in rental buildings "separate from virtually all of the other hourly employees").[39] Taken together, the fact that the petitioned-for employees work in a separate department, report to a different supervisor, and work in separate physical spaces supports our finding that the petitioned-for employees do not share an overwhelming community of interest with other selling employees. Cf. *Guide Dogs for the Blind*, supra, slip op. at 6 (finding factors did not "overlap

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[38] Although the dissent states that Store Manager McKay "exercises control over and oversees all salespeople across the store, both directly... and indirectly," aside from her role in leading the morning "rallies," the record is almost entirely silent as to McKay's day-to-day interactions with cosmetics and fragrances or any other selling employees.

[39] The fact that the cosmetics and fragrances selling areas are adjacent to other selling areas does not, in our view, reduce the significance of the fact that the petitioned-for employees have their own distinct selling areas.

almost completely" where employees sought to be added to petitioned-for unit worked in separate administrative departments, reported to different managerial chains, and worked in separate physical spaces).

Further, the record before us does not show any significant contact between the petitioned–for employees and other selling employees. The Employer claims that there is "regular" contact because the petitioned-for employees recruit customers in other sales departments, work in close proximity to other departments, and all store employees attend daily morning rallies. The testimony regarding customer recruitment, however, is exceptionally vague and consists of a single statement, never elaborated upon, that "cosmetics associates go into the shoe department to recruit."[40] Further, there is no indication how frequently petitioned-for employees engage in such recruitment, nor is there any indication that this leads to anything more than incidental contact with other selling employees. Likewise, notwithstanding the possibility of some informal contact with selling employees in neighboring departments, there is no record evidence as to the frequency or extent of any such interactions. As for the 15-minute rallies at the start of the day, there is no indication of any employee interaction beyond simply being in attendance, and the rallies do not involve the employees performing their main selling function. Thus, the record simply does not

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[40] As noted above, this statement also appears in the context of a discussion about how fragrance vendor-employed sprayers recruit customers in other departments.

support a finding of regular, significant contact between the petitioned-for employees and other selling employees.

Likewise, the record does not show significant interchange between the petitioned-for employees and other selling employees. The Employer asserts that there is significant interchange based on nine permanent transfers into and out of the cosmetics and fragrances department over the last 2 years, and also claims that the petitioned-for employees assist other departments. We do not agree. Nine permanent transfers over a 2-year period do not establish significant interchange between petitioned-for and nonpetitioned-for employees, particularly in this relatively large unit of 41 employees, as all but one of those transfers was into the petitioned for unit, and the sole transfer out was to a supervisory position. Further, evidence of permanent interchange is a less significant indicator of whether a community of interest exists than is evidence of temporary interchange. See, e.g., *Bashas', Inc.*, 337 NLRB 710, 711 fn. 7 (2002). As for temporary interchange, the record is clear that cosmetics and fragrances employees are never asked to sell in other departments, nor are other selling employees asked to sell in the cosmetics and fragrances department. The petitioned-for employees do assist other departments with inventory, but there is no indication that this involves a significant portion of the petitioned-for employees' time, and in any event inventory work is incidental to the petitioned-for employees' selling function. Further, there is no evidence that other selling employees assist the cosmetics and fragrances department with inventory.

Although there was, as the dissent points out, testimony that other selling employees might be expected to assist customers at a temporarily unattended cosmetics or fragrances counter, there was no indication that this occurs more than sporadically.[41] Accordingly, the available evidence shows that any temporary interchange is infrequent, limited, and one-way. Such "interchange" does not require including the other selling employees in the petitioned-for unit. See *DTG Operations*, supra, slip op. at 7.

Regarding functional integration, the Employer and our dissenting colleague are correct that in *Wheeling Island Gaming*, the Board found significant functional integration between poker dealers and other table games dealers because they were "integral elements of the Employer's gaming operation," as reflected in common second-level supervision. 355 NLRB at 642. But the significance of functional integration is reduced where, as here, there is limited interaction between the petitioned-for employees and those that the employer seeks to add. The Board has emphasized this point in two recent cases applying *Specialty Healthcare*.[42] In *DTG Operations*, the Board stated that the employer's facility was functionally integrated as "all employees

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[41] Similarly, the evidence regarding cosmetics and fragrances products being rung up in other departments, and other products being rung up in cosmetics and fragrances, is at best inconclusive. McKay testified that this happens from ""time to time," but two beauty advisors claimed that they were not aware of cosmetics ever being rung up in other departments.

[42] *Wheeling Island Gaming* predated *Specialty Healthcare*, and did not apply the framework of that decision.

work[ed] toward renting vehicles to customers," but that because each classification had a separate role in the process, the classifications had only limited interaction with each other, thus reducing the significance of the functional integration. *DTG Operations*, supra, slip op. at 7. Similarly, in *Guide Dogs for the Blind*, the Board specified that functional integration does not establish an overwhelming community of interest where each classification has a separate role in the process and only limited interaction and interchange with each other. See *Guide Dogs for the Blind*, supra, slip op. at 7-8. Accordingly, even if the petitioned-for employees are functionally integrated with the other selling employees, the petitioned-for employees have a separate role in the process, as they sell products no other employees sell, and they have limited interaction and interchange with other selling employees. Thus, in this case, the Employer "has failed to demonstrate" that the petitioned-for employees and all other selling employees "are so functionally integrated as to blur" the differences between the two groups. Id. at 8.

Nor does the fact that the petitioned-for employees perform tasks similar to those performed by other selling employees–i.e., selling merchandise–establish an overwhelming community of interest. In *Guide Dogs for the Blind*, the Board observed that certain petitioned-for employees provided physical care to dogs in a manner that resembled dog care provided by excluded kennel employees, but the Board found that the similarity of function was offset by the fact that these two groups of employees worked in different departments under different managers,

dealt with different dog populations, and had little formal contact or interchange. See id. at 6. The Board also found that other petitioned-for employees performed training duties similar to those performed by excluded field service managers, but found that this functional similarity was also offset because the two groups of employees worked toward distinct goals in disparate locations, and worked in distinct departments under different managers. See id. Here, too, we find that although the petitioned-for employees and the other selling employees perform similar, related duties, this overlap is offset by the fact that the petitioned-for employees work in different departments, report to different immediate supervisors, have their own distinct work areas, and have little formal contact or interchange with the other selling employees.

The factors we have discussed to this point demonstrate that, contrary to the Employer and amici, the petitioned-for unit is not a "fractured" unit. A unit is "fractured" when it is an "arbitrary segment" of what would be an appropriate unit, or is a combination of employees for which there is "no rational basis." *Specialty Healthcare*, supra, slip op. at 13. In *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 4-6 (2011), the Board applied *Specialty Healthcare* and found the petitioned-for unit was fractured because it did not track any lines drawn by the employer, such as classification, departmental, or functional lines, and also was not drawn according to any other community of interest factor. Here, by contrast, the petitioned-for unit tracks a departmental line drawn by the Employer itself. See, e.g., *Fraser Engineering*, supra, slip op. at 8.

Similarly, the petitioned-for unit contains all beauty advisors and counter managers, rather than a subset of these classifications. Cf. *Specialty Healthcare*, supra, slip op. at 13 (unit might be fractured if it included only a select group of a given classification, such as CNAs who work on the first floor). The Employer and amici argue that the petitioned-for unit is fractured because it is smaller than the "presumptively appropriate" storewide unit; we address this alleged presumption below, but for now it is sufficient to reiterate that a unit is not fractured simply because a larger unit might also be appropriate, or even more appropriate. See id.

To be sure, there are–as the dissent emphasizes–similarities between the petitioned-for employees and other selling employees. The petitioned-for employees and all other selling employees work shifts during the same store hours, are subject to the same handbook, are evaluated based on the same criteria, are subject to the same dispute-resolution procedure, receive the same benefits, use the same entrance and break room, attend brief morning rallies (although some are departmental), and use the same clocking system. It is also true that no prior experience is required for any selling position. But the fact that two groups share some community of interest factors does not, by itself, render a separate unit inappropriate. Cf. *Specialty Healthcare*, supra, slip op. at 10 (once Board has determined petitioned-for employees share a community of interest, "it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate"). Given the distinctions we have

noted above, we do not find that these similarities establish an "almost complet[e]" overlap, and thus they do not establish an overwhelming community of interest. Id. at 11.

We agree with the Employer that several of the "meaningful differences" identified by the Acting Regional Director are not fully supported by the record, insofar as they do not distinguish all petitioned-for employees from all other selling employees. In this regard: (1) vendor representatives play a role in hiring some specialist selling employees, just as they play a role in hiring (most, but not all) cosmetics beauty advisors; (2) vendor representatives provide training to some (but not all) other selling employees (including specialist selling employees), just as they provide training to cosmetics beauty advisors, and all such training involves selling technique and product knowledge; (3) some (but not most) of the other sales departments and certain specialist selling employees are paid a base wage plus commission, as are all of the petitioned-for employees; (4) some other selling employees maintain client lists, just as most of the petitioned-for employees, and the record does not support a finding that petitioned-for employees' use of these lists differs from those kept by other selling employees;[43] and (5) some (but not necessarily most)

[43] That said, as described above, it appears that the cosmetics beauty advisors make heavier use of these lists than do other selling employees, insofar as they use them not just to inform clients of special events, but also to presell products, offer them free gifts, and book makeover appointments.

of the petitioned-for employees are subject to the same dress code as the other selling employees.[44]

These circumstances do not, however, assist the argument that the selling employees share an overwhelming community of interest with the cosmetics employees. In this regard, we emphasize that the Employer does not argue that *some*, but not *all*, of the other selling employees share an overwhelming community of interest with the cosmetics and fragrances employees; rather, the Employer argues that the smallest appropriate unit includes all selling employees–i.e., that all selling employees share an overwhelming community of interest with all of the petitioned-for employees. See *DTG Operations*, supra, slip op. at 5. The factors just enumerated, however, show only that some petitioned-for employees share similarities with some other selling employees. Thus, it is not the case that all selling employees have vendor input in hiring, or receive training from vendor representatives. Similarly, although some employees are, like the petitioned-for employees, paid on a base-plus-commission basis, it is undisputed that other selling

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[44] The Acting Regional Director also found that the petitioned-for employees differ from other selling employees because counter managers provide an extra level of supervision. As the counter managers are not supervisors, but are instead part of the petitioned-for unit, the record does not support a finding that they provide an extra level of supervision. But as we have explained above, the presence of counter managers in the cosmetics and fragrances department is by itself a factor that distinguishes the petitioned-for employees from other selling employees, even if the counter managers are not supervisors.

employees are compensated by other methods.[45] Likewise, not all other selling employees maintain client lists. And although some petitioned-for employees are subject to the same dress code as all other selling employees, it remains the case that many petitioned-for employees do wear distinctive uniforms. In sum, the mere fact that all petitioned-for employees share certain community of interest factors with some (but not all) other selling employees, or that some (but not all) petitioned-for employees share similarities with some (but not all) other selling employees, does not demonstrate the "almost complet[e]" overlap of factors required to establish an overwhelming community of interest between all the petitioned-for employees and all the other selling employees. *Specialty Healthcare*, supra, slip op. at 11.[46] In any event, even if we were to find that all of the foregoing considerations do support the Employer's argument, we would nevertheless find that they are outweighed by the separate department, the structure of the department that includes counter

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[45] Even if all employees were paid in the same manner, similarity of wages does not render a separate petitioned-for unit inappropriate. See id. at 7.

[46] This is especially so where, as here, the record contains no breakdown of the number of other selling employees who, for instance, are compensated on a base-plus-commission basis. That is, because we do not know how many other selling employees are paid base-plus-commission, or are subject to vendor input in hiring, or maintain client lists, we cannot draw firm conclusions as to whether these circumstances establish the requisite overwhelming community of interest. This state of affairs must be construed against the Employer, as the party arguing that an overwhelming community of interest exists. See id. at 12-13.

managers, separate supervision, separate work areas, and lack of significant contact and meaningful interchange. These considerations alone clearly show that the community of interest factors do not "overlap almost completely," and therefore the Employer has not established that the petitioned-for employees and other selling employees share an overwhelming community of interest. Id.

Finally, *Wheeling Island Gaming*, supra, does not warrant a different result.[47] In that case, the majority found that a unit limited to poker dealers was inappropriate because the poker dealers were not sufficiently distinct from other table games dealers. See id. at 637. More specifically, the *Wheeling Island Gaming* Board found that although poker dealers and other table games dealers had separate immediate supervision, an absence of daily interchange, and little permanent interchange, these distinctions were outweighed by other factors showing the two groups shared a community of interest. See id. at 641-642. *Wheeling Island Gaming* is relevant here inasmuch as the *Specialty*

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[47] The Employer has also cited two unpublished, and therefore nonprecedential, Regional decisions that the Employer claims show that the petitioned-for employees cannot be separate from other selling employees. Both of these cases are clearly factually distinguishable from this case, as they indicate evidence of interchange and/or common supervision of the cosmeticians and other selling employees, and both cases involved a different issue (whether cosmeticians should be excluded from a petitioned-for unit) than the current case (whether cosmetics and fragrances employees constitute an appropriate unit). See *Jordan Marsh Co.*, Case 01-RC-019262 (1989) (not reported in Board volumes); *Jordan Marsh Co.*, Case 01-RC-015563 (1978) (not reported in Board volumes).

Healthcare Board adopted, as an “integral part of [its] analysis,” *Specialty Healthcare*, supra, slip op. at 13 fn. 32, several well-established legal principles articulated in *Wheeling Island Gaming*: (1) “the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board’s inquiry ends;” (2) “[t]he issue...is not whether there are too few or too many employees in the unit;” (3) the Board “never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another” but also determines “whether the interests of the group sought are sufficiently distinct from those of other employees;” and (4) a unit might be fractured if it is limited to the members of a classification working on a particular floor or shift. Id. at 12, fn. 28; 11; 8; 13.

These legal principles, articulated in *Wheeling Island Gaming* and reaffirmed in *Specialty Healthcare*, are consistent with our decision today. Moreover, the application of those principles to the particular facts of *Wheeling Island Gaming* is also consistent with our conclusion in this case. The Employer and our dissenting colleague contend that the distinctions between the petitioned-for employees and the other selling employees in this case are no greater than those between the poker dealers and other table games dealers in *Wheeling Island Gaming*. We do not agree. *Wheeling Island Gaming*, decided before *Specialty Healthcare*, did not apply the *Specialty Healthcare* framework, and *Specialty Healthcare* gave no indication how the overwhelming community of interest framework might have been applied in *Wheeling Island Gaming*. More important, *Wheeling Island Gaming* is distinguishable on its

facts from this case – unsurprisingly, perhaps, given the differences between a gaming operation and a retail store.[48]

In *Wheeling Island Gaming*, the only significant distinctions between the poker dealers and the other table games dealers were separate immediate supervision, separate work locations, and an absence of significant interchange. See id at 640, 642. Here, however, there are two further important distinctions. First, the petitioned-for unit in this case is not simply separately supervised, but also conforms to a separate, Employer-drawn department. By contrast, there is no indication that the poker dealers in *Wheeling Island Gaming* constituted a separate administrative department. Although the poker dealers were separately supervised, there was accordingly a much less defined demarcation between the poker dealers and other dealers than is the case between the petitioned-for employees and the other selling employees here. Second, the cosmetics and fragrances department is itself structured differently from other departments, in that there is no evidence that other selling departments have the equivalent of a counter manager. Accordingly, *Wheeling Island Gaming* does not require finding that an overwhelming community of interest exists in this case.[49]

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[48] Unlike the Acting Regional Director, we do not distinguish *Wheeling Island Gaming* merely on the ground that it predated *Specialty Healthcare*. See *Fraser Engineering*, supra, slip op. at 2 fn. 4.

[49] The Acting Regional Director distinguished *Wheeling Island Gaming* on several other factual grounds, but not all of his distinctions (method of compensation, vendor input in hiring

For all the foregoing reasons, we find that the Employer has failed to establish that the petitioned-for employees share an overwhelming community of interest with the other selling employees. Due to the fact that the petitioned-for employees work in a separate department under separate supervision, have only limited interchange and contact with other selling employees, have distinct work areas, and work in a differently-structured department, it simply cannot be said that their community of interest factors "overlap almost completely" with those of the other selling employees.[50]

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and training, different uniforms) are, as discussed above, fully supported by the record.

[50] In addition to the foregoing, the Petitioner argues that bargaining history favors finding the petitioned-for unit appropriate. The relevant bargaining history does not involve the employees at the Saugus store and does not necessarily implicate the Employer as it is currently constituted, so it is not binding. Even so, this bargaining history may be regarded as evidence of area practice and the history of bargaining in the industry, which are relevant considerations. See *Grace Industries*, supra, slip op. at 7. As noted above, the cosmetics employees are excluded from agreements covering other selling employees at the Employer's Boston, Natick, Belmont, Braintree, and Peabody stores, and the cosmetics and fragrances employees at the Warwick store were organized separately from the other employees at that location. As the evidence shows that cosmetics and fragrances employees have been treated as a distinct group at other area retail department stores, we find that the bargaining history provides limited additional support for the Petitioner's position. We would find the petitioned-for unit appropriate without that evidence.

C. Board Precedent Concerning the Retail Industry Does Not Require a Unit of all Employees, or of All Selling Employees

Our inquiry, however, does not end here. In *Specialty Healthcare*, supra, slip op at 13 fn. 29, the Board noted that there are "various presumptions and special industry and occupational rules," and stated that its holding "is not intended to disturb any rules applicable only in specific industries." The Employer contends–and amici, as well as our dissenting colleague, argue at length–that there is a line of precedent setting forth unit determination considerations specific to the retail industry. More specifically, the Employer, amici, and our dissenting colleague argue that in the retail industry, a storewide unit is presumptively appropriate and that finding the petitioned-for unit appropriate would be an unprecedented departure from the Board's approach to this industry. We agree that there is a line of cases dealing with unit determinations in retail department stores. Under *Specialty Healthcare*, this line of cases remains relevant. That said, we find that the retail industry precedent does not mandate finding the petitioned-for unit inappropriate. Instead, the "presumption" the Employer, amici, and our dissenting colleague refer to has evolved into a standard for retail unit determinations that, in this case, complements the *Specialty Healthcare* analysis set forth above.

To begin, the Board has referred to a "presumptively appropriate" storewide unit in two retail industry contexts. The first involves situations where a petitioner seeks a unit consisting of all employees at one store in a retail chain and another

party argues that the unit must include other stores. In such cases, the petitioned-for storewide unit is presumptively appropriate, although this presumption can be rebutted by a showing that the day-to-day interests of the employees in a particular store have merged with those of employees of other stores. *Haag Drug*, 169 NLRB 877 (1968); *Sav-On Drugs*, 138 NLRB 1032 (1962).[51] This line of cases, which references a "presumptively appropriate" storewide unit, does not apply here, however, because the Petitioner is not requesting a storewide unit, nor is there any contention that employees at *other* stores must be included in the petitioned-for unit.[52]

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[51] Of course, the single-facility presumption is applied outside the retail store context. See, e.g., *Rental Uniform Servic*e, 330 NLRB 334, 335 (1999).

[52] The dissent's reliance on *Haag Drug* and related cases is misplaced. None of those cases addressed whether a subset of employees at a single store could be an appropriate unit. The issue, rather, was whether a single store, apart from other stores, was an appropriate unit. See *NLRB v. J. W. Mays, Inc.*, 675 F.2d 442 (2d Cir. 1982), enfg. 253 NLRB 717 (1980); Gimbels Midwest, Inc., 226 NLRB 891 (1976); *Davison-Paxon Co.*, 185 NLRB 21 (1970); *Hochschild, Kohn & Co.*, 184 NLRB 636 (1970); *Allied Stores of Ohio, Inc.*, 175 NLRB 966 (1969); *The M. O'Neil Co.*, 175 NLRB 514 (1969). Although the dissent properly acknowledges that *Haag Drug* and related cases involve an issue not present in this case, he nevertheless argues that these cases "remain relevant in the instant case because they recognize that employees in a storewide unit are likely to share a community of interests that renders such a unit presumptively appropriate." As we explain below, under Board law, the rule that a certain unit is presumptively appropriate in a single store does not entail that a different unit is not also appropriate. Tellingly, none of the cases involving a petitioned-for unit consisting of a subset of employees at a single department store discussed below–or cited by the dissent–rely

There are also cases in which the Board has referred to a "presumptively appropriate" storewide unit when a petitioner seeks a unit limited to only certain employees at a retail department store. See *Sears, Roebuck & Co.*, 184 NLRB 343, 346 (1970); *G. Fox & Co.*, 155 NLRB 1080, 1081 (1965); *Bamberger's Paramus*, supra at 751; *Montgomery Ward*, supra at 600. Even in these cases, however, the Board has emphasized that a storewide unit is not the only appropriate unit.[53] And subsequent to all these cases,

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on the *Haag Drug* passage that the dissent quotes. For example, as further explained below, Charrette Drafting Supplies, 275 NLRB 1294 (1985), cited by the dissent, like *Haag Drug*, involved the issue of whether employees at a second location had to be included in the single-location petitioned-for unit. Although several cases we discuss below cite *Sav-On Drugs*, they do so either in the context of a party arguing that a single-location unit is inappropriate, see J. W. Mays, Inc., 147 NLRB 968, 970 fn. 3 (1964), or for reasons unrelated to any retail industry presumptions. See *John's Bargain Stores* Corp., 160 NLRB 1519, 1522 fn. 6 (1966) (Board considers "all relevant factors" for unit determinations "in a variety of industries"); *Bamberger's Paramus*, 151 NLRB 748, 751 fn. 9 (1965) (labor organization not compelled to seek representation in most comprehensive grouping of employees unless that is only appropriate unit); *Montgomery Ward* & Co., Inc., 150 NLRB 598, 601 fn. 9 (1964) (same).

[53] For example, in *Montgomery Ward*, supra at 600, the Board observed that because Sec. 9(b) of the Act empowers the Board to decide the appropriate unit in each case and directs it to make unit determinations that will "assure to employees the fullest freedom" in exercising their rights, the Act accordingly "does not compel labor organizations to seek representation in the most comprehensive grouping of employees"–that is, just because a storewide unit might be appropriate does not mean that other, smaller units might not also be appropriate. Further, the precedent these cases cite for the "presumptive appropriateness" of a storewide unit does not use that phrase,

the Board has made clear that if there ever was a presumption that "only a unit of all employees" is appropriate, it is "no longer applicable to department stores." *Saks Fifth Avenue*, 247 NLRB 1047, 1051 (1980). Indeed, the Board has not applied a presumption of appropriateness to storewide units in department stores since *Saks Fifth Avenue*.[54]

Even during the period when the Board expressed a policy or preference favoring storewide units in retail department stores, it nevertheless always permitted less-than-storewide units. And over time, the overall trend has been an unmistakable relaxation of a presumption in favor of a storewide unit. In older cases, the Board stated that in the absence of storewide bargaining history or a labor organization seeking to represent employees on a storewide basis, a less-than-storewide unit was appropriate if the employees shared "a mutuality of employment interests not shared by other

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but instead refers to the storewide unit as "basically appropriate" or the "optimum unit." See, e.g., *Stern's*, *Paramus*, 150 NLRB 799, 803 (1965); Polk Brothers, Inc., 128 NLRB 330, 331 (1960); *I. Magnin* & Co., 119 NLRB 642, 643 (1957); *May Department Stores* Co., 97 NLRB 1007, 1008 (1952); see also *Sears, Roebuck & Co.*, 227 NLRB 1403, 1404 (1977); *Sears, Roebuck & Co.*, 178 NLRB 577, 577 (1969).

[54] In one case, the Board adopted an administrative law judge's decision that mentioned the presumptive appropriateness of storewide units in a case involving meatcutters in a grocery store context. *Wal-Mart Stores, Inc.*, 348 NLRB 274, 287 (2006), enfd. 519 F.3d 490 (D.C. Cir. 2008). Even if the dissent is correct in inferring that the Board there "reaffirmed the presumptive appropriateness of storewide units in the retail industry"–a view we do not share–the case in no way suggests that a less-than-storewide unit is presumptively inappropriate.

department store employees, which existed by reason of their singularly different work and training skills" or if the employees constituted a "homogenous group" possessing "sufficiently distinctive skills." *May Department Stores*, supra at 1008. This focus on skills was soon softened: In *I. Magnin*, supra at 643, the Board stated that a smaller unit was appropriate "when comprised of craft or professional employees or where *departments composed of employees having a mutuality of interests not shared* by other store employees are involved" (emphasis added). In other words, a smaller unit, not limited to a craft or professional unit, was appropriate so long as the interests of the employees in that unit were "sufficiently different" from those of other employees. Id. The Board employed similar formulations for several years, [55] but also emphasized that in determining whether a less-than-storewide petitioned-for unit was appropriate, the issue was whether such a unit "is appropriate in the circumstances of *this* case and *not* whether another unit consisting of all employees...would also be appropriate, more appropriate, or most appropriate." *Bamberger's Paramus*, supra at 751 (citing *Montgomery Ward*, supra at 601).

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[55] See, e.g., *J.W. Mays, Inc.*, 147 NLRB at 972 (unit must "comprise a homogenous group which can justifiably be established as a separate appropriate unit"); *Lord & Taylor*, 150 NLRB 812, 816 (1965) (unit must be "sufficiently distinct, homogenous, and identifiable"); *Stern's*, *Paramus*, supra at 802 (employees in less-than-storewide units must be "sufficiently different from each other as to warrant establishing separate units").

Then, in *John's Bargain Stores*, supra at 1522, the Board clarified that it had "reexamined and revised" the "previous policy favoring" storewide units in the retail industry, and the "new policy," articulated in cases such as *Stern's*, *Paramus*, supra, "calls for a careful evaluation of all relevant factors in each case." Shortly thereafter, in *Sears, Roebuck & Co.*, 160 NLRB 1435, 1436 (1966), the Board further commented that cases such as *Lord & Taylor*, supra:

> have applied the long-established principles that the appropriate unit for self-organization among the employees of a given employer is generally based upon a community of interest...as manifested, inter alia, by their common experiences, duties, organization, supervision, and conditions of employment.

In other words, by 1966 the Board had essentially stated that less-than-storewide units were appropriate so long as such units were based on the usual community-of-interest considerations and sufficiently distinct from other employees. The Board went still further in *Sears, Roebuck and Co.*, 261 NLRB 245, 246 (1982), stating, when confronted with a petitioned-for unit limited to automotive center employees at a retail department store, that "the sole inquiry here is whether" the petitioned-for unit "is appropriate in the circumstances of this case." After reiterating that "it is irrelevant whether another unit would also be appropriate, more appropriate, or most appropriate," the Board went on to find that the petitioned-for unit was appropriate because the petitioned-for employees had limited contact with other employees and constituted a "functionally integrated group working in a recognized product line

under separate supervision who share a community of interest that sufficiently differentiates them from other store employees and functions." Id. at 246-247. Aside from a few cases dealing with separate units of warehouse employees, which are governed by a standard not applicable here,[56] this is the Board's latest word on the standard for finding a less-than-storewide unit appropriate in the retail department store setting.[57]

Considering these unit determination cases as a whole, it is evident that the Board has moved away from any presumption favoring storewide units in retail department stores. Similarly, if the standard for deviating from a storewide unit was ever, as amicus NRF suggests, "fairly strenuous," that is clearly no longer the case. Rather, the Board has, over time, developed and applied a standard that allows a less-than-storewide unit so long as that unit is identifiable, the unit employees share a community of interest, and those employees are sufficiently

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[56] See *A. Harris & Co.,* 116 NLRB 1628, 1631-1632 (1956). Contrary to amici RILA-RLC, the Board has never held that *A. Harris* articulates an overall test for deviating from a storewide unit. That case applies to "the establishment of warehouse units in retail department stores only." See *Lily-Tulip Cup Corp.*, 124 NLRB 982, 984 fn. 2 (1959) (emphasis omitted).

[57] Our dissenting colleague suggests that the "competitive challenges" retail establishments face "should render inappropriate any bargaining unit consisting of less than a storewide selling unit, especially where the record does not contain compelling evidence of distinctions unique to a particular subset of retail store salespeople." The Board has never articulated such a restrictive standard applicable to retail establishments, and we decline our colleague's invitation to impose such a standard here.

distinct from other store employees. That, of course, is almost precisely the standard articulated in *Specialty Healthcare*.[58] As we have explained above, the petitioned-for employees in this case are identifiable as a separate group, they share a community of interest, and because they do not share an overwhelming community of interest with other selling employees, they are also sufficiently distinct from other selling employees to constitute an appropriate unit. See *Specialty Healthcare*, supra, slip op. at 13 (explaining "overwhelming community of interest" standard clarifies "what degree of difference renders the groups' interests 'sufficiently distinct'").

Further, our foregoing analysis shows that the petitioned-for unit is appropriate under retail department store precedent even without reference to *Specialty Healthcare*. The petitioned-for unit appears to meet the standard articulated in *I. Magnin*, supra at 643, as the petitioned-for employees have a "mutuality of interests" not shared by all other selling employees (they share most community-of-interest factors, work in their own department, the department is structured unlike other departments due to the presence of counter managers, and have separate supervision), and are "sufficiently different" from the other selling employees so as to justify representation on a separate basis (in addition to the foregoing, they work in distinct areas and also have

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[58] Furthermore, *Specialty Healthcare* clarified that–contrary to the position argued by NRF–"[a] party petitioning for a unit other than a presumptively appropriate unit ... bears no heightened burden to show that the petitioned-for unit is also an appropriate unit." Supra, slip op at 7.

little contact or interchange with the other employees). Further, our analysis comports with *John's Bargain Stores*, supra at 1522, as we have found that the petitioned-for unit is appropriate based on a careful evaluation of all the relevant factors of this case. And as in Sears, Roebuck, 261 NLRB at 246-247, the petitioned-for unit in this case is a "functionally integrated group working in a recognized product line under separate supervision who share a community of interest that sufficiently differentiates them" from other selling employees.

To summarize, Board precedent regarding retail department stores has evolved away from any presumptions favoring storewide units, and the current standard for determining whether a less-than-storewide unit comports with, and is in fact complementary to, the framework articulated in *Specialty Healthcare*. Both the retail industry standard and *Specialty Healthcare* are concerned with ensuring that petitioned-for employees are separately identifiable and share a community of interest, and that they are also sufficiently distinct from other employees. We therefore do not agree with the claims of amici and our dissenting colleague that applying *Specialty Healthcare* to find this petitioned-for unit appropriate is directly contrary to retail industry precedent, undermines that body of precedent, or is otherwise inconsistent with it.[59]

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[59] We also reject NRF's argument that *Specialty Healthcare* should not be applied to the retail industry because tests for unit determination should not be applied outside the specific industry at issue. As *Specialty Healthcare* made clear, it was articulating generally applicable unit determination principles,

In discussing the storewide "presumption," the Employer, amici, and our dissenting colleague argue that the Board has never deviated from a storewide unit to the extent it is being asked to do here. But as in Sears, Roebuck, 261 NLRB at 247, the sole question here is whether the petitioned-for unit is appropriate in the circumstances of this case. So long as the petitioned-for unit is appropriate–as we have found that it is–it is not significant that in other cases, based on different facts, the Board has previously approved units of all selling or nonselling employees,[60] or that other less-than-storewide units have involved groups of employees not involved in selling merchandise.[61] See *Specialty Healthcare*, supra, slip op. at 6 fn. 11. Further, the various cases cited by the Employer, amici, and our dissenting colleague do not demonstrate that the Board has rejected a petitioned-for unit similar to the one at issue here. Indeed, there are no published decisions

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not principles limited to a particular industry. 357 NLRB No. 85, slip op. at 8.

[60] See, e.g., *Wickes Furniture*, 231 NLRB 154, 154-155 (1977) (approving unit of selling employees); *Lord & Taylor*, supra at 816 (directing election in unit of nonselling employees); *Stern's, Paramus*, supra at 808 (approving separate units of selling, nonselling, and restaurant employees).

[61] See, e.g., *Super K Mart Center*, 323 NLRB 582, 586-589 (1997) (approving separate meat department unit); *W & J Sloane, Inc.*, 173 NLRB 1387, 1389 (1968) (finding display employees need not be included in nonselling unit due to distinct community of interest); *Arnold Constable Corp.*, 150 NLRB 788, 795 (1965) (approving separate units of office, cafeteria, and selling employees); *Foreman & Clark, Inc.*, 97 NLRB 1080 (1952) (approving unit of tailor shop/alterations employees).

involving a petitioned-for unit limited to a cosmetics and fragrances department. Amici RILA-RL G cite a case in which cosmetics demonstrators were included in a larger unit, but in that case, the petitioned-for unit was a storewide unit and the issue was whether cosmetics demonstrators were employees of the employer, which the Board found they were. *Burrows & Sanborn, Inc.*, 81 NLRB 1308, 1309 (1949).[62] Similarly, the Employer, amici, and our dissenting colleague have not cited a case that rejects a departmental unit like the one sought here. In *I. Magnin*, supra at 643, the store in question was a clothing store with 105 departments, four of which were shoe selling departments scattered through the store.[63] The petitioner sought a unit covering the 23 employees in the four shoe selling departments. See id. In finding the petitioned-for unit inappropriate, the Board particularly emphasized that employees from other departments had been assigned to work as shoe sellers and that shoe sellers were actively encouraged to sell items throughout the store. See id. Thus, *I. Magnin* is distinguishable based on the contours of the unit, which was not defined as a single primary selling department, as well as the significant interchange between petitioned-for and

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[62] RILA-RLC also cite *R. H. Macy & Co.*, 81 NLRB 186 (1949), claiming that here, too, cosmetic demonstrators were included in a broader unit. In that case, however, the Board found–in "substantial agreement" with the parties– that the appropriate unit included "all staff employees," but excluded a variety of other classifications, one of which was "demonstrators (except those who demonstrate cosmetics and beauty preparations)." See id. at 186-187.

[63] *I. Magnin* does not reveal whether these four departments were each separately supervised.

other selling employees, which is absent in this case.[64] Further, it is telling that even in *I. Magnin*, the Board did not dismiss the petitioned-for unit out of hand, but instead proceeded to consider the usual community-of-interest factors.[65]

Our dissenting colleague cites, and several amici discuss at length, the Board's decision in *Kushins and Papagallo Divisions of U.S. Shoe Retail, Inc.*, 199 NLRB 631 (1972) (*U.S. Shoe*). However, that decision does not warrant a different result here.

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[64] *I. Magnin* overruled *May Department Stores* Co., 39 NLRB 471 (1942), in which the Board found appropriate a unit limited to the shoe department. The Board's factual findings in *May Department Stores* are vague and limited to stating that (1) "the shoe department is distinct from the other departments;" (2) "the retail sale of shoes is often operated as a separate business by many companies"; (3) the duties and skills of shoe sellers are different from other employees; and (4) the "self-organization of the employees" favored a separate unit of shoe sellers. Id. at 477. As the foregoing discussion makes clear, our holding in this case is based on a more specific discussion of the community-of-interest factors than, and relies on many community-of-interest considerations not present in, *May Department Stores*.

[65] Indeed, the analysis in *I. Magnin* generally comports with the contemporary use of presumptions in Board representation case law. That a unit is presumptively appropriate in a particular setting does not mean that a different unit is presumptively inappropriate. Specifically, when a petition is filed in a "presumptively appropriate" unit, the burden is on the party contesting the unit to show why it is not appropriate. In contrast, when a petitioned-for unit does not fit within an existing presumption, the petitioner must demonstrate why the unit is appropriate, but does not bear a heightened burden to do so because of the presumption. See, e.g., *Capital Coors Co.*, 309 NLRB 322 fn. 1 (1992), citing *NLRB v. Carson Cable TV*, 795 F.2d 879, 886-887 (9th Cir. 1986).

U.S. Shoe involved a store that mainly sold shoes, rather than a variety of products such as the Employer's Saugus store. See id. at 631. Further, in *U.S. Shoe*, the store was divided into four selling areas, three operated by the Kushins division, one by the Papagallo division. All four areas primarily sold shoes and related accessories, although the Papagallo division also sold dresses. The Kushins and Papagallo divisions had separate sales managers, different compensation, slightly different benefits, and minimal interchange. See id. Although Papagallo employees had a separate sales manager, a Kushins manager set the hours, holidays, and regulations for all store employees and could require the discharge of Papagallo employees. See id. At the time the store opened (February 1971), Kushins and Papagallo were separate corporate entities, but by the time the petition was filed (sometime before May 12, 1972), this was no longer the case. See id. at 631 fn. 2. In rejecting a unit limited to the Kushins division employees, the Board acknowledged the foregoing differences but found that there was no basis to exclude the Papagallo employees because "consistent with our unit policy in department store cases, the unit must be broadened in scope to include all store employees." Id. at 631-632. This statement is, of course, out of step with the Board's earlier statement in *John's Bargain Stores*, and is also at odds with the Board's subsequent statement that the presumption that "only a unit of all employees" is appropriate is "no longer applicable to department stores." *Saks Fifth Avenue*, supra at 1051. Accordingly, *U.S. Shoe* appears to have

misarticulated the relevant policy.[66] But in any event, although not explicitly stated, the Board's rationale in *U.S. Shoe* appears to have turned on the fact that most of the differences between the Kushins and Papagallo employees were based on historical accident. That is, the differences existed only because the two divisions had once been, but no longer were, separate corporate entities. Setting aside the differences in compensation and benefits, and considering the fact that the Kushins sales manager dictated certain terms and conditions for the Papagallo employees, the only distinction between the two groups was that they had different sales areas and some sold dresses in addition to shoes. On a fundamental level, however, all of the employees were shoe sellers. This is clearly distinguishable from the situation in this case, where there are various differences between the petitioned-for employees and other selling employees, who may all be engaged in sales, but are nevertheless selling different types of products in different departments.

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[66] We note that *U.S. Shoe* has never been cited by another Board decision. One of the cases it cites for the "unit policy in department store cases" does not even involve the issue of whether a less-than-storewide unit is appropriate. See *Zayre Corp.*, 170 NLRB 1751 (1968) (finding respondent violated Section 8(a)(5) by refusing to bargain with the union and clarifying the unit to include several formerly leased departments). The other case it cites merely states that a less-than-storewide unit is appropriate so long as the excluded employees have a separate and distinct community of interest. See *Bargain Town U.S.A. of Puerto Rico, Inc.*, 162 NLRB 1145, 1147 (1967). And Member Jenkins concurred in the result, but did not rely on either of these cases. 199 NLRB at 632 fn.3.

The remaining cases cited by the Employer and amici are easily reconcilable with our decision today. In *Sears*, 191 NLRB 398, 399-400 (1971), the Board refused to divide a store into three separate units, in part because all employees worked in close proximity to each other and attended regular storewide meetings. But unlike this case, there was also substantial integration and overlap between the three petitioned-for groups; further, the Board found that the Sears store at issue was smaller and more highly integrated than a typical Sears location, and there is no basis for making a similar finding about the Macy's store at issue here. See id. at 404-406.[67] In *Levitz Furniture Co.*, 192 NLRB 61, 62 (1971), the Board found petitioned-for units[68] limited to certain nonselling employees at a retail furniture store inappropriate, in part because all store employees shared the same benefits and participated in inventory. But unlike this case, there was frequent regular and temporary interchange between the

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[67] Contrary to amici RILA-RLC, the Board in *Sears* did not simply accept the conclusory statement that the store should not be divided into separate units because a high degree of compartmentalization could not be utilized in ""this kind of retail operation." Id. at 403. Although the Board agreed with the employer's position, it also examined the interchange and overlap of employees in the three proposed units in detail (finding, for example, that the selling employees also performed warehouse functions and regularly relieved nonselling employees). See id. at 404-406.

[68] One petitioner sought what amounted to a warehouse unit, which the Board found inappropriate based on an application of the *A. Harris* test. See id. at 62-63. A second petitioner sought a unit limited to truckdrivers and helpers, and both petitioners argued that a combined "nonselling" unit of both petitioned-for units would also be appropriate. See id. at 61.

petitioned-for employees and the store's other employees, such that nonselling employees would occasionally perform selling functions and selling employees would perform nonselling functions. See id. at 62-63. And in *Saks & Co.*, 204 NLRB 24, 25 (1973), there was similarly evidence of close integration between the petitioned-for nonselling employees[69] and the store's selling employees, as transfers between the two groups were common.[70]

We need only briefly address the remaining arguments advanced by the Employer and amici. First, we decline the invitation to revisit or overrule *Specialty Healthcare*. The Employer did not raise this argument in its request for review. Moreover,

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[69] In addition, the Board also found that the petitioned-for unit in *Saks & Co.* was inappropriate because although it was claimed to be a unit of nonselling employees, it in fact excluded a number of nonselling employees. See id. at 25. The petitioner also contended that the petitioned-for employees shared a common function, but the Board found this was not so because the petitioned-for employees had disparate interests and were not even commonly supervised. See id. at 24-25. *Saks & Co.* is therefore also distinguishable on these grounds.

[70] Amici RILA-RLC also contend that Charrette Drafting Supplies, 275 NLRB 1294, shows that the petitioned-for unit is inappropriate, and the dissent also mentions that case. Charrette Drafting Supplies, however, involved a petitioned-for warehouse unit, and the Board accordingly analyzed the unit under the A. Harris standard, which is not applicable here. See id. at 1295-1296. Further, Charrette Drafting Supplies also implicated *Haag Drug*, because the employer contended that employees at a second location should be included in the petitioned-for unit. See id. at 1296-1297. And even if Charrette Drafting Supplies applied to this case, there too the petitioned-for employees and the employees the employer sought to add performed each other's functions, unlike in this case. See id. at 1297.

the Employer does not articulate any persuasive grounds for overruling *Specialty Healthcare*, and the arguments advanced by amici and the dissent were recently rejected by the Sixth Circuit in *Kindred Nursing Centers*, 727 F.3d at 559-565.[71] In any event, as our analysis makes clear, our decision in this case fully complies with Section 9(b)'s requirement that the Board decide the appropriate unit "in each case," as well as Section 9(c)(5)'s command that a unit determination not be controlled by "the extent to which the employees have organized."[72] Additionally,

[71] The Sixth Circuit explicitly rejected arguments that *Specialty Healthcare* violates Sec. 9(c)(5) and that the Board abused its discretion by making policy through adjudication rather than rulemaking. See id. at 563-565. Further, the Sixth Circuit rejected the argument that *Specialty Healthcare* represented a material change to the Board's jurisprudence and was therefore an abuse of discretion. In rejecting this argument, the court cited with approval the same statement by the Board that amici here mistakenly invoke to argue that *Specialty Healthcare* ignored the right of employees to refrain from organizing. See id. at 560-561 (quoting *Specialty Healthcare*, supra, slip op. at 12 (the "first and central right set forth in Section 7 of the Act is the employees' 'right to self-organization'")). Finally, the Sixth Circuit observed that the Board must decide the appropriate unit "in each case," id. at 559, but at no point suggested that the standard in *Specialty Healthcare* runs afoul of this statutory command, as argued by the employer in *Kindred Nursing Centers*. See Br. of Petitioner Cross-Respondent at 55-56, *Kindred Nursing Centers*, 727 F.3d 552.

[72] The dissent likewise asserts that *Specialty Healthcare* is "irreconcilable" with the requirement that the Board decide the appropriate unit "in each case" and that, in doing so, the Board assure employees the "fullest freedom" in exercising their statutory rights. The framework for unit determinations in *Specialty Healthcare* is fully consistent with these requirements, and we have, consistent with Sec. 9(b), applied the *Specialty*

the fact that the Petitioner was previously a party to an election involving a storewide unit, but in this case has petitioned for a smaller unit, in no way runs afoul of Section 9(c)(5) or any other statutory requirement. Indeed, this situation was also present in *Stern's*, *Paramus*, a case cited by the Employer, our dissenting colleague, and all amici. 150 NLRB at 808-809 (Member Jenkins, dissenting) (noting that petitioner lost a 1960 election in a storewide unit before filing petitions for separate units of selling, nonselling, and restaurant employees sometime between mid-1962 and 1964); see also *Fraser Engineering*, supra, slip op. at 1 (stipulation for larger unit in previous election union lost does not invalidate appropriateness of smaller unit subsequently sought) (citing Macy's San Francisco,

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Healthcare framework to the particular facts of this case. See generally *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610-614 (1991) ("in each case" simply means that whenever parties disagree over unit appropriateness, Board shall resolve the dispute, and imposition of rule defining appropriate units in acute care hospitals does not run afoul of "in each case" command so long as Board applies the rule "in each case"). We also reject the dissent's view that by according the petitioned-for employees their fullest freedom to organize, we have somehow denied the excluded employees (who have not sought representation) their fullest freedom. The proper understanding of the statutory language on which the dissent relies has been explained in detail by the Board in *Specialty Healthcare* and by the U.S. Court of Appeals for the Sixth Circuit in its decision enforcing the Board's order. See *Specialty Healthcare*, supra, slip op. at 8 and fn. 18; *Kindred Nursing Centers East*, supra, 727 F.3d at 563-565. Those discussions are reprinted in full in Member Hirozawa's concurring opinion, with which we agree.

120 NLRB 69, 71-72 (1958)).[73] See generally *Overnite Transportation Co.*, 322 NLRB 723 (1996) and 325 NLRB 612 (1998) (finding of different units in the same factual setting does not mean that the decision is based on extent of organization); *Specialty Healthcare*, supra, slip op. at 6 fn. 11 ("prior precedent holding a different unit to be appropriate in a similar setting is *not* persuasive").

We are not persuaded that applying *Specialty Healthcare* to retail department stores, or finding the petitioned-for unit appropriate, will, as the Employer and amici predict, harm the retail industry through "destructive factionalization." First, our only finding today is that, based on the particular facts of this case, this petitioned-for unit is appropriate. Whether any other subset of selling employees at this store, or any other retail department store, constitutes an appropriate unit is a question we need not and do not address.[74] As always, such determinations will

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[73] *May Department Stores Co. v. NLRB*, 454 F.2d 148, 150 (9th Cir. 1972), cert denied 409 U.S. 888 (1972), cited by the Employer, involved refusal-to-bargain charges. In the underlying representation case (*May Department Stores* Co., 186 NLRB 86 (1970)), the Board had approved a unit of warehouse employees, but three years earlier the union had lost an election in a larger unit. 454 F.2d at 149-150. The Ninth Circuit criticized the Board for failing to provide any explanation for why both units were appropriate, rejected the Board's "after-the-fact attempts to explain the record," and held that the Board had allowed the extent of organization to control its decision. Id. at 150-151. Here, of course, we have explained why this smaller unit is appropriate. Thus, contrary to the Employer, there is no "compelling inference" that we have allowed the extent of unionization to control our decision.

[74] We note, however, that many of the scenarios predicted by RILA-RLC–such as units of "second floor designer men's socks"

depend on the individual circumstances of individual cases. Second, we find it significant that this petitioned-for unit consists of 41 employees, more than one-third of all selling employees, and nearly one-third of all employees, at the Saugus store. This unit is also significantly larger than the median unit size from 2001 to 2010, which was 23 to 26 employees. See *Specialty Healthcare*, supra, slip op. at 10 fn. 23 (citing 76 Fed. Reg. 36821 (2011)). These statistics belie amicus NRF's description of the petitioned-for unit as a "micro-union," and refute the Employer's and amici's assertion that finding this unit appropriate will result in "dozens" of units within a single store. Third, neither the Employer nor amici have offered any evidence in support of their claims that finding the petitioned-for unit appropriate will result in administrative burdens, "competitive bargaining," destructive work stoppages, or reduced employee productivity, opportunity, and flexibility. All of these arguments are pure speculation and many of them rely on characterizations of the retail industry that are not supported by the record here, such as frequent employee interchange. Finally, we note that the Board has long approved multiple units in a single department store, apparently without the harmful effects forecast by the Employer and amici. See, e.g., *Stern's*, *Paramus*, supra (approving separate units of selling, nonselling, and restaurant employees).

CONCLUSION

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or "third floor TVs"–might well involve fractured units, which the Board has always rejected.

For the reasons explained above, we find that the cosmetics and fragrances employees are a readily identifiable group who share a community of interest among themselves. We further find that the Employer has not demonstrated that its other selling employees share an overwhelming community of interest with the cosmetics and fragrances employees. Under *Specialty Healthcare*, the petitioned-for unit thus constitutes an appropriate unit for bargaining. This result is consistent with Board precedent concerning retail department stores.

ORDER

The Acting Regional Director's Decision and Direction of Election is affirmed. This proceeding is remanded to the Regional Director for appropriate action consistent with the Decision and Order.

Dated, Washington, D.C. July 22, 2014

Mark Gaston Pearce	Chairman
Kent Y. Hirozawa	Member
Nancy Schiffer	Member

MEMBER HIROZAWA, concurring.

In this decision, the Board correctly applies the analytical framework set forth in *Specialty Healthcare and Rehabilitation Center*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC, v. NLRB*, 727 F.3d 552 (6th Cir. 2013), to the question whether the petitioned-for unit is appropriate. I concur in the Board's decision in all respects. I write separately to offer a brief observation apropos of the dissent.

It might surprise a reader of the dissent to learn that the provisions of the Act for unit determinations in representation cases are short and simple. The Act's direction to the Board concerning unit determinations for most employees covered by the Board's jurisdiction, unchanged since 1947, consists of a single sentence: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[75] The

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[75] NLRA, § 9(b), 29 U.S.C. § 159(b). In 1947, Congress added to Sec. 9(b) provisos applicable to professional employees, guards, and craft units that include employees covered by a prior unit determination, along with a new subdivision, Sec. 9(c)(5), discussed below, limiting the weight to be given to the extent of organization in making unit determinations. These two subdivisions of section 9, reprinted here in full, constitute the entirety of the Act's provisions concerning unit determinations: (b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect

inquiry mandated by this sentence, whether a proposed unit is "appropriate for the purposes of collective bargaining," is aptly framed in the Board's community-of-interest test, applied in *Specialty Healthcare* and innumerable decisions going back over 60 years, which essentially asks whether the employees in the proposed unit have enough in common for it to make sense for them to bargain together as a group. To the extent that the dissent's objections are based on the text of the Act, they rely on the requirement, contained in the Act's directive sentence, that the Board designate a unit that will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act," or on Section 9(c)(5). In both instances, the dissent misconstrues the statutory language. The Board's decision does not address this language in detail, appropriately since it has already been explicated authoritatively in *Specialty Healthcare* and elsewhere and is fully accounted for in the *Specialty Healthcare* standard that the Board has applied in this decision. For the convenience of the reader, the Board's explanation from *Specialty Healthcare* follows:

The Act ... declares in Section 9(b) that "[t]he Board shall decide in each case whether, in order to

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the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The first and central right set forth in Section 7 of the Act is employees' "right to self-organization." As the Board has observed, "Section 9(b) of the Act directs the Board to make appropriate unit determinations which will 'assure to employees the fullest freedom in exercising rights guaranteed by this Act.' i.e., the rights of self-organization and collective bargaining." *Federal Electric Corp.*, 157 NLRB 1130, 1132 (1966).

The Board has historically honored this statutory command by holding that the petitioner's desire concerning the unit "is always a relevant consideration." *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964). See also, e.g., *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (reaffirming "polic[y] ... of recognizing the desires of petitioners as being a relevant consideration in the making of unit determinations"); *E. H. Koester Bakery Co.*, 136 NLRB 1006, 1012 (1962). Section 9(c)(5) of the Act provides that "the extent to which the employees have organized shall not be controlling." But the Supreme Court has made clear that the extent of organization may be "consider[ed] ... as one factor" in determining if the proposed unit is an appropriate unit. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965). In Metropolitan Life, the Court made clear that "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization." Id. at 441 (emphasis added). In other

words, the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner's preference), that the proposed unit is an appropriate unit. Thus, both before and after the adoption of the 9(c)(5) language in 1947, the Supreme Court had held, "[n]aturally the wishes of employees are a factor in a Board conclusion upon a unit." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941).

We thus consider the employees' wishes, as expressed in the petition, a factor, although not a determinative factor here.[76]

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[76] 357 NLRB No. 83, slip op. at 8-9 (footnote omitted). In enforcing the Board's Specialty Healthcare decision, to which it referred as "*Specialty Healthcare II*," the United States Court of Appeals for the Sixth Circuit further discussed Sec. 9(c)(5): We now turn to [the employer]'s argument that *Specialty Healthcare II*'s application of either the American Cyanamid community-of-interest test, or of the overwhelming-community-of interest test, violates section 9(c)(5) of the Act by making it impossible for an employer to challenge the petitioned-for unit. In section 9(c)(5), Congress provided a statutory limit on the Board's discretion to define collective-bargaining units. Section 9(c)(5) states that "the extent to which the employees have organized shall not be controlling" in determining whether a unit is appropriate. 29 U.S.C. § 159(c)(5). The Supreme Court has interpreted section 9(c)(5) as showing Congress' intent to prevent the Board from determining bargaining units based solely upon the extent of organization, while at the same time allowing the Board to consider "the extent of organization as one factor, though not the *controlling* factor, in its unit determination." *N.L.R.B. v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965) (footnote omitted; emphasis added).

But courts have struggled with what Congress meant by this provision; one court even famously commented that "[s]ection

9(c)(5), with its ambiguous word 'controlling,' contains a warning to the Board almost too Delphic to be characterized as a standard." *Local 1325, Retail Clerks Int'l Ass'n, AFL-CIO v. N.L.R.B.*, 414 F.2d 1194, 1199 (D.C.Cir.1969). Nevertheless, the court added, section 9(c)(5) "has generally been thought to mean that there must be substantial factors, apart from the extent of union organization, which support the appropriateness of a unit, although extent of organization may be considered by the Board and, in a close case, presumably may make the difference in the outcome." *Id.* at 1199-[1200].

Section 9(c)(5) appears to have been added to prevent the Board from deciding cases like *Botany Worsted Mills*, 27 NLRB 687 (1940), in which the Board deemed a bargaining unit appropriate without applying any kind of community-of-interest analysis, but solely on the basis that the workers wanted to organize a union. The Board at that time acted as a union partisan, encouraging organizing. In *Botany Worsted Mills*, the Board explained, in the course of deeming that a bargaining unit of workers in two job classifications (wool sorters and trappers) constituted an appropriate bargaining unit, that "[w]herever possible, it is obviously desirable that, in a determination of the appropriate unit, [it] render collective bargaining of the [c]ompany's employees an immediate possibility." *Botany Worsted Mills*, 27 NLRB at 690. The Board thus made clear that it based its determination that the bargaining unit was appropriate on the mere fact that the employees wanted to engage in collective bargaining. The Board observed that there was "no evidence that the majority of the other employees of the [c]ompany belong[ed] to any union whatsoever; nor has any other labor organization petitioned the Board for certification as representative of the [c]ompany's employees on a plant-wide basis." *Id.* The Board said that [c]onsequently, even if, under other circumstances, the wool sorters or trappers would not constitute the most effective bargaining unit, nevertheless, in the existing circumstances, unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers." *Id.* The Board concluded by stating that "in view of the existing state of labor organization among the employees of the [c]ompany, in order to insure to the sorters or trappers the full

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benefit of their right to self-organization and collective bargaining and otherwise to effectuate the policies of the Act," it found that the wool sorters or trappers of the company "constituted an appropriate bargaining unit." *Id.* [The employer] characterizes *Specialty Healthcare II*'s certification of a CNA-only unit as a throw-back to the discredited *Botany Worsted Mills* analysis."

But [the employer]'s argument misses the mark, because here, in *Specialty Healthcare II*, the Board did not assume that the CNA-only unit was appropriate. Instead, it applied the community-of-interest test from *American Cyanamid* to find that there were substantial factors establishing that the CNAs shared a community of interest and therefore constituted an appropriate unit–aside from the fact that the union had organized it. Indeed, nowhere in its briefs, nor before the Board, did [the employer] dispute that the CNAs shared a community of interest. Therefore, the Board's approach in *Specialty Healthcare II* did not violate section 9(c)(5).

Nor does the overwhelming-community-of-interest test violate section 9(c)(5). In this regard, we find persuasive the District of Columbia Circuit's analysis in *Blue Man*, which *Specialty Healthcare II* relied upon and quoted as holding that "'[a]s long as the Board applies the overwhelming community of interest standard *only after* the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight.'" *Specialty Healthcare II*, 357 NLRB No. 83, 2011 WL 3916077 at n. 25 (quoting *Blue Man*, 529 F.3d at 423) (emphasis added).

Here, in *Specialty Healthcare II*, the Board followed the *Blue Man* approach, conducting its community-of-interest inquiry before requiring [the employer] to show that the other employees shared an overwhelming community of interest with the CNAs. It would appear, then, that *Specialty Healthcare II* does not violate section 9(c)(5) of the Act.

Kindred Nursing Centers East, LLC v. NLRB, 727 F.3d 552, 563-565 (6th Cir. 2013).

The dissent regards with suspicion the approval of any unit requested by a petitioner, discerning therein a dereliction of the Board's imagined duty to find fault with any grouping that a petitioner might choose, simply because the petitioner chose it. I take a different view. The commands of the Act in this area are short and simple. While they are general, and meant to be elaborated, the Board ought to be able to do that in a manner simple enough to permit a reasonably intelligent lay person to identify a grouping of workers that makes sense for collective bargaining. I believe *Specialty Healthcare* does that by clearing away needlessly confusing variations in the standard for answering a common question, and settling on a formulation that is relatively easy to understand and apply. If the result is that parties are better able to predict which potential units will be found appropriate, and consequently more petitioned-for units are approved, we should view that not as suspicious, but as a success.

Dated, Washington, D.C. July 22, 2014

Kent Y. Hirozawa Member

MEMBER MISCIMARRA, dissenting.

My colleagues find that a petitioned-for bargaining unit limited to department-store salespeople who sell cosmetics and fragrances, and excluding all other salespeople in a Macy's full-service department store, constitutes an "appropriate" bargaining unit.[77] I dissent because, in my view, the facts establish that such a bargaining unit is not appropriate under any

[77] NLRA Sec. 9(a), 29 U.S.C. § 159(a).

standard. More generally, I believe this case illustrates the frailties associated with the *Specialty Healthcare*[78] standard regarding what constitutes an appropriate bargaining unit. Accordingly, for the reasons expressed below, I would refrain from applying *Specialty Healthcare* in this or any other case.

Unlike the majority, I believe the smallest "appropriate" unit here consists of all salespeople in the Employer's Saugus, Massachusetts department store. In my view, finding a combined cosmetics and fragrances unit excluding all other salespeople (a "C&F unit") to be an appropriate unit has a triple infirmity: (a) such a unit disregards wide-ranging *similarities* that exist among sales employees generally throughout the store; (b) the unit focuses on distinctions between C&F unit employees and other salespeople while disregarding the same types of distinctions that exist between sales employees who work *within* the C&F unit; and (c) the unit would be irreconcilable with the structure of the work setting where all salespeople are employed and would give rise to unstable bargaining relationships. In my opinion, the outcome here departs from the Board's long-held retail industry standards that ostensibly were left undisturbed by *Specialty Healthcare*. More generally, as demonstrated by the majority's application of *Specialty Healthcare* in the instant case, I believe *Specialty Healthcare* affords too much deference to the petitioned-for unit in derogation of the mandatory role that Congress requires the Board

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[78] 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

to play "in each case" when making bargaining-unit determinations.

FACTS

The Employer's full-service, two-story department store in Saugus, Massachusetts, is an extremely complex operation. While broadly sharing many common working conditions throughout the store, there are also many differences between and among salespeople in many different departments, *including substantial differences between and among salespeople in the C&F unit*. The differences are driven by the wide variety of products, customers, and types of information needed to address customer needs and questions.

In 2011, the Petitioner Union and the Board took the position that a bargaining unit consisting of *all salespeople* in the Saugus store was appropriate (there was a 2011 election among these employees, and the Union lost).[79]

There are 11 sales departments in the Saugus store, collectively overseen by 7 sales managers who report to a single store manager. The 11 sales departments consist of (1) juniors, (2) ready-to-wear, (3) women's shoes, (4) handbags, (5) furniture (also known as big ticket), (6) home (also referred to as housewares), (7) men's clothing, (8) bridal, (9) fine

[79] The Union represents sales employees at other Macy's stores in Massachusetts. At the Belmont store, the Union represents a bargaining unit consisting of all salespersons, although there are no cosmetics employees at that store. At the Braintree, Natick, and Peabody stores, the Union represents salespersons, except cosmetics sales employees are excluded from the units.

jewelry, (10) fashion jewelry, and (11) cosmetics and fragrances. The store has a total of 120 salespeople, of whom 41 work in the cosmetics and fragrances department.[80]

A. Shared Working Conditions and Benefits Common to All Salespeople

All salespeople at the store are subject to the same policies set forth in the same employee handbook, they participate in the same benefit plans, they staff shifts that occur during the same time periods, they use the same employee entrance(s), they use the same timeclock system, they share the same breakroom(s), and they are subject to the same in-store dispute resolution program.

All selling employees, including sales managers, attend *daily* rallies typically conducted by Store Manager Danielle McKay, the purpose of which is to motivate employees and to inform them of the previous day's sales totals, special events, and any other pertinent news.

All salespersons throughout the store receive *performance evaluations* under the same storewide evaluation system, based on the same criteria (sales, customer feedback, and teamwork). Each department utilizes the same "sales scorecard" to rate employees' overall sales performance. These scorecards measure four criteria: the number of items sold per customer transaction, average sale amount per customer transaction, overall sales per hour, and the number of store credit cards opened.

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[80] Employees in the petitioned-for unit are primarily known as "beauty advisors."

The most heavily weighted criterion is actual sales (i.e., their "sales scorecard" performance).[81]

Although non-C&F salespeople do not regularly work in the cosmetics and fragrances department, and vice versa, McKay testified that there are "opportunities" for selling employees to "help out" in other departments. More generally, the record reveals that the Employer expects selling employees to assist all customers regardless of the customer's needs, even if the customer's request does not pertain to the particular employee's assigned department.[82] McKay testified that there are occasions where C&F employees conduct inventory for non-C&F departments.[83]

During the past 2 years, the Employer has permanently transferred nine employees from other sales positions into C&F sales positions, and one C&F employee (who worked in cosmetics) was

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[81] The Employer's 2012 performance reviews reveal that 70-80 percent of an employee's overall appraisal is based on their "sales scorecard." Scorecard performance carries less weight (55 percent) for counter managers, who account for only 9 of the 140 selling employees.

[82] McKay further testified that all selling departments, including the cosmetics and fragrances department, had rung up products from other departments. McKay explained, however, that the Employer's policy provided that departments should ring up only their own products so that the Employer could properly track sales for commission purposes.

[83] For example, McKay explained that the Employer granted a beauty counter employee's request to perform inventory in a noncosmetics area, and cosmetics beauty advisor Maria Francisco testified that, during the past year, a manager in the jewelry department asked that a few cosmetics employees assist with that department's inventory.

promoted to a supervisory position in a different department.

B. Similarities and Differences Between and Among C&F Employees

As my colleagues note, the Employer maintains a cosmetics and fragrances "department," but the record also demonstrates that substantial dissimilarities in compensation and working conditions exist among and between these employees.

(a) *Physical Locations*. For starters, the C&F salespeople work in the same store, but they are separated into two different areas located on two different floors. *Cosmetics and women's fragrances* are located on the first floor. *Men's fragrances* are located on the second floor.

(b) *Layout/Organization*. The first floor cosmetics area is divided into eight counters, each of which is *dedicated to selling products from a specific vendor*. Cosmetics "beauty advisors" work at specific counters and typically only sell products associated with their assigned vendor. Fragrances "beauty advisors" sell all products, regardless of vendor. Seven of the cosmetics counters and the two fragrance areas (women's and men's fragrances, respectively) also have "counter managers" who, in addition to selling, coach beauty advisors on service and selling techniques. The Employer utilizes seven "on-call" employees who are assigned as needed to *any* of the cosmetics counters or fragrance areas.

(c) *Proximity to Different Salespeople/ Departments*. The first-floor cosmetics and women's fragrances area is surrounded by several other departments: women's and juniors' clothing, fine

jewelry, and fine watches. The second-floor men's fragrances area is surrounded by the *men's clothing department*.

(d) *Complex On-Site "Vendor" Relationships and Training*. Cosmetics "beauty advisors" have frequent contact with two types of "vendor" representatives: vendor account executives (who are employed by vendors) and vendor account coordinators (who are employed by the Employer). These vendor representatives provide in-store and offsite training for beauty advisors assigned to their brands. Training sessions cover product knowledge and selling techniques, and may deal with topics such as skin tones, skin types, use of color, and for fragrances, ingredients, scents, and notes. Because each cosmetics "beauty advisor" typically sells only one vendor's products, the advisor has significant interaction with that vendor's representatives while other cosmetics "beauty advisors" have significant interaction with others, creating further differences in working conditions within the C&F unit.

(e) *Hiring*. Significantly, vendor account coordinators and executives participate in hiring cosmetics beauty advisors. They typically interview job candidates along with the Employer. The Employer and these vendor representatives then consult with each other to ensure that mutually acceptable applicants are hired. There are also vendor representatives associated with fragrances, but the record suggests they do not visit the store as consistently as cosmetics vendor representatives. Unlike the hiring process applicable to "cosmetics" beauty advisors, vendor representatives do not participate in the hiring of "fragrances" beauty

advisors or on-call employees. For all beauty advisor applicants, however, prior experience in selling relevant products is desirable, but not required.

(f) *Attire*. Several of the cosmetics vendors provide distinctive uniforms for their beauty advisors. All other beauty advisors adhere to the Employer's storewide "basic black" uniform policy.

(g) *Compensation*. Beauty advisors receive an hourly wage, plus a 3 percent commission on all sales. "Cosmetics" beauty advisors (but not "fragrances" beauty advisors) receive a 2 percent commission when they sell cosmetics outside of their assigned product line, which happens on occasion. "Counter managers" also receive an hourly wage, a 3 percent commission on their own sales, and a .5 percent commission on all sales made at their counter. "On-call" employees receive a 2 percent commission regardless of what they sell. The Employer negotiates with vendors to determine the exact mechanism by which beauty advisors receive commissions. The record does not reveal specific information about the details of these arrangements, save that vendors generally pay these commissions.

(h) *Importance of Customer Relationships*. Cosmetics beauty advisors maintain lists of their regular customers, which they use to track customer purchases and to call customers to book appointments for makeovers, invite them to try new products, or notify them of special promotions or events. Fragrances beauty advisors also maintain customer lists, which they utilize to invite customers to new fragrance launches.

C. Comparable Similarities and Distinctions Among Non-C&F Sales Employees

The remaining selling employees work in ten other departments: women's shoes, handbags, women's clothing, men's clothing and shoes, juniors, fine jewelry, fashion jewelry, home, furniture, and bridal. The record reveals that these other sales employees (non-C&F salespeople) have responsibilities, working conditions, hiring procedures, and compensation arrangements that are comparable and dissimilar in varying degrees, in line with the similarities and distinctions that exist among C&F sales employees.

(a) *Physical location*. The non-C&F salespeople are located on the first or second floor of the Saugus store.

(b) *Layout/Organization*. The 10 non-C&F departments feature products made by a variety of vendors or manufacturers, including both "vendor specific" and ""Macy's private brand" products such as "Levi's; INC.; Buffalo; Polo; LaCoste; Guess shoes; [and] North Bay shoes."[84] As noted above, the salespeople are managed by at least six managers who, like the C&F department manager, report to the single store manager; and also like the C&F department manager, it appears that at least two of the six other managers oversee more than one functional area.[85]

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[84] Employer *Macy's, Inc.*'s Brief on Review, at 3 (citing Hearing Transcript at 104-109).

[85] A single manager is responsible for the juniors and fine jewelry salespeople, and a single manager is responsible for women's shoes and handbags salespeople.

(c) *Proximity to Other Salespeople/Departments*. Like the C&F salespeople, the non-C&F sales employees work in designated locations on the first and second floors. As one would expect in any full-service department store, the different sales areas are adjacent to one another. The record reveals that four or five of the non-C&F product areas are physically adjacent either to the first floor cosmetics and women's fragrances area or the second floor men's fragrances area.

(d) *Complex On-Site "Vendor" Relationships and Training*. As the Regional Director found, "like cosmetics employees," selling employees in other departments (referred to as specialists) are also assigned to sell a specific vendor's products, which requires specialized familiarity with that vendor's product lines. These specialists sell Guess shoes and men's clothing, North Bay shoes, and Polo men's clothing. Levi's, Lacoste, Buffalo, INC, the North Face, Lenox, and Hilfiger also have specialists at the Saugus store. As the Regional Director further found, "like their colleagues in Cosmetics/Fragrances," selling employees in other departments also have contact with vendor representatives. These representatives monitor stock and conduct onsite and offsite training for both specialists and nonspecialist employees who sell their products. Selling employees also receive training through product information sheets and conversations with management. District Human Resources Director Gina DiCarlo testified that the Employer and its many vendors organize this training for "virtually ... every category of associates within our organization." Departments also hold special seminars during the year concerning

product knowledge, selling techniques, and other related topics.[86]

(e) *Hiring*. Like cosmetics vendors, multiple non-C&F vendors are involved in hiring the sales specialists assigned to their particular products. Store Manager McKay testified that the Employer and these vendors jointly interview applicants to ensure that they hire the best specialists. Again, prior experience in selling a given department's products is desirable, but not required.

(f) *Attire*. As noted above, the Employer maintains a storewide "basic black" uniform policy, and there were no other required uniforms for C&F or non-C&F employees, with the exception of some (but not all) cosmetics salespeople who were required, by certain vendors, to wear a vendor-specific uniform.

(g) *Compensation*. Selling employees outside the cosmetics and fragrances department also receive sales-based incentives. Selling employees in fine jewelry, men's clothing and shoes, furniture, and bridal receive commissions. Specialists selling products for Levi's, Guess, Buffalo, and Polo receive bonuses from their assigned vendors. The record

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[86] DiCarlo testified that the Employer and its vendors, during the first 10 months of 2012, held 47 of these training seminars. And, much like cosmetics beauty advisors are trained on skin types and fragrance scents, selling employees who deal with dresses are trained on silhouette, fabrics, and fit; selling employees in shoes are trained on fit, type, fabric, and color; and fine jewelry employees are trained on clarity, cut, color, and weight of gemstones. McKay testified that the Employer regularly utilizes a storewide coaching program (My Product Activities) to ensure that all selling employees maintain the highest level of product knowledge and sales techniques.

does not reveal the precise details of these arrangements.

(h) *Importance of Customer Relationships*. Non-C&F salespeople also maintained customer lists. McKay testified that the Employer has developed a program called "My Client" to facilitate such lists because they have "become much more of a focus to the company." Selling employees in fine jewelry, men's clothing, big ticket,[87] and bridal have already utilized these lists to invite customers to special events.[88]

ANALYSIS

The starting point for evaluating the Board's role in bargaining-unit determinations is the Act itself. Here, three points are clear from the statute and its legislative history.

First, Section 9(a) provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*."[89] Thus, questions

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[87] The record reveals that big ticket items are sold in the furniture department.

[88] My colleagues state that the Employer has no "imminent plan to use client lists in the remaining primary sales departments," but McKay's testimony suggests otherwise. McKay testified that it was important to have client lists "throughout the store" (emphasis added).

[89] 29 U.S.C. § 159(a) (emphasis added). The Supreme Court has indicated that Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'–not necessarily the single most appropriate unit." *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis in original; citations omitted). See also *Serramonte Oldsmobile, Inc. v. NLRB*, 86

about unit appropriateness are to be resolved by reference to the "purposes" of representation, should a unit majority so choose–namely, "collective bargaining."

Second, Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation. Section 9(b) states: "The Board shall decide *in each case* whether, in order to *assure to employees the fullest freedom* in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." [90] Referring to the "natural reading" of the phrase "in each case," the Supreme Court has stated that

> whenever there is a disagreement about the appropriateness of a unit, *the Board shall resolve the dispute*. Under this reading, the words "in each case" are synonymous with "whenever necessary" or "in any case in which there is a dispute." Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, *the decision "in each case" in which a dispute arises is to be made by the Board*.[91]

F.3d 227, 236 (D.C. Cir. 1996) (the NLRB "need only select an appropriate unit, not the most appropriate unit").

[90] 29 U.S.C. § 159(b) (emphasis added).

[91] *American Hospital Assn. v. NLRB*, 499 U.S. at 611 (emphasis added). See also id. at 614 (Section 9(b) requires

Third, the language in Section 9(b) resulted from intentional legislative choices made by Congress over time. Regarding unit determinations, earliest versions of the Wagner Act legislation, introduced in 1934, did not contain the phrase "in each case," nor did they state that the Board must "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." The initial wording simply stated: "The Board shall determine whether eligibility to participate in elections shall be determined on the basis of the employer unit, craft unit, plant unit, or other appropriate grouping."[92]

When reintroduced in 1935, the legislation added a statement that unit determinations were "to effectuate the policies of this Act."[93] When reported out of the Senate Labor Committee, the legislation stated that the Board "shall decide in each case" the appropriateness of the unit.[94] Regarding this

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"that the Board decide the appropriate unit in every case in which there is a dispute").

[92] See, e.g., S. 2926, 73d Cong. § 207 (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935 (hereinafter "NLRA Hist.") 11 (1949). See also S. 2926, 73d Cong. § 10(a) (1934), reprinted in 1 NLRA Hist. 1095 ("The Board shall decide whether eligibility to participate in a choice of representatives shall be determined on the basis of employer unit, craft unit, plant unit, or other appropriate unit.").

[93] See S. 1958, 74th Cong. § 9(b) (1935), reprinted in 1 NLRA Hist. 1300 ("The Board shall decide whether, in order to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit.").

[94] See S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 2291 (emphasis added). The full provision stated: "The Board shall decide in each case whether, in order to effectuate

language, a House report stated: Section 9(b) provides that the Board shall determine whether, in order to effectuate the policy of the bill ..., the unit appropriate for the purposes of collective bargaining shall be the craft unit, plant unit, employer unit, or other unit. This matter is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination.[95]

Section 9(b) in the final enacted version of the Wagner Act stated that the Board's unit determinations "in each case" were "to insure to employees the *full benefit* of their right to self-

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the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit." Id. See also H.R. 7937, 74th Cong. § 9(b), reprinted in 2 NLRA Hist. 2850 (same); H.R. 7978, 74th Cong. § 9(b), reprinted in 2 NLRA Hist. 2862 (same). The Senate report accompanying S. 1958 explained: "Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind." S. Rep. 74-573, at 14 (1935), reprinted in 2 NLRA Hist. 2313 (emphasis added). The language remained unchanged when adopted by the Senate. See S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 2891 (version of S. 1958 passed by the Senate and referred to the House Committee of Labor). The same language was contained in H.R. 7978, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 2903 (version of Wagner Act legislation reported by the House Committee on Education and Labor).

[95] H.R. Rep. 74-969, at 20 (1935), reprinted in 2 NLRA Hist. 2930 (emphasis added).

organization, and to collective bargaining, and otherwise to effectuate the policies of this Act."[96]

In 1947, as part of the Labor Management Relations Act,[97] Congress devoted more attention to the Board's unit determinations. The LMRA amended Section 7 so that, in addition to protecting the right of employees to engage in protected activities, the Act protected "the right to *refrain from* any or all of such activities."[98] The LMRA added Section 9(c)(5) to the Act, which states: "In determining whether a unit is appropriate ... *the extent to which the employees have organized shall not be controlling*."[99] A House report–though

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[96] S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 3039 (emphasis added) (Senate-passed bill reported by the House Committee on Education and Labor). The same language was contained in the version adopted by the House, see S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 3244, in the version adopted by the Conference Committee, see H.R. Rep. 74-1371, at 2, reprinted in 2 NLRA Hist. 3253-3254, and in the version that was enacted. See 49 Stat. 449, S. 1958, 74th Cong. § 9(b) (1935), reprinted in 2 NLRA Hist. 3274.

[97] Labor Management Relations Act (Taft-Hartley Act or LMRA), 61 Stat. 136 (1947), 29 U.S.C. §§ 141 et seq.

[98] NLRA Sec. 7, 29 U.S.C. § 157 (emphasis added). See also H.R. Rep. 80-245, at 27 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (hereinafter LMRA Hist.) 318 (1948) ("A committee amendment assures that when the law states that employees are to have the rights guaranteed in section 7, the Board will be prevented from compelling employees to exercise such rights against their will .... In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.").

[99] 29 U.S.C. § 159(c)(5).

recognizing the Board had "wide discretion in setting up bargaining units"–explained that this language

> strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate.... While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and ... is not to be controlling.[100]

Finally, the LMRA also amended Section 9(b) to state–as it presently does–that the Board shall make bargaining-unit decisions "in each case" in "order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."[101]

This legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would *not* be perfunctory. In the language quoted above, Section 9(b) mandates that the Board determine what constitutes an appropriate unit "in each case," with the additional mandate that the Board only approve a unit configuration that "assures" employees their "fullest freedom" in

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[100] H.R. Rep. 80-245, at 37 (1947), reprinted in 1 LMRA Hist. 328 (emphasis added), citing Matter of New England Spun Silk Co., 11 NLRB 852 (1939); Matter of Botany Worsted Mills, 27 NLRB 687 (1940).

[101] 29 U.S.C. § 159(b) (emphasis added). See, e.g., S. 1126, 80th Cong. § 9(b), reprinted in 1 LMRA Hist. 117; H.R. 3020, 80th Cong. § 9(b), reprinted in 1 LMRA Hist. 244-245.

exercising protected rights. Although more than one "appropriate" unit might exist, the statutory language plainly requires that the Board "in each case" consider multiple potential configurations–i.e., a possible "employer unit," "craft unit," "plant unit" or "subdivision thereof."

It is also well established that the Board may not certify petitioned-for units that are "arbitrary" or "irrational"–for example, where integration and similarities between two employee groups "are such that neither group can be said to have any separate community of interest justifying a separate bargaining unit."[102] However, it appears clear that Congress did not intend that the petitioned-for unit would be controlling in all but a few extraordinary circumstances when contrary evidence is overwhelming, nor did Congress anticipate that every petitioned-for unit would be accepted unless it is "arbitrary" or "irrational." Congress placed a much higher burden on the Board "in each case," which was to determine whether and which unit configuration(s) satisfy the requirement of assuring employees their "fullest freedom" in exercising protected rights.

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[102] *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 120 (D.C. Cir. 1996). See generally *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552, 558-559 (6th Cir. 2013); *Mitchellace, Inc. v. NLRB.*, 90 F.3d 1150, 1157 (6th Cir. 1996); *Bry-Fern Care Ctr., Inc. v. NLRB*, 21 F.3d 706, 709 (6th Cir. 1994); *NLRB. v. Hardy-Herpolsheimer*, 453 F.2d 877, 878 (6th Cir. 1972).

A. The C&F Salespeople Are Not Sufficiently Distinct from Non-C&F Sales Employees to Be an Appropriate Unit

The record uniformly establishes two things that, in my view, preclude an ""appropriate" unit determination other than one consisting of all salespeople storewide. First, the evidence shows that salespeople across all departments have multiple important interests in common (including the Employer's rules and policies as reflected in the employee handbook, the same evaluation system, the same or similar compensation arrangements, participation in the same daily rallies regarding storewide sales issues, and–most important–the overriding responsibility to sell assigned products and create an environment encouraging customers to purchase products throughout the store). Second, to the extent there are dissimilarities between the working conditions of sales employees in a combined cosmetics and fragrances group and those of sales employees outside cosmetics and fragrances, *these same dissimilarities exist between and among the salespeople within the combined cosmetics/fragrances group*. In short, as the Board has held in numerous other retail cases (see part B below), the record demonstrates here that a unit other than all salespeople storewide is not "appropriate" for purposes of the Act.

A bargaining-unit analysis in any retail setting must relate to the nature of the business. In *Allied Stores of New York, Inc.*,[103] the Board recognized the importance of a retail employer's overriding business

[103] 150 NLRB 799 (1965).

objective–selling–when evaluating what constitutes an "appropriate" bargaining unit in a retail setting. The Board stated: "We perceive a great difference between a retail store, like the Employer, that employs salespeople to serve the public and one where the public serves itself without the aid of sales personnel."[104] The Board rejected the employer's argument for a combined unit of selling and nonselling employees and reasoned:

> The Employer's argument ... minimizes the significance of the Employer's main venture–to sell–and the salespeople whose ability to sell plays a large part in the success of its business. Certainly the obvious job qualifications of the competent salesperson–pleasing personality, poise, self-confidence, ease in dealing with strangers, imagination, ability to speak well, and to persuade–are not demanded of nonselling personnel. The latter's work is largely manual in bringing merchandise in and out of the store, does not involve meeting the public, knowing desirable features and construction of merchandise, and showing initiative in marketing a product. Failure to appreciate the difference between a salesperson's job and that of other store employees is to disregard the obvious.[105]

Allied Stores was decided more than 50 years ago, which was long before bricks-and-mortar retail stores faced anything resembling modern-day competitive pressures resulting from Internet sales, global price

[104] Id. at 804.

[105] Id. (emphasis added).

competition, and smartphone price-matching. In the present day, these competitive challenges confront retail employers and their sales employees alike, and these challenges constitute an overriding common concern that should render inappropriate any bargaining unit consisting of less than a storewide selling unit, especially where the record does not contain compelling evidence of distinctions unique to a particular subset of retail store salespeople.[106]

The specific facts here reveal that all selling employees share significant common interests and working conditions. If the following matters involved differences, there is no doubt that they would be emphasized and discussed prominently in any discussion of the "appropriate" unit (i.e., as evidence that a discrete subset of employees, rather than a storewide unit, should be deemed appropriate). The significance of these factors is not diminished merely because they undermine rather than support the petitioned-for unit:

- Within and outside the C&F area, some salespeople participated in a hiring process that involved outside vendors, and other salespeople were hired without input from outside vendors.

[106] The instant case does not present any issue regarding the appropriateness of a single-store retail salesperson unit in comparison to a multistore, regional or nationwide salesperson units, and I do not express any view regarding issues that may be relevant in these other contexts. Likewise, because I would find that the petitioned-for unit is not appropriate, I do not reach the Employer's alternative argument regarding the appropriateness of a unit consisting of all selling and nonselling employees. See, e.g., *Sears, Roebuck & Co.*, 184 NLRB 343, 346 (1970).

- All salespeople across the store–within and outside the C&F area–are covered by the same policies expressed in the same employee handbook.
- All salespeople storewide participate in the same benefits plans that are administered by the same human resources representatives and plan administrators.
- All salespeople storewide receive the same types of performance evaluations, based on the same criteria, and the same "sales scorecard" is used for rating purposes.[107]
- All salespeople storewide are subject to the same in-store dispute resolution procedure.
- All salespeople share other important matters associated with their day-to-day existence at work, including the time periods they work, the timeclock system, the breakroom(s), and participation in the same "daily" rallies regarding sales-related totals and special events.

The nature of the employer's business leaves no doubt why all salespeople storewide have so many of these things in common: these shared working conditions are consistent with the Employer's

[107] This weakens the Petitioner's request to represent just C&F employees. See *Wheeling Island Gaming*, 355 NLRB 637, 642 (2010) (poker dealers not distinguishable from other table game dealers where they were "evaluated using the same performance appraisal"); TDK Ferrites Corp., 342 NLRB 1006, 1009 (2004) (petitioned-for unit inappropriate where the employer evaluated the performance of included and excluded employees "based on the same factors").

singular focus, which is to ensure that all salespeople–working separately and in coordination one another–can maximize sales across the store. To the extent there are distinctions between a combined C&F salespeople unit and the non-C&F salespeople who work at the same store, (i) such distinctions also exist between and among the C&F salespeople, and (ii) any distinctions pale in comparison to the interests that all salespeople storewide have in common.

As noted previously, C&F and non-C&F selling employees perform the same basic job function of selling merchandise to customers, without a requirement that the salespeople have specific selling experience before working for the Employer. Within and outside the C&F group, many salespeople are assigned to sell particular vendor brands, and other salespeople sell multiple vendor brands. Salespeople across the store must have specialized, technical knowledge about the products they sell.

Regarding compensation, the record reveals that C&F salespeople have a variety of commission arrangements, salespeople in at least 4 of the remaining 10 departments (fine jewelry, men's clothing and shoes, furniture, and bridal) also receive commissions, and sales-related bonuses are provided to non-C&F salespeople employed to sell four major brands (Levi's, Guess, Buffalo, and Polo). Although C&F and non-C&F salespeople do not all receive the same commission rates, the Board has held that differences in commissions and related pay incentives are insufficient to render inappropriate a bargaining

unit that is otherwise appropriate.[108] The important overriding factor here is that salespeople across the store–not just C&F salespeople–receive sales-based incentive pay that significantly supplements their base wages.[109]

The record further reveals that salespeople within and outside the C&F department participate in training and other storewide programs designed to maximize sales, and have significant interaction with the many vendors that sell products in the store. This shared emphasis on training reinforces the appropriateness of a unit of all salespersons storewide rather than the petitioned-for subset of salespersons. See *Boeing Co.*, 337 NLRB 152, 153 (2001) (petitioned-for unit deemed inappropriate where, among other things, included and excluded employees shared "similarity in training" and attended the same employer-provided classes). There is also evidence of integration and interaction among salespeople within and outside the C&F group. Most important, salespeople across the store develop customer relationships and maintain customer lists–undoubtedly involving many of the same customers–to maximize sales.

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[108] See, e.g., *Wheeling Island Gaming*, 355 NLRB at 642 ("fact that poker dealers keep individual tips and the other table games dealers share tips appear to be a minor difference"); Hotel Services Group, 328 NLRB 116, 117 (1999) (petitioned-for unit of salon's massage therapists did not possess a separate community of interest because, among other things, they had "similar" compensation as other salon employees despite differences in commission and gratuity rates).

[109] See *Coca-Cola Bottling Co.*, 229 NLRB 553, 554-555 (1977) (unit limited to certain salesmen deemed inappropriate where all salesmen were paid on "a salary-plus-commission basis").

The facts also reveal that the Union and the Board–at this same store–have deemed a storewide salesperson unit appropriate. In *Allied Stores of New York, Inc.*, [110] the Board supported its unit determination in part by evaluating the "pattern of organizing" in the retail industry. The Petitioner Union in the instant case itself previously attempted (unsuccessfully) to organize a storewide salesperson unit that the Board deemed appropriate, and the same Union represents employees in other storewide or multidepartment salesperson units. This pattern, though not controlling, "demonstrates the understanding" of the Union and the Employer that "singular differences" have *not* been relied upon in the past in favor of a unit limited to a narrow subset of selling employees who share broad commonalities with sales colleagues storewide.

In the instant case, the record compels a conclusion that the petitioned-for subset of C&F salespeople is inappropriate because the unit would arbitrarily include some salespeople and exclude others, when the included and excluded are all engaged in selling merchandise to the same customers in a full-service department store. This conclusion is reinforced by the fact that all salespeople, throughout the store, are covered by the same or similar hiring procedures, the same handbook and policies, the same dispute resolution procedure, the same performance evaluation criteria and tools, and similar commission arrangements (with pay differences that exist both within and outside the petitioned-for unit). In these respects,

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[110] 150 NLRB at 804.

the Employer's operation resembles that of the employer in *Wheeling Island Gaming*,[111] where a petitioned-for group consisting of poker dealers was deemed inappropriate because excluded employees (other table game dealers) were "integral elements of the Employer's business of operating a casino."[112] Here, as in *Trident Seafoods, Inc. v. NLRB*,[113] the integration and similarities between C&F and non-C&F salespeople "are such that *neither group can be said to have any separate community of interest justifying a separate bargaining unit*."[114]

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[111] 355 NLRB at 642. Specialty Healthcare explicitly reaffirmed *Wheeling Island Gaming*. See 357 NLRB No. 83, slip op. at 13 fn. 32.

[112] 355 NLRB at 642. See also Allied Stores, 150 NLRB at 804 (selling employees' ability to sell, an employer's "main venture," "plays a large part in the success of its business").

[113] 101 F.3d at 111.

[114] Id. at 120 (emphasis added). Two considerations emphasized by my colleagues–the fact that the C&F salespeople comprise a single "department" presided over by a single supervisor–do not in my view adequately support a C&F-only unit. The complexity of the Employer's store clearly requires some delineation of particular product areas, and department stores traditionally delineate those areas by departments; but the considerations that directly bear on unit "appropriateness" are those that directly affect employees, and as noted in the text at length, (i) broad commonalities in terms and conditions of employment among all selling employees storewide favor a storewide salespersons unit, and (ii) to the extent that differences exist between C&F salespeople and those in other "departments," the same types of differences exist between and among salespeople working within the combined C&F unit. For similar reasons, although common immediate supervision is relevant to the appropriate-unit determination, it is only one factor, and it is outweighed here by the common working conditions that cut across departmental lines, as well as the fact

For these reasons alone, even if *Specialty Healthcare* were applied, I would find that C&F employees do not constitute an appropriate unit. Using the language of *Specialty Healthcare*, the record establishes that the excluded non-C&F salespeople share an "overwhelming" community of interests with the C&F salespeople employed in the petitioned-for unit.[115] I would find that the smallest appropriate unit in the instant case must include all salespeople at the Employer's store.[116]

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that Store Manager McKay exercises control over and oversees all salespeople across the store, both directly (through the daily rallies) and indirectly (through her oversight of the store's sales managers, who report to McKay). See Hotel Services, 328 NLRB at 117 (multiple supervisors does "not necessarily mandate excluding differently supervised employees" from a unit); *Haag Drug* Co., 169 NLRB 877, 877-888 (1968) ("the community of interest of the employees in a single store takes on significance" when the store is "under the immediate supervision of a local store manager"). Moreover, counter managers oversee the work of discrete groups of employees within the C&F group, and there are other significant differences in working conditions between and among C&F employees, as detailed above.

[115] Specialty Healthcare, 357 NLRB No. 83, slip op. at 12-13.

[116] My colleagues cite a single case–*Sears, Roebuck & Co.*, 261 NLRB 245 (1982)–for the proposition that the Board has found a subset of salespeople within a department store to be an appropriate unit. However, Sears is plainly distinguishable because the unit there was limited to auto center employees who were physically separated from other retail departments (the repair shop was separated from the main store by a wall), they had different working hours and vacation schedules, and they were only encouraged to attend monthly storewide meetings. Id. at 246-247. The Board noted that interaction between auto center salespeople and other salespeople was isolated to "rare situations," which reflected the "absence of any close

B. A Unit Limited to C&F Salespeople Contradicts Longstanding Board Standards Regarding the Retail Industry

In *Specialty Healthcare*, the Board dealt with the appropriateness of a particular bargaining unit in a nonacute healthcare setting. However, the Board acknowledged the existence of "various" presumptions and rules governing other industries, and it expressly stated that *Specialty Healthcare* was "not intended to disturb" those standards.[117]

Some of these standards, which reflect the development of Board law over many decades, relate specifically to the retail industry. Specifically, the Board has held that "storewide" bargaining units are presumptively appropriate in the retail industry.[118]

There are substantial reasons for the Board's presumption in so many cases that storewide retail

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relationship" between the two groups of employees. Id. at 247. Most importantly, the Board in Sears emphasized that the petitioned-for unit centered around "a nucleus of craft employees (the mechanics) around whom the other auto center employees are organized," and only 7 people in the 33-employee unit were "sales employees." Id. at 245. Therefore, Sears involved a traditional "craft" exception to the retail industry presumption of a storewide bargaining unit, and a majority of the unit employees were not even salespeople. These considerations are completely absent in the instant case.

[117] 357 NLRB No. 83, slip op. at 13 fn. 29.

[118] See *May Department Stores* Co., 97 NLRB 1007, 1008 (1952) ("storewide unit" called "the optimum unit for the purposes of collective bargaining"); *I. Magnin* & Co., 119 NLRB 642, 643 (1957) (the Board regards storewide unit "as a basically appropriate unit in the retail industry"); *Sears, Roebuck*, 184 NLRB at 346 (calling a storewide unit "presumptively appropriate").

units are appropriate. In *Haag Drug* Co.,[119] the Board explained:

> The employees in a single retail outlet form a *homogeneous, identifiable, and distinct group*, physically separated from the employees in the other outlets of the chain; they *generally perform related functions* under immediate supervision apart from employees at other locations; and *their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets*.

The presumed appropriateness of a storewide unit can be especially clear where, as in the instant case, "a local store manager ... is involved in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems."[120] The Board elaborated in *Haag Drug*: "It is in *this framework* that the community of interest of the employees in a single store *takes on significance*."[121] See also *Allied Stores of New York*, 150 NLRB at 804

[119] 169 NLRB at 877-878 (1968) (emphasis added).

[120] Id. at 878.

[121] Id. (emphasis added). Although cases such as *Haag Drug* arose in the context of evaluating whether a storewide unit was appropriate, rather than a multistore unit, these cases remain relevant in the instant case because they recognize that employees in a storewide unit are likely to share a community of interests that renders such a unit presumptively appropriate. See also *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631 (1962).

(Board finds storewide unit of retail sales employees appropriate based on "pattern of organiz[ing]" and given the "great difference between a retail store ... that employs salespeople to serve the public and one where the public serves itself without the aid of sales personnel").

The Board's cases regarding unit appropriateness in the retail industry involve a number of issues that have been handled in a consistent manner.

First, as noted previously, the Board has indicated that unique characteristics shared by sales employees have warranted findings that storewide sales employee bargaining units are appropriate.[122] In *I. Magnin*,[123] the Board found that a union was *not* justified in seeking to represent a unit limited to a retail clothing store's shoe salesmen.[124] Like all the store's salespeople, the shoe salesmen were hired through the same personnel department, worked the same number of hours, enjoyed the same benefits, and shared the same general sales skills. The Board

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[122] See, e.g., *Allied Stores of New York, Inc.*, 150 NLRB at 804. See also *Wickes Furniture*, 231 NLRB 154, 154-155 (1977) ("selling employees have a sufficiently distinct community interest apart from other [nonselling] store employees ... [t]hey are under separate immediate supervision, spend the large majority of their time on the selling floor initiating virtually all sales, alone receive commissions for their sales, and have minimal contacts with warehouse employees"); *Sears, Roebuck & Co.*, 174 NLRB 941, 941-942 (1969) (because "display department employees, receivers, shippers, stockmen, unit control employees, auditing department, and credit department employees ... do no selling ... we shall exclude them from the unit" of petitioned-for salesmen).

[123] 119 NLRB at 642.

[124] Id. at 643.

found that the shoe salesmen were not craft or professional employees and thus were not "sufficiently different" from other selling employees to warrant their segregation in a separate unit. Likewise, in *Kushins & Papagallo*,[125] the Board held that a petitioned-for unit was not appropriate where it was limited to one division of sales employees in a multidepartment retail store that sold shoes, dresses, and accessories.[126]

Second, the Board has found less-than-storewide retail units of "craft or professional employees" to be appropriate.[127]

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[125] 199 NLRB 631, 631 (1972).

[126] The Board has also been unwilling to separate selling employees into separate bargaining units in other industries where the employer's primary goal is to sell its products. See, e.g., *Coca-Cola Bottling Co.*, 229 NLRB at 553-555 (separate unit comprised of a subset of an employer's soft drink and vending machine product salesmen inappropriate; all sales employees had the same duty "to sell and/or deliver the Employer's products"); *Larry Faul Oldsmobile Co., Inc.*, 262 NLRB 370, 371 (1982) (finance and insurance salespersons should be included in a petitioned-for unit of automobile salespersons because both groups of employees were "primarily engaged in selling"); *Liberty Mutual Insurance Co.*, 185 NLRB 734, 735 (1970) (personal and business insurance salesmen belonged in a single unit).

[127] *I. Magnin*, 119 NLRB at 643. See, e.g., *Goldblatt Bros., Inc.*, 86 NLRB 914, 915-916 (1949) (window and interior display personnel warranted a separate unit; they exercised artistic ability, used specialized tools, and completed a 2-year training program before beginning work); *May Department Stores* Co., 97 NLRB at 1008-1009 (hair stylists, beauticians, and manicurists constituted an appropriate, separate unit; they completed training, obtained licenses, and had specialized knowledge); *Foremen & Clark, Inc.*, 97 NLRB 1080, 1081-1082 (1952) (tailor shop employees warranted a separate unit; they "engaged in

The Supreme Court has indicated that the Board's bargaining-unit determinations can appropriately "be guided not simply by the basic policy of the Act but also by the rules that the Board develops *to circumscribe and to guide its discretion* ... in the process of case-by-case adjudication," and "the Board has created *many such rules* in the half-century during which it has adjudicated bargaining unit disputes."[128] In the circumstances presented here, a bargaining unit limited to C&F salespeople is not only inappropriate given the facts of this case, such a unit is contrary to standards developed and recognized by the Board in numerous other retail industry cases. These retail industry standards have been applied consistently and exist for good reasons.[129] Like the rules developed by the Board for

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manual work, much of it highly skilled, which is easily differentiated from the duties of selling personnel"); J.*L. Hudson Co.*, 103 NLRB 1378, 1380-1383 (1953) (carpet and upholstery installers warranted separate units because they composed functional groups "possessing predominantly craft skills"); *Rich's, Inc.*, 147 NLRB 163, 164-165 (1964) (bakery employees constituted an appropriate unit).

[128] *American Hospital Assn. v. NLRB*, 499 U.S. at 611-612 (emphasis added; citations omitted).

[129] Unlike my colleagues, I do not believe *Saks Fifth Avenue*, 247 NLRB 1047, 1051 (1980), supports the proposition that the presumption favoring storewide units is "no longer applicable to department stores." This statement in *Saks Fifth Avenue* related to a successorship situation, where the new employer argued it could refuse to recognize and bargain with the union that previously represented a preexisting unit of "alterations" employees. These employees were employed in a less-than-storewide "craft" unit that traditionally has been considered appropriate by the Board. See cases cited in fn. 50, supra. Moreover, the above-quoted statement from *Saks Fifth Avenue*

other industries, our retail industry standards should "circumscribe" and "guide" our resolution of the instant case.

C. Specialty Healthcare

As noted above, a wide array of undisputed facts renders inappropriate a bargaining unit limited to C&F employees. My colleagues, like the Acting Regional Director, reach a contrary conclusion based on the Board's decision in *Specialty Healthcare*.[130] In most cases, under *Specialty Healthcare*, the petitioned-for unit of employees will be deemed appropriate, instead of a larger unit, unless the opposing party proves that the excluded employees "share an *overwhelming* community of interest" with the petitioned-for group.[131]

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was accompanied by a citation to *Allied Stores*, 150 NLRB at 803, where the Board upheld the appropriateness of a storewide salesperson unit. Neither *Saks Fifth Avenue* nor *Allied Stores* supports a less-than-storewide unit that selectively includes some salespeople and excludes other salespeople at the same store. Also, as my colleagues concede, subsequent to *Saks Fifth Avenue*, the Board has reaffirmed the presumptive appropriateness of storewide units in the retail industry. See *Wal-Mart Stores*, 348 NLRB 274, 287 (2006), enfd. 519 F.3d 490 (D.C. Cir. 2008). See also *Charrette Drafting Supplies*, 275 NLRB 1294, 1297 (1985).

[130] 357 NLRB No. 83.

[131] Id., slip op. at 1. In addition to the holding that a petitioned-for unit will be accepted unless the opposing party proves that excluded employees share an "overwhelming" community of interest with employees in the proposed unit, Specialty Healthcare also states that, within the proposed unit, employees must be "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)," and they must "share a community of interest" based on "traditional criteria." Id., slip op. at 12 (citing

Contrary to my colleagues, I would not apply *Specialty Healthcare* here or in any other decision. Three considerations, in my view, suggest that *Specialty Healthcare* is inconsistent with the role that the Board has been admonished to play "in each case" when deciding the appropriate unit.

First, *Specialty Healthcare* constitutes an unwarranted departure from standards developed over the course of decades that have long governed the Board's bargaining-unit determinations. Rather than upholding petitioned-for units except when there is proof that excluded employees share an "overwhelming" community of interest with employees in the proposed unit, I believe the Board's responsibility is to evaluate whether a unit's appropriateness is supported based on a careful examination of what interests are shared within and outside the proposed unit. The Board reaffirmed this approach in *Wheeling Island Gaming*,[132] which, though cited with approval in *Specialty Healthcare*,[133] examined "whether the interests of the group sought are *sufficiently distinct* from those of other [excluded] employees to warrant establishment of a separate unit."[134] I believe the same type of examination, if

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Wheeling Island Gaming, 355 NLRB at 637 fn. 2) (other citations omitted). These other standards existed long before the Board issued its Specialty Healthcare decision, and I agree with them.

[132] 355 NLRB at 641-642.

[133] 357 NLRB No. 83, slip op. at 13 fn. 32.

[134] 355 NLRB at 637 fn. 2 (emphasis in original). My colleagues quote the Sixth Circuit appeal of Specialty Healthcare for the proposition that it is "just not so" that Specialty Healthcare represented a material change in the law.

conducted here, warrants a conclusion that the petitioned-for unit is not appropriate.

Second, the Board in *Specialty Healthcare* stated that its decision was "not intended to disturb" rules developed by the Board regarding particular industries.[135] Yet, the instant case involves precisely the type of industry–and a classification of employees within that industry–warranting a continuation of the consistent treatment that the Board has applied to similar facts in other cases. As applied in the instant case, *Specialty Healthcare* detracts from the type of employer and industry-specific standards that

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Yet although the Sixth Circuit indicated that the phrase "overwhelming community of interest" appeared in some Board decisions, see *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552, 561-562 (6th Cir. 2013) (citing two examples), the Board in Specialty Healthcare acknowledged that other prior cases had used "different words" when describing when excluded employees rendered inappropriate the petitioned-for unit, or evaluated whether employee interests were "sufficiently distinct," or even failed to articulate "any clear standard," Specialty Healthcare, 357 NLRB No. 83, slip op. at 11-12, and the Fourth Circuit squarely rejected the "overwhelming community of interest" standard in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995). Additionally, my colleagues suggest the Sixth Circuit rejected arguments "similar to those presented" in this dissent, but nothing in Kindred suggests that the Sixth Circuit evaluated the considerations expressed here–especially that Specialty Healthcare improperly limits the Board's statutory role, contrary to the Act and its legislative history, by affording too much deference to the petitioned-for unit in derogation of Section 9(b)'s requirement that the Board "in each case" undertake a broader and more refined analysis, play a more active role, and consider the Section 7 rights of included and excluded employees when determining the appropriate unit. See fns. 60-67 and accompanying text, infra.

[135] 357 NLRB No. 83, slip op. at 13 fn. 29.

remain applicable to bargaining unit determinations, particularly since the Board in *Specialty Healthcare* expressly stated that these standards remain intact.

Third, and most important, I believe the *Specialty Healthcare* standard is irreconcilable with the role that Congress intended that the Board would play ""in each case" regarding bargaining unit questions,[136] and *Specialty Healthcare* renders "controlling" the "extent to which the employees have organized" contrary to Section 9(c)(5).[137] As recited at some length above, the Act and its legislative history indicate that Congress requires the Board–as reflected in mandatory statutory language–to undertake an active inquiry that is twofold: (a) the Board "shall decide in each case whether" the appropriate unit "shall be the *employer unit*, *craft unit*, *plant unit*, or *subdivision thereof*";[138] and (b) when making such a decision in each case, the Board must determine which of these competing groupings operates "to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."[139] By its terms, *Specialty Healthcare* appears to guarantee that the Board will not "in each case" decide which of the unit configurations enumerated in the statute (i.e., the "employer unit," "craft unit," "plant unit," or "subdivision thereof") operates to

[136] NLRA Sec. 9(b), 29 U.S.C. § 159(b).

[137] 29 U.S.C. § 159(c)(5). See *NLRB v. Lundy Packing Co.*, 68 F.3d at 1581 ("overwhelming community of interest" requirement "effectively accorded controlling weight to the extent of union organization").

[138] NLRA Sec. 9(b), 29 U.S.C. § 159(b) (emphasis added).

[139] Id. (emphasis added).

"assure employees the fullest freedom in exercising the rights" associated with union elections. Under *Specialty Healthcare*, the petitioned-for unit "in each case" will govern, except in the rare and unusual situation where an opposing party proves the existence of an "overwhelming community of interests" between excluded employees and those in the proposed unit. I believe Congress has required that the Board "in each case" will undertake a broader and more refined analysis, and play a more active role, when determining whether or not a unit is "appropriate" than is permitted under the *Specialty Healthcare* standard.

In my view, the "overwhelming community of interests" standard also improperly focuses solely on the Section 7 rights of employees in the petitioned-for unit, and it disregards the Section 7 rights of excluded employees except in a rare case where the excluded employees' interests "overlap almost completely" with those of included employees.[140] All statutory employees have Section 7 rights, whether or not they are initially included in the petitioned-for unit. And the Act's two most important core principles governing elections–the concepts of "exclusive representation" and "majority rule," both set forth in Section 9(a)–are completely dependent on the scope of the unit. For these reasons, the Board's unit determinations must, in part, consider whether the rights of nonpetitioned-for employees warrant their inclusion in any bargaining unit. Yet, such

[140] Specialty Healthcare, 357 NLRB No. 83, slip op. at 11 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)) (internal quotation marks omitted).

inquiry is effectively precluded under *Specialty Healthcare*. As stated in the dissenting opinion authored by former Member Hayes, *Specialty Healthcare* makes "the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances."[141]

In short, the Act requires the Board to approach unit determinations with vigilance and some reasonably broad range of vision regarding alternative unit configurations. In this regard, *Specialty Healthcare* affords too much deference to the petitioned-for unit in derogation of the mandatory role that Congress requires the Board to play. I believe this will necessarily result in bargaining units not decided upon by the Board based on criteria specified in the Act, but instead units will mostly result from "whatever group or groups the petitioning union his organized at the time,"[142] contrary to

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[141] Id., slip op. at 15 (Member Hayes, dissenting). See also *DTG Operations*, Inc., 357 NLRB No. 175, slip op. at 8-9 (2011) (Member Hayes, dissenting); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 6-9 (2011) (Member Hayes, dissenting). In my view, the mere possibility that excluded employees may seek separate representation in one or more separate bargaining units does not solve the problem caused by the Board's failure to give reasonable consideration to their inclusion in a larger unit. The Act's requirement that the Board "assure to employees the fullest freedom" in exercising protected rights requires the Board "in each case" to consider the interests of all employees–whether or not they are included in the petitioned-for unit–so the Board can "decide" whether the unit should be the "employer unit, craft unit, plant unit, or subdivision thereof." NLRA Sec. 9(b), 29 U.S.C. § 159(b).

[142] H.R. Rep. 80-245, supra fn. 23, at 37.

Section 9(c)(5) and Sections 9(a) and 9(b) of the Act.[143]

Conclusion

The Employer here–like countless others in the retail industry–operates a store that involves enormous complexity: an array of products and brands, with salespeople who have overlapping relationships with customers and one another, with innumerable additional details regarding commissions and compensation, common performance criteria, onsite vendor representatives, and nonsales personnel. The record reveals that all salespeople storewide have the same or similar working conditions, employment policies, job responsibilities, performance criteria, benefit plans, and commission and compensation arrangements. To the extent that cosmetics and fragrances salespeople are dissimilar from other salespeople in the same store, there are comparable dissimilarities among and between the C&F employees themselves. Moreover, if a unit limited to C&F salespeople is

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[143] I recognize that Specialty Healthcare was enforced by the Court of Appeals for the Sixth Circuit, which held–as did the D.C. Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008)–that the Board's "overwhelming community of interest" standard does not violate Section 9(c)(5). As referenced in fn. 58, supra, and with due respect for these court decisions, I believe Specialty Healthcare affords too much deference to the petitioned-for unit in derogation of the role that Congress requires the Board to play when making unit determinations, contrary to Section 9(c)(5), Section 9(a) and Section 9(b). However, to the extent that Specialty Healthcare is considered to be within the discretion that Congress prescribed for the Board, I would still decline to apply or rely on that decision for the reasons stated in the text.

deemed appropriate, that will raise the prospect of one or more additional separate bargaining units for other segments of sales personnel at the same store, and the resulting multiplicity of bargaining relationships would create even more complexity that would be at odds with the Employer's overriding business objective: to attract and retain customers who purchase products throughout the store.

I would find that the petitioned-for C&F salesperson unit is not appropriate, and that the smallest potential appropriate unit would consist of all salespeople storewide. I believe the contrary result my colleagues reach is inconsistent with the Board's traditional standards governing retail operations. Finally, I believe the *Specialty Healthcare* standard, as applied in the instant case, highlights important shortcomings that render *Specialty Healthcare* inappropriate and contrary to the Act, and I would refrain from applying or relying on *Specialty Healthcare* in any case.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. July 22, 2014

Philip A. Miscimarra Member

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

MACY'S, INC. *AND* LOCAL 1445, OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Case 01-CA-137863
January 7, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Local 1445 of the United Food and Commercial Workers International Union (the Union) on October 1, 2014,[1] the General Counsel issued the complaint on October 14, alleging that Macy's, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain

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1 All subsequent dates are in 2014, unless otherwise indicated.

following the Union's certification in Case 01-RC-091163. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 30, the General Counsel filed a Motion for Summary Judgment. On October 31, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Charging Party filed a statement in support of the General Counsel's motion. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union's certification on the basis of its argument, raised and rejected in the representation proceeding,2 that the unit of certain employees in the cosmetics and fragrances department of the Respondent's Saugus, Massachusetts store (the Saugus store) is inappropriate because it comprises an arbitrary segment of the Respondent's employees and is inconsistent with Board precedent holding that a wall-to-wall retail department store unit is presumptively appropriate. In addition, in its answer

[2] 361 NLRB No. 4 (2014).

to the complaint, the Respondent alleges as an affirmative defense that the unit has experienced a 50 percent employee turnover since the December 7, 2012 election, and that 75 percent of unit employees signed a petition disavowing a desire for union representation.[3]

It is well settled that an alleged postelection loss of majority support is not relevant to the question of whether a union should be certified as the result of a properly conducted Board election. *See Brooks v. NLRB*, 348 U.S. 96, 104 (1954); *Alta Vista Regional Hospital*, 356 NLRB No. 167, slip op. at 3 (2011), enfd. 697 F.3d 1181, 1187 (D.C. Cir. 2012) ("post-election assertion that a union has lost majority support has no bearing on the validity of an election that has

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[3] On October 7, the Respondent sent a letter to the Region stating that it was refusing to bargain with the Union in order to test the Union's certification. There, the Respondent also asserted the same arguments regarding employee turnover and dissatisfaction as set forth in its answer to the complaint, and attached two documents purporting to be employee petitions reflecting a loss of majority support for the Union. The first document, entitled "Petition NOT to Unionize" (emphasis in original), lists the names of 17 individuals whom it states it hired between the election and the Board's July 22, 2014 Decision on Review and Order and shows the date August 4, 2014, next to each name. The document further states, "In accordance with the National Labor Relations Act, we petition for our right to vote in this matter, and we hereby expressly vote NO" (emphasis in original). A second petition, which includes 28 names and the same date, states, "We the undersigned, as employees of the of the Cosmetics and Fragrances Department at Macy's in Saugus, Massachusetts, hereby petition NOT to be represented by a Union" (emphasis in original). August 4, 2014, fell after the Board's July 22, 2014 Decision on Review and Order in the representation proceeding but before the Union's August 11, 2014 certification.

already occurred"); *Kane Co.*, 145 NLRB 1068, 1070 (1964), enfd. 352 F.2d 511 (6th Cir. 1965); *Sunbeam Corp.*, 89 NLRB 469, 473 (1950); *Teesdale Mfg. Co.*, 71 NLRB 932, 935 (1946). In any event, the Respondent is procedurally barred from raising this issue here, as it had the opportunity to raise this argument, but did not, in the underlying representation proceeding, either directly or through a motion for reconsideration or a motion to reopen the record.[4]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[5]

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[4] See Sec. 102.65(e)(1) of the Board's Rules and Regulations (motion to reopen the record must be filed promptly upon discovery of the evidence sought to be adduced).

[5] Member Miscimarra would have granted review in the underlying representation proceeding and found that the smallest appropriate unit would include all salespeople in the Saugus store. He agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding, and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation engaged in the operation of retail department stores throughout the United States, including a store located in Saugus, Massachusetts.

In conducting its operations described above, the Respondent annually derives gross revenues in excess of $500,000, and purchases and receives at the Saugus store goods valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on December 7, 2012, the Union was certified on August 11, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and

> fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

The Union continues to be the collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated August 12, 2014, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about August 12, 2014, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about August 12, 2014, to bargain with the Union as the exclusive collective-bargaining representative of employees in

the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Macy's, Inc., Saugus, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 1445 of the United Food and Commercial Workers International Union (Union), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time, regular part-time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Saugus, Massachusetts, copies of the

attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 7, 2015

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[6]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce	Chairman
Philip A. Miscimarra	Member
Kent Y. Hirozawa	Member

APPENDIX
NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 1445 of the United Food and Commercial Workers International Union ("Union"), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on

terms and conditions of employment for our employees in the following bargaining unit:

> All full-time, regular part-time, and on-call employees who have worked an average of four hours per week during the calendar quarter immediately preceding the eligibility date, employed by Macy's in the cosmetics and fragrances department at its Saugus, Massachusetts store, including counter managers, beauty advisors, and all selling employees in cosmetics, women's fragrances, and men's fragrances, but excluding MAC employees, sprayers, the cosmetics fragrances manager, the store manager and assistant store managers, account coordinators, selling floor supervisor, merchandise team managers, receiving team manager, visual manager, administrative team manager, human resource manager, operations manager, loss prevention manager, clerical employees, guards, and supervisors as defined in the Act.

MACY'S, INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-137863 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-194

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60022

MACY'S, INCORPORATED,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

Petitions for Review of an Order of the
National Labor Relations Board

O R D E R :

(X) The petitioner cross-respondent's opposed motion for recall and stay of the mandate for 90 days pending petition for writ of certiorari is DENIED.

( ) The petitioner cross-respondent's opposed motion for recall and stay of the mandate for 90 days pending petition for writ of certiorari is GRANTED through ____.

s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60022

MACY'S INCORPORATED,
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner

Filed June 2, 2016

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

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ON PETITION FOR REHEARING EN BANC,
(Opinion June 2, 2016, 824 F.3d 557)

Before BENAVIDES, DENNIS, and COSTA, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel

rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 6 judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod), and 9 judges voted against rehearing (Chief Judge Stewart and Judges Davis, Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ James L. Dennis

JAMES L. DENNIS

United States Circuit Judge

E. GRADY JOLLY, Circuit Judge, joined by JONES, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from the denial of rehearing en banc:

This appeal presents another example of the current National Labor Relations Board's ("NLRB") determination to disregard established principles of labor law. The NLRB certified a small bargaining unit consisting of only the cosmetics and fragrances employees at a Macy's department store in Saugus, Massachusetts. On appeal, the panel denied Macy's petition for review and granted the NLRB's application for enforcement of its unfair labor practices order, which ordered Macy's to bargain with

the Union.[1] *Macy's, Inc. v. NLRB*, 824 F.3d 557, 560–61 (5th Cir. 2016). On petition for en banc review, the en banc Court, in a split vote, denied further review. I respectfully dissent from that denial.

As an initial matter, the panel erred by allowing the NLRB's decision to stand when it and its underlying foundations are marred by the misapplication of the NLRA and its historical interpretation. As the NLRB acknowledges, it has long held that, in the retail industry, storewide units of salesforce employees are the presumptively appropriate collective bargaining unit. *Macy's & Local 1445*, 361 N.L.R.B. 4, at *17–19 (2014); *see also, e.g., I. Magnin & Co.*, 119 N.L.R.B. 642 (1957); *May Dep't Stores*, 97 N.L.R.B. 1007 (1952). Even if this presumption has been overcome on infrequent occasions, the NLRB has only authorized smaller units where a petitioned-for unit of employees has "a 'mutuality of interests' not shared by all other selling employees ... and are 'sufficiently different' from the other selling employees so as to justify representation on a separate basis." *Macy's & Local 1445*, 361 N.L.R.B. 4, at *20. Such cases have been rare for an obvious reason: no matter the titular differences, such as employees' assignment to different departments, all salesforce workers have the same basic employment, skills, interests, function, and working conditions.

Here, there are no circumstances that isolate the cosmetics and fragrances employees from the presumptive bargaining unit of all salesforce employees. The NLRB nonetheless applied, inaptly,

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[1] Local 1445, United Food and Commercial Workers Union.

the two-prong standard from *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 83 (2011), to allow the smaller and select unit that the Union had successfully organized.

There are statutory constraints on the NLRB's evaluation of a union's requested collective bargaining unit. Section 9(c)(5) of the NLRA expressly provides that "the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). Courts have interpreted this to mean that the extent of union organization may only be "consider[ed] ... as one factor' in determining whether a proposed unit is appropriate." *Blue Man Vegas, LLC v. N.L.R.B.*, 529 F.3d 417, 421 (D.C. Cir. 2008) (quoting *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965)). But, here, the only justification for a unit of only cosmetics and fragrances employees is that it reflects the apex of the Union's organizational strength. Indeed, the Union failed in two efforts to organize larger bargaining units at this store. The Union was only successful on its third try: this time with a micro-unit of cosmetics and fragrances employees that evidently reflected its greatest strength. But the en banc Court must acknowledge that the Supreme Court has explained that "the enforcing court should not overlook or ignore an evasion of the § 9(c)(5) command." *Metro. Life Ins. Co.*, 380 U.S. at 442, 85 S.Ct. 1061. In short, the NLRB's decision here challenges this admonition.

Furthermore, the panel decision pays little respect to one of the underlying policies of the NLRA: the

promotion of labor peace and stability.[2] Peace and stability are weakened by the balkanization of bargaining units in a single, coordinated workplace. *NLRB v. R. C. Can Co.*, 328 F.2d 974, 978–79 (5th Cir. 1964). In this case, the NLRB sacrificed considerations of promoting labor peace by using a rationale that approved a small, carved-out bargaining unit that contains no real limiting principle in future cases. For example, nothing in the NLRB's rationale prevents a dozen micro-units within a retail store's salesforce—all fraught with mini-bargaining at multiple times and the possibility of disputes and mini-strikes occurring continually over the working year. One is led to assume, as the amici suggest, that three bowtie salesman would be an appropriate bargaining unit if they sold bowties at a separate counter from other merchandise. So much for promoting labor peace and stability.

On a different level, the panel has effectively disregarded our own precedent in *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153 (5th Cir. 1980). When the NLRB "exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and

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[2] *E.g.*, 29 U.S.C. § 151; *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964) (" 'The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.'" (citation omitted)); *Brooks v. NLRB*, 348 U.S. 96, 103, 75 S.Ct. 176, 99 L.Ed. 125 (1954) ("The underlying purpose of [the NLRA] is industrial peace."); *Am. Bread Co. v. NLRB*, 411 F.2d 147, 155 (6th Cir. 1969) ("One of the objectives of the National Labor Relations Act is to promote peace and tranquility between labor and management while insuring employees the opportunity to be represented by the union of their choice.").

'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Id.* at 1161 (quoting *Metro. Life Ins. Co.*, 380 U.S. at 443, 85 S.Ct. 1061). Although the panel acknowledged *Purnell's Pride*, it gave the NLRB a pass on its requirements: in the words of one panel member, the NLRB's decision reads like "a bad law school exam."

And now, from the broad strokes, to the analysis.

I.

"This court … reviews unit determinations only to determine 'whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in evidentiary support." *Macy's*, 824 F.3d at 563 (citation omitted). But this deference does not require the Court to "bow to the mysteries of administrative expertise." *E.g.*, *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971). This Court has "refused to enforce [NLRB] orders where they have no reasonable basis in law" because they "fail[ed] to apply the community of interest standard" and where "the reasons supporting the Decision ... [were] not sufficiently articulated to permit proper judicial review." *NLRB v. Magna Corp.*, 734 F.2d 1057, 1061, 1064 (5th Cir. 1984) (citation and internal quotation marks omitted); *Purnell's Pride*, 609 F.2d at 1161. The panel opinion is a troublesome decision that permits the NLRB's decision to stand despite the fact that it contains both of these critical flaws; troublesome especially when we have precedent that rejects the breezy analysis employed by the threesome.

A.

The NLRB abused its discretion by applying an incorrect standard for analyzing the first prong of the *Specialty Healthcare* framework: whether the petitioned-for employees share a community of interest. Moreover, the flawed analysis demonstrates that the NLRB's determination was controlled by the extent of union organization, which NLRA § 9(c)(5) explicitly prohibits.

1.

The NLRA constrains the NLRB's evaluation of a union's proffered collective bargaining unit. As noted, NLRA § 9(c)(5) provides that "the extent to which the employees have organized shall not be controlling," although it "may be 'consider[ed] ... as one factor' in determining whether a proposed unit is appropriate." 29 U.S.C. § 159(c)(5); *Blue Man Vegas*, 529 F.3d at 421 (citation omitted). Thus, "while still taking into account the petitioner's preference," the NLRB "must proceed to determine, based on additional grounds," whether "the proposed unit is ... appropriate." *Specialty Healthcare*, 357 N.L.R.B. 83, at *13.

"To guide its discretion, and to avoid giving controlling weight to the extent of organization," the NLRB traditionally uses a multi-factor community of interest analysis to determine whether a petitioned-for unit is appropriate. *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 495 (4th Cir. 2016) (citation omitted). In *Specialty Healthcare*, the NLRB clarified [3] the traditional principles of unit

[3] The NLRB and courts have described the community of interest factors in various ways over time. *E.g.*, *Nestle*, 821 F.3d

determination and explained how the traditional standard applies when an employer contends that the appropriate unit contains more employees than those in the petitioned-for unit, as Macy's does here. 357 N.L.R.B. 83, at *12–20. In such cases, the NLRB applies a two-step test.

In the first step, the NLRB decides whether the petitioned-for unit is *prima facie* appropriate. It begins by determining whether the employees in the petitioned for unit "are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)." *Id*. at *17. This first step is completed by examining whether "the employees in the group share a community of interest." *Id*. In making this decision, the NLRB examines:

> whether the employees are organized into a *separate department*; have *distinct* skills and training; have *distinct* job functions and perform *distinct* work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated *with the Employer's other employees*; have frequent contact *with other employees*; interchange *with other employees*; have distinct terms and conditions of employment; and are *separately* supervised.

Macy's, 824 F.3d at 568–69 (emphasis in original) (quoting *Specialty Healthcare*, 357 N.L.R.B. 83, at *14). If it finds that a petitioned-for unit is "readily identifiable as a group" and "that the employees in the group share a community of interest after

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at 495; *NLRB v. Catalytic Indus. Maint. Co.*, 964 F.2d 513, 518 (5th Cir. 1992).

considering the traditional criteria," the NLRB proceeds to the second step. *Specialty Healthcare*, 357 N.L.R.B. 83, at *17.

In the second step, the burden shifts from the petitioner to the employer to show that "employees in [a] larger unit share an overwhelming community of interest with those in the petitioned-for unit." *Id*. An employer satisfies this burden if it shows that "there 'is no legitimate basis upon which to exclude certain employees from it' "so that the community of interest "factors 'overlap almost completely.'" *Id*. at *16 (quoting *Blue Man Vegas*, 529 F.3d at 421–22). If the employer cannot make this showing, the NLRB "will find the petitioned-for unit to be an appropriate unit." *Id*. at *17.

But the NLRB itself has more than a perfunctory obligation when analyzing the community of interest factors in the first step: the NLRB must compare and contrast the employees in the group with each other *and with employees outside of the group*. The NLRB has repeatedly recognized the importance of this comparison. It has stated, for example, that:

> [T]he [NLRB]'s inquiry never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another.... Our inquiry ... necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit. The [NLRB] has a long history of applying this standard in initial unit determinations.

Wheeling Island Gaming, Inc., 355 N.L.R.B. 637, at *1 n.2 (2010) (emphasis in original) (citations and internal quotation marks omitted). The NLRB maintained this requirement in *Specialty Healthcare*. It formulated the community of interest test detailed above, which emphasizes this comparison, and applied the test using an analysis replete with distinctions between the employees in the petitioned-for unit and excluded employees. *Specialty Healthcare*, 357 N.L.R.B. 83, at *14. Moreover, the Fifth Circuit and its sister circuits have recognized that employees in a petitioned-for unit must be compared with employees who share common interests but have nonetheless been excluded from the petitioned-for unit.[4]

Ultimately, in applying *Specialty Healthcare*, the NLRB must guard against violating NLRA § 9(c) by making "arbitrary exclusions." *Nestle*, 821 F.3d at

[4] *E.g.*, *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 440 (3d Cir. 2016) (recognizing that *Specialty Healthcare's* "initial community-of-interest test ... noted similarities among the employees within the petitioned-for unit, and distinctions between them and excluded employees"); *Macy's*, 824 F.3d at 568–69; *Nestle*, 821 F.3d at 495 ("The test ensures not only that the employees in the unit share common interests, but also that these interests are distinct from those of excluded employees."); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016) ("[T]he community of interest test does in fact compare the interests and characteristics of the workers in the proposed unit with those of other workers.... The precedents relied on by the [NLRB] in *Specialty Healthcare* make clear that the [NLRB] does not look at the proposed unit in isolation."); *Amalgamated Clothing Workers of Am. v. NLRB*, 491 F.2d 595, 598 n.3 (5th Cir. 1974) ("The touchstone of appropriate unit determinations is whether the unit's members have a 'recognizable community of interest sufficiently distinct from others.'" (citation omitted)).

499. If it does not compare employees in the petitioned-for group with excluded employees in the first step or if it only identifies "meager differences" between these employees, the NLRB "conduct[s] a deficient community-of-interest analysis" that "fails to guard against arbitrary exclusions" and creates an "apparent union gerrymander." *Id.*; see also *Blue Man Vegas*, 529 F.3d at 425–26; *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580, 1580–81 (4th Cir. 1995), *supplemented*, 81 F.3d 25 (4th Cir. 1996); *See Macy's*, 824 F.3d at 568–69. This conduct violates § 9(c) because, "[b]y rubber-stamping [a union's petitioned-for unit] and then applying the overwhelming-community-of-interest test, 'the [NLRB would] effectively accord[ ] controlling weight to the extent of union organization.'" *Nestle*, 821 F.3d at 499 (citation omitted).

2.

Here, the NLRB conducted a deficient analysis of whether the petitioned-for unit of cosmetics and fragrances employees was *prima facie* appropriate. The NLRB began by incorrectly phrasing step one of the *Specialty Healthcare* analysis as being concerned only with "whether employees *in a proposed unit* share a community of interest." *Macy's & Local 1445*, 361 N.L.R.B. 4, at *10 (emphasis added). Then, in conducting this community of interest analysis, the NLRB barely noticed how the employees in the petitioned-for group differed from excluded employees and made no effort to explain how the admittedly questionable difference it identified was not, in fact, "meager."

The NLRB discussed similarities between employees within the petitioned-for group, but it did

not discuss similarities between the included employees and the excluded employees. *Id*. at *10–11. For example, it addressed Macy's' arguments as to why employees within the petitioned-for group did not share similar interests. *Id*. at *11. But it only acknowledged Macy's' contention that the cosmetics and fragrances employees' interests did not meaningfully differ from those of other sales employees once it advanced to step two of the *Specialty Healthcare* analysis. *Id*. at *11–17.

The NLRB also cited only one[5] distinction between cosmetics and fragrances employees and Macy's' other selling employees: only cosmetics and fragrances employees sell fragrance and cosmetic products to customers. *Id*. at *10. This distinction is, however, hollow and just plain meaningless. The NLRB had to admit that there was "evidence regarding cosmetics and fragrances products being rung up in other departments." *Id*. at *13 n.41. And the NLRB did not explain why this purported difference had contextual substance or was not "meager"—an explanation that was particularly necessary because the NLRB later conceded that "the petitioned-for employees and other selling employees perform similar, related duties." *Id*. at *14.

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[5] The NLRB may have also made the distinction that only cosmetics and fragrances employees work almost exclusively in a specific area of the store. *Id*. at *10–11 (stating that cosmetics and fragrances employees "perform their functions in two connected, defined work areas" and "are not expected to work in other departments"). Assuming the NLRB made this distinction, it is, in the NLRB's words, "analytically insignificant." *Id*. at *11 & n.34; *see also D.V. Displays Corp.*, 134 N.L.R.B. 568, at *1 (1961).

3.

Regrettably, the panel has failed properly to grasp and to apply the principles that guide step one of the *Specialty Healthcare* analysis. It is clear to any reasonable reader that the panel did not require the NLRB actually to engage the crucial step of rigorously weighing the community of interest factors by comparing the employees in a petitioned-for unit with employees outside of that unit. Instead, in a blow-by treatment of whether the NLRB applied the correct standard, the panel stated without further explanation "[t]hat [rigorously weighing the factors] is precisely what the [NLRB] has done in the instant case. As a result, the test and its application do not violate Section 9(c)." *Macy's*, 824 F.3d at 568.

This conclusionary expression does not reconcile the NLRB's analysis with the NLRA's and *Specialty Healthcare*'s requirements. The fact remains that, in its analysis under *Specialty Healthcare*'s first prong, the NLRB articulated and applied the wrong standard. The NLRB failed to consider any of the similarities between included and excluded employees, only identified one questionable distinction between them, and did not explain how that distinction was meaningful. Because the NLRB did not apply the correct community of interest standard, its decision, in the final analysis, had "no reasonable basis in law" and was therefore an abuse of discretion. *Magna Corp.*, 734 F.2d at 1061, 1064 (citation omitted).

Moreover, and crucially, this case is a picture perfect example of the NLRB violating the NLRA by approving a bargaining unit defined by the limited success of a union's organizational efforts in the

larger and appropriate unit. This bypassing of statutory barriers has been achieved by avoiding an analysis of the guiding precedents in shaping bargaining units. After the Union was stymied from organizing a storewide unit to join a multi-store unit and lost an election for a standalone storewide unit, the Union cherry-picked a unit of only cosmetics and fragrances employees—the group apparently most favorable to the Union's organization efforts.[6] And the NLRB allowed it to hobble across the finish line as a survivor "substitute" bargaining unit. The NLRB has long used a thorough community of interest test, which compares employees within and outside of the proposed unit, "to avoid giving controlling weight to the extent" to which employees have organized, which NLRA § 9(c)(5) unequivocally prohibits. *Nestle*, 821 F.3d at 495 (citation omitted). But, here, the NLRB rubberstamped the Union's proffered unit by engaging in a callow community of interest analysis. It then improperly forced Macy's to satisfy an overwhelming community of interest standard. Thus, the NLRB gave excessive deference to the composition of the requested unit and arbitrarily disregarded the collective bargaining interests of

[6] "On March 24, 2011, the [Union] filed a petition seeking a self-determination election to determine whether Saugus employees wished to join [an] existing five-store unit; the petition covered all full-time and regular part-time employees at the Saugus store." *Macy's & Local 1445*, 361 N.L.R.B. 4, at *7. Macy's opposed this election on the ground that "adding the Saugus employees to the existing five-store unit would be inappropriate." *Id*. "The Regional Director agreed with [Macy's], and instead directed an election to determine whether the Saugus employees wished to be represented in a single-store unit." *Id*. The Union lost that election. *Id*.

other salesforce employees to be in the same unit, "'effectively accord[ing] controlling weight to the extent of union organization.'" *See Id.* at 499 (citation omitted); see also, e.g., *Blue Man Vegas*, 529 F.3d at 425–26; *Lundy Packing Co.*, 68 F.3d at 1580, 1580–81.

B.

The NLRB not only abused its discretion and violated the NLRA as noted, but it also inadequately explained the reasons for its decision, thereby disregarding our circuit precedent and preventing proper judicial review.

1.

While "a bargaining unit designation by the [NLRB] is not lightly to be overturned," "it was manifestly not the congressional intent that appellate scrutiny of [NLRB] decisions be relegated to a formalistic ritual of stamping an appellate imprimatur on administrative determinations without having undertaken a careful examination of the basis of the [NLRB]'s action." *Amalgamated Clothing Workers of Am. v. NLRB*, 491 F.2d 595, 597 (5th Cir. 1974). Rather, courts must carefully review the record "to determine whether the [NLRB]'s decision is a rational one supported by the evidence." *Id.* This "translates into a duty by the [NLRB] ... to articulate 'substantial reasons' for its unit determinations." *Id.* (citation omitted); see also *Metro. Life*, 380 U.S. at 443, 85 S.Ct. 1061.

To satisfy this requirement, the NLRB must "do more than simply tally the factors on either side of a

proposition." *Purnell's Pride*, 609 F.2d at 1156.[7] Because "[t]he crucial consideration is the weight or significance ... of factors relevant to a particular case," the NLRB "must assign a relative weight to each of the competing factors it considers" in order "to permit proper judicial review." *Id.* Thus, "unit determination[s] will be upheld only if the [NLRB] has indicated clearly how the facts of the case, analyzed in light of the policies underlying the community of interest test, support its appraisal of the significance of each factor." *Id.* at 1156–57 (citing *Metro. Life*, 380 U.S. at 442–43, 85 S.Ct. 1061 (remanding a unit determination case to the NLRB because its "lack of articulated reasons for the decisions in and distinctions among [unit determination] cases" frustrated judicial review)).

2.

Here, the NLRB has determined that *Macy's*' cosmetics and fragrances employees share a community of interest using a remarkably similar analysis to one this Court rejected in *Purnell's Pride*. In *Purnell's Pride*, the NLRB[8]: (1) made findings of fact; (2) discussed the traditional community of interest factors; (3) stated the employer's objections; (4) addressed them by applying the facts to the factors and citing four times to precedent; (5)

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[7] It is irrelevant that *Purnell's Pride* is a pre-*Specialty Healthcare* case because the Supreme Court has explained that "the basis of the [NLRB]'s action, in whatever manner the [NLRB] chooses to formulate it," must "meet[ ] the criteria for judicial review." *Metro. Life*, 380 U.S. at 443 n.6, 85 S.Ct. 1061 (citations omitted).

[8] The NLRB adopted the Regional Director's analysis. 609F.2d at 1160.

"concluded that evidence bearing on [some factors] supported approval of the proposed unit while evidence [on other factors] militated against the proposed unit"; and (6) found that the evidence supported approval of the proposed unit. 609 F.2d at 1159–60. This Court held that the analysis contained a crucial flaw: the NLRB "d[id] not adequately explain ... the weight ... assigned to each individual factor." *Id.* at 1160. The reasons supporting the NLRB's decision were therefore "not sufficiently articulated to permit proper judicial review." *Id.* at 1161–62.

Here, like the decision we overruled in *Purnell's Pride*, the NLRB: (1) made findings of fact; (2) discussed the traditional community of interest factors; (3) applied the facts to the factors; (4) stated the employer's objections; (5) addressed them by applying the facts to the factors and citing to four cases; (6) concluded that "differences among the petitioned-for employees ... are insignificant compared to the strong evidence of community of interest that they share"; and (7) found that the evidence supported approval of the proposed unit. *Macy's & Local 1445*, 361 N.L.R.B. 4, *10–11. But, as in *Purnell's Pride*, the NLRB did not address the weight it assigned to each competing factor.

3.

The panel fails to acknowledge that, just as in *Purnell's Pride*, the NLRB committed a "fatal" error by not weighing the community of interest factors and explaining why the differences between the cosmetics and fragrances employees and other selling employees outweighed the similarities. *Macy's*, 824

F.3d at 565. The panel summarily dismissed Macy's argument in three sentences:

> In *Purnell's Pride*, the Regional Director had simply listed the factors that guided his unit determination. Finding that the [NLRB], in upholding the Regional Director's ruling, had failed to adequately explain its weighing of the community interest factors, this court ***197** remanded the case to allow the [NLRB] to disclose the basis of its order. Here, the [NLRB] satisfied *Purnell's Pride*'s requirements: the decision identified some factors that could weigh against the petitioned-for unit and explained—with citation to [NLRB] precedent—why these factors did not render the petitioned-for unit inappropriate. *Macy's & Local 1445*, 361 N.L.R.B. No. 4, *11.

Macy's, 824 F.3d at 565–66 (citations omitted).

Respectfully, the panel's analysis is obviously flawed. First, as discussed above, in *Purnell's Pride*, the NLRB patently did not, as the panel asserts, simply list the factors that guide the unit determination. Second, in Purnell's Pride, we required more of the NLRB than, as the panel asserts, identifying some factors that could weigh against a petitioned-for unit because the NLRB did precisely that in *Purnell's Pride*. Instead, *Purnell's Pride* required the NLRB to assign a weight to each community of interest factor and weigh the factors. 609 F.2d at 1156–57. Third, the NLRB neither weighed the community of interest factors here nor explained why the differences between the cosmetics and fragrances employees and other selling employees outweighed the similarities. Consequently,

"the reasons supporting the Decision ... [were] not sufficiently articulated to permit proper judicial review." *See id*. at 1161.

In this light, the panel's decision to nevertheless uphold the NLRB's decision contravenes circuit precedent. The next panel that addresses the question of whether the NLRB, or another agency, has sufficiently articulated the reasons for its decision may not be bound by the panel opinion in this case because *Purnell's Pride* predates the panel's decision and remains cognizable law in this circuit. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 425 n.8 (5th Cir. 2006) ("The rule in this circuit is that where two previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit (absent an intervening holding to the contrary by the Supreme Court or this court en banc)."). In short, when we fail to follow clearly applicable precedent, we send confusing signals to the litigants and to the district courts. They deserve better.

II.

For these reasons, I respectfully dissent from the failure of the Court to vote this case en banc.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 15-60022

NLRB Docket No. 01-CA-137863

MACY'S, INCORPORATED,
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner

FILED
June 2, 2016
Lyle W. Cayce
Clerk

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

Before BENAVIDES, DENNIS, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the petition of Macy's Incorporated for review and cross-application for enforcement of an order of the National Labor Relations Board and was argued by counsel.

It is ordered and adjudged that the petition for review is denied and the Board's cross-application for enforcement of its order is granted.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX G

29 U.S.C. § 157 provides:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 159 provides:

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such

grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall 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: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated

directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall

direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this

section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

5 U.S.C. § 557 provides:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member

of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause

why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.