No. 15-60022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would assist the Court in evaluating the important issues presented in this case.

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Regulations:

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Macy's, Incorporated ("Macy's") to review a Decision and Order of the National Labor Relations Board issued on January 7, 2015, and reported at 361 NLRB No. 163. (ROA.510-13.)[1]

[1] "ROA." refers to the administrative record filed on March 9, 2015, which includes the transcript of the representation hearing before the Board Hearing Officer (Record Volume I, ROA.1-169), and the pleadings before the Board and the Board decisions under review (Record Volume III, ROA.170-513). "RX"

The Board found that Macy's unlawfully refused to bargain with Local 1445, United Food and Commercial Workers Union ("the Union"), which the Board certified as the bargaining representative of a unit of Macy's employees. (ROA.511.) The Board has cross-applied for enforcement of its Order, which is final with respect to both parties under Section 10(e) and (f) of the National Labor Relations Act, as amended. 29 U.S.C. § 160(e) & (f). The Union has intervened on the Board's behalf.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id*. § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because Macy's transacts business within this Circuit. Macy's filed its petition for review on January 8, 2015, the Board filed its cross-application on February 26, 2015. Both were timely; the Act places no time limitations on such filings.

The Board's unfair-labor-practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 01-RC-91163), in which Macy's contested the Board's certification of the Union as the employees'

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refers to exhibits introduced at the hearing by Macy's, which are located in Record Volume Two. References before a semicolon are to the Board's findings; those following are to the supporting evidence. Macy's opening brief is referred to as "M-Br." Amici's three briefs are referred to as: "HR-Br." (HR Policy Association); "RA-Br." (Retail Associations); and CDW-Br. (Coalition for a Democratic Workplace, et al.).

collective-bargaining representative. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record in that proceeding is part of the record before this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

ISSUE STATEMENT

The issue before the Court is whether the Board acted within its discretion in determining that a unit of cosmetics and fragrances department employees at a Macy's store in Saugus, Massachusetts constitutes an appropriate unit for collective bargaining. If so, then the Board properly found that Macy's unlawfully refused to bargain with the Union following its victory in a representation election.

STATEMENT OF THE CASE

The Board found that Macy's violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to recognize and bargain with the Union.

Macy's took those actions in order to challenge the Union's certification, following a representation election, as the exclusive collective-bargaining representative of the employees in Macy's cosmetics and fragrances department. Macy's claims that unit is inappropriate because it does not include other employees at its Saugus, Massachusetts department store. The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

I. The Board's Findings of Fact

A. Background: Macy's Operations

Macy's operates a national chain of department stores. This case involves its store in Saugus, Massachusetts. (ROA.439; 10.) Store manager Danielle McKay, the store's highest executive, oversees 7 sales managers in 11 primary sales departments: juniors, ready-to-wear, women's shoes, handbags, furniture, home, men's clothing, bridal, fine jewelry, fashion jewelry, and cosmetics and fragrances. (ROA.439; 12-14.) Of the store's 150 employees, 120 are selling employees, 41 of whom work in cosmetics and fragrances. (*Id*.) The Board certified a unit of all 41 employees in the cosmetics and fragrances department, which is comprised of three classifications: counter managers, cosmetics and fragrances beauty advisors, and on-call employees. (ROA.439-40.)

B. Cosmetics and Fragrances Department Employees Have Common Supervision, Work In Two Connected, Defined Work Areas, and Sell Products that Are Only Sold in Their Department

The cosmetics and fragrances employees report directly to Kelly Quince, the sales manager for that department. She has no regular responsibilities for the other primary sales departments, and the other departmental sales managers have no regular responsibilities for cosmetics and fragrances. Quince evaluates the employees in her department, applying the general criteria and forms to account for the nature of the products they sell. (ROA.439; 24-27, 159-63, RX3, pp. 2-4.)

Cosmetics and fragrances employees work in two defined, connected areas within the store. Cosmetics and women's fragrances are located on the first floor, between the store entrance and the escalators leading to the second floor. The men's fragrances counter is located on the second floor in the area surrounding the escalator bank. Those two selling areas are spatially distinct from, although adjacent to, several of the other primary sales departments. (ROA.440; 15-16, 125-26, RX1.)

In addition to the women's fragrances counter, the first-floor area is divided into eight cosmetics counters, each of which is dedicated to the products of a primary vendor. Cosmetics beauty advisors are assigned to one of those eight counters. Those beauty advisors typically sell only their vendor's products, though they will sometimes sell another vendor's products, such as when the advisor

assigned to that counter is on break. (ROA.440; 26-27, 125-26, 131-32.) In addition, those beauty advisors demonstrate products by giving customers makeovers. Fragrance beauty advisors are assigned to either the men's or women's fragrance counter, and sell all available fragrance products there, regardless of the vendor.

The men's and women's fragrances counters, and six of the eight cosmetics counters, each has its own non-supervisory counter manager who sells product, helps organize promotional events, assures the stocking of sufficient product, and coaches beauty advisors on selling and promotional techniques. In addition, there are seven on-call employees in cosmetics and fragrances who may sell both types of products and work at any of the department's counters. (ROA.440; 24-27, 60-62, 109-10, 125.)

Typically, vendor representatives, along with Macy's personnel, interview applicants for cosmetics beauty advisor positions, but not for fragrance beauty advisor or on-call positions. Prior experience in selling cosmetics or fragrances is preferred but not required. (ROA.440; 53, 77-79, 98, 101.) Once hired, cosmetics and fragrances beauty advisors receive specialized in-house and off-site training that is tailored to the products they sell. Product-knowledge training for fragrance beauty advisors involves ingredients, scents, and notes. Product-knowledge training for cosmetics beauty advisors mainly involves the products in their

vendor's line, but they also receive training in interselling so that they can assist customers at other cosmetics and fragrances counters. (ROA.440-41; 31, 68-70, 119-22, 129, 137-40.) Cosmetics beauty advisors are also trained in skin-tones, skin types, skin conditions, and use of color. On-call employees in cosmetics and fragrances receive no training beyond what they learn on the selling floor. (*Id*.)

All cosmetics and fragrances employees are paid on a wage-plus-commission basis. Cosmetics and fragrances beauty advisors earn an hourly wage plus a three-percent commission on products sold from their own counter. Cosmetics beauty advisors also receive a two-percent commission when they sell cosmetics from other counters. Counter managers receive an hourly wage plus a three-percent commission, and a one-half percent commission on all sales made at their counter. On-call employees receive a two-percent commission regardless of what cosmetics and fragrances they sell. (ROA.441; 33-35, 37, 61-63.)

Cosmetics and fragrances may occasionally be purchased in other departments. However, Macy's does not want employees to "make a habit" of ringing up sales of items from one department in a different department because no one earns a commission in those circumstances. (ROA.441-42; 35-37, 125-26.) Moreover, cosmetics and fragrances employees are not scheduled to work in other departments, and employees from other departments are not scheduled to work in

cosmetics and fragrances, other than occasional inventory work, which does not involve selling products. (ROA.443; 50-51, 94.)

Cosmetics and fragrances employees have their own regular customers with whom they develop specialized relationships. Thus, cosmetics beauty advisors keep lists of their regular customers, which are used to pre-sell items, and to invite customers to try new products and attend special promotions and events. Customers may also contact their preferred cosmetics beauty advisor to ask for product refills or to schedule a makeover. Similarly, fragrance beauty advisors keep client lists, which they use to invite customers to new fragrance launches. (ROA.441; 45, 123, 127, 143.)

Most of the major cosmetics vendors provide distinctive uniforms for the counter managers and beauty advisors who staff their respective counters. The remaining cosmetics and fragrances beauty advisors follow Macy's "basic black" dress code. (ROA.441; 29-31, 49, 131-33, 138.)

C. The Other Employees Work in Different Departments, Report to Different Supervisors, Sell Different Products, and Function Primarily in Their Own Distinct Selling Areas, Without Regular Contact or Interchange with Cosmetics and Fragrances Employees

The Saugus store has approximately 30 non-selling employees. They include stock employees who are grouped in a receiving team with its own

manager, and a merchandising team with two managers. There are also staffing employees. (ROA.441; 10-14.)

The Saugus store also has 80 selling employees who are organized into the other 10 primary sales departments. Employees in those departments sell distinct products, such as men's clothing or furniture, and they work primarily in the defined selling area for their assigned department and products. Most, but not all, of those 10 departments have their own sales managers. As noted, those sales managers have no regular responsibilities for cosmetics and fragrances. (ROA.441; 10-14.)

Employees in some of the 10 other sales departments receive product-specific training. For example, shoe salespersons are trained in fit, fabric, and color. Some departments also hold seminars on selling technique and product knowledge, such as when the juniors department conducts back-to-school and newborn seminars. (ROA.442; 67-68, 140.) Additionally, some departments consult with vendor representatives in hiring the employees who will sell that vendor's product. Prior sales experience is desirable, but not required. (ROA.442; 54.)

Further, some, but not all, selling employees from the other 10 departments are paid on a wage-plus commission basis, although specific arrangements vary by vendor. For instance, Levi's specialists receive a bonus rather than a commission.

(ROA.442; 74, 102-03.) In addition, some of those selling employees keep customer lists that are used to invite customers to special promotional events for the products they sell. (ROA.442; 76.)

There is limited contact between cosmetics and fragrances employees and other employees. As noted, Macy's does not like employees "to make a habit" of ringing up merchandise from one department in another. (ROA.442; 35-37, 125-26.) There is some incidental contact between cosmetics and fragrances employees and other selling employees, given the proximity of their departments. In addition, Macy's holds 15-minute daily morning "rallies" attended by all on-duty employees save those whose departments conduct separate meetings. (ROA.443; 35-36, 50-51, 85-87.)

There is little interchange between cosmetics and fragrances employees and other employees. As noted, cosmetics and fragrances employees are not required or asked to work in other departments, aside from occasionally assisting in inventory. Conversely, other selling employees are not regularly asked to work in cosmetics and fragrances, although they may, for example, occasionally assist a customer if a counter is temporarily unattended. (ROA.443; 50-52, 86, 91-94.) Additionally, between October 2010 and October 2012, there were only eight permanent transfers from other departments into cosmetics and fragrances, and one

permanent transfer out of that department into a supervisory position. (ROA.443; 80-83, 96, 98.)

D. All Selling Employees Work Similar Shifts, Use the Same Entrance, Breakroom, Time Clock and Handbook, Receive Similar Benefits, and Are Evaluated under the Same General Criteria

All selling employees work similar shifts and use the same entrance, clocking system, and breakroom. They also have similar benefits and are subject to the same employee handbook. Typically, they are evaluated by their respective department heads under the same general criteria, which may be adjusted to account for differences in the products sold in various departments. (ROA.443; 26-27, 84-85, 156-63, RX 3, pp. 2-4.) All selling employees are trained in general sales techniques and product knowledge through the My Product Activities program, though cosmetics and fragrances and other departments provide product-specific training. (ROA.443; 31, 69-70, 119-22, 129, 140-42, RX2.)

II. The Board Proceedings

A. The Representation Case

On October 12, 2012, the Union filed a petition with the Board seeking a representation election among all cosmetics and fragrances employees at Macy's Saugus store. (ROA.439.) Following a hearing, the Acting Regional Director issued a Decision and Direction of Election finding that the petitioned-for employees constitute an appropriate unit for collective bargaining, and directing an

election. (*Id*.) On December 4, 2012, the Board granted Macy's request for review of the unit determination. On July 22, 2014, the Board (Chairman Pearce and Members Hirozawa and Schiffer; Member Miscimarra, dissenting) issued a Decision on Review and Order (361 NLRB No. 4, *see* ROA.439-71), which affirmed the Acting Regional Director's finding that the petitioned-for unit was appropriate. Like the Acting Regional Director, the Board applied the standard clarified by the Board, and enforced by the Sixth Circuit, in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *15-16 (2011) ("*Specialty*"), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013) ("*Kindred*"). (ROA.439.) As required by *Specialty*, the Board first applied the traditional community-of-interest test to determine whether the petitioned-for unit is "appropriate." (ROA.446-47.) The Board majority, agreeing with the RD, determined that the cosmetics and fragrances workers are readily identifiable as a group, share a community of interest, and therefore constitute an appropriate unit. (*Id*.)

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. (ROA.447-51.) The Board explained that *Specialty* 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 there is no legitimate basis upon which to exclude them. (ROA.447.) Applying that test, the Board majority found that Macy's failed to show that the other employees at Macy's store share an overwhelming community of interest with the employees in its cosmetics and fragrances department. (ROA.447-51.)

Thereafter, the Board conducted a secret ballot election, and the cosmetics and fragrances department employees voted for union representation. On August 11, 2014, the Board certified the Union as the exclusive collective-bargaining representative of those employees. (ROA.439, 472-73.)

B. The Unfair Labor Practice Case

Following certification, Macy's contested the validity of the election by refusing to comply with the Union's bargaining demand. The Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint alleging that Macy's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) & (1). (ROA.476.) The General Counsel subsequently filed a motion for summary judgment. Macy's opposed, again claiming that all Saugus store employees, or at least all selling employees at the store, must be included in the unit.

III. The Board's Conclusions and Order

On January 7, 2015, the Board (Chairman Pearce and Members Miscamarra and Hirozawa) issued a Decision and Order (361 NLRB No. 163, *see* ROA.510-13) granting the General Counsel's motion for summary judgment and finding that Macy's violated the Act by refusing to bargain with the Union. (ROA.511.) The Board found that all representation issues raised by Macy's in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. (ROA.510.)

The Board's Order requires Macy's to cease and desist from the unfair labor practice found and from, 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, 29 U.S.C. § 157. (ROA.511-12.) Affirmatively, the Order directs Macy's, on request, to bargain with the Union as the representative of its cosmetics and fragrances department employees. (*Id*.) The Order further requires Macy's to post a remedial notice. (*Id*.)

SUMMARY OF ARGUMENT

The employees in Macy's cosmetics and fragrances department chose union representation in a Board-conducted, secret-ballot election. Macy's has admittedly refused to bargain, claiming it has no obligation to do so because the unit must include other employees spread across ten other departments in its Saugus store, or

in the alternative, all selling employees in all store departments. In rejecting those claims, the Board reasonably applied the well-accepted community-of-interest test to determine that the cosmetics and fragrances department workers constitute *an* appropriate unit for collective bargaining.

After making that finding, the Board found that Macy's failed to meet its burden of showing that the other store employees share an overwhelming community of interest with the cosmetics and fragrances employees, such that they must be included in order to make an appropriate unit. The Board's application of that standard, recently clarified in *Specialty* and approved by the Sixth Circuit in *Kindred*, comports with the Board's prior jurisprudence. Moreover, the standard is based on a reasonably defensible construction of the Act, which gives the Board broad discretion in making unit determinations.

Macy's objects to the *Specialty* test, raising many of the same arguments rejected by the Sixth Circuit in *Kindred*. For example, Macy's contends incorrectly that the Board has attempted to hide its announcement of a wholly new standard. As the Sixth Circuit explained, however, the Board did not create a new test, but further elucidated its longstanding test, which focuses on similarities and differences among groups of employees. Relying on terminology different from the Board's, Macy's also argues that the cosmetics and fragrances employees and the employees in other departments form one "homogeneous" workforce with

"virtually indistinguishable" interests. But this contention is at odds with the substantial record evidence showing that the cosmetics and fragrances employees are housed in their own department, have separate supervision, and sell different products in distinct physical areas.

Additionally, Macy's erroneously argues that the *Specialty* standard improperly gives controlling weight to the extent of unionization. It is not improper for the Board to first examine the proposed unit, as long as the Board scrutinizes that unit using the multifactor community-of-interest test, as it did here. Nor did the Board infringe on the rights of employees to refrain from engaging in union activity, as Macy's contends. The employees in other departments retain their statutory rights under the Act whether or not their colleagues unionize.

Macy's and amici's speculation about the size of units that might be certified under the Board's standard should be rejected. Size is irrelevant so long as the Board certifies a unit that is appropriate under Section 9 of the Act. Macy's also contends that the departmental unit approved here is contrary to precedent in the retail industry favoring store-wide units. However, that precedent merely presumes a store-wide unit is an appropriate unit; it does not preclude a finding that another unit is also appropriate. Accordingly, the Board has long permitted less than store-wide units based on traditional community-of-interest principles.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT THE UNIT OF COSMETICS AND FRAGRANCES DEPARTMENT EMPLOYEES CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING, AND THEREFORE MACY'S VIOLATED THE ACT BY ADMITTEDLY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of [its] employees." 29 U.S.C. § 158(a)(5).[2] Macy's does not dispute (M-Br.13) that it refused to bargain with the Union. Rather, it objects to the standard that the Board applied in certifying a unit of all employees in Macy's cosmetics and fragrances department, and contends that all employees storewide, or at least all selling employees, should have been included in the unit. Because the Board's standard is reasonable and its findings are fully supported by the record evidence, Macy's violated the Act by refusing to bargain with the Union. *See Electronic Data Sys. Corp. v. NLRB*, 938 F.2d 570, 572, 575 (5th Cir. 1991) (enforcing order where Board did not exceed its "large measure of informed discretion" in determining the appropriate bargaining unit).

[2] An employer who violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [their organizational] rights." 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

A. This Court Gives Considerable Deference to the Board's Finding of an Appropriate Unit

Section 9(a) of the Act 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 th[e 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). Construing that section, the Supreme Court has stated that the determination of an appropriate unit "lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed." *South Prairie Constr. Co. v. Operating Eng'rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quote marks and citation omitted); *accord NLRB v. J.C. Penney Co., Inc.*, 559 F.2d 373, 375 (5th Cir. 1977). Indeed, this Court has repeatedly stated that its review of the Board's determination of the appropriate bargaining unit is "exceedingly narrow" and is "limited to determining whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in evidentiary support." *Electronic Data Sys.*, 938 F.2d at 573; *accord Vicksburg Hosp., Inc. v. NLRB*, 653 F.2d 1070, 1073 (5th Cir. 1981).

Section 9(b), however, does not tell the Board how to decide whether a particular grouping of employees is appropriate. Accordingly, the Board's

selection of an appropriate unit "involves of necessity a large measure of informed discretion." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In deciding whether a group of employees constitutes an appropriate unit for collective bargaining, the Board focuses its inquiry on whether the employees share a "community of interest." *Specialty*, 2011 WL 3916077, at *12; *accord Electronic Data Sys.*, 938 F.2d at 573 ("In deciding whether a group of employees is an appropriate unit, this court has adopted the 'community of interest' analysis."). This analysis considers such factors as similarity in skills, interests, duties, and working conditions, degree of interchange and contact among employees, the employer's organizational and supervisory structure, and bargaining history. *Electronic Data Sys.*, 938 F.2d at 573; *NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir. 1986). Moreover, the Board's "discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors." *DMR Corp.*, 795 F.2d at 475. Additionally, the Board is permitted to "consider[] extent of organization as one factor, though not the controlling factor in its unit determination." *NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442 (1965); *accord DMR Corp.*, 795 F.2d at 475; *NLRB v. So. Metal Serv., Inc.*, 606 F.2d 512, 514 (5th Cir. 1979).

The Board's decision must be upheld as long as it approves *an* appropriate bargaining unit. The Board has long recognized that there is nothing in the Act's

language requiring "that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate.'" *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950); *accord Electronic Data Sys.* 938 F.2d at 573 ("It is the duty of [the Board] to select an appropriate unit; it need not delimit the *most* appropriate unit.") (emphasis in original). The Supreme Court has agreed, stating that "employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *Am. Hosp. Ass'n*, 499 U.S. 606, 610 (1991). The focus of the Board's determination remains the unit for which the petition has been filed because, under Section 9(a) of the Act, "the initiative in selecting an appropriate unit resides with the employees." *Id.* As the Board has explained, "[a] union's petition, which must according to the statutory scheme and the Board's Rules and Regulations be for a particular unit, necessarily drives the Board's unit determination." *Overnite Transp. Co.*, 325 NLRB 612, 614 (1998).

This Court has recognized that, in many cases, the Board is faced with alternative appropriate units. *See J.C. Penney*, 559 F.2d at 375; *NLRB v. J.M. Wood Mfg. Co.*, 466 F.2d 201, 202 (5th Cir. 1972). Thus, the "choice among appropriate units is within the discretion of the Board." *J.C. Penney*, 559 F.2d at 375. Accordingly, "to set aside a Board certified unit, . . . [a] showing that some other unit would be appropriate is insufficient." *Id.* Instead, an employer

challenging the Board's unit determination "has the burden of establishing that the designated unit is clearly not appropriate.'" *Electronic Data Sys.*, 938 F.2d at 573 (quoting *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1155-56 (5th Cir. 1980)). "[A] unit would be truly inappropriate if, for example, there were no legitimate basis upon which to exclude certain employees from it." *Kindred*, 727 F.3d at 562 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)); *accord Specialty*, 2011 WL 3916077, at *13-15 (2011). If the objecting party shows that excluded employees "share an overwhelming community of interest" with the petitioned-for employees, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421; *accord Kindred*, 727 F.3d at 562.

The Board's interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*. 467 U.S. 837, 843 (1984). *See NLRB v. UFCW, Local 23*, 484 U.S. 112, 123-24 (1987). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board's reasonable interpretation of the Act. Indeed, the Court 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 (1996) (citation omitted). Accordingly, 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 (1979); *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007). Further, the Board's findings of fact are "conclusive" if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Strand Theatre*, 493 F.3d at 518; *Central Freight Lines, Inc. v. NLRB*, 666 F.2d 238, 239 (5th Cir. 1982).

B. The Board Reasonably Determined that a Unit Limited to All Employees in Macy's Cosmetics and Fragrances Department Constitutes an Appropriate Unit for Collective Bargaining

The Board reasonably applied its longstanding, judicially approved community-of-interest test here to find that the petitioned-for unit of cosmetics and fragrances employees is appropriate for collective bargaining. Further, the Board—applying the standard clarified in *Specialty* and approved in *Kindred* for when an employer claims additional employees must be included—found that Macy's failed to show that all store (or all selling) employees shared an overwhelming community of interest with the cosmetics and fragrances employees such that the unit would be inappropriate if they were excluded.

1. The Board properly applied the traditional community-of-interest factors to find an appropriate unit

The record evidence fully supports the Board's finding (ROA.446-47) that the proposed unit of all cosmetics and fragrances employees is an appropriate unit because those employees "are readily identifiable as a separate group" and share a community of interest based on the Board's traditional factors. It is plain that those employees are readily identifiable as a group. They constitute all the non-supervisory employees in the cosmetics and fragrances department – beauty advisors, counter managers, and on-call employees – who perform the function of selling cosmetics and fragrances at the store. As such, the petitioned-for unit is coextensive with a departmental line drawn by Macy's.

As the Board further found (ROA.446), the cosmetics and fragrances employees share a community of interest. Thus, in addition to constituting all the workers in a separate selling department, they perform their functions in two connected, defined work areas. They also have common supervision, as they are all directly supervised by Kelly Quince, the sales manager for the cosmetics and fragrances department. Their work has a shared purpose and functional integration, because they all sell cosmetics and fragrances to customers. This integration is exemplified by the department's on-call employees, who sell both cosmetics and fragrances products throughout the department. Indeed, cosmetics and fragrances employees are the only ones assigned to sell those products.

Moreover, their only regular contact with other employees is during 15-minute morning rallies. Any other contact is incidental, as they are not assigned to work in other departments, apart from inventory assistance, and Macy's does not "like to make a habit" of ringing up merchandise from one department in another. Additionally, there were only nine permanent transfers into or out of the cosmetics and fragrances department over a two-year period, and the only transfer out was to a supervisory position. Such limited, one-way interchange does not render a separate unit inappropriate. *See* cases cited at pp. 34-35.

Further, as to compensation, cosmetics and fragrances employees are all paid on a similar basis, as they receive a regular wage plus commissions based on their sale of their assigned cosmetics and fragrances products. Additionally, they receive the same benefits, and are subject to the same employer policies.

These considerations support the Board's finding that the cosmetics and fragrances employees share a community of interest and therefore constitute an appropriate unit. *See DMR Corp.*, 795 F.2d at 475 (geographic proximity, common supervision, similarity in benefits, pay and job functions, common fit within employer's administrative structure, and limited contact and interchange with other employees may demonstrate that petitioned-for employees constitute an appropriate bargaining unit); *accord Electronic Data Sys. Corp.*, 938 F.2d at 573.

Macy's provides no grounds for overturning this well-supported finding. Contrary to Macy's contention (M-Br.27 n.1, 60-61), the Board fully considered (ROA.446-47) the minor differences among cosmetics and fragrances employees, but reasonably found them insignificant compared to the strong evidence of community of interest they share. For example, although on-call employees earn a slightly smaller commission than beauty advisors and counter managers, as the Board noted (ROA.446), minor differences in compensation do not render a petitioned-for unit inappropriate. Similarly, the unit is not inappropriate merely because cosmetics beauty advisors sell one vendor's products and give makeovers, whereas fragrances beauty advisors sell all fragrance vendors' products without makeovers.

Nor is the unit rendered inappropriate by other very minor differences, such as the vendor-specific uniforms worn by most cosmetics beauty advisors, or the fact that on-call employees do not attend training events for beauty advisors and vendor representatives are only consulted about hiring cosmetics beauty advisors.[3] As the Board observed (ROA.446), in most key respects, the interests of cosmetics and fragrances employees are nearly identical. Thus, applying the traditional community-of-interest factors, the Board had little difficulty concluding that this

[3] As the Board also explained (ROA.446 & n.34), the unit is not inappropriate merely because petitioned-for employees staff different counters or work on two floors connected by escalator banks. *See D.V. Displays Corp.*, 134 NLRB 568, 569 (1961).

distinct group shares a community of interest and is therefore an appropriate unit for collective bargaining. *See, e.g.*, *DTG Operations*, 357 NLRB No. 175 (2011), 2011 WL 7052275, *6 (unit appropriate despite "slight differences" among petitioned-for employees who shared most community-of-interest factors).

2. The Board acted within its discretion in applying the overwhelming community-of-interest test to determine that the other employees at Macy's store do not have to be included in the cosmetics and fragrances employees unit

It is well-settled, as discussed above, that the Act requires only *an* appropriate unit. *Am. Hosp. Ass'n*, 499 U.S. at 610. As the Board stated in *Specialty*, "it cannot be that the mere fact that [the petitioned-for unit of employees] also share a community of interest with additional employees [thereby] renders the smaller unit inappropriate." 2011 WL 3916077, at *15. Because a unit need only be *an* appropriate unit, it "follows inescapably" that simply demonstrating that another unit would also be appropriate "is not sufficient to demonstrate that the proposed unit is inappropriate." *Id.*; *accord Electronic Data Sys.*, 938 F.2d at 573; *DMR Corp.*, 795 F.2d at 475; *J.C. Penney*, 559 F.2d at 375. As the D.C. Circuit has held, that "excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit." *Blue Man Vegas*, 529 F.3d at 421.

Here, the Board applied the standard, clarified in *Specialty*, and approved by the Sixth Circuit in *Kindred*, for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group that shares a community of interest under the traditional test. Under that standard, an employer seeking to expand the unit must demonstrate that employees in the larger unit "share an overwhelming community of interest with those in the petitioned for unit." *Specialty*, 2011 WL 3916077, at *15. In approving that standard, the Sixth Circuit agreed with the Board that, although different language has been used over the years, the Board has consistently required a heightened showing from a party arguing for the inclusion of additional employees in a unit that shares a community of interest.[4] *Kindred*, 727 F.3d at 562-63.

[4] *See, e.g., Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, 2010 WL 3406423, at *1 n.2 (2010) (including additional employees because interests of petitioned-for unit were not "sufficiently distinct"); *United Rentals, Inc.*, 341 NLRB 540, 541-42 (2004) (employer presented "overwhelming" evidence that employees had "significant overlapping duties and interchange" and a "substantial community of interest"); *Engineered Storage Prods.*, 334 NLRB 1063, 1063 (2001) (larger group and petitioned-for group did "not share such a strong community of interest that their inclusion in the unit is required"); *Lawson Mardon, U.S.A.*, 332 NLRB 1282, 1282 (2000) (evidence did not show "such a substantial community of interest exists" between the two groups "so as to require their inclusion in the same unit"); *J.C. Penney Co.*, 328 NLRB 766, 766 (1999) (telemarketing employees "share such a strong community of interest with the employees in the unit found appropriate that their inclusion is required"); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (employer failed to show "such a community of interest or degree of integration between the truck drivers and the mechanics as would render the requested truck driver unit inappropriate").

As the Sixth Circuit explained, the overwhelming community of interest standard "is not new" to unit determinations. *Id.* at 561. The Board has consistently applied it. *See, e.g.*, *Academy LLC*, 27-RC-8320, Decision and Direction of Election, at 12 (2004) (rejecting petitioned-for unit because additional employees "share an overwhelming community of interest" with the petitioned-for unit), available at www.nlrb.gov/case/27-RC-008320; *accord Laneco Constr. Sys., Inc.*, 339 NLRB 1048, 1050 (2003) (rejecting argument that additional employees "shared such an overwhelming community of interest[] with" the petitioned-for unit); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (including concierges in the unit because they "share an overwhelming community of interest with the employees whom the Petitioner seeks to represent").[5]

Moreover, prior to *Kindred*, the D.C. Circuit had also approved the test in *Blue Man Vegas v. NLRB*, 529 F.3d 417, 419 (D.C. Cir. 2008). There, a union

[5] *See also, e.g.*, *Thomas Motors of Ill., Inc.*, 13-RC-021965, Decision and Direction of Election, at 5 (2010) (party challenging petitioned-for unit "must demonstrate that unit is inappropriate because it constitutes an arbitrary grouping of employees . . . or excludes employees who share an overwhelming community of interests or have no separate identity from employees in the petitioned-for unit"), *available at* www.nlrb.gov/case/13-RC-021965; *Stanley Assocs.*, 01-RC-022171, Decision and Direction of Election, at 14 (2008) ("quality assurance employees do not share such an overwhelming community of interest with the petitioned-for employees as to mandate their inclusion in the unit"), *available at* www.nlrb.gov/case/01-RC-022171; *Breuners Home Furnishings Corp.*, 32-RC-4603, Decision and Direction of Election, at 9 (1999) ("receptionists do not share such an overwhelming community of interest with the warehouse employees to be required to be included in the petitioned-for unit"), *available at* www.nlrb.gov/case/32-RC-004603.

petitioned to represent a unit of stage crew members, but the employer wanted to add the musical instrument technicians (MITs). The Board found that the stage crew members constituted an appropriate unit and that the MITs did not share an overwhelming community of interest with the stage crew. *Id*. at 423. The court recognized that an employer must demonstrate that an otherwise appropriate unit is "truly inappropriate," which it can do by showing that "there is no legitimate basis on which to exclude certain employees" because they "share an overwhelming community of interest" with the included employees. *Id*. at 421. Specifically, the court found that the employer failed to meet its burden because the MITs' working conditions, including supervision, form of payment, and sign-in sheets, differed from those shared by the stage crew. *Id*. at 424.

In *Specialty*, the Board and the Sixth Circuit found *Blue Man Vegas* to be persuasive and consistent with Board law. *See Specialty*, 2011 WL 3916077, at *16; *Kindred*, 727 F.3d at 562-65. Accordingly, as the Sixth Circuit aptly stated: "Because the overwhelming community-of-interest standard is based on some of the Board's prior precedents, has been approved by the District of Columbia Circuit, and because the Board did cogently explain its reasons for adopting the standard, the Board did not abuse its discretion in applying this standard in *Specialty*[]." *Kindred*, 727 F.3d at 563.

Moreover, this Court, consistent with the Sixth and D.C. Circuits, has applied a similar standard, holding an employer seeking a larger unit to a higher burden when the petitioned-for unit shares a community of interest. Thus, in *Electronic Data Systems Corporation v. NLRB*, a union petitioned to represent the 42 workers in the employer's print shop. 938 F.2d at 571-72. As Macy's did here, the employer insisted that additional employees ought to be included in the unit. This Court rejected that argument, holding that even assuming the larger unit sought by the employer shared a community of interest and was, therefore, also "an appropriate unit," that alone did not meet the employer's burden of establishing "that the designated unit is clearly not appropriate." *Id.* at 574 (quoting *Purnell's Pride*, 609 F.2d at 1156).[6]

[6] *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) ("[I]t is not enough for the employer to suggest a more suitable unit; it must 'show that the Board's unit is clearly inappropriate.'"); *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534, 538 (4th Cir. 1999) (employer challenging a unit determination must show the unit certified by the Board is "utterly inappropriate").

3. Macy's has not shown that the store's other employees share an overwhelming community of interest with the cosmetics and fragrances employees

Consistent with the precedent discussed above, the Board reasonably applied the overwhelming community-of-interest standard, and concluded that Macy's failed to meet its burden of showing that the cosmetics and fragrances employees share such a strong community of interest with other selling employees that excluding the additional employees would render the petitioned-for unit inappropriate. (ROA.447-51.) The Board also reasonably rejected Macy's assertion that the non-selling employees must also be included in the unit, because there is "virtually no record evidence" (ROA.447) concerning those employees.

Macy's contends (M-Br.21, 24-30) that the Board arbitrarily broke up a "homogeneous" store-wide workforce with "virtually indistinguishable" interests, and addressed the cosmetics and fragrances employees in isolation without comparing them to other selling employees. That contention, however, is belied by the Board's careful analysis of the two groups' similarities and differences (ROA.447-51), and the record evidence showing important distinctions between them. Macy's argues (M-Br.21-30) that the differences are insignificant, and complains that the Board downplayed the similarities, like common employment policies. Even if Macy's claims were viewed in the light most favorable to it, they assert only that a unit consisting of all selling employees would be a *more*

appropriate unit. As this Court held long ago, the employer must show, not that another unit is more appropriate, but that the designated unit is "clearly not appropriate." *Electronic Data Sys.*, 938 F.2d at 573-74; *see also* cases cited above at n.6.

The Board carefully compared the cosmetics and fragrances employees with other selling employees (ROA.447-51), and reasonably found (ROA.447) "clear distinctions" between the two groups. Thus, as shown (ROA.447-49; *see* pp. 5-11), cosmetics and fragrances employees work in a separate department from other employees, have separate immediate supervision, typically work in their own distinct areas, sell products that are only sold in their department, and do not have significant regular interaction or interchange with the other employees. As the Board aptly summarized it (ROA.447), "[t]aken together," those facts show "that the petitioned-for employees do not share an overwhelming community of interest with other selling employees." *See DTG Operations, Inc.*, 2011 WL 7052275, at *7-9 (finding no overwhelming community of interest where two groups of employees work separately from each other and perform distinct sales tasks); *cf. Neiman Marcus Group*, 361 NLRB No. 11 (2014), 2014 WL 3724884, at *4 (proposed unit inappropriate where, unlike here, it did not track any departmental line drawn by employer, and employees to be included lacked common supervision). The significant differences noted by the Board refute Macy's

assertion (M-Br.21-24) that its storewide selling workforce is "homogenous," and that the interests of the cosmetics and fragrances employees and other employees are "virtually indistinguishable."

Nor did the Board fail to weigh those important differences against the two groups' similarities, as Macy's wrongly claims (M-Br.21-30). Rather, the Board acknowledged (ROA.447), for example, that both groups are commonly supervised at the highest level by store manager McKay. As the Board explained, however, such common upper-level supervision is outweighed by the key differences shown here. *See Neiman Marcus*, 2014 WL 3724884, at *4 (common upper-level management outweighed by distinct immediate supervision and other differences).

Macy's relies heavily on its claim (M-Br.23) that all store employees purportedly have the "same opportunities for interaction and collaboration" and attend the same daily 15-minute meetings. The Board, however, fully addressed those claims, and reasonably found (ROA.448-49) little or no evidence of significant contact or interchange between the cosmetics and fragrances employees and other selling employees. *See Electronic Data Sys*, 938 F.2d at 574 (lack of frequent contact and interchange with other employees may support separate unit); *accord DMR*, 795 F.2d at 475; *DTG Operations*, 2011 WL 7052275, at *8. Thus, cosmetics and fragrances employees are not assigned to work in other departments, and other employees are not assigned to work in cosmetics and fragrances.

Further, as noted, Macy's admittedly discourages employees from ringing up merchandise from one department in another.

The Board also fully considered (ROA.448) "the possibility of some informal contact" with other employees in neighboring departments, but reasonably found no record evidence as to the extent or frequency of such interactions. Thus, as the Board noted, although other selling employees may be expected to assist a customer at an unattended counter in cosmetics and fragrances, there is no evidence (ROA.448 & n.41) that this occurs frequently. As for the 15-minute morning rallies, there is no evidence of employee interaction beyond simply being in attendance at those brief events, which do not involve employees performing their main selling function.

Nor did the Board "dismiss" the evidence of permanent employee interchange, as Macy's wrongly suggests (M-Br.24). Rather, the Board fully addressed the evidence and explained (ROA.448-49) that nine permanent transfers in and out of the cosmetics and fragrances department over a 2-year period does not establish significant interchange between petitioned-for and non-petitioned for employees. This is particularly so given the relatively large size of the 41-employee unit, and the fact that all but one of the transfers were into the unit and the sole transfer out was to a supervisory position. As the Board observed (ROA.448), such infrequent, one-way interchange does not require including the

other selling employees in the petitioned-for unit. *See DTG Operations*, 2011 WL 7052275, at *8.

Macy's also gains no ground in claiming (M-Br.20, 27) that the store's overall functional integration—essentially that all selling employees share the same general function of selling store merchandise to customers—renders a separate unit of cosmetics and fragrances employees inappropriate. As the Board explained (ROA.448-49), the significance of such integration is reduced by the limited amount of interaction and interchange between cosmetics and fragrances employees and other employees. Likewise (*id.*), the broad similarity in selling function is offset by the fact that cosmetics and fragrances employees work in a separate department, report to a different supervisor, and sell distinct products in distinct physical areas. In other words (*id.*), even if the cosmetics and fragrances employees are functionally integrated with other selling employees, they have a separate role in the process, as they sell products no other employees sell, and have limited interaction and interchange with other selling employees.[7] *See DTG*

[7] *Wheeling Island Gaming*, 355 NLRB 637 (2010), upon which Macy's heavily relies (Br.29-30), is factually distinguishable and does not require a different result. In *Wheeling*, the Board found that a unit limited to poker dealers, and excluding other table game dealers, was inappropriate. There, the fact that the two dealer groups had separate immediate supervision, worked in separate locations, and lacked daily interchange, was outweighed by the significant functional integration between them, namely, they were both "integral elements of" the same gaming operation, as reflected in common second-level supervision. 355 NLRB at 642. As the Board explained (ROA.450-51), however, the distinctions between the two

Operations, 2011 WL 7052275, at *9 (the significance of functional integration of all employees working towards company-wide goal of renting cars to customers was diminished by each classification having a separate role in the process, and only limited interaction).

Thus, contrary to Macy's contention (M-Br.24-26), the Board did not merely "tally the factors" favoring a separate cosmetics and fragrances unit without explaining each factor's relative "weight or significance," as this Court instructed the Board to do in *Purnell's Pride*, 609 F.2d at 1156. Rather, consistent with those instructions, the Board explained, for example, why it accorded diminished weight to the store's functional integration, given the absence of significant interaction and interchange between the cosmetics and fragrances employees and other employees, the different roles played by those groups in selling different products in distinct departments, and other relevant distinctions favoring a separate cosmetics and fragrances unit. (ROA.448-49.)

Finally, the Board addressed (ROA.449; *see* M-Br.21-24) the other similarities between the two groups, namely, that they have common work shifts,

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groups at issue here are greater. Unlike the two dealer groups in *Wheeling*, the cosmetics and fragrances employees are not merely separately supervised, but conform to a separate employer-drawn departmental line. Moreover, the cosmetics and fragrances department is structured differently than other selling departments, as there is no evidence that other departments have the equivalent of counter managers. (ROA.450-51; 10-14.) This fact further distinguishes *Wheeling*, where there was no evidence of such a distinction between the two dealer groups.

are subject to the same company policies and basic evaluation criteria, receive the same benefits, and use the same entrance, break room, and clocking system. It is also true, as the Board acknowledged (ROA.449), that no prior experience is required for any selling position.[8] As the Board explained (*id.*), however, the fact that two groups share some community-of-interest factors does not, by itself, render a separate unit inappropriate. *See* cases cited at pp. 26, 30. Rather, given the significant distinctions discussed by the Board, it reasonably found the comparatively minor similarities between the two groups failed to establish that they share an overwhelming community of interest.

C. Macy's Provides No Other Basis for Denying Enforcement of the Board's Order

In asserting that other selling employees must be included in the cosmetics and fragrances unit, Macy's raises a plethora of claims, variously arguing that the standard gives controlling weight to the extent of organization; constitutes an abuse of discretion; will result in the undue proliferation of units; and is contrary to

[8] Even so, Macy's failed to prove its claim (M-Br.21-24) that the two groups have "homogenous" qualifications, training, and evaluations. While prior experience is not required by any selling department, most provide product-specific training. *See* pp. 6-7, 9. For example, only cosmetics and fragrances employees are trained in scents and skin-tones because that knowledge is essential to selling those products, which other employees do not sell. Similarly, employees in other departments receive training specific to selling their products. Moreover, only cosmetics and fragrances employees are evaluated by their department's sales manager, and she applies the corporate evaluation form to them in light of the particular products they sell. *See* p. 5.

precedent for unit determinations in the retail industry. As the Sixth Circuit held in *Kindred*, 727 F.3d at 559, 563-65, and as explained below, those arguments have no merit.

1. The overwhelming-community-of-interest standard does not give controlling weight to the extent of organization

Macy's and amici argue (M-Br.37-45; RA-Br.18-20; HR-Br.16-18) that the Board's overwhelming community-of-interest test improperly gives controlling weight to a union's extent of organization in the workplace. The Board in *Specialty*, and the Sixth Circuit in *Kindred*, properly rejected this contention. *See Specialty*, 2011 WL 3916077, at *13, *16 n.25; *Kindred*, 727 F.3d at 563-65.

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 (1965); *accord DMR Corp.*, 795 F.2d at 475; *NLRB v. So. Metal Serv., Inc.*, 606 F.2d 512, 514 (5th Cir. 1979). In other words, as the Board noted in *Specialty*, "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 petitioner's preference), that the proposed unit is an appropriate unit." 2011 WL 3916077, at *13. *Accord Kindred*, 727 F.3d at 564.

Procedurally, the Board processes unit determinations consistent with this twin admonition. It "examines the petitioned-for unit first," and if that unit is appropriate under the traditional community-of-interest test, the Board's *initial* inquiry "proceeds no further." *Specialty*, 2011 WL 3916077, at *12; *see also Wheeling Island*, 355 NLRB 637, 637 n.2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, of course, the Board did just that. It reasonably determined that the proposed unit of cosmetics and fragrances department employees is readily identifiable as a separate, distinct group of employees that shares a community of interest, and therefore constitutes an appropriate unit. (ROA.446-51.)

By examining multiple factors bearing on the unit-determination decision, the Board's traditional community-of-interest test ensures that the extent of organization would not be the controlling factor. For this reason, the Sixth Circuit properly rejected the claim that the Board's approach in *Specialty* gives controlling weight to the extent of organizing. As the court explained, the Board does not, under that test, "assume" that the petitioned-for unit is appropriate, but "applie[s] the community of interest test" to determine whether the employees in the petitioned-for unit "share[] a community of interest and therefore constitute[] an

appropriate unit—aside from the fact that the union had organized it." *Kindred*, 727 F.3d at 564.

As the Board confirmed here, its "analysis makes clear" that it considered a number of factors in making its decision, none of which were singularly dispositive. (ROA.456.) The Board thereby complied with "Section 9(c)(5)'s command that a unit determination not be controlled by 'the extent to which the employees have organized.'" (*Id*.) Thus, in finding that the cosmetics and fragrances workers share a community of interest, the Board properly relied on their common supervision, wages, benefits, location, and functions within a separate department. (*Id*.) The Board did not, therefore, give controlling weight to the unit that was petitioned for; instead, it separately and independently identified a number of factors that, under the community-of-interest test, support its determination that the cosmetics and fragrances unit is appropriate. Simply put, Macy's and amici failed to "show that the extent of organization was the *dominant* factor in the Board's unit determination." *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002) (emphasis in original).

Nor did the Board contravene Section 9(c)(5) of the Act when it applied the overwhelming-community-of-interest test to determine whether other employees must be included in the unit. Because the Board had already found that the cosmetics and fragrances employees constitute a clearly identified group that

shares a community of interest, without giving controlling weight to the petitioned-for unit's scope, Section 9(c)(5) was satisfied. *See* cases cited at pp. 38-40. And the Board does not allow the extent of organization to control the analysis simply by then giving the employer a chance to show that other employees share such an overwhelming community of interest that they must also be included in the unit.

As noted above at p. 39, the Sixth Circuit rejected the claim, which Macy's and amici repeat here (M-Br.36-39, 44; HR-Br.16-18; RA-Br.18-20), that the overwhelming community-of-interest test violates Section 9(c)(5). The Sixth Circuit found persuasive the D.C. Circuit's analysis in *Blue Man Vegas*, 529 F.3d at 423, which the Board relied upon in *Specialty*, 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." *Kindred*, 727 F.3d at 565 (internal cites and quotation marks omitted) (emphasis in original). The *Kindred* court thus explained that, in *Specialty*, the Board followed the *Blue Man Vegas* approach, and conducted its community-of-interest inquiry before requiring the employer to show that the other employees share an overwhelming community of interest with the petitioned-for employees. *Id.* It follows, the Sixth Circuit concluded, that *Specialty* does not

contravene Section 9(c)(5). *Id.* Macy's provides no grounds for departing from the persuasive reasoning of the Sixth and D.C. Circuits.

Contrary to Macy's contention (M-Br.38-40, 44), *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), does not prohibit the test applied by the Board here. The *Lundy* court's objection was that the Board had *presumed* the petitioned-for unit was appropriate instead of analyzing the issue under the traditional community-of-interest standard. *Id*. at 1581; *see Lundy Packing Co*., 314 NLRB 1042, 1043-44 (1994). The court characterized the presumption as "a novel legal standard" that could only be explained by an effort to give controlling weight to the extent of organizing. 68 F.3d at 1581-82. The court added that if the petitioned-for unit is "otherwise inappropriate," then a union's desire for a certain unit alone is not grounds for certification. *Id*. at 1581.

In the instant case, the Board did not apply such a presumption, nor did it rely solely on the Union's request for a certain unit. Instead, the Board examined traditional community-of-interest factors, as well as Macy's contention that the unit was otherwise inappropriate. Thus, the Board's analysis here is consistent with the Fourth Circuit's decision in *Lundy*, as the D.C. Circuit recognized in *Blue Man Vegas*, 529 F.3d at 423. Likewise, the Sixth Circuit found that the Board's approach in *Specialty* does not "assume" the petitioned-for unit is appropriate, but applies the community-of-interest test, which considers several factors beyond the

extent of organization. *Kindred*, 727 F.3d at 564. That is exactly what the Board did here, and what it will do "in each case" as required by Section 9(b) of the Act.

And while Macy's and amici suggest (M-Br.34; RA-Br.15) that the Union has complete control over who ends up in the unit, in reality it is the employer who has control over nearly all of the community-of-interest factors that the Board assesses. In fact, the community-of-interest test "focuses almost exclusively on how the employer has chosen to structure its workplace." *Specialty*, 2011 WL 3916077, at *14 n.19; *see also Int'l Paper Co.*, 96 NLRB 295, 298 n.7 (1951) ("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees."). For this reason, Macy's and amici are wrong when they claim (RA-Br.15) that the Board's unit determinations under *Specialty* bear no relation to the way in which the employer's business actually operates and functions, or that "the Board's decision invites unions to gerrymander" bargaining units (M-Br.34). All of the relevant factors in this case – departmental lines, supervision, job classifications, location, interchange and contact, skills and training, and other terms and condition of employment – were determined by Macy's.[9]

[9] Indeed, the Board's unit determinations under *Specialty* have continued to give weight to how the employer has organized its operations. *See, e.g.*, *Neiman Marcus*, 2014 WL 3724884, at *4 (rejecting petitioned-for unit of all women's

Moreover, the Supreme Court has long recognized that the choice of unit is not merely up to the union but to the employees as well. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941) ("Naturally the wishes of employees are a factor in a Board conclusion upon a unit."). Employees are fully informed of the composition of the unit on the Notice of Election posted at least 3 days before voting and on the ballot itself. *See* 29 C.F.R. § 103.20.[10] If employees have second thoughts about the petitioned-for unit, they can vote against representation in that unit.

Macy's speculates (M-Br.36, 41, 44) that the overwhelming-community-of-interest standard will always result in the petitioned-for unit being approved. This is incorrect. *See Gen. Dynamics Land Sys.*,19-RC-076743, Decision and Direction of Election, at 2 (May 31, 2012) (including employees union sought to exclude because they "share an overwhelming community of interest with the petitioned for unit"), *available at* http://www.nlrb.gov/case/19-RC-076743, *review denied*, 2012

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shoe sales associates at retail store because, among other things, the petitioned-for unit did not track any administrative or operational lines drawn by the employer).

[10] Various amendments to the Board's representation-case procedures became effective April 14, 2015. *See* 79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014). The rules in effect when the Board's Order issued may be found at the Board's website. *See* National Labor Relations Board, Rules and Regulations—Part 102, *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf

WL 2951834 (2012).[11] And when the Board applied a similarly-heightened standard under a different name, it regularly granted requests to expand the unit where the employer showed more than that its alternative unit was also appropriate. *See Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976), and cases cited at pp. 27-28 & n.4.

2. The Board did not abuse its discretion or violate the Administrative Procedure Act by clarifying the appropriate standard

Macy's argues (M-Br.37, 55-60) that the Board in *Specialty* impermissibly adopted a "sweeping" and "new rule" that conflicts with precedent, and that such changes can only be effected through formal, notice-and-comment rulemaking. As the Sixth Circuit in *Kindred* explained in rejecting those very arguments, they are factually and legally erroneous.

The Board in *Specialty* did not make the sweeping or "radical" changes claimed by Macy's (M-Br.35, 37, 45-47, 55, 59). As explained above (pp. 27-29), although various terms have been used, the Board has traditionally imposed a heavy burden on a party claiming that additional employees must be included in

[11] *See also Odwalla, Inc.*, 357 NLRB No. 132, 2011 WL 6147417, *1-2 (2011) (finding employer demonstrated that its merchandisers shared an overwhelming community of interest with the employees the union petitioned to represent); *Academy LLC*, 27-RC-8320, *supra* page 28 (rejecting petitioned-for unit because additional employees "share an overwhelming community of interest" with the petitioned-for unit).

the petitioned-for unit. In *Specialty*, the Board concluded that the use of "slightly varying verbal formulations" to describe this heightened burden could be improved by unifying the terminology. 2011 WL 3916077, at *17. To provide clarity, the Board adopted the careful work of the D.C. Circuit in *Blue Man Vegas*, 529 F.3d at 421, which viewed Board case law as articulating an "overwhelming community of interest" standard. *Id.* The *Kindred* court properly credited the Board's concern that using varying formulations neither served the statutory purpose of "assur[ing] employees the fullest freedom in exercising the rights guaranteed by the Act," nor "permit[ted] employers to order their operations with a view toward productive collective bargaining should employees choose to be represented." 727 F.3d at 563.

The *Kindred* court also rejected the employer's claim, repeated by Macy's (M-Br.35, 37, 45-47), that the overwhelming-community-of-interest standard represents a "material change" in the law. *Id.* at 561. As the *Kindred* court observed, the Board had used this standard before, "so its adoption in *Specialty* [] is not new." *Id.* The Sixth Circuit further explained that "[i]t is not an abuse of discretion for the Board to take an earlier precedent that applied a certain test and to clarify that the Board will adhere to that test going forward." *Id.* at 563.

Macy's nonetheless points (M-Br.19, 30, 47-48) to a line of cases considering whether the interests of the petitioned-for unit were "sufficiently

distinct" from those the employer sought to include. It claims (M-Br.47-48) that the *Specialty* test radically "transformed" the "sufficiently distinct" test. But the standards are almost identical, and the Board cited a number of those cases in *Specialty*, 2011 WL 3916077, at *17 & n.26.[12]

Macy's objects (M-Br.46) to the Board's use of the word "clarify" in *Specialty*, where the Board explained that it was rearticulating the overwhelming-community-of-interest standard. But courts "give great weight to an agency's expressed intent as to whether a rule clarifies existing law or substantively changes the law." *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999). There, the court agreed with an agency that its amendments to an administrative regulation were mere clarifications because they did "not represent any major policy changes" and "because the new wording is not 'patently inconsistent'" with prior interpretations. *Id.* at 479. The same is true here. The Board has made no policy change. It has always required only that the petitioned-

[12] *See, e.g., Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000) (most employees that employer sought to include did "not share such a substantial community of interest with the other employees," except the concierges, who "share[d] an overwhelming community of interest" and therefore had to be included in unit); *Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976) (employer argued that two groups had an "overwhelming community of interest," and Board agreed that the groups did "not have sufficiently separate community of interests"). *See also Kindred*, 727 F.3d at 563 (noting the "sufficiently distinct community of interest" test was among the "slightly varying verbal formulations" the Board clarified by adopting the overwhelming-community-of-interest test).

for unit be appropriate, and it has always held a party seeking a broader unit to a heightened standard.

Macy's incorrectly claims (M-Br.49-52) that the overwhelming community-of-interest standard was developed for, and should only be used in, accretion cases. The Board has used that exact language in prior unit determination cases. *See Kindred*, 727 F.3d at 561-63 (citing the Board's use of the standard in prior cases, and explaining that the Board's adoption of it in *Specialty* was, therefore, "not new"); *Blue Man Vegas*, 529 F.3d at 423 (citing Regional Directors' use of the standard); *see also Laneco Constr. Sys.*, 339 NLRB 1048, 1050 (2003).

Mistakenly relying on two distinguishable Ninth Circuit decisions,[13] Macy's contends (M-Br.56-57) that when a principle of general application changes existing law, it can only be adopted through formal rulemaking. Even if the Board had made a policy change – which, as shown above, it did not – the Supreme Court has made clear that the Board is "not precluded from announcing new principles in an adjudicative proceeding."[14] And even under Ninth Circuit precedent, a

[13] *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981), and *Pfaff v. U.S. HUD*, 88 F.3d 739, 748 (9th Cir. 1996).

[14] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). The pre-*Bell Aerospace* cases cited by *Macy's* are not to the contrary. In *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973), for example (*see* M-Br.56), the agency had clearly engaged in rulemaking where its decision was equally applicable to all entities within its jurisdiction *and* it had made "no effort" to consider the particular circumstances of any entity *and* was clearly not "adjudicating a particular set of

"clarification" of an agency policy that amounts to "a minor adjustment, a fine tuning of doctrine" "does not require rulemaking unless it imposes severe hardship or circumvents existing rules." *Cities of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984). Macy's has made no such showing with respect to the Board's clarification of its unit determination standard. And, as the Sixth Circuit observed in *Kindred*, "if the Board may announce a new principle in an adjudication, . . . it may choose to follow one of its already existing principles," as it did in adopting the overwhelming-community-of-interest test in *Specialty*. 727 F.3d at 565.

Finally, contrary to Macy's contention (M-Br.58-60), the issue decided by the Board in *Specialty* was squarely before it. A union there petitioned to represent a group of nursing assistants, but the employer argued that additional employees should be included in the unit. As the Sixth Circuit found, the Board properly summarized the law applying a heightened standard in such cases, and clarified that it would apply prospectively the overwhelming-community-of-interest test when a party seeks to include additional employees into an already-deemed-

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disputed facts." *Id.* at 245-46. By contrast, in *Specialty*, the Board adjudicated disputed facts regarding a particular entity's workforce in applying its unit-determination standard. *See* 2011 WL 3916077, *2-6, 13-14, 19. Likewise, Macy's gains nothing by citing (M-Br.57) *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). That case addressed whether the Board may promulgate "new rules" in adjudicatory proceedings without complying with the APA's requirements. *Id.* at 764. As shown, and as the Sixth Circuit found, the rule in *Specialty* is "not new."

appropriate unit. *Kindred*, 727 F.3d at 561-63 (citing *Specialty*, 2011 WL 3916077, at *1, 15-17).

3. Amici's and Macy's concerns about unit size and undue proliferation of units are irrelevant

Amici and Macy's argue that the *Specialty* standard will lead to the certification of smaller units.[15] (*See* RA-Br.13-17; CDW-Br.7, 10, 17; HR-Br. 9-10, 19; M-Br.30-33.) However, the Board has held that the size of a proposed unit is "not alone a relevant consideration, much less a sufficient ground" for finding an otherwise appropriate unit to be inappropriate. *Specialty*, 2011 WL 3916077, at *15. Indeed, a "cohesive unit – one relatively free of conflicts of interest – serves the Act's purpose of effective collective bargaining" and prevents "a minority group interest from being submerged in an overly large unit." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (citations omitted).[16]

Thus, this Court should not be detained by Macy's (M-Br.30-33) and amici's (RA-Br.13-17) speculation that enforcing the Board's unit determination will lead

[15] Amici argue (RA-Br.16; CDW-Br.7, 10; HR-Br. 9-10, 19) that the *Specialty* standard will result in the formation of "micro-unions," a term they fail to define. Nor do they explain why the formation of such unions would be inappropriate under any provision of the Act.

[16] Moreover, this Court has recognized why there is no statutory preference for a particular unit size, as "very large" and "small" units may present their own advantages and disadvantages, a reality that amici recognize here (HR-Br.9). *See Purnell's Pride*, 609 F.2d at 1156.

to smaller, multiple units that might "wreak havoc" in the retail industry. As the Board emphasized (ROA.457), its only finding here is that, based on the particular facts of this case, this particular departmental unit of cosmetics and fragrances employees is an appropriate unit. The Board did not address whether any other subset of employees at this or any other store would be appropriate.

Moreover, the Act does not prohibit multiple units at an employer; instead, it explicitly recognizes that a unit containing a "subdivision" of employees may be appropriate. 29 U.S.C. § 159(b). And, even if there were a rule against small units, which, as shown, there is not, the 41-person unit certified here is not small. Indeed, it is comparable to the 42-employee print-shop unit this Court approved in *Electronic Data Systems*, 938 F.2d at 472-74.[17] In any event, Macy's and amici do not support their conjecture (*e.g.*, M-Br.30-33) that applying *Specialty* or approving the cosmetics and fragrances unit will result in excessive administrative burdens, multiple, crippling work stoppages, or unproductive bargaining.[18] To the contrary, the Board has long approved multiple units in this and other industries

[17] As the Board noted here (ROA.457) and in *Specialty*, the median unit size certified from 2001 to 2010 was 23 to 26 employees. 2011 WL 3916077, at *15 n.23 (citing *Proposed NLRB Rule*, 76 Fed. Reg. 36821 (June 22, 2011)); *see also Final NLRB Rule,* 79 Fed. Reg. 74308, 74391 n.391 (Dec. 15, 2014) (noting that the median unit size from 2011 to 2013 was 24 to 28 employees.

[18] As shown (p. 46), moreover, the Sixth Circuit in *Kindred* credited the Board's view in *Specialty* that its clarification of its unit-determination standard would help "employers order their operations with a view towards productive collective bargaining."

without the grave effects prophesied here. *See* pp. 54-55, below (Board has approved multiple units at department stores); *Teledyne Economic Dev. v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997) (enforcing Board's decision certifying two units at one employer); *Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996) (enforcing Board order requiring employer to bargain over three different units).

Amici's related argument (RA-Br.13-16) that the Board's *Specialty* standard will lead to undue "proliferation" of units should also be rejected as irrelevant outside the healthcare industry. That phrase appears in the legislative history of the 1974 healthcare amendments to the Act, which admonished the Board to give "due consideration" "to preventing proliferation of bargaining units in the health care industry." S.Rep.No.766, 93rd Cong., 2d Sess. 5 (1974); H.R.Rep.No.1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). Moreover, even in the healthcare industry context, the Supreme Court unequivocally found that the "admonition" was not binding on the Board and does not have "the force of law." *Am. Hosp. Ass'n*, 499 U.S. at 616-17 ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute"). Simply put, there is nothing in the Act suggesting that two or more units at one facility constitutes "undue proliferation." *See Teledyne*, 108 F.3d at 57.

Nor is there any merit to Macy's and amici's argument (M-Br.33-34; CDW-Br.27; HR-Br. 19) that the *Specialty* standard fails to guarantee employees the right to refrain from engaging in concerted activity. The other store employees have the right, as well as the opportunity, to organize or refrain from doing so, to vote for or against unionization, and to encourage their coworkers to do the same. And those workers' statutory rights remain firmly intact whether or not some of their colleagues unionize. *Cf. Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (certification of unit of drivers, which excluded mechanics, protected the rights of both groups). The Board's *Specialty* standard therefore "assure[s] to employees," both inside and outside the unit, "the fullest freedom in exercising the rights guaranteed by th[e] Act." 29 U.S.C. § 159(b).

4. Board precedent involving the retail industry does not require a unit of all employees or all selling employees

Macy's errs in contending (M-Br.52-55) that the departmental unit approved here is contrary to precedent in the retail industry favoring store-wide units. Rather, as the Board thoroughly explained (ROA.451-57), that precedent presumes only that a store-wide unit is *an* appropriate unit; it does not preclude a finding that another unit is also appropriate. Indeed, the Board has long permitted less-than-storewide units based on the traditional community-of-interest principles that it applied here.

Moreover, even in cases where the Board has referred to a "presumptively appropriate" storewide unit, it has emphasized that the Act does not compel unions to "seek the most comprehensive grouping of employees" in a department store. *Sears Roebuck & Co.*, 184 NLRB 343, 346 (1970). Accordingly, in assessing the appropriateness of less-than-storewide units, the Board has repeatedly explained that the sole inquiry is whether the petitioned for unit "is [an] appropriate [unit] in the circumstances of *this* case and *not* whether another unit consisting of all [store] employees . . . would also be appropriate, more appropriate, or most appropriate." *Bamberger's Paramus*, 151 NLRB 748, 751 (1965) (emphasis in original); *accord Sears Roebuck & Co.*, 261 NLRB 245, 246 (1982) (approving under this standard a unit limited to auto-center employees at a department store); *see also Sears Roebuck & Co.*, 160 NLRB 1435, 1436 (1966) (confirming that the appropriate unit in the retail industry is determined by traditional community-of-interest principles).[19] Moreover, the Board stated long ago that if there ever was a presumption that *only* a unit of all store employees is appropriate, it is "no longer

[19] *See also 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 642, 643 (1957) (noting that less-comprehensive units of retail-clothing store employees are appropriate for separate departments of employees having a distinct mutuality of interests).

applicable to department stores." *Saks Fifth Ave.*, 247 NLRB 1047, 1051 & n.8 (1980) (citing *Stern's Paramus*, 150 NLRB at 803).

Thus, as the Board appropriately noted (ROA.453), it has long "applied a standard that allows less-than-storewide units 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." This, of course, is almost precisely the standard articulated in *Specialty* that the Board applied here. As the Board reasonably found (ROA.446-51), the cosmetics and fragrances department employees are identifiable as a group and share a community of interest. Further, because they do not share an overwhelming community of interest with other selling employees, they are sufficiently distinct from those employees to constitute an appropriate unit. *See Specialty Healthcare*, 2011 WL 3916077, *17 (explaining that the "overwhelming community of interest standard" clarifies the degree of difference that renders a group of employees "sufficiently distinct.")

Moreover, the Board reasonably explained (ROA.454-56) why the cases cited by Macy's (M-Br.52-55) do not require a different result. Indeed, Macy's does not cite a single case that rejected a departmental unit similar to the one here. Instead, Macy's relies (M-Br.20, 52) on cases like *I. Magnin*, 119 NLRB 642, that do not advance its cause. As the Board explained (ROA.454), under the standard articulated in *I. Magnin*, the issue here would be whether the petitioned-for-

employees have a "mutuality of interests" not shared by other selling employees. *Id*. at 643. The cosmetics and fragrances employees would meet that standard because they share most community-of-interest factors and work in their own department, which is structured differently from other departments due to the presence of counter managers. The cosmetics and fragrance employees are also "sufficiently different," *id.*, from other selling employees because, in addition to the foregoing factors, they work in distinct areas and have little contact or interchange with other workers.

Furthermore, *I. Magnin* does not undermine the unit determination here because it is factually distinguishable. It involved a clothing store with 105 departments, 4 of which were shoe-selling departments that the union sought to represent. In finding the petitioned-for unit inappropriate, the Board emphasized that employees from other departments had been assigned to work as shoe sellers, and that shoe sellers were actively encouraged to sell other items throughout the store. *Id.* at 643. The opposite is true of Macy's cosmetics and fragrances employees, who are not actively encouraged to sell other products or assigned to work in other departments, and have little contact or interchange with other employees.

For similar reasons, Macy's errs in suggesting (M-Br.53) that the Board's unit determination here is inconsistent with *Levitz Furniture Co.*, 192 NLRB 61

(1971). There, the Board found petitioned-for units limited to certain non-selling employees at a retail furniture store inappropriate because, in contrast with the instant case, there was frequent regular and temporary interchange between the petitioned-for employees and the non-selling employees, who would perform each other's job functions. *Id.*[20]

Macy's nonetheless replies (M-Br.55) that the Board has never before deviated from a storewide unit to approve a unit like the instant one. As the Board explained (ROA.454), however, the sole question is whether the unit is appropriate in the circumstances of this case. The Board reasonably found that it was. Because the unit is appropriate, it is of no moment that in some other cases, based on different facts, the Board has previously approved larger units. *See NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1311 (5th Cir. 1973) ("a determination of a unit's appropriateness will invariably involve factual situations peculiar to the employer and unit at issue," which is why "the Board has been given great discretion in ruling on these matters").

In sum, as the Board aptly concluded (ROA.454), its "precedent regarding retail department stores has evolved away from any presumption favoring

[20] Likewise, *Kushins and Papagallo Div. of U.S. Shoe Retail, Inc.*, 199 NLRB 631 (1972), also cited by Macy's (M-Br.53), does not warrant a different result. In that case, all store employees were shoe sellers. *Id.* at 631-32. Here, in contrast, there are various differences between cosmetics and fragrances employees and other employees, who may all be engaged in sales, but who sell different products in different departments.

storewide units, and the current standard for determining whether a less-than-storewide unit [is appropriate] comports with, and is complementary to, the framework articulated in *Specialty*." After all, both *Specialty* and retail-industry precedent ensure that petitioned-for employees are separately identifiable, share a community of interest, and are sufficiently distinct from other employees. Accordingly, Macy's errs in claiming (M-Br.52) that applying *Specialty* to find the cosmetics and fragrances unit appropriate is directly contrary to retail-industry precedent.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Macy's petition for review and enforcing the Board's Order in full.

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June 2015

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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	:
Petitioner/Cross-Respondent	:
	: Case No. 15-60022
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 1-CA-137863
	:
Respondent/Cross-Petitioner	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,464 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 10th day of June, 2015

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	:
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, D.C.
this 10th day June, 2015