No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

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

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BRIEF OF INTERVENOR LOCAL 1445, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION IN SUPPORT OF RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

1. Macy's, Incorporated, Petitioner/Cross-Respondent.
2. Shay Dvoretzky, Willis J. Goldsmith, David Raimer, Attorneys for Petitioner/Cross-Respondent Macy's, Incorporated.

3. National Labor Relations Board, Respondent/Cross-Petitioner.

4. Linda Dreeben, Julie Brock Broido, Gregory Paul Lauro, Attorneys for Respondent/Cross-Petitioner National Labor Relations Board.

5. Local 1445, United Food and Commercial Workers International Union, Intervenor.

6. Matthew J. Ginsburg, James B. Coppess, Alfred Gordon O'Connell, Attorneys for Intervenor Local 1445, United Food and Commercial Workers International Union.

The undersigned counsel of record further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that Intervenor Local 1445, United Food and Commercial Workers International Union is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns 10% or more of its stock.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg
Attorney of record for
Intervenor Local 1445, United
Food and Commercial Workers
International Union

STATEMENT REGARDING ORAL ARGUMENT

Local 1445, United Food and Commercial Workers International Union agrees with the National Labor Relations Board that oral argument would assist the Court in evaluating the issues presented in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CASES – Continued:

Page

CASES – Continued:

Page

STATUTES:

MISCELLANEOUS:

BRIEF OF INTERVENOR LOCAL 1445, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION IN SUPPORT OF RESPONDENT

INTRODUCTION

Local 1445, United Food and Commercial Workers International Union ("Local 1445") fully concurs with the persuasive analysis set forth in the National Labor Relations Board's brief regarding the appropriateness of a bargaining unit composed of all 41 employees of the cosmetics and fragrances department at Macy's, Inc.'s Saugus, Massachusetts department store. Local 1445 files this brief to help situate the Board's legal analysis in the context of the established collective bargaining relationship between Local 1445 and Macy's.

As the Board explained in its brief, the text of the National Labor Relations Act ("NLRA" or "the Act") recognizes that more than one appropriate bargaining unit may exist in any given workplace. The determination of whether a particular unit is appropriate, therefore, is highly fact-specific and turns fundamentally on whether collective bargaining in the unit selected is likely to be practical.

In this case, the answer to that question is straightforward because Macy's and Local 1445 have demonstrated through their conduct in negotiating collective bargaining agreements at six other stores in the area

that Macy's cosmetics and fragrances departments have a distinct character from the company's other sales departments that make it appropriate to treat cosmetics and fragrances departments separately for purposes of collective bargaining. At the nearby Warwick, Rhode Island store, Macy's and Local 1445 have engaged in successful collective bargaining for a unit of cosmetics and fragrances department employees for a decade. And, at five other area stores, the company and the union have excluded cosmetics and fragrances departments from overall units of sales employees. The parties' conduct in this regard is strong evidence that treating the cosmetics and fragrances department as a distinct unit for purposes of collective bargaining is practical.

There are two characteristics of cosmetics and fragrances departments that account for the parties' practice of treating them separately from Macy's other sales departments for purposes of collective bargaining. First, the third-party vendors whose products Macy's cosmetics and fragrances department employees sell are deeply involved in the employment relationship between Macy's and employees in the department. Second, the organization of work in the cosmetics and fragrances department requires close personal relationships between individual beauty advisors and their customers. These two characteristics combine to create a unique

relationship among vendors, beauty advisors, and customers in which the beauty advisor is held out as the public face of the vendor's brand in order to create strong brand-identification among customers. No other sales department at Macy's relies so heavily on a close three-way relationship among vendors, beauty advisors, and customers to cultivate brand-identification, and the effects of this arrangement on the terms and conditions of employment in the cosmetics and fragrances department distinguishes employees in that department from employees in other sales departments in the store.

STATEMENT OF THE CASE

1. Local 1445 filed a petition to represent the 41 employees employed by Macy's in the cosmetics and fragrances department of its Saugus store. The NLRB found the petitioned-for unit appropriate and ordered an election. *Macy's, Inc.*, 361 NLRB No. 4 (July 22, 2014) ("*Macy's I*"), ROA.439-71.[1] The majority of employees then cast ballots in favor of Local 1445, ROA.472, and the Board certified Local 1445 as the employees' exclusive collective bargaining representative, ROA.473. Macy's refused to bargain

[1] "ROA" refers to the three volume administrative record filed by the NLRB with this Court on March 9, 2015. Volume II of the administrative record consists of exhibits from the hearing before the NLRB hearing officer and is not Bate-stamped. We refer to documents from Volume II as "ROA.Vol. II" followed by the exhibit number and the internal page reference from within the particular exhibit.

with Local 1445 in order to test the Board's certification of the union as the employees' bargaining representative. The Board found that that refusal to bargain constituted an unfair labor practice and ordered Macy's to bargain with Local 1445. *Macy's, Inc.*, 361 NLRB No. 163 (Jan. 7, 2015) ("*Macy's II*"), ROA.510-13. Macy's filed this petition for review, and the Board cross-petitioned for enforcement.

2. The cosmetics and fragrances department is one of eleven primary sales departments in Macy's Saugus store and is managed by a dedicated cosmetics and fragrances department sales manager. *Macy's I* at 1, ROA.439. The department is composed of nine cosmetics counters and a women's fragrances counter grouped together on the first floor of the store, and a men's fragrances counter located on the second floor of the store. *Id.* at 2, ROA.440. Each of the cosmetics counters is dedicated to a single vendor's products – Shiseido, Elizabeth Arden, Chanel, Clarins, Lancôme, Clinique, Estée Lauder, Origins, and MAC. *Id.* at 2 & n.9, ROA.440. The fragrances counters sell products from numerous vendors. *Id.* at 2, ROA.440.

Eight of the nine cosmetics counters are staffed by Macy's employees who are jointly-hired by Macy's and the particular third-party vendor whose products are sold at each counter. *Ibid.* The ninth counter, the MAC

cosmetics counter, is staffed by employees of vendor Estée Lauder, which owns the MAC cosmetics line. *Id.* at 2 n.9, ROA.440. The women's and men's fragrance counters are staffed by Macy's employees who are solely hired by Macy's. *Id.* at 2, ROA.440.

Forty-one of the 120 sales employees in the Saugus store are employed in the cosmetics and fragrances department. *Id.* at 1, ROA.439. Employees in the department hold one of three job titles. Twenty-six "beauty advisors" are the primary sales employees at the eight cosmetics and two fragrances counters. *Id.* at 2, ROA.440. There are "counter managers" at six of the eight cosmetics counters and at each fragrance counter. *Ibid.* These counter managers monitor the vendor's stock and coach the beauty advisors in addition to directly selling the vendor's products.[2] *Ibid.* Finally, there are seven on-call employees who exclusively fill in for regular employees in the cosmetics and fragrances department when they are absent. *Ibid*. These on-call employees may be assigned to any of the eight cosmetics counters or either of the fragrances counters as needed. *Ibid.*

The role of the cosmetics beauty advisors, as supported by the counter managers and on-call employees, is to sell their particular cosmetics

[2] The parties agree that the counter managers are not supervisors or managers and should be included in the bargaining unit. *Macy's I* at 1-2, ROA.439-40.

vendor's products to Macy's customers. *Ibid.* To promote the vendor's products, employees at six of the eight cosmetics counters wear distinctive vendor-specific uniforms that identify the beauty advisors as representatives of the vendor's brand. *Id.* at 3, ROA.441. These vendor-specific uniforms are the same whether a beauty advisor works, for example, as a Clinique beauty advisor at Macy's or as a Clinique beauty advisor at a competing department store. ROA.134.

The vendor provides beauty advisors with extensive product knowledge and sales technique training, including training regarding skin tone, skin types, skin conditions, and the use of color, *Macy's I* at 2-3, ROA.440-41, as well as training regarding how to apply the vendor's product to the customer's body, ROA.119-22. Mandatory all-day trainings, which are run by the vendor but for which beauty advisors are paid by Macy's, take place several times a year at off-site locations. ROA.129-30. These trainings are attended by beauty advisors who work at different Macy's stores as well as by beauty advisors employed at competing department stores. ROA.130-31. For example, a Clinique beauty advisor from Macy's Saugus store testified that Clinique beauty advisors employed at Lord & Taylor department stores attended the same Clinique-run training as Macy's employees. *Ibid.* Beauty advisors receive pins for completing

vendor-provided training that they wear on their uniforms. ROA.132-34. These pins are the same whether a beauty advisor is employed to sell the vendor's products at Macy's or at a competing department store. ROA.134.

Vendor-provided training is crucial because a significant aspect of a beauty advisor's job is to promote and demonstrate the vendor's new products to customers. ROA.123-24. To do this, cosmetics beauty advisors keep lists of their "personal clients," ROA.124, with whom they are "on a first name basis," ROA.135, and use these lists to book appointments for makeovers, to invite customers to the store to try new products, and to notify customers of special promotions or events, *Macy's I* at 3, ROA.441. The two cosmetics beauty advisors who appeared at the hearing testified that they had approximately 200 and 400 customers in their respective client lists. *Id.* at 3 & n.15, ROA.441. One of the beauty advisors testified that she used her list to call her regular clients approximately five times per year. *Id.* at 3, ROA.441.

As mentioned, cosmetics beauty advisors routinely market the vendor's products to regular customers by scheduling appointments for makeovers in which the beauty advisor applies the vendor's products directly to the customer's body. *Id.* at 3, ROA.441. A makeover is a one-on-one consultation between the beauty advisor and the customer in which

the beauty advisor "prep[s] [the customer] up with toner, [] moisturizer, [] serum, eye cream" and then, after this "skin care," matches suggested cosmetics colors with the customer's skin "undertones." ROA.137-38. A makeover is a labor-intensive service; it can take a beauty advisor up to a half hour to conduct a makeover on a single customer. ROA.135.

Cosmetics and fragrances beauty advisors are paid a base salary plus three percent commission for sales of products at their counter, with the commission paid by the vendor.[3] *Macy's I* at 3, ROA.441; DDE 5,[4] ROA.225. When a cosmetics beauty advisor sells a product from a different counter – such as while assisting a co-worker whose counter is busy or while covering a different counter for a co-worker who is on lunch or on break – the employee receives a two percent commission. *Macy's I* at 3, ROA.441; DDE 5 & n.12, ROA.225. Counter managers, who facilitate sales by beauty advisors at a particular vendor's counter, receive a base salary plus one-half percent commission for all sales made on their vendor's product line in addition to three percent commission for their own sales of the vendor's

[3] Store Manager Danielle McKay testified that commissions are paid by the vendors, although she wasn't familiar with the specific payment arrangement used by each vendor. ROA.33-34.

[4] "DDE" refers to the NLRB Regional Director's Decision and Direction of Election. ROA.221-34.

products. *Macy's I* at 3, ROA.441. On-call employees receive a base salary plus two percent commission for all sales. *Ibid*.

Cosmetics vendors regularly hold special events in the cosmetics and fragrances department known as "mega events," "makeover events," or "master class events" in which cosmetics beauty advisors use their client lists to book multiple makeovers at the same time. ROA.42-43. On the day of the special event, the vendor sends its own employees, known as makeup artists, to assist the beauty advisor to do the makeovers. *Ibid.* The Macy's beauty advisor who books the appointments, rather than the vendor's makeup artist, receives all of the commissions generated by such special events. ROA.43.

Similarly, fragrances vendors hold special events to invite customers to the store "to preview a new fragrance," ROA.46, and also routinely send their own employees, known as "sprayers" or "spritzers," into the Saugus store to circulate throughout the store spraying fragrances in order to interest customers in the vendor's products. ROA.37-39. When a sprayer's efforts result in a sale at one of the fragrances counters, the commissions from such a sale are shared among the Macy's employees at that counter, rather than paid to the vendor's employee. ROA.39-40.

Cosmetics and fragrances employees are not temporarily transferred or otherwise assigned to work outside of the cosmetics and fragrances department, with the sole exception of employees occasionally assisting another department with periodic inventory, an activity which does not involve selling. *Macy's I* at 5 & n.25, ROA.443. Conversely, other sales employees in the Saugus store are not assigned to work in the cosmetics and fragrances department, as the cosmetics and fragrances department employs a group of on-call employees for that purpose. *Id*. at 5, ROA.443.

In the two years before the hearing, eight Macy's employees from outside the cosmetics and fragrances department were hired into the department. *Macy's I* at 5 & n.26, ROA.443. One employee left the cosmetics and fragrances department to take a supervisory position in another department at the Saugus store. *Id.* at 5, ROA.443.

All employees in the Saugus store, including the cosmetics and fragrances employees, receive the same benefits, are subject to the same employee handbook, and have access to the same in-store dispute resolution program. *Ibid*. In addition, all sales employees in the Saugus store are evaluated based on the same general criteria, although evaluation forms differ from department to department and each department has its own sales goals and assigns different weights to sales volume. *Id.* at 5 & n.27,

ROA.443. For example, sales constitute 70% of the performance review score for "general selling associates" at the Saugus store, while constituting 80% of the performance review score for cosmetics beauty advisors. ROA.Vol. II, Employer Ex. 3, unnumbered pages 1-2.

Sales employees in the fine jewelry, men's clothing, men's shoes, and big ticket departments are paid, like employees in the cosmetics and fragrances department, on a base salary plus commission basis. *Macy's I* at 4, ROA.442. Employees in these departments sell products from a variety of vendors. *Id.* at 4 & n.19, ROA.442. Sales employees in other primary sales departments are compensated in a manner other than base salary plus commission. *Id.* at 4, ROA.442.

There are a limited number of sales employees outside the cosmetics and fragrances department who are jointly-hired by Macy's and a vendor to specialize in the sale of a particular vendor's products – such as Levi's, Polo, Buffalo, and Guess products. *Ibid*. Some specialists are paid a commission for sales of their vendor's products, some receive a bonus payment from the vendor, and some receive no special commission or bonus at all. *Ibid.*

3. Local 1445 represents employees at six other Macy's department stores in Massachusetts and Rhode Island.[5] *Macy's I* at 5, ROA.443. For many years, the collective bargaining agreements between Macy's and Local 1445 at all six of these stores covered all sales employees except cosmetics and fragrances department employees, who were treated as outside of the general sales employees' bargaining unit.[6] *Ibid.*

In 2005, employees in the cosmetics and fragrances department at Macy's Warwick, Rhode Island store – where other sales employees were already covered by a multi-store collective bargaining agreement – voted to join Local 1445. *Ibid.* Macy's and Local 1445 then negotiated a separate collective bargaining agreement for the cosmetics and fragrances employees at the Warwick store. ROA.112-13. Subsequently, the parties decided to attach the cosmetics and fragrances employee agreement as "Exhibit A" to

[5] Macy's, Inc., the employer in this case, is the same employer with which Local 1445 bargains at the six other area Macy's stores. *See Macy's, Inc.*, Decision and Direction of Election, Case 01-RC-022530, at 2, available at http://nlrb.gov/case/01-RC-022530 (explaining that Macy's "operates a chain of retail stores that includes 89 stores in the northeast region," including the Saugus store and the other six stores where Local 1445 represents Macy's employees). *See also Macy's I* at 6 n.29, ROA.444 (taking administrative notice of the Decision and Direction of Election in Case 01-RC-022530).

[6] The Board mistakenly states that "there are apparently no cosmetics and fragrances employees at the Belmont store." *Macy's I* at 5 n.28, ROA.443. The Board seems to have misunderstood the testimony, which was that the cosmetics and fragrances department at Belmont is not unionized, not that it does not exist. *See* ROA.115-16. *See also* DDE 8 & n.20, ROA.228 (Regional Director's factual finding that "[i]n the five Massachusetts stores [including Belmont], cosmetics and fragrances employees have been excluded from storewide units.").

the multi-store agreement between Macy's and Local 1445. ROA.113-14; ROA.Vol. II, Union Ex. 1, pp. 59-64.

The agreement between Macy's and Local 1445 for the Warwick cosmetics and fragrances department contains numerous substantive terms that apply only to employees in that department. As to compensation, cosmetics and fragrances department employees are paid on a base salary plus commission basis, whereas many other sales employees are paid on a straight wage basis, a straight commission basis, or a draw versus commission basis. ROA.Vol. II, Union Ex. 1, pp. 24-27, 60-62. In addition, the agreement provides that cosmetics and fragrances department employees are paid different commission rates than other commissioned sales employees. *Compare id.*, p. 61 (cosmetics and fragrances department rates) *with id.*, p. 26 (rates for other commissioned sales departments). The agreement also includes detailed provisions for determining the commission rate when an employee of one cosmetics vendor line sells products from a different cosmetics vendor line, *id.*, p. 61, provisions that do not exist for other commissioned sales employees covered by the contract.

The agreement states that for hiring, promotion, and transfer decisions for cosmetics and fragrances department employees at the Warwick store "acceptability to interested parties" is a relevant factor, *id.*, p. 59, *i.e.*, that

vendor approval is required for some positions. *Id.*, p. 59. The agreement also specifically permits Macy's to fill open positions in the cosmetics and fragrances department, including open positions that would constitute promotions, with employees from outside the bargaining unit. *Ibid.* Vendor approval is not required for the hiring, promotion, or transfer of any other sales employees covered by the contract. *Id.*, pp. 30-31. And, the collective bargaining agreement requires that, for all positions other than in the cosmetics and fragrances department, Macy's must consider internal candidates for open positions, promotions, and transfers before filling such positions with candidates from outside the bargaining unit. *Ibid.*

The agreement states that seniority within the cosmetics and fragrances department is determined – including for layoff and vacation purposes – by the length of an employee's tenure on a particular vendor line or fragrance bay rather than on a storewide or even a departmental basis. *Id.*, pp. 59, 62-64. Seniority for all other sales employees is calculated by length of tenure in designated seniority groups across the entire multi-store bargaining unit. *Id.*, pp. 31-32.

Finally, the agreement states that "Beauty Advisors will not be required to perform duties outside their department that interfere with their ability to assist cosmetic customers" and that "[o]nly Beauty Advisors shall

have the right to any additional selling hours in the cosmetic department." *Id.*, pp. 63-64. In contrast, as to all other employees, Macy's "may temporarily transfer employees for assignments to any of their stores," including transferring commissioned employees to non-commission departments and vice-versa. *Id.*, p. 28-29.

SUMMARY OF THE ARGUMENT

The NLRB correctly determined that a unit of all 41 employees in the cosmetics and fragrances department at Macy's Saugus store is an appropriate unit for collective bargaining because they are in a "separate department" from other sales employees, the "structure of the department" is distinct from other sales departments, and because there is "separate supervision, separate work areas, and lack of significant contact and meaningful interchange" with other employees in the store. *Macy's I* at 12, ROA.450.

The Board's conclusion that employees in the cosmetics and fragrances department constitute an appropriate unit for purposes of collective bargaining is confirmed by the long history of actual bargaining between Macy's and Local 1445 at six area stores in which the parties have treated employees in the cosmetics and fragrances departments separately from other sales employees. At the Warwick store, Macy's and Local 1445

have bargained separate terms and conditions of employment for cosmetics and fragrances department employees for a decade. And, at the five other area stores where Local 1445 represents Macy's employees, the company and the union have treated cosmetics and fragrances department employees as distinct from employees in all other sales departments by excluding cosmetics and fragrances employees from the store-wide bargaining units. Notably, Macy's has never contended that the bargaining units at these six stores that treat cosmetics and fragrances department employees separately are inappropriate.

As Local 1445 has learned from bargaining with Macy's, and as the record reflects, the deep involvement of third-party vendors in the employment relationship between Macy's and employees in the cosmetics and fragrances department and the close personal relationship between beauty advisors and their customers combine to result in a unique relationship between vendors, beauty advisors, and customers. This relationship, in which the beauty advisor is held out as the public face of the vendor's brand in order to cultivate a strong brand-identification among customers, so distinguishes the terms and conditions of employment of cosmetics and fragrances employees from employees in other Macy's sales

departments as to clearly make them an appropriate separate group for bargaining.

Finally, Macy's various attacks on the legal standard applied by the Board in this case are unavailing. There is nothing problematical about the Board's reliance on *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), as that decision broke no new ground. In *Specialty Healthcare*, the Board merely adopted the D.C. Circuit's description of the Board's traditional approach to bargaining unit determinations in cases where an employer claims that employees must be added to an otherwise appropriate bargaining unit, a description that is entirely in keeping with this Court's own understanding of the Board's unit determination test. Nor did the Board err by declining to decide this case based on a presumption that only a store-wide unit of all employees or all sales employees is appropriate. As the Board explained in great detail, Board precedent does not mandate store-wide units in retail stores, but rather requires that each bargaining unit be evaluated on its facts using traditional community of interest factors.

ARGUMENT

As the NLRB persuasively explained in its brief, a unit of all 41 employees in the cosmetics and fragrances department at Macy's Saugus store is an appropriate unit for collective bargaining because cosmetics and fragrances employees are in a "separate department" from other sales employees, the "structure of the department" is distinct from other sales departments, and because there is "separate supervision, separate work areas, and lack of significant contact and meaningful interchange" with other employees in the store. *Macy's I* at 12, ROA.450. When these facts are viewed within the context of the established collective bargaining relationship between Macy's and Local 1445 at six other area Macy's stores, it is especially clear that the Board's analysis is correct.

1. The bargaining history between Macy's and Local 1445 at the company's other area stores confirms the Board's conclusion that cosmetics and fragrances departments have a strongly distinct character from Macy's other sales departments.

Section 9(a) of the NLRA provides that the representative "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 representative 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." 29 U.S.C. 159(a) (emphasis added). Section 9(b) of the Act delegates to the Board the authority to "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." 29 U.S.C. 159(b). This statutory language means that "employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis in original). "Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof." *Ibid.* *Accord Amalgamated Clothing Workers of America v. NLRB*, 491 F.2d 595, 597 (5th Cir. 1974) ("an intra-plant bargaining unit" is appropriate where employees in the unit have "separate interests, distinct from those of co-employees").

In determining in each case whether a particular group of employees constitutes "'a unit' that is 'appropriate,'" *American Hospital Association*, 499 U.S. at 610, the Board focuses on whether the unit selected "serves the Act's purpose of effective collective bargaining." *NLRB v. Action*

Automotive, Inc., 469 U.S. 490, 494 (1985). At bottom, this is a practical inquiry. "The goal is to create a viable bargaining unit." *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977). In cases "where there has existed successful and harmonious collective bargaining, there is strong, empirical evidence of a workable relationship." John E. Abodeely, The NLRB and the Appropriate Bargaining Unit 56 (rev. ed. 1981). *See also* Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law § 5.2 (2d ed. 2004) ("[B]argaining history will normally demonstrate that collective bargaining on that basis is viable."). For this reason, the Board found that the bargaining history between Macy's and Local 1445 constituted "evidence of area practice and the history of bargaining in the industry" that provided "additional support for [Local 1445]'s position." *Macy's I* at 13 n.50, ROA.451.

Macy's hyperbolic claims that the Board's approval of a cosmetics and fragrances employees unit will "make bargaining unmanageable," make "the store's business model quickly become[] unworkable," and "[w]reak [h]avoc in the [r]etail [i]ndustry," Pet. Br. 3, 30, 31, are belied by the actual bargaining that has taken place between Macy's and Local 1445. The parties for many years have treated employees in Macy's cosmetics and fragrances departments as separate groups from employees in all other sales

departments in the six stores where they engage in collective bargaining. *Macy's I* at 5, ROA.443. And, for a decade, Macy's has successfully bargained with Local 1445 for separate terms and conditions of employment for cosmetics and fragrances department employees at the company's Warwick store. *Ibid.* *See also* ROA.112-14; ROA.Vol. II, Union Ex. 1, pp. 59-64.

Macy's does not claim that the bargaining units at its five stores that include employees in all sales departments except the cosmetics and fragrances department are inappropriate. Nor does Macy's claim that its separate treatment of cosmetics and fragrances department employees at its Warwick store is contrary to the NLRA. The history of bargaining between Macy's and Local 1445 and the agreements that the parties have reached therefore constitute "strong, empirical evidence of a workable relationship," J. Abodeely, The NLRB and the Appropriate Bargaining Unit, at 56, in which cosmetics and fragrances departments are treated as distinct from other sales departments.

It is especially pertinent that the actual terms and conditions of employment set forth in the collective bargaining agreement between Macy's and Local 1445 for the Warwick cosmetic and fragrances department employees clearly distinguish those employees from employees

in all other sales departments in the store. The cosmetics and fragrances department employees may only be hired, promoted or transferred with vendor approval, ROA.Vol. II, Union Ex. 1, p. 59, have seniority calculated by length of tenure with a particular vendor line or fragrance bay rather than by seniority group within the bargaining unit as a whole, *id.*, pp. 59, 63-64, may not be temporarily transferred to other departments, *id.*, pp. 63-64, and are paid at a different commission rate than other employees, *id.*, p. 61. The contrast between the terms the parties have bargained for the Warwick cosmetics and fragrances department employees and those negotiated for employees in all other sales departments constitutes highly probative evidence that employees in Macy's cosmetics and fragrances departments share a strong community of interest distinct from that of employees in other sales departments such that separate bargaining for the Saugus cosmetics and fragrances department is practical and appropriate.

2. In Local 1445's experience, and as reflected in the record in this case, there are two characteristics of Macy's cosmetics and fragrances departments that especially distinguish them from other sales departments at Macy's stores. First, the third-party vendors whose products Macy's cosmetics and fragrances department employees sell are deeply involved in the employment relationship between Macy's and employees in the

department. Second, the beauty advisor position requires a particularly close personal relationship between individual employees and their customers. These two characteristics combine to create a unique relationship between vendors, beauty advisors, and customers in which the beauty advisor is held out as the public face of the vendor's brand in order to create strong brand-identification among customers. No other sales department at Macy's cultivates this type of relationship, and its effect on the terms of employment in the cosmetics and fragrances department so distinguishes employees in that department from employees in other sales departments in the store so as to make them an appropriate separate group for bargaining.

There are numerous indicia of the deep involvement of third-party vendors in the employment relationship between Macy's and employees in the cosmetics and fragrances department.

(a) Hiring. First, and most importantly, Macy's and the cosmetics vendors jointly hire the beauty advisors and counter managers that staff the cosmetics counters. *Macy's I* at 2, ROA.440. The vendor's control over these hiring decisions obviously directly affects the terms and conditions of employment of cosmetics employees and their opportunity for advancement and transfer.

(b) Uniforms. Although the cosmetics and fragrances employees are Macy's employees, at six of the eight cosmetics counters employees wear distinctive vendor-provided uniforms that hold them out as representatives of the vendor. *Id.* at 3, ROA.441. Beauty advisors who sell a particular vendor's product wear the same uniform whether they sell that vendor's product at Macy's or at a competing department store, *e.g.*, a beauty advisor who sells Clinique products wears "a white lab coat, like a doctor" provided by Clinique whether they are selling Clinique products at Macy's or at a Lord & Taylor store. ROA.132-34.

(c) Training. Vendors provide training to cosmetics employees that is different in kind than that provided to other sales departments. It is especially pertinent in this regard that a cosmetics employee's sales efforts frequently involve demonstrating the vendor's products by applying those products directly to the customer's body through makeovers. Cosmetics vendors thus provide employees with extensive training not just on sales techniques and product knowledge, but also regarding skin tone, skin types, skin conditions, and the use of color. *Macy's I* at 2-3, ROA.440-41. *See also* ROA.138 (testimony describing training provided to beauty advisors on "skin care," including knowledge of "what type of skin . . . customers

have," including skin conditions such as "acne" and "rosacea," as well as the "different undertone[s]" of each customer's skin color).

(d) Compensation. Macy's and the cosmetics vendor jointly pay the cosmetics employees, with Macy's paying the base salary and the vendor paying the commission. *Macy's I* at 3, ROA.441. Although Macy's store manager could not describe the precise terms of these payment arrangements, ROA.33-34, the Board has previously described similar cosmetics sales commission arrangements as follows:

> "[C]osmetics manufacturers enter into representative or demonstration agreements with retailers . . . whereby the former provides a 10 percent rebate on sales of their own products made at the latter's stores. . . . [N]ormal practice appears to be that vendors allocate a certain percentage of the rebate to employees who make the sales and the rest of the rebate to the retailer. . . . [T]he fairly common allocation is 3 percent to the sales employees and 7 percent to the retailer." *Lamont's Apparel, Inc.*, 268 NLRB 1332, 1332 (1984) (footnotes omitted).

In addition to these indicia of the deep involvement of third-party vendors in the employment relationship between Macy's and most employees in the cosmetics and fragrances department, there is also

significant evidence in the record of the close personal relationship between individual beauty advisors and customers that Macy's and vendors require of employees in the cosmetics and fragrances department.

(a) Client lists. Cosmetics employees maintain extensive lists of their regular clients. *Macy's I* at 3 & n.15, ROA.441. Beauty advisors are on a first-name basis with their customers, ROA.135, and communicate with them regularly to inform them of the availability of new products, to replenish products that the customer has previously purchased, to schedule makeovers, and to invite customers to special events, *Macy's I* at 11-12 n.43, ROA.449-50.

(b) Makeovers and similar demonstrations of the vendor's products. Cosmetics beauty advisors regularly conduct makeovers in which they demonstrate the vendor's products by directly applying the products to the customer's body. *Macy's I* at 3, ROA.441; ROA.135, 137-38. A makeover is an intensive service that includes both skin care – "prep[ping] up [the customer] from toner, to moisturizer, to serum, [to] eye cream" – "and then [applying] the colors." ROA.138. It can take up to a half hour of a beauty advisor's time to conduct a makeover for a single customer. ROA.135.

(c) Special events. Cosmetics employees use their customer lists to recruit customers to special vendor-sponsored events where multiple

customers are scheduled to receive makeovers at the same time. ROA.42-43. Vendors assist in this endeavor by sending their own makeup artists to do makeovers alongside the beauty advisor. *Ibid.* The Macy's beauty advisor who books the appointments, rather than the vendor, receives all commissions generated by the makeover appointments. *Ibid.*

Taken together, the vendor's deep involvement in the employment relationship between Macy's and its cosmetics and fragrances department employees and the close personal relationship between individual beauty advisors and customers combine to create a unique relationship among vendors, beauty advisors, and customers.

A customer walking into Macy's Saugus store, for example, would be hard-pressed to determine whether a beauty advisor at the Clinique cosmetics counter – who is dressed in the same "white lab coat" uniform that Clinique beauty advisors wear at Lord & Taylor and other department stores, ROA.134 – is a Macy's or Clinique employee. Indeed, beauty advisors at the MAC cosmetics counter at the Saugus store are *not* Macy's employees, *Macy's I* at 2 n.9, ROA.440, although this would not be apparent to most customers as the MAC counter is "[s]andwiched between the Lancôme cosmetics counter and the fragrances counter," DDE 3, ROA 223, both of which are staffed by Macy's beauty advisors. And the client of a Macy's

Lancôme beauty advisor, who receives regular communications from the beauty advisor about Lancôme products and special events, ROA.123-24, is unlikely to know that her beauty advisor is a Macy's employee, rather than employed directly by Lancôme.

No other sales department at Macy's cultivates this unique relationship in which Macy's employees are held out as the public face of the vendor's brand in order to cultivate brand-identification among customers. The effects of this unique relationship on the terms and conditions of employment in the cosmetics and fragrances department – from the fact that vendors jointly hire all cosmetics beauty advisors, *Macy's I* at 2, ROA.440, to the additional commissions beauty advisors earn during special events because their vendor provides them with makeup artists to conduct makeovers for the beauty advisors' clients, ROA.42-43 – distinguishes employees in this department from employees in Macy's other sales departments.

Although fragrances beauty advisors stand in a somewhat different relationship to third-party vendors than do cosmetics beauty advisors, they are fully integrated into the cosmetics and fragrances department. Most fundamentally, Macy's, like other department stores, historically has grouped fragrances sales together in the same department with cosmetics

sales. *See* Rachel Felder, *New York Department Stores Revamp Cosmetics and Fragrance Sections*, N.Y. Times, Oct. 16, 2013, at E3 (discussing "cosmetics and fragrances sections" at four New York City department stores, including the flagship Macy's Herald Square store). The women's fragrances counter is located at the entrance to the Saugus store, directly contiguous to the cosmetics counters. *Macy's I* at 2, ROA.440; ROA.Vol. II, Employer's Ex. 1, p. 1 (drawing showing layout of store). Although vendors do not play a role in the hiring of fragrances beauty advisors, fragrances vendors do provide fragrances employees with extensive product training. *Macy's I* at 2-3, ROA.440-41. And, fragrances vendors sponsor special events to invite customers to the store "to preview a new fragrance," ROA.46, and routinely send their own employees into the Saugus store as "sprayers" or "spritzers" in order to generate interest in the vendor's products, with all commissions generated by such promotional activities accruing to Macy's fragrances employees, ROA.37-40.

On-call employees are also fully integrated into the cosmetics and fragrances department. Although vendors do not play a role in hiring on-call employees, the existence of a cadre of on-call employees dedicated solely to servicing the cosmetics and fragrances department reflects the shared desire of Macy's and its vendors to have specially-skilled employees fill in for

regular department employees when they are absent, rather than using general sales employees from other departments to play that role. ROA.57-59. In this way, on-call employees "exemplif[y]" both the "functional integration" of the cosmetics and fragrances department, "sell[ing] both cosmetics and fragrances products throughout the department, depending on staffing needs," *Macy's I* at 8, ROA.446, and the department's lack of integration with Macy's other sales departments.

The Board recognized that "some (but not all) petitioned-for employees share similarities with some (but not all) other selling employees." *Id.* at 12, ROA.450. For example, a few sales employees outside of the cosmetics and fragrances department also work closely with third-party vendors. *Id.* at 11, ROA.449. But none of those other employees have anything close to the combination of significant vendor involvement in terms and conditions of employment and a close personal relationship with customers as employees in the cosmetics and fragrances department. "Specialists" for brands such as Levi's, Polo, Buffalo, and Guess are jointly hired by Macy's and the vendor to specialize in the sale of the vendor's products in different sales departments. *Id.* at 4, ROA.442. However, while some of these specialists are paid a commission for their sales of the vendor's product, others receive only a bonus payment for their sales, and

still others receive no special commission or bonus from the vendor at all. *Ibid.*

In addition, sales employees in a few departments like fine jewelry, men's clothing, men's shoes, and big ticket items are paid on a base wage plus commission basis like employees in the cosmetics and fragrances department. *Ibid.* However, sales employees in these departments are not hired with vendor input and sell products from multiple vendors. *Id.* at 4 & n.19, ROA.442; DDE 6 & n.16, ROA.226. And, Macy's presented no evidence that commissions in these departments are paid by vendors rather than by Macy's. DDE 6, ROA.226.

In any case, as the Board explained, Macy's "d[id] not argue that some, but not all, of the other selling employees" – such as specialists or sales employees in the men's shoes or big ticket items department – "share an overwhelming community of interest with the cosmetics and fragrances employees; rather, [Macy's] argues that the smallest appropriate unit includes *all* selling employees." *Macy's I* at 12, ROA.450 (emphasis added). Presumably for that reason Macy's did not introduce evidence at the hearing regarding, for example, "how many other selling employees are paid base-plus-commission, or are subject to vendor input in hiring, or maintain client lists." *Id.* at 12 n.46, ROA.450. The Board properly construed

Macy's failure to introduce any of this potentially-relevant evidence against the company, *ibid.*, because "[a]n employer who challenges the Board's determination has the burden of establishing 'that the designated unit is clearly not appropriate," *Electronic Data Systems Corp. v. NLRB,* 938 F.2d 570, 573 (5th Cir. 1991).

3. Finally, the NLRB's brief persuasively explains why Macy's various attacks on the legal standard applied by the Board in this case are unavailing. We briefly address two of Macy's principal arguments regarding the legal standard applied in order to highlight why the Board's analysis is correct.

a. Macy's takes issue with the Board's reliance in this case on *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), and that case's use of the phrase "overwhelming community of interest" to describe the showing an employer must make to prove that the Board erred in its bargaining unit determination when the employer claims that additional employees must be added to the unit, claiming that *Specialty Healthcare* "radically departs" from the Board's traditional approach to bargaining unit determinations. Pet. Br. 15. As the Board correctly explained in its brief, however, in *Specialty Healthcare* "the

Board did not create a new test, but further elucidated its longstanding test, which focuses on similarities and differences among groups of employees." NLRB Br. 15.

The NLRB in *Specialty Healthcare* adopted the D.C. Circuit's description of the Board's traditional approach to bargaining unit determinations in situations where an employer claims that additional employees must be added to the unit, as set forth by the Court in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). As the D.C. Circuit explained, "[t]hat the excluded employees share a community of interest with the included employees does not . . . 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 bargaining unit. If, however, the excluded employees share an overwhelming community of interest with the included employees, then there is no legitimate basis upon which to exclude them from the bargaining unit." *Id.* at 421. *Accord NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1372 (11th Cir. 2012) ("A unit is truly inappropriate if . . . there is no legitimate basis upon which to exclude certain employees from it." (Quoting *Blue Man Vegas*, 529 F.3d at 421)).

As the Sixth Circuit later recognized in enforcing the Board's decision in *Specialty Healthcare*, "[t]he Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* [] is not new," *Kindred Nursing Centers East*, 727 F.3d at 561-62 (citing Board cases). *See also Blue Man Vegas*, 529 F.3d at 421-22 (citing same cases).[7] "Moreover, as the Board explained in *Specialty Healthcare* [], not only has the Board used this test before, but the District of Columbia Circuit approved of the Board's use of it in *Blue Man Vegas* [], which denied review of the employer's challenge to a bargaining-unit

[7] Examples of the Board's use of the overwhelming community of interest test cited by the D.C. Circuit and the Sixth Circuit include: *Jewish Hospital Ass'n*, 223 NLRB 614, 617 (1976), in which the Board found the petitioned-for unit of service employees inappropriate based on the "overwhelming community of interest" those employees shared with maintenance employees; *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000), in which the Board required the inclusion of a small number of "concierge" employees in the petitioned-for bargaining unit of hotel employees on the basis that they "share[d] an overwhelming community of interest with the employees whom the [union] seeks to represent"; and *Laneco Construction Systems, Inc.*, 339 NLRB 1048, 1050 (2003), in which the Board found that the employer failed to meet the required standard of showing that employees supplied by an outside company and jointly employed by the employer "shared such an overwhelming community of interests with its solely-employed carpenters and helpers that a unit excluding the former employees would be inappropriate." *See also* NLRB Br. 28 & n.5 (citing four additional pre-*Specialty Healthcare* cases applying the same standard).

Macy's claim that the D.C. Circuit in *Blue Man Vegas* "principally justified the overwhelming community of interest test based on cases setting forth the standard for appellate review of unit determinations already made by the Board," Pet. Br. 42, is therefore obviously incorrect. Moreover, as the D.C. Circuit made clear, "[d]ecisions of the Board and of the courts in unit determination cases generally conform to a consistent analytical framework," since the employer's burden both before the Board and before a reviewing court is to show that "there is no legitimate basis upon which to exclude [employees] from the bargaining unit." *Blue Man Vegas*, 529 F.3d at 421.

determination and enforced the Board's order." *Kindred Nursing Centers East*, 727 F.3d at 562.

The Board forthrightly acknowledged in *Specialty Healthcare* that "different words have been used to describe th[e] heightened showing" that an employer must make to demonstrate that a Board bargaining unit determination is incorrect. 357 NLRB No. 83, at 11. For example, the Board has used the phrases "*substantial* community of interest," *Id.* at 12 & n. 26 (quoting *Lawson Mardon, U.S.A.*, 332 NLRB 1282, 1282 (2000)); *see also Colorado National Bank of Denver*, 204 NLRB 243, 243 (1973), "*strong* community of interest," *ibid.* (quoting *J.C. Penney Co.*, 328 NLRB 766, 766 (1999)), and "*so significant*" a community of interest, *ibid.* (quoting *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701-02 (1967)); *see also Home Depot, USA*, 331 NLRB 1289, 1289 (2000) (all emphases in *Specialty Healthcare*), to describe the required showing.

Whether the phrase used is "substantial," "strong," "so significant," or "overwhelming," the meaning is the same – the employer must show, as this Court has explained, that the shared community of interest between employees within the unit and outside the unit is sufficient such that the exclusion of employees outside the petitioned-for unit "is clearly not appropriate" because there is no basis to distinguish between the included

and excluded workers. *J.C. Penney Company*, 559 F.2d at 375. In contrast, "[a] showing that some other unit would be appropriate is insufficient," because the NLRA requires only that the Board find the unit to be *an* appropriate unit. *Ibid.* *See also Electronic Data Systems*, 938 F.2d at 574 (where "there is evidence to support each side's contentions" that their preferred unit is appropriate, "we cannot say that the one approved by the NLRB was clearly not appropriate" (quotation marks and citation omitted)).

Macy's also claims that the approach to bargaining unit determinations described in *Specialty Healthcare* is incorrect because it requires an employer to prove the same overwhelming community of interest between employees in the petitioned-for unit and employees outside the unit as the Board requires when a union seeks to accrete a newly-created job category or department into an existing bargaining unit. Pet. Br. 49-52. This argument too is unavailing. The fact that the Board uses the phrase "overwhelming community of interest" in accretion cases as well as in initial unit determination cases merely reflects the need for a heightened showing from different parties in different factual settings, *i.e.*, (a) where a union seeks to prove that a group of employees is properly accreted to an existing bargaining unit; and (b) where an employer seeks to prove that an otherwise appropriate initial bargaining unit determination is inappropriate because it

does not include additional employees. There is nothing improper about the Board using the same phrase to describe the heightened showing required in these two different contexts.

In an accretion, "[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*." *NLRB v. DMR Corp.*, 795 F.2d 472, 476 (5th Cir. 1986) (quoting *NLRB v. St. Regis Paper Co.*, 674 F.2d 104, 107-08 (1st Cir. 1982)) (emphasis added in *DMR Corp.*). Thus, "[t]he decision to permit an accretion . . . reflects 'a legal conclusion that two groups of employees constitute one bargaining unit.'" *Blue Man Vegas*, 529 F.3d at 422 n.* (quoting *Northland Hub, Inc.*, 304 NLRB 665, 665 (1991)). This is the same consideration – whether two groups of employees necessarily constitute one bargaining unit – that is at stake when an employer challenges an initial unit determination on the basis that it excludes employees who must be included for the unit to be appropriate. Just as a union's request for an accretion is not appropriate where there is "a distinct and separate community of interests among the employees to be accreted," *DMR Corp.*, 795 F.2d at 476, an employer cannot prove an otherwise appropriate initial unit determination inappropriate where the employees it seeks to add have a community of

interest distinct from employees within the unit. The use of the phrase "overwhelming community of interest" to describe the heightened showing an employer must make to prove that an otherwise appropriate bargaining unit is inappropriate, therefore, "complements the Board's accretion policy." *Blue Man Vegas*, 529 F.3d at 422 n.*.

In sum, the fact that the Board has chosen to use the phrase "overwhelming community of interest" rather than another similar phrase drawn from the Board's precedent to describe the heightened showing required of an employer does not constitute a change to the Board's approach to unit determinations, much less the "radical departure" that Macy's claims.

b. Macy's also contends that the Board's decision in this case improperly "dispense[d] with decades of precedent favoring storewide bargaining units consisting, at the least, of all sales employees in a retail store." Pet. Br. 15-16. The Board's conclusion that nothing in its retail store precedent renders a unit composed of all employees in the cosmetics and fragrances department of Macy's Saugus store inappropriate was clearly correct.

Macy's first contention – that Board law dictates that "'a storewide unit of all selling and non-selling employees'" is the smallest appropriate

unit in a retail store, Pet. Br. 20 (quoting *Haag Drug Co.*, 169 NLRB 877, 877 (1968)) – can be disposed of quickly. As the Board correctly explained, the line of cases Macy's relies on "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." *Macy's I* at 14, ROA 452 (citing *Haag Drug*, 169 NLRB 877, and *Sav-On Drugs*, 138 NLRB 1032 (1962)). "This line of cases, which references a 'presumptively appropriate' storewide unit, does not apply here . . . because [Local 1445] is not requesting a storewide unit, nor is there any contention [by Macy's] that employees at *other* stores must be included in the petitioned-for unit." *Ibid.* (emphasis added).

Moreover, as the Board explained clearly, "if there ever was a presumption [in the retail setting] that '*only* a unit of all employees' is appropriate, it is 'no longer applicable to department stores.'" *Ibid.* (quoting *Saks Fifth Avenue*, 247 NLRB 1047, 1051 (1980) (emphasis in *Saks*)). Indeed, that has not been Board law for half a century. *See John's Bargain Store Corp.*, 160 NLRB 1519, 1522 (1966) (explaining that "[t]he [then-]new policy, which calls for a careful evaluation of all relevant factors in each case, permits less than overall or storewide units"); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965) (although "a storewide or overall unit

is presumptively appropriate" "the Board has recently reemphasized that the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit"). And, "the appropriateness of an overall unit," such as a store-wide unit, "does *not* establish that a smaller unit is inappropriate." *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964) (emphasis added).

As an alternative, Macy's contends that a unit of all sales employees in the store is the smallest appropriate unit in the retail store setting. Pet. Br. 20-21. But as the Board explained after a detailed review of its prior precedent,

> "[T]he 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 distinct from other store employees." *Macy's I* at 15, ROA.453.

Applying that standard – which "is almost precisely the standard articulated in *Specialty Healthcare*," *ibid.* – the Board has on numerous occasions approved of less-than-storewide units in retail department stores. For example, the Board has approved of units composed solely of a store's tailor shop employees, *Foreman & Clark, Inc.*, 97 NLRB 1080 (1952),

alteration employees, *Sak's Fifth Ave.*, 247 NLRB 1047 (1980), restaurant employees, *Stern's Paramus*, 150 NLRB 799 (1965), bakery employees, *Rich's, Inc.*, 147 NLRB 163 (1964), office employees, *Montgomery Ward & Co.*, 100 NLRB 1351 (1952), auto center employees, *Sears Roebuck and Co.*, 261 NLRB 245 (1982), display installation employees, *Goldblatt Bros., Inc.*, 86 NLRB 914 (1949), building service employees, *Thalhimer Bros.*, 83 NLRB 664 (1949), and beauty salon employees, *May Department Stores Co., Kaufmann Div.*, 97 NLRB 1007 (1952), among others groups of workers. Thus, while "[t]he Board has long regarded a storewide unit of all selling and non-selling employees as a basically appropriate unit in the retail industry," it has also regularly found that "[s]maller units of retail clothing store employees are 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." *I. Magnin & Co.*, 119 NLRB 642, 643 (1957).

It bears emphasis that – contrary to Macy's and its *amici*'s claims that "the Board's decision to deem a single department of a single department store an 'appropriate' unit will wreak havoc in the retail industry," Pet. Br. 30 (capitalization omitted) – the question the Board considered in this case is *not* whether a unit composed of all the employees in a single department will

be *per se* appropriate in every case, but rather only "whether such a unit 'is appropriate in the circumstances of *this* case.'" *Macy's I* at 15, ROA 453 (quoting *Bamberger's Paramus*, 151 NLRB at 751) (emphasis in *Bamberger's*). For example, the Board recently found that a unit composed of women's shoe sales employees in a department store was inappropriate based on the application of traditional community of interest factors. *Bergdorf Goodman*, 361 NLRB No. 11 (July 28, 2014). In contrast, because in this case the Board determined that the cosmetics and fragrances department employees at Macy's Saugus store both "hav[e] a mutuality of interests" and also that that "mutuality of interests [is] not shared by other store employees," *I. Magnin*, 119 NLRB at 643, the Board's decision to approve the unit at issue here was correct.

CONCLUSION

The Decision and Order of the Board should be enforced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 8,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2015, the foregoing Brief of Local 1445, United Food and Commercial Workers International Union In Support of Respondent was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which constitutes service under the Court's rules.

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