No. 15-60022

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MACY'S, INCORPORATED,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

Petition for Review of a Decision of the National Labor Relations Board

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REPLY BRIEF OF PETITIONER CROSS-RESPONDENT

Willis J. Goldsmith
JONES DAY
222 East 41st Street
New York, NY 10017
Tel: (212) 326-3649
Fax: (212) 755-7306
wgoldsmith@jonesday.com

Shay Dvoretzky
David Raimer
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 379-3939
Fax: (202) 626-1700
sdvoretzky@jonesday.com

Counsel for Petitioner Cross-Respondent Macy's, Inc.

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INTRODUCTION

The National Labor Relations Board ("NLRB" or the "Board") found that a single department of a single department store is "a unit appropriate for . . . purposes of collective bargaining." 29 U.S.C. § 159(a). The National Labor Relations Act ("NLRA"), the Board's own precedent, and basic common sense establish otherwise. In response, the Board argues at length for a deferential standard of review. But deference has its limits. An agency "'must [1] cogently explain *why* it has exercised its discretion in a given manner' and '[2] supply a reasoned analysis' for any departure from other agency decisions." *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 369 (5th Cir. 1997) (emphasis added); *see also NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1155-56 (5th Cir. 1980). The Board has failed on both counts.

First, the Board never explains *why* the purported distinctions between sales employees in the cosmetics-and-fragrances department and sales employees in other departments matter for determining an appropriate bargaining unit. The distinctions cited by the Board—for example, that cosmetics-and-fragrances sales employees sell particular products in a particular part of the store—are not meaningful in an integrated department store where all sales employees perform the same fundamental task of selling merchandise. Moreover, these same alleged distinctions would apply to virtually every department of every department store.

Recognizing countless distinct bargaining units along these lines is nonsensical. For that reason, the Board itself—until this case—has long favored storewide bargaining units composed of all employees or all selling employees in a particular retail store. The Board provides no reasoned basis for its contrary conclusion here.

Second, the "overwhelming community of interest" test adopted in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83, 2011 NLRB LEXIS 489 (Aug. 26, 2011), and applied here departs improperly from decades of precedent governing initial unit determinations. Rather than using its own traditional analysis for initial unit determinations, the Board imported the overwhelming-community-of-interest test wholesale from the accretion context—an entirely different area of labor law. The Board's unwillingness even to acknowledge—much less explain—its break from past precedent warrants reversal by this Court. Indeed, when the Board first attempted to use the overwhelming-community-of-interest test, the Fourth Circuit held that it impermissibly affords controlling weight to the extent of union organization in violation of 29 U.S.C. § 159(c)(5). *See NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995). This Court should reach the same conclusion.

ARGUMENT

I. THE UNIT SANCTIONED BY THE BOARD WAS CLEARLY NOT APPROPRIATE

A. The Board and the Union Cannot Justify the Board's Decision to Approve a Unit of Cosmetics-and-Fragrances Sales Employees at a Single Macy's Store

As Macy's explained, there are no material distinctions among the sales employees in the Saugus store. Macy's Br. at 18-24. The factors that this Court has considered "[t]he most reliable indicium of common interests among employees"—"similarity of their work, skills, qualifications, duties and working conditions"—show that the interests of cosmetics-and-fragrances sales employees are virtually "indistinguishable" from those of other sales employees. *NLRB v. DMR Corp.*, 699 F.2d 788, 792 (5th Cir. 1983); *Amalgamated Clothing Workers v. NLRB*, 491 F.2d 595, 598 (5th Cir. 1974).

All sales employees perform the same kind of work—selling merchandise—as part of an integrated department store. Moreover, all sales employees have the same qualifications, operate under the same terms and conditions of employment, participate in the same benefits programs, enjoy the same training opportunities, are evaluated using the same criteria, collaborate in the same integrated workplace, and attend the same daily meetings. Macy's Br. at 7-10, 21-24. Accordingly, a unit limited to cosmetics-and-fragrances sales employees "'is clearly not

appropriate'" under the standards that this Court and the Board itself have long applied. *Purnell's Pride*, 609 F.2d at 1155-56 (citation omitted).

The contrary arguments made by the Board and the Union are unavailing.

1. The Board says that cosmetics-and-fragrances sales employees "work in their own distinct areas," staff "a separate department," "have separate immediate supervision," and "do not have significant regular interaction or interchange with the other [sales] employees" at the Saugus store. NLRB Br. at 16, 32. But the Board merely incants these alleged differences repeatedly, as though their "weight or significance" were self-evident. *Purnell's Pride*, 609 F.2d at 1156.

As the Board itself concedes, this Court's precedent requires the NLRB to do more than "merely 'tally the factors.'" NLRB Br. at 36. It must explain *why* these alleged distinctions render a unit of cosmetics-and-fragrances sales employees "appropriate." *Purnell's Pride*, 609 F.2d at 1156, 1160. Indeed, "the significance of neutral *rationales* for inclusion or exclusion of particular employees in collective bargaining units cannot be overstated." *See Lundy*, 68 F.3d at 1583 (emphasis added). Otherwise, the Board could simply recite "differences when the union desires exclusion of employees" and "similarities when the union desires inclusion"—leaving courts with "no means of enforcing §

9(c)(5)'s prohibition" against giving controlling weight to union-proposed units. *Id.*; *see infra* Part II.

A reasoned explanation is particularly essential here because the factors on which the Board relies would justify separate units for virtually *every* department in *every* department nationwide—contrary to the Board's own longstanding presumption that "employees in a single retail outlet form a homogeneous, identifiable, and distinct group." *Haag Drug Co.*, 169 N.L.R.B. 877, 877 (1968); Macy's Br. at 20, 52-55. Thus, the Board must "give . . . plausible reason[s for] why differences that ha[ve] seemed unimportant for many years actually ha[ve] determinative significance," and to explain "why a unit that it had again and again found to be homogeneous should be broken into subunits." *Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1094 (7th Cir. 1984).

The Board, however, failed to provide any such explanation, and the considerations upon which it purported to rely are virtually meaningless when applied in the context of a retail department store. *See* Macy's Br. at 25-29.

First, the so-called "distinct area[]" in which cosmetics-and-fragrances sales employees work is a patch of floorspace immediately adjacent to several other departments. *Id.* at 5, 9, 11. The Board does not explain why this is relevant to whether they should form a separate bargaining unit. *See Purnell's Pride*, 609 F.2d at 1160 (criticizing the Board for failing to explain "why the separate location

of the processing plant has such significance when all of the facilities are in the same general area"). Ignoring this Court's precedent, *see id.*, the Board relies instead on Board cases that are a far cry from this one because they involve employees performing fundamentally different work in entirely separate buildings—not sales employees performing the same duties under a single roof. *E.g.*, NLRB Br. at 32-33 (citing *DTG Operations, Inc.*, 357 N.L.R.B. No. 175, 2011 NLRB LEXIS 803, at *24 (Dec. 30, 2011) (unit of employees working behind the counter in a "separate" building at a rental car facility, who have different duties and working conditions than, for example, mechanics in that facility's maintenance garage)).

Second, Macy's decision to arrange its store into different sales departments does not justify departmental bargaining units. Employers organize their businesses into separate "departments" for many different reasons. Sometimes those reasons reflect unique skills. *E.g.*, *Big Y Foods, Inc.*, 238 N.L.R.B. 855 (1978) (separate bargaining unit for a grocery chain's meat department employees); Macy's Br. at 28. But other times departmental lines reflect administrative or business concerns—e.g., customer convenience, inventory management, or sales tracking—that are irrelevant to collective bargaining. *E.g.*, ROA.105 (explaining that "the way we send merchandise in is by department"). The Board must therefore do more than merely point to a departmental label to

justify the creation of a separate unit; it must "explain[] exactly why" that label is significant. *Purnell's Pride*, 609 F.2d at 1160.

Here, the fundamental nature of *all* sales employees' duties is the same: selling merchandise. Macy's Br. at 7. Macy's requires no prior skills or qualifications for any sales position within the store, ROA.443, all sales employees are governed by virtually uniform policies, Macy's Br. at 21-24, and all sales employees are trained not only to sell their own products, but also to recommend items to customers from different departments across the store, *id.* at 8. The Board offers no explanation for why, in such circumstances, a departmental bargaining unit is appropriate. To be sure, employees in the cosmetics-and-fragrances department sell different products and receive some level of distinct training. NLRB Br. at 37 n.8. But again, this could be said of virtually *any* department within any department store. Why does that make it appropriate to separate employees trained to sell cosmetics-and-fragrances products from employees trained to sell, for example, fine jewelry? *Cf. Purnell's Pride*, 609 F.2d at 1160 (criticizing the Board for failing to explain "why the uniqueness of the job functions at the processing plant is important where employees in all departments are generally 'unskilled'").

Third, the Board fails to explain the significance here of separate supervision. The sales manager for the cosmetics-and-fragrances sales department

reports to a single store manager and evaluates her employees using centrally determined, store-mandated criteria that—with trivial differences among departments—are applied uniformly across the store. Macy's Br. at 8, 26; ROA.439, 443; Union Br. at 10-11. "[T]he Board has long held that a difference in supervision does not necessarily mandate excluding differently supervised employees," *Hotel Servs. Grp., Inc.*, 328 N.L.R.B. 116, 117 (1999), and here, the Board provides no basis for its break with this longstanding rule. This Court has criticized the Board for the same failure before. *See Purnell's Pride*, 609 F.2d at 1160 (criticizing the Board for failing to explain "why the degree of departmental supervision outweighs central determination of labor policies and plant-wide hire, dismissal, and compensation").

Finally, the Board claims to have identified a lack of "contact or interchange" among employees, but its conclusions fly in the face of the undisputed facts. NLRB Br. at 33-34. The Board offers no explanation for its assertion that the transfer of nine employees into and out of the cosmetics-and-fragrances department over two years—a turnover of nearly a quarter of the department's employees—does "not establish significant interchange between petitioned-for and non-petitioned-for employees." NLRB Br. at 34. This Court has previously set aside similar *ipse dixits* by the Board. *Cf. Purnell's Pride*, 609 F.2d at 1160 ("[T]he decision does not articulate why, in the context of the

particular business, the transfer of twenty employees from one department to another is so insubstantial as to tell in favor of the unit."). [1]

More fundamentally, the Board ignores the nature of a department store, which allows customers to purchase various products in different departments. Macy's Br. at 5, 7-8, 22-24, 31; Retail Ass'ns Amicus Br. at 6-11. *Regardless* of whether sales employees regularly transfer to or pick up shifts in other departments, they work together towards the common goal of providing customers with seamless storewide service. That is why the Board has recognized "a functional integration and mutuality of interests" among employees in "retail establishments." *Woolworth Co.*, 119 N.L.R.B. 480, 484 (1957); *I. Magnin & Co.*, 119 N.L.R.B. 642, 643 (1957) (same). In other words, by its very nature, a department store is an integrated enterprise, making the Board's analogies to

[1] The Board's characterization of the level of storewide integration is wrong for additional reasons. For example, to ensure that its employees receive the commissions to which they are entitled, Macy's does not "like [its employees] to make a habit" of ringing-up *commission* items in other departments. ROA.37. The Board improperly transforms this statement into the sweeping assertion that Macy's "discourages employees from ringing up merchandise from one department in another," NLRB Br. at 34. In reality, "a lot of customers want" to make a single transaction, and Macy's "would never allow [its] associates" to decline to provide such services. ROA.36. In fact, all sales employees are trained to encourage customers to "complete" their purchases with complementary items from other departments, Macy's Br. at 8, and it is store policy for employees to "help out wherever needed," ROA.50-51, and to "service any customer with any product." ROA.104. The Board's brief never acknowledges this evidence, which Macy's discussed repeatedly in its opening brief.

computer service and telecommunications companies inapt. *E.g.*, NLRB Br. at 33 (citing *Electronic Data Sys. Corp. v. NLRB*, 938 F.2d 570, 574 (5th Cir. 1991) (lack of interaction between employees at a telecommunications company's "two facilities [that] perform[ed] fundamentally distinct functions'")).

Unable to explain the significance in the retail setting of the factors detailed above, the Board resorts to repeated assertions that these considerations "outweigh" or "offset" those favoring a storewide unit of sales employees. *E.g.*, NLRB Br. at 32, 33, 35. Such bald assertions, however, "do[] not adequately explain . . . the weight that has been assigned to each individual factor," nor do they "sufficiently justify the conclusion that the totality of the factors" favoring a "community of interest" among cosmetics-and-fragrances sales employees "preponderates over the opposing criteria." *Purnell's Pride*, 609 F.2d at 1160.

At bottom, this Court has required the Board to "assign a relative weight to each of the competing factors it considers" and then to "indicate[] clearly how the facts of the case, analyzed in light of the policies underlying the community of interest test, support its appraisal of the significance of each factor." *Purnell's Pride*, 609 F.2d at 1156-57. As the Seventh Circuit put it, the Board must do more than merely "recite" a list of purported distinctions and "tack on a conclusion that therefore" a separate unit is warranted. *Cont'l Web*, 742 F.2d at 1092. Because

that "is precisely what the Board did in this case," *id.* at 1091, its decision should be set aside.

2. The Union's arguments fare no better. According to the Union, two additional considerations support a unit of cosmetics-and-fragrances sales employees: the bargaining history between Macy's and the Union "at six other stores in the area," and the purportedly unique "three-way relationship among vendors, [cosmetics-and-fragrances sales employees,] and customers." Union Br. at 1, 3. Neither contention can rescue the Board's erroneous unit determination.

a. As an initial matter, these considerations should be given little or no weight because they did not form the basis for the Board's decision.

"The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). That is, the NLRB's "'action must be measured by what [it] did, not by what it might have done.'" *Tex. Power & Light Co. v. FCC*, 784 F.2d 1265, 1269-70 (5th Cir. 1986) (quoting *Chenery*, 318 U.S. at 93). Thus, for this Court to uphold the NLRB's unit determination, "the reasons [for that affirmance] must be contained" in the Board's order: this Court "may not accept appellate counsel's post hoc rationalizations for agency action." *NLRB v. Pioneer Nat. Gas Co.*, 397 F.2d 573, 576 (5th Cir. 1968).

Here, the "considerations urged [by the Union] in support of the [NLRB's] order were not those upon which its action was based." *Chenery*, 318 U.S. at 92. The Regional Director did not rely on the "bargaining history" cited by the Union in his Decision and Direction of Election. ROA.232 n.39. And the Board relegated its discussion of that topic to a footnote, concluding that, at most, it provided "limited additional support for the [Union's] position," while noting that it "would find the petitioned-for unit appropriate without that evidence." ROA.451 n.50. The Board likewise disclaimed reliance on the purported "unique relationship" among cosmetics-and-fragrances sales employees, vendors, and customers, explaining that the "'meaningful differences'" cited by the Union were "not fully supported by the record." ROA.449; Macy's Br. at 11-13.

b. There was good reason for the Board not to rely on these factors.

With respect to bargaining history, the Union incorrectly asserts that "Macy's and Local 1445 have engaged in successful collective bargaining for *a unit* of cosmetics and fragrances department employees for a decade" at the Warwick store. Union Br. at 2. In reality, the cosmetics-and-fragrances sales employees at that store "*join*[*ed* an] existing five-store unit" consisting of all "selling and support employees" at Macy's Braintree, Natick, Peabody, Belmont, and Warwick locations. ROA.443. To be sure, the agreement covering that five-store unit now "sets forth a number of provisions

applicable only to the Warwick cosmetics and fragrances employees," ROA.443, but if anything, this history shows that cosmetics-and-fragrances sales employees can be successfully integrated into larger, storewide bargaining units. At no point has Macy's bargained with a unit consisting exclusively of cosmetics-and-fragrances sales employees.

In any event, the bargaining history of other Macy's locations arose in vastly different circumstances. The employees at those locations unionized decades ago when those stores were owned by different companies—Jordan Marsh and Filene's. ROA.443; *see also* ROA.117 (noting that the Filene's locations had been organized "[l]onger than you and I have been alive"). There is "no further evidence" in the record about "how th[ese] unit[s] came into existence," ROA.443 (e.g., by the consent of the parties or pursuant to a direction of election from the Board), or about other factors that could make analogy to this case inapt. *See Laboratory Corp. of Am. Holdings*, 341 N.L.R.B. 1079, 1083 (2004) ("It has long been the Board's policy not to consider itself bound by a bargaining history (or lack of bargaining history) resulting from a consent election in a unit stipulated by the parties rather than one determined by the Board.").

In such circumstances, bargaining history at other facilities is irrelevant. For example, in *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40 (1st Cir. 1981), a union argued for a unit of "meat department employees in 11 of the Company's [16] stores." *Id.* at 41. The employer countered that such a unit was inappropriate in light of "the over 10-year successful bargaining history between the Company" and the union as representative for employees in "*all* departments" in "the 5 stores not involved in these proceedings," which had been acquired from another company. *Id.* at 42, 46-47 (emphasis added). The First Circuit held that the NLRB had given "the obviously correct answer to that contention: what the Company and the [Union] did with respect to employees in 5 stores acquired from [another company] is not part of the bargaining history of the employees in the instant case," and is thus irrelevant. *Id.* at 47. The same is true here.

c. With respect to the relationships among cosmetics-and-fragrances sales employees, vendors, and customers, the Board correctly concluded that the departmental "distinctions" asserted by the Union were "not fully supported by the record." ROA.449. Both within *and* outside the cosmetics-and-fragrances department, Macy's coordinates with vendor representatives for training and hiring purposes, and some sales employees receive

commissions, maintain client lists, and adhere to the store's "basic black" dress code. Macy's Br. at 12-13; NLRB Br. at 9-10; Union Br. at 11. Moreover, within the cosmetics-and-fragrances department, these practices do not apply to all sales employees. For example, vendors do not play any role in the hiring of fragrances or on-call sales employees, and on-call sales employees do not attend vendor training available to other cosmetics-and-fragrances sales employees. ROA.446-47. Likewise, rather than specialize in a particular vendor's products, both fragrances and on-call sales employees sell all vendors' merchandise. ROA.440, 446. Thus, the considerations cited by the Union are neither unique to cosmetics-and-fragrances sales employees nor applicable to all employees in that department. They therefore provide no support for a separate bargaining unit consisting solely of the cosmetics-and-fragrances sales employees at the Saugus store.[2]

[2] Moreover, if the "deep involvement of third-party vendors" and the need for "brand-identification" are, as the Union argues, so significant as to warrant the creation of a separate unit, it is unclear why it would be appropriate to include on-call and fragrances sales employees in the petitioned for unit. Indeed, on-call employees appear to be *excluded* from the five-store collective bargaining agreement upon which the Union relies. ROA.Vol. II, Union Ex. 1, p.4 (recognizing "the Union as the sole collective bargaining agent [for covered employees at the five stores] *and the Beauty Advisors in the Warwick, Rhode Island store*" (emphasis added)).

B. The Board's Decision Will Have Significant Repercussions for the Retail Industry

The unit approved by the Board is also clearly inappropriate because of the consequences it will have for the retail industry. Macy's Br. at 30-34. The proliferation of bargaining units within a single store threatens to undermine the business model for all department stores as well as the bargaining rights and career opportunities of employees. *See id.*; Retail Ass'ns Amicus Br. at 6-11, 13-18; Chamber Amicus Br. at 17-20 ; HR Policy Amicus Br. at 7-11.

The Board's brief underscores these concerns. As noted above, the factors relied upon by the Board to sanction a unit of cosmetics-and-fragrances sales employees have no limiting principle. The Board's reasoning would justify the unionization of virtually every department in every department store. *Supra* p.5. Macy's fears about potentially being "compelled to bargain with upwards of 8,000 units across the country" are thus fully warranted. Macy's Br. at 3.

The Board mischaracterizes Macy's position when it says that Macy's objects to small bargaining units. NLRB Br. at 50-52. Macy's objects to the Board's decision not because it resulted in a "small" unit, but because it endorsed a unit wholly unsuited for the retail industry. *See* Macy's Br. at 30-34. While "the Act does not prohibit multiple units at an employer," NLRB Br. at 51, those units must be "appropriate" for the particular context. For the reasons expressed by Macy's and its amici, it is clearly not appropriate to fracture a department store

into a dozen different bargaining units. *See* Macy's Br. at 30-34. In such circumstances, customers could be denied basic services, employees could find their careers short-circuited, and employers could confront insuperable administrative obstacles. *See id.*

Finally, the Board is wrong to claim that "the *Specialty* standard" safeguards employees' "right to refrain from engaging in concerted activity." NLRB Br. at 53. "[O]ther store employees have the right, as well as the opportunity, to organize or refrain from doing so," *id.*, but as Macy's explained, those employees' bargaining power may be curtailed due to the proliferation of competing unions, Macy's Br. at 33. Moreover, when unions are invited to gerrymander proposed units, an employee's right to "refrain" from collective bargaining is illusory. *Id.* at 33-34. Here, for example, the "right" to vote against organization is cold comfort for the 18 employees who voted against a cosmetics-and-fragrances unit. ROA.472. While they were in the majority with respect to the initial storewide petition, the Union effectively nullified their votes by "engag[ing] in incremental organizing." *Specialty Healthcare*, 2011 NLRB LEXIS 489, at *86 (Member Hayes, dissenting).

II. THE OVERWHELMING-COMMUNITY-OF-INTEREST TEST VIOLATES THE NLRA

Despite the lack of meaningful distinctions among sales employees at the Saugus store, the Board certified a cosmetics-and-fragrances unit by applying the

overwhelming-community-of-interest test set forth in *Specialty Healthcare*. As Macy's explained, Congress entrusted the Board with the responsibility to make unit determinations "in each case," 29 U.S.C. § 159(b), without allowing "the extent to which the employees have organized" to be "controlling," *id.* § 159(c)(5); Macy's Br. 37-45. The Board's overwhelming-community-of-interest standard violates this command by effectively making the union's choice of unit the "dominant" factor in the Board's determination. *See Lundy*, 68 F.3d at 1580.

Relying on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), and *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Board claims that *Specialty Healthcare*'s overwhelming-community-of-interest test "ensures that the extent of [union] organization w[ill] not be the controlling factor." NLRB Br. at 39. According to the Board, the Fourth Circuit's concern in *Lundy* was that the overwhelming-community-of-interest test "*presumed*" the propriety of the union-proposed unit. NLRB Br. at 42. The Board claims that *Specialty Healthcare* solves this problem by first determining (without a presumption) whether the petitioned-for unit is appropriate and only then requiring the employer to show that excluded employees share an "overwhelming community of interest" with those in the proposed unit. *See id.* at 39-40.

As an initial matter, *Specialty Healthcare* belies the Board's claim that its standard is "vastly and crucially different" from that rejected in *Lundy*. 2011

NLRB LEXIS 489, at *51 n.25; Macy's Br. at 40. The Board itself admitted that *Specialty Healthcare* "articulate[s] the same standard" as in *Lundy*, justifying that standard by citing the very decision that the Fourth Circuit found to violate 29 U.S.C. § 159(c)(5). 2011 NLRB LEXIS 489, at *50-51 (citing *Lundy Packing Co.*, 314 N.L.R.B. 1042, 1043 (1994)). Thus, the Fourth Circuit's primary concern with the overwhelming-community-of-interest test articulated in *Lundy* remains equally applicable to the overwhelming-community-of-interest test articulated in *Specialty Healthcare*. *See* Macy's Br. at 38-39. Allowing an employer to challenge the propriety of a union-proposed unit only if it can show that excluded employees share an "overwhelming community of interest" with those in the petitioned-for unit "effectively accord[s] controlling weight to the extent of union organization," and thus "runs afoul of § 9(c)(5)." *Lundy*, 68 F.3d at 1581, 1582. [3]

But even if the Board were correct that "the *Lundy* court's objection was that the Board had *presumed* the petitioned-for unit was appropriate," NLRB Br. at 42, the Board's current standard fares no better. The first step of the *Specialty*

[3] The Board relies heavily on *Blue Man*. NLRB Br. at 46. But as Macy's explained, the D.C. Circuit erred by relying on cases applying an appellate standard of review, Macy's Br. at 42-45, and an inapt analogy to accretion cases, *id.* at 42 n.3, 49-52. The Board continues to conflate the standard applicable *on appeal* with the standard the Board applies in making its *initial* unit determination. *See* NLRB Br. at 30 (arguing that this Court's precedent is consistent with *Specialty Healthcare* because it holds "an employer seeking a larger unit to a higher burden when the petitioned-for unit shares a community of interest"). And the Board's arguments concerning the accretion standard fail for the reasons discussed below. *See infra* pp.24-26.

Healthcare inquiry—asking whether employees in the petitioned-for unit are "readily identifiable as a group" and share "a community of interest," 2011 NLRB LEXIS 489, at *51 n.25—amounts to a virtually irrebuttable presumption favoring the union's proposed unit. *See* Macy's Br. at 43-44, 47-49; HR Policy Amicus Br. at 13-16.

As Macy's has explained, before *Specialty Healthcare*, the Board "*never* address[ed], solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-12 (1980) (emphasis added). The reason for this is obvious: "numerous groups of employees"—when viewed in isolation—"fairly can be said to possess employment conditions or interests 'in common.'" *Id*. Such a test would sanction a union-proposed unit of half the butchers employed by a grocery store, or a third of the appellate litigation associates in a law firm. After all, those employees share some common interests. But those interests are also shared by the remainder of their colleagues. For that reason, before *Specialty Healthcare*, the Board did not deem a unit appropriate without deciding "whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *Id.* (emphasis added).

By contrast, under *Specialty Healthcare*, the Board "will find the petitioned-for unit to be an appropriate unit" so long as the unit is "readily identifiable" and

shares "a community of interest," *Specialty Healthcare*, 2011 NLRB LEXIS 489, at *54; NLRB Br. 23-26. Significantly, it will make this determination *without considering* whether the interests of the employees within the proposed unit are sufficiently distinct from those of other employees. *See id.* The Board's brief in this case reflects this approach, considering the interests of the cosmetic-and-fragrances sales employees in isolation. *See* NLRB Br. 23-26. For example, the Board relies on the fact that cosmetics-and-fragrances sales employees "receive the same benefits, and are subject to the same employer policies," *id.* at 24—even though the same is true of all sales employees in the store.

In other words, the first step of the *Specialty Healthcare* analysis does what the Board previously claimed it would "never" do—deem a unit appropriate by considering the interests of a petitioned-for unit "in isolation." *Newton-Wellesley Hosp.*, 250 N.L.R.B. at 411-12. Because almost any group of employees can be found to share a community of interest when considered in isolation, this standard amounts to a presumption in favor of the union-proposed unit—precisely the problem that, according to the Board, was the basis for the Fourth Circuit's decision in *Lundy*.[4]

[4] The Board's rejection of union-proposed units after *Specialty Healthcare* because they do not correspond to departmental or job classification lines, NLRB Br. at 43 n.9, 45 n.11 (citing *Neiman Marcus Grp.*, 361 N.L.R.B. No. 11, 2011 NLRB LEXIS 709 (2014), *Odwalla, Inc.*, 357 N.L.R.B. No. 132, 2014 NLRB LEXIS 587 (2011)), does not change the conclusion that the overwhelming-

Accordingly, *Specialty Healthcare* contravenes the NLRA, and its application here requires that the Board's decision be set aside.

III. THE BOARD DEPARTED FROM PAST PRECEDENT WITHOUT A REASONED EXPLANATION IN ADOPTING THE OVERWHELMING-COMMUNITY-OF-INTEREST TEST AS THE RULE FOR ALL FUTURE UNIT DETERMINATIONS

In addition to violating the NLRA, *Specialty Healthcare* "fundamentally change[d] the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." 2011 NLRB LEXIS 489, at *65 (Member Hayes, dissenting); Macy's Br. at 45-55. Abandoning the multi-factor balancing test previously applied to determine the propriety of a proposed unit, the Board imported the overwhelming-community-of-interest test from the accretion context and dispensed with longstanding precedent favoring storewide bargaining units. Macy's Br. at 49-55.

If the Board wishes to "change its view of what test is to be applied in unit determination cases and what factors are to be considered in its application," it must "announce the change of mind and the reasons supporting the change." *Rayonier, Inc. v. NLRB*, 380 F.2d 187, 189 (5th Cir. 1967). And if it does so

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community-of-interest test affords controlling weight to the union's choice of unit. "As long as a union does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a particular classification[or] department . . . it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees. Board review of the scope of the unit has now been rendered largely irrelevant." *DTG Operations*, 2011 NLRB LEXIS 803, at *36-37 (Member Hayes, dissenting).

through a "generalized," "basically legislative-type judgment" that will have "prospective application" beyond the "particular set of disputed facts" at issue, *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973), it must comply with the requirements of the Administrative Procedure Act for rulemaking, Macy's Br. at 55-60.

The Board responds principally by insisting that it "made no policy change" in *Specialty Healthcare*. NLRB Br. at 47-48. The Board maintains that "although different language has been used over the years," it has "consistently applied" the overwhelming-community-of-interest standard, and that *Specialty Healthcare* merely "clarif[ied] existing law. *Id.* at 27-28 & nn.4 & 5, 45, 47. These claims cannot withstand even cursory scrutiny.

1. This Court should not take the NLRB at its word that its overwhelming-community-of-interest test is a mere "clarification" of existing precedent. NLRB Br. at 47. Blindly accepting the Board's characterization "would enable the [Board] to make substantive changes in the guise of clarification.'" *Smith v. Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000) (citation omitted). "The particular label placed upon a regulation is not necessarily conclusive"; rather, "'it is the substance of what the [agency] has purported to do and has done which is decisive.'" *Detroit Edison Co. v. EPA*, 496 F.3d 244, 249

(6th Cir. 1974) (citation omitted).[5] And for the reasons expressed below, "the substance of what the [NRLB] has purported to do" reflects a material change in the Board's approach to unit determination.

2. The Board's use of the accretion standard to make initial unit determinations starkly illustrates its break from past precedent.

As Macy's explained, an accretion is the forcible addition of employees to an existing bargaining unit. Macy's Br. at 49-50. Because this compulsory unionization creates "substantial tension" with the NLRA's "guarantee of employee self determination," the Board has required an exceptionally high showing to accrete employees to an existing unit. *NLRB. v. Superior Prot.*, 401 F.3d 282, 287-88 (5th Cir. 2005); *Lundy*, 68 F.3d at 1581 (stating that "[i]n accretion cases," "the showing of shared characteristics must be higher" because "new employees are added to an existing bargaining unit *without* a representation election"); *Archer Daniels Midland Co.*, 333 N.L.R.B. 673, 675 (2001) ("[T]he Board has followed a restrictive policy in finding accretions to existing units because the Board seeks to insure that the right of employees to determine their

[5] Indeed, even the Seventh Circuit, in the case cited by the Board, admits that deference is not warranted where there is "inconsistency with [the agency's] previously stated position." *First Nat'l Bank of Chi. v. Standard Bank & Trust*, 172 F.3d 472, 479 (7th Cir. 1999); *see also Pettibone Corp. v. United States*, 34 F.3d 536, 542 (7th Cir. 1994) ("In 1994 the IRS changed its view. We do not accept its assertion that the 1994 version merely restates and clarifies the 'real' meaning of the older regulation.").

own bargaining representatives is not foreclosed."). That exceptionally high showing requires the employer to demonstrate that the employees to be accreted "'share an overwhelming community of interest with the preexisting unit.'" *Superior Prot.*, 401 F.3d at 288 (quoting *Safeway Stores, Inc.*, 256 N.L.R.B. 918 (1981)).

The Board now suggests that the showing necessary to challenge the propriety of a union-proposed unit *is and always has been* the same showing necessary for the "rare" and "extraordinary" case, *Superior Prot.*, 401 F.3d at 288 & n.9, in which an employee is compelled to join an existing unit, NLRB Br. at 48 (asserting that the standard the Board now applies in the initial unit determination context is the "exact" test it has applied in accretion cases). This is simply wrong. As this Court and others have explained, the accretion test has always been understood to be "*substantially more stringent* than the traditional community of interest test applied in 'the Board's more ordinary decision to certify initially a particular group of employees as an appropriate bargaining unit.'" *Superior Prot.*, 401 F.3d at 288 n.9 (emphasis added); *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 427 (4th Cir. 2001) (stating that "a decision to accrete employees to a unit *without an election* requires *a showing of much more*" than is required in initial unit determinations (second emphasis added)).

Moreover, contrary to the Union's argument, the "consideration[s]" in initial unit determinations and accretions are not "the same." Union Br. at 37. Because employees will have the opportunity to vote for or against unionization after the Board makes its decision, the "heightened concern" for employee self-determination rights that necessitates the use of the overwhelming-community-of-interest test in accretion cases, *Superior Prot.*, 401 F.3d at 287 n.6, is absent in the initial unit determination context.

Thus, the Board's use of the accretion standard to make initial unit determinations belies its argument that the *Specialty Healthcare* test does not depart from past precedent.

3. The Board is also wrong in arguing that it has applied the overwhelming-community-of-interest test in "prior unit determination cases." NLRB Br. at 48.

The Board and the Union cite several Regional Director Decisions, NLRB Br. at 28 & n.5, and three Board decisions that use the phrase "overwhelming community of interest," *id.* at 28 & n.5, 45, 47 n.12, 48; *see also* Union Br. at 34 n.7. But "'Regional Director's Decisions do not have precedential value.'" *Rental Uniform Serv., Inc.*, 330 N.L.R.B. 334, 336 n.10 (1999) (citation omitted). And, as Macy's previously explained, none of the three Board decisions cited by the NLRB and the Union (and also cited in *Specialty Healthcare* and *Blue Man*) show that the

Board endorsed the overwhelming-community-of-interest test. Macy's Br. at 42 n.3, 49 n.5. In *Logidan, Inc.*, 332 N.L.R.B. 1246 (2000), the phrase "overwhelming community of interest" merely appears in a Regional Director's Decision attached as an appendix to an order denying review. In *Laneco Construction Systems*, 339 N.L.R.B. 1048, 1050 (2003), and *Jewish Hospital Association*, 223 N.L.R.B. 614, 617 (1976), the phrase is used in recounting *the employer's* arguments. In any event, it is telling that out of the hundreds of initial unit determinations cases, the Board, the Union, and the D.C. Circuit could find only three decisions that parrot the standard the NLRB claims to have "consistently" applied. NLRB Br. at 28; Union Br. at 34 n.7.

The Board is also incorrect to argue that it has previously applied the overwhelming-community-of-interest test using "'slightly varying verbal formulations.'" *E.g.*, NLRB Br. at 27 n.4; *id.* at 46-47 & n.12; Union Br. at 35. As Macy's has explained, *Specialty Healthcare* is not the test the Board has applied in the past. *E.g.*, Macy's Br. at 43-44, 47-49; *supra* pp.20-21 (detailing how the Board's "sufficiently distinct" standard differs from the overwhelming-community-of-interest test). The Board itself confirms this by distinguishing prior caselaw on the basis that it was "decided before *Specialty Healthcare*[and] did not apply the *Specialty Healthcare* framework." ROA.451; Macy's Br. at 48-49.

At bottom, before *Specialty Healthcare*, the Board decided the propriety of a petitioned-for unit through a multi-factor balancing test focused on "'whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.'" Macy's Br. at 47-49 (citation omitted). The Board has abruptly replaced that multi-factor balancing test with a rigid, two-step formula that places an almost insuperable burden on any employer challenging a petitioned-for unit. Whereas before, the Board said it would not deem a unit appropriate simply by considering the interests of the petitioned for unit in isolation, that is now exactly what it does. And while the Board previously took it upon itself to decide whether the interests of the petitioned-for unit were sufficiently distinct from those of excluded employees, the *employer* is now forced to show that excluded employees share an "overwhelming community of interest" with those in the proposed unit. In light of this obvious change of course, the Board cannot credibly claim to be applying the same standard it has "always" applied, NLRB Br. at 47, and its failure to fully explain its departure from past precedent is fatal to the decision at issue here.

4. The contention that *Specialty Healthcare* does not run afoul of prior precedents favoring storewide units fares no better. *Id.* at 53; Union Br. 38-42. As Macy's explained, the Board has consistently rejected petitioned-for units consisting solely of the employees of a particular department within a retail store.

Macy's Br. at 52-55. And even when the Board has deviated from the presumption favoring units of all storewide employees, it has endorsed storewide units of selling or nonselling employees or units with craft-like skills—it has never before sanctioned a unit consisting of a particular subset of selling employees within a particular store. *See id.*

The Board does not deny that this decision is the first of its kind. NLRB Br. at 57. Instead, it repeats the mantra that "the sole question is whether the unit is appropriate in the circumstances of this case." *Id.* That, however, does not absolve the Board of its duty to explain *why* it has concluded that the purported distinctions that it has identified between cosmetics-and-fragrances sales employees and other sales employees, *see supra* Part I.A, warrant a separate bargaining unit, when such distinctions have been insufficient in the past, *e.g.*, *I. Magnin & Co.*, 119 N.L.R.B. 642. Indeed, because such "distinctions" could describe virtually any department store in the country, they ring particularly hollow in light of the Board's prior assertions that its "policy in department store cases" was to expand proposed units "to encompass all store employees." *Kushins & Papagallo Divisions of U.S. Shoe Retail, Inc.*, 199 N.L.R.B. 631, 631-32 (1972).[6]

[6] In addition to its claim that the rule announced in *Specialty Healthcare* is "not new," the Board offers several additional reasons why it did not need to comply with the APA's rulemaking procedures. These reasons are unpersuasive. For example, the Board claims that Macy's "rel[ies] on two distinguishable Ninth Circuit decisions" without explaining why those decisions are distinguishable.

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The Board is wrong to claim that the rule announced in *Specialty Healthcare* is "not new." Accordingly, that rule must be set aside, both because the Board failed to provide any explanation for its departure from past precedent, and because it promulgated a new rule outside the framework of the APA.

CONCLUSION

For the reasons articulated above, this Court should grant the petition for review and deny the Board's cross-application for enforcement. At a minimum, the matter should be remanded to the Board with instructions to apply the appropriate legal standard or to further explicate the reasons for its decision.

NLRB Br. at 48. Macy's has never denied that the Board may "announc[e] new principles in an adjudicative proceeding," NLRB Br. at 48, but has argued that it was improper to do so in the circumstances of *Specialty Healthcare*—which was originally about nothing more than the standard for unit determinations in non-acute healthcare facilities, Macy's Br. at 55-60. Instead of limiting itself to the facts and parties before it, the Board reached out to issue a "policy-type rule[] or standard[]" to be applied in all future unit determination cases. *Fla. E. Coast Ry. Co.*, 410 U.S. at 245.

Respectfully submitted,

/s/ Shay Dvoretzky

Willis J. Goldsmith
JONES DAY
222 East 41st Street
New York, NY 10017
Tel: (212) 326-3649
Fax: (212) 755-7306
wgoldsmith@jonesday.com

Shay Dvoretzky
David Raimer
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 379-3939
Fax: (202) 626-1700
sdvoretzky@jonesday.com

Counsel for Petitioner Cross-Respondent Macy's, Inc.

CERTIFICATE OF SERVICE

I hereby certify that this July 13, 2015, I caused a true and correct copy of the foregoing Reply Brief of Petitioner Cross-Respondent to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Shay Dvoretzky
Shay Dvoretzky