No. 16-1016

In the Supreme Court of the United States

MACY'S, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

The National Labor Relations Act, 29 U.S.C. 159(b), authorizes the National Labor Relations Board to designate a unit of employees appropriate for the purpose of collective bargaining in each case. The question presented is whether, on the facts of this case, the court of appeals correctly upheld the Board's determination that a unit of cosmetics and fragrances department employees at one of petitioner's department stores is an appropriate unit for collective bargaining.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 824 F.3d 557. The opinion of the National Labor Relations Board approving the bargaining unit (Pet. App. 25a-134a) is reported at 361 N.L.R.B. No. 4. The opinion of the Board finding that petitioner unlawfully refused to bargain with the exclusive collective-bargaining representative of that unit (Pet. App. 135a-145a) is reported at 361 N.L.R.B. No. 163.

JURISDICTION

The judgment of the court of appeals (Pet. App. 167a) was entered on June 2, 2016. A petition for rehearing was denied on November 18, 2016 (Pet. App. 147a). The petition for a writ of certiorari was filed on February 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, to "safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939). To that end, the NLRA establishes mechanisms to resolve questions about union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160. The Board is the "specific and specially constituted tribunal" that Congress vested with "primary" authority to interpret and apply the rules set out in the NLRA. *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953); see 29 U.S.C. 153, 154, 159, 160.

Section 159 of the Act, 29 U.S.C. 159, sets out a framework for determining whether a majority of employees in an appropriate bargaining unit desire union representation for purposes of collective bargaining. Section 159(b) provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b). The Board's designation of an appropriate unit "involves of necessity a large measure of informed discretion." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). "[E]mployees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit." *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 610 (1991). Accordingly, the Board's determination that a unit is appropriate, "if not final, is

rarely to be disturbed." *South Prairie Constr. Co.* v. *Operating Eng'rs, Local 627*, 425 U.S. 800, 805 (1976) (per curiam) (quoting *Packard Motor Car Co.*, 330 U.S. at 491).

In determining whether the petitioned-for unit is appropriate, the Board's "focus is on whether the employees share a 'community of interest.'" *NLRB* v. *Action Auto., Inc.*, 469 U.S. 490, 494 (1984). The Board examines a range of factors to determine whether the proposed unit constitutes "a readily identifiable and functionally distinct group" of employees "with common interests distinguishable from the Employer's other" employees. *United Operations, Inc.*, 338 N.L.R.B. 123, 123 (2002); accord *Blue Man Vegas, LLC* v. *NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008).

In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011) (*Specialty Healthcare*), enforced *sub nom. Kindred Nursing Centers E., LLC* v. *NLRB*, 727 F.3d 552, 561-565 (6th Cir. 2013), the Board undertook an examination of its precedent and, on that basis, clarified a two-step analysis for determining whether a unit is appropriate for purposes of collective bargaining. *Id.* at 943-945. First, the Board determines whether employees in the petitioned-for unit are "readily identifiable as a group" and share a community of interest under the Board's traditional community-of-interest factors that it has long found relevant for purposes of collective bargaining. *Id.* at 941-943. That analysis considers factors such as whether:

> the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with

> the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id. at 942 (quoting *United Operations*, 338 N.L.R.B. at 123). The Board also explained that the unit proposed by the union is a relevant consideration. *Id.* at 941-942. Although 29 U.S.C. 159(c)(5) provides that "the extent to which the employees have organized shall not be controlling," this Court has stated that the Board can "consider[] extent of organization as one factor, though not the controlling factor in its unit determination." *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442 (1965).

Second, if the objecting party claims that the petitioned-for unit is inappropriate because it excludes certain employees, the Board then requires that party to show that the excluded employees share "an overwhelming community of interest" with those in the petitioned-for unit, such that no legitimate basis exists to exclude them because the traditional community-of-interest factors overlap almost completely. *Specialty Healthcare*, 357 N.L.R.B. at 944-947. This heightened showing recognizes that because "the statute requires only *an* appropriate unit," "it cannot be that the mere fact that [unit employees] also share a community of interest with additional employees renders the smaller unit inappropriate." *Id.* at 943 (citing *Blue Man Vegas*, 529 F.3d at 421).

Every court of appeals to review the Board's *Specialty Healthcare* framework has approved it. *E.g.*, *Constellation Brands, Inc.* v. *NLRB*, 842 F.3d 784, 791-793 (2d Cir. 2016); *FedEx Freight, Inc.* v. *NLRB*, 839 F.3d 636, 638-639 (7th Cir. 2016); *NLRB* v. *FedEx Freight, Inc.*, 832 F.3d 432, 439-445 (3d Cir. 2016); *Nestle*

Dreyer's Ice Cream Co. v. *NLRB*, 821 F.3d 489, 495-502 (4th Cir. 2016); *FedEx Freight, Inc.* v. *NLRB*, 816 F.3d 515, 522-527 (8th Cir. 2016), reh'g & reh'g en banc denied, No. 15-1848 (8th Cir. May 26, 2016); *Kindred Nursing Ctrs. E., LLC* v. *NLRB*, 727 F.3d 552, 561-565 (6th Cir. 2013).

2. Petitioner's department store in Saugus, Massachusetts, is divided into 11 primary sales departments, including one for cosmetics and fragrances. Forty-one employees work in that department. The store has about 80 additional selling employees spread out across the ten other departments, and 30 non-selling employees. Pet. App. 5a, 27a-28a.

The cosmetics and fragrances department occupies two connected physical areas that are spatially distinct from, though adjacent to, some other sales departments. Pet. App. 29a. The cosmetics and fragrances employees work under the direct supervision of their department's sales manager, who has no responsibilities for other departments. Other department managers have no responsibility for supervising cosmetics and fragrances. *Id.* at 27a-28a, 34a.

Cosmetics and fragrances employees are the only employees who sell those products, and they receive training specific to that function. Pet. App. 29a-30a. Employees in other sales departments receive training for the products they sell. *Id.* at 31a-32a, 34a-36a. Cosmetics and fragrances department employees are not assigned to work in other departments, other than assisting with periodic inventory; and employees in other departments are not assigned to work in cosmetics and fragrances. *Id.* at 39a-40a & n.25. Although customers may occasionally pay for cosmetics and fragrances in other departments, petitioner does not want employees

to "make a habit" of ringing up those cross-department purchases because no one earns a commission in those circumstances. *Id.* at 37a-38a. Cosmetics and fragrances employees have little contact with other employees beyond daily 15-minute employee rallies. *Id.* at 38a. Over a two-year period, eight employees permanently transferred into the cosmetics and fragrances department, and one employee transferred out, to a supervisory position. *Id.* at 40a. Cosmetics and fragrances employees are all paid on a base wage-plus-commission basis, unlike employees in some of the other selling departments. *Id.* at 32a, 36a-37a. All sales employees receive the same benefits, and are subject to the same employer policies. *Id.* at 40a.

3. In October 2012, respondent United Food and Commercial Workers International Union, Local 1445 (union) petitioned to represent the 41 cosmetics and fragrances employees. Pet. App. 5a. Petitioner opposed, arguing that "the smallest appropriate unit must include all employees at the Saugus store or, in the alternative, all selling employees at the store." *Ibid.* After a hearing, the Board's regional director approved the petitioned-for unit. *Id.* at 42a-43a. Applying the *Specialty Healthcare* framework, the regional director first found that the cosmetics and fragrances employees are readily identifiable as a group and share a community of interest, and therefore constitute an appropriate unit. *Ibid.* Second, the regional director found that petitioner had not met its burden of showing that the excluded employees share an "overwhelming community of interest" with the employees in the cosmetics and fragrances department, such that no legitimate basis exists to exclude them. *Id.* at 43a. The regional director

explained that, "even before *Specialty Healthcare* the petitioned-for unit would have been appropriate." *Ibid.*

Petitioner filed a request for review, which the Board granted. In its resulting decision, the Board affirmed the regional director's findings. Pet. App. 25a-88a. First, applying step one of *Specialty Healthcare*, the Board determined that the cosmetics-and-fragrances employees share a community of interest. *Id.* at 49a. The Board explained that the petitioned-for unit is "coextensive with a departmental line that the Employer has drawn," and subject to direct supervision by the department sales manager. *Id.* at 49a-50a. The Board also noted that cosmetics and fragrances employees are "readily identifiable" based on their classifications and functions, and their status as the only employees who sell those products. *Ibid.* The Board pointed out that these employees have little daily contact with other selling employees, that "there are only nine examples of permanent transfers into, or out of, the cosmetics and fragrances department over the last 2 years"; and that all the cosmetics-and-fragrances employees were "paid on a base-plus commission basis." *Id.* at 50a.

The Board also recognized that there were "some differences" among the employees in the cosmetics and fragrances department, including that on-call employees "earn a slightly smaller commission than beauty advisors and counter managers." Pet. App. 51a. But it found that "minor" differences in compensation and other differences were "insignificant compared to the strong evidence of community of interest that they share." *Ibid.*

Next, applying *Specialty Healthcare* step two, the Board found that petitioner had not carried its burden of establishing its contention that the excluded employees share an "overwhelming community of interest"

with the employees in the cosmetics and fragrances department. Pet. App. 53a.[1] While acknowledging some similarities between the cosmetics-and-fragrances employees and certain other selling employees, the Board concluded that a larger unit including all selling employees was not required given the "clear distinctions" between those two groups. *Ibid.* The Board explained that cosmetics and fragrances employees work in a separate department from all other selling employees, which tracks a "dividing line" drawn by petitioner; that the cosmetics and fragrances department "is structured differently than other primary sales departments," as there is "no evidence that other departments have the equivalent of counter managers" or on-call employees; that the entire department is under separate immediate supervision; that the entire department works its "own distinct selling areas"; and that the employees lack significant contact or interchange with the other selling employees. *Id.* at 53a-57a. Likewise, the Board explained that the limited number of permanent transfers over a two-year period did not establish significant interchange or mandate a larger unit, particularly given the relatively large size of the 41-employee unit. *Id.* at 56a. Those differences also offset the fact that the included and excluded sales employees have the same general selling function. *Id.* at 58a-59a. The Board acknowledged that all selling employees are commonly supervised at the highest level by the store manager, but explained that that factor was outweighed by the absence of evidence of daily interaction between the store manager and any sales employees. *Id.* at 54a &

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[1] The Board noted that there was little or no record evidence concerning the non-selling employees. Pet. App. 33a, 53a.

n.38. And evidence of commonalities between the included and excluded employees—such as work shifts, benefits, and employment policies—did not establish an almost complete overlap between the two groups or render the petitioned-for unit inappropriate. *Id.* at 60a-61a.

In August 2014, an election was held in which the cosmetics and fragrances department employees voted 23 to 18 in favor of union representation, and the Board certified the union as their exclusive collective-bargaining representative. See Pet. 10. Petitioner then refused to bargain to test the Board's certification of the union. The union filed an unfair labor practice charge, and the Board's general counsel issued a complaint alleging that petitioner's refusal violated Section 158(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). Pet. App. 135a. Finding that all representation issues were or could have been litigated in the representation proceeding, the Board granted the general counsel's motion for summary judgment, found that petitioner's refusal to bargain with the union violated the Act, and ordered petitioner to bargain with the union. *Id.* at 135a-145a.

4. The court of appeals enforced the Board's order. Pet. App. 1a-24a. First, the court rejected petitioner's contention that the Board's *Specialty Healthcare* framework is inconsistent with the Act and Board precedent. In so doing, the court joined its sister circuits in approving the framework. *Id.* at 15a-17a (collecting cases). The court explained that, in identifying the two-step framework, *Specialty Healthcare* "clarified the principles that apply in cases, such as this one, where a party contends that the smallest appropriate bargaining unit must include additional employees beyond those in the petitioned-for unit." *Id.* at 10a.

Second, the court of appeals rejected petitioner's contention that the approved unit in this particular case was clearly not appropriate on the grounds that all sales employees purportedly represent a "homogenous work force." Pet. App. 11a. That argument, the court found, "ignores or contradicts the Board's explicit findings that illustrate the distinct interests of the cosmetics and fragrances employees," such as the limited "evidence of temporary interchange between the petitioned-for employees and other selling employees," the department-specific training, and the unique selling function of the unit employees. *Id.* at 11a-12a (citation omitted). The court also noted that petitioner, while conceding distinctions of separate departments, supervision, and location, claimed that the Board failed to explain its weighing of relevant factors. The court rejected that argument, stating that the Board had properly "identified some factors that could weigh against the petitioned-for unit and explained—with citation to Board precedent—why these factors did not render the petitioned-for unit inappropriate." *Id.* at 12a-13a.

The court of appeals also rejected petitioner's argument that the *Specialty Healthcare* standard looks "solely and in isolation" at the common interests among employees in proposed unit. Pet. App. 17a. The court observed that the "community of interest test articulated in *Specialty Healthcare* and applied in this case," taken from *United Operations*, "does not look only at the commonalities with the petitioned-for unit," but focuses on distinctions between the included and excluded employees. *Id.* at 19a-20a (citing *Specialty Healthcare*, 357 N.L.R.B. at 942). Accordingly, the court concluded, the "Board's initial unit determination in *Specialty*

Healthcare and in this case * * * conformed to established precedent." *Id.* at 20a.

The court of appeals found no merit to petitioner's legal challenges to step two of the *Specialty Healthcare* framework, "the overwhelming community of interest test," which petitioner alleged impermissibly gives controlling weight to the union's extent of organization. Pet. App. 21a; see *id.* at 15a-24a. Finally, the court upheld the Board's finding that petitioner failed to meet its burden under that test because "the Board's factual findings illustrate numerous distinctions between the cosmetics and fragrances employees and the other selling employees, such that it cannot be said that there is 'no legitimate basis upon which to exclude [those] employees'" from the unit. *Id.* at 24a (brackets in original) (quoting *Specialty Healthcare*, 357 N.L.R.B. at 943).

The court of appeals denied a petition for rehearing en banc by a vote of nine to six, with an accompanying dissenting opinion. Pet. App. 147a-165a.

ARGUMENT

Petitioner does not seek review of the court of appeals' decision, consistent with the decision of every other court of appeals to address the issue, see pp. 4-5, *supra*, to uphold the Board's framework for determining whether a unit is "appropriate" for purposes of collective bargaining. See *Specialty Healthcare & Rehabilitation Ctr. of Mobile*, 357 N.L.R.B. 934 (2011), enforced *sub nom. Kindred Nursing Ctrs. E., LLC* v. *NLRB*, 727 F.3d 552, 561-565 (6th Cir. 2013). Petitioner instead seeks review of the question whether the Board "must explain the legal significance of factual distinctions between included and excluded employees when deciding if a petitioned-for 'unit [is] appropriate for col-

lective bargaining.'" Pet. i (brackets in original) (quoting 29 U.S.C. 159(b)). That question is not presented here because the court of appeals affirmatively agreed that the Board must provide such an explanation. Pet. App. 12a. The court of appeals further concluded on the record of this particular case that the Board had provided an adequate explanation for its decision and therefore affirmed. *Id.* at 13a. To the extent petitioner seeks review of the court of appeals' case-specific determination that the Board's detailed explanation in this particular case was sufficient, that question does not warrant further review. The court's decision is correct, highly factbound, and does not conflict with the decision of any other court of appeals. Further review is not warranted.

1. Consistent with the decision of every other court of appeals to address the issue, the court of appeals upheld the two-step framework the Board articulated in *Specialty Healthcare* for making bargaining unit determinations. See pp. 4-5, *supra* (collecting cases). In so doing, the courts of appeals have uniformly concluded, in accord with the court below, that *Specialty Healthcare* "clarified—rather than overhauled"—the Board's unit-determination analysis. Pet. App. 15a-16a (quoting *Nestle Dreyer's Ice Cream Co.* v. *NLRB*, 821 F.3d 489, 500 (4th Cir. 2016) (*Dreyer's*)).

Specifically, the courts have recognized that *Specialty Healthcare* did not alter the longstanding requirement that the Board's community of interest test —now denominated as the first step of the *Specialty Healthcare* framework—involves a determination that employees in the petitioned-for unit share interests among themselves that are distinct from those of the excluded employees. See *Dreyer's*, 821 F.3d at 495-496

(holding that Board's reliance on community-of-interest factors ensures that unit employees share common interests that are "distinct" from excluded employees' interests); see also *FedEx Freight, Inc.* v. *NLRB*, 839 F.3d 636, 637 (7th Cir. 2016) (stating, in approving the Board's adoption and application of *Specialty Healthcare*, that the Board should analyze "the similarity or dissimilarity in working conditions across different groups of workers"); *NLRB* v. *FedEx Freight, Inc.*, 832 F.3d 432, 440-441 (3d Cir. 2016) (same); *FedEx Freight, Inc.* v. *NLRB*, 816 F.3d 515, 523 (8th Cir. 2016) (stating that the community-of-interest factors cited in *Specialty Healthcare* "parallel" the court's previous description of the test, and that "the Board does not look at the proposed unit in isolation" when applying those factors), reh'g and reh'g en banc denied, No. 15-1848 (8th Cir. May 26, 2016).

Consistent with that uniform view, the court of appeals stated that the "community of interest test articulated in *Specialty Healthcare* and applied in this case * * * does not look only at the commonalties within the petitioned-for unit." Pet. App. 19a. The court observed that *Specialty Healthcare* adopted the Board's 2002 decision in *United Operations, Inc.*, 338 N.L.R.B. 123, which focused on whether unit employees are "organized into a *separate department*" with "*distinct*" skills, training, and job functions, are "*separately* supervised," or have other "*distinct* terms and conditions of employment" compared to other employees. Pet. App. 19a-20a (citing *Specialty Healthcare*, 357 N.L.R.B. at 942).

2. Contrary to petitioner's contention (Pet. i, 14-19), the court of appeals did not hold that the Board could fail to explain the legal relevance of factual distinctions

between included and excluded employees. To the contrary, the court affirmatively agreed that the Board had an obligation "to explain why the[] distinctions outweigh the similarities between the petitioned-for employees and the other selling employees." Pet. App. 12a. Indeed, the court relied upon circuit precedent establishing that the Board must "adequately explain its weighing of the community interest factors." *Id.* at 13a (citing *NLRB* v. *Purnell's Pride, Inc.*, 609 F.2d 1153, 1162 (5th Cir. 1980)); see *Constellation Brands, Inc.* v. *NLRB*, 842 F.3d 784, 793 (2d Cir. 2016) (similar).

The court of appeals held on the record here, however, that the Board's explanation "satisfied *Purnell's Pride*'s requirements." Pet. App. 13a. Accordingly, the abstract question on which petitioner seeks review—whether the Board must provide an explanation of the significance of the factual distinctions it identified—is not presented here. The court held that such an explanation is required, and concluded that the Board had provided such an explanation.

3. To the extent petitioner seeks review of the court of appeals' case-specific determination that, on the record here, the Board provided an adequate explanation consistent with prior Fifth Circuit precedent, that question does not warrant this Court's review. The court of appeals' decision in that regard is correct, highly fact-bound, and does not conflict with the decision of any other court.

a. The court of appeals correctly held that the Board's explanation "satisfied *Purnell's Pride*'s requirements." Pet. App. 13a; see *ibid.* ("[T]he decision identified some factors that could weigh against the petitioned-for unit and explained—with citation to Board precedent—why these factors did not render the

petitioned-for unit inappropriate."); *id.* at 19a (describing the Board as having "rigorously weigh[ed] the traditional community-of-interest factors to ensure that the proposed unit was proper under the NLRA"); *id.* at 20a ("The Board's initial unit determination in *Specialty Healthcare* and in this case * * * conformed to established precedent."); *ibid.* ("The Board did not abuse its discretion by applying the traditional community of interest test in its initial unit determination.").[2]

b. Contrary to petitioner's assertion (Pet. 14-19), there is no circuit conflict between the Fifth Circuit's decision here and the Second Circuit's decision in *Constellation Brands*. Like the Fifth Circuit here and every other court of appeals to address the issue, the Second Circuit in *Constellation Brands* upheld the *Specialty Healthcare* framework. See *Constellation Brands*, 842 F.3d at 787 ("We hold the *Specialty Healthcare* framework to be valid, as our sister circuits have."). Indeed, the Second Circuit cited the Fifth Circuit's decision here as one of the set of court of appeals decisions approving *Specialty Healthcare* that it was joining. *Id.* at 787 n.1. Moreover, like the Fifth Circuit here, which required the Board to "adequately explain its weighing of the community interest factors," Pet. App. 13a, the Second Circuit similarly required an explanation of

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[2] To the extent petitioner contends (Pet. 21-23) that the court of appeals' decision is nonetheless contrary to *Purnell's Pride*, that question does not warrant this Court's review. The court of appeals distinguished *Purnell's Pride*, noting that the Board's explanation there was inadequate. Pet. App. 12a-13a. And this Court's review is not warranted to address a claimed intra-circuit conflict involving a case-specific application of the same legal requirement to different factual circumstances. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

"*why* those employees had interests 'sufficiently distinct from those of other employees to warrant the establishment of a separate unit,'" *Constellation Brands*, 842 F.3d at 793 (quoting *Dreyer's*, 821 F.3d at 500).

The cases' different outcomes in turn are explained by their different facts and records. *Constellation Brands* involved a winery that divided its employees into various departments, including a "cellar operations department" consisting of "outside cellar" and "barrel" employees. 842 F.3d at 787. The regional director approved a unit of the "outside cellar" employees, and the dispute was whether they were properly treated as a separate unit from the "barrel" employees (and other employees). *Ibid.* The court of appeals vacated and remanded, holding that the regional director had improperly applied the Board's *Specialty Healthcare* framework by failing to "explain *why* those employees had interests 'sufficiently distinct from those of other employees to warrant the establishment of a separate unit.'" *Id.* at 793 (quoting *Dreyer's*, 821 F.3d at 500).

Specifically, although the regional director in *Constellation Brands* "made a number of *factual* findings that tend to show that outside cellar employees had interests distinct from other employees," the court of appeals stated, "he never explained the weight or relevance of those findings." 842 F.3d at 794. For example, the court pointed out, he did not explain why differentiating factors like "physically separate locations" or "separate front-line [and] immediate supervisors" outweighed findings of similarities, "*e.g.*, similar 'job functions and duties,' evidence of 'interchange' and 'work-[ing] together,' and 'identical skills and training requirements.'" *Ibid.* The court also found the regional

director's purported distinctions at step one to be "conclusory" and "implausible." *Id.* at 794 n.39. For example, the regional director had stated (without explanation or support) that "unlike the unit of employees sought by the Employer," the outside cellar workers "must demonstrate skills of lower-level job classifications before moving up to higher-level job classifications within the department." *Ibid.* "It seems implausible," the court concluded, "that non-cellar employees need not 'demonstrate skills' before being promoted." *Ibid.*

The court of appeals' decision in this case does not conflict with *Constellation Brands*, because the record here is strikingly different and the Board's analysis more thorough. At the outset, *Constellation Brands* involved a different business context (a winery, not retail) with a different structure. And as the court noted in holding that the Board's initial unit determination in this case conformed to "established precedent," Pet. App. 20a, the Board found that the unit is "coextensive with a departmental line that [petitioner] has drawn," as it consists of all the non-supervisory employees in the cosmetics and fragrances department; that all the employees share common, separate supervision; that the department has a unique structure, as the only department with "on-call" employees and "counter managers"; that the employees work in physically distinct areas of the store; that the group is functionally integrated internally yet distinct from the rest of the store, as they are the only employees who sell cosmetics and fragrances; that all the employees work on a base-plus-commission basis; that their contact with employees in other departments is "brief" and "incidental"; and "there are only nine examples of permanent transfers into, or out of, the cosmetics and fragrances department over

the last 2 years." *Id.* at 6a, 11a-13a, 48a-50a. The Board also explained why it rejected the argument by petitioner (and its amici) that the petitioned-for group was too *disparate* to be treated as a single unit. *Id.* at 50a-52a. Petitioner does not renew that argument here.[3]

The Board's analysis at step two then dovetailed with its analysis in step one, as the Board found it "readily apparent that there are clear distinctions between the petitioned-for employees and other selling employees." Pet. App. 53a. The Board reiterated the distinctions it drew above, including that the unit consisted of a separate and uniquely-structured department, where the record "does not show any significant contact" and "does not show significant interchange" between the petitioned-for employees and other selling employees." *Id.* at 55a-56a; *e.g.*, *id.* at 56a ("[C]osmetics and fragrances employees are never asked to sell in other departments, nor are other selling employees asked to sell in the cosmetics and fragrances department.").

The Board then "emphasize[d]" that petitioner did "not argue that *some*, but not *all*, of the other selling employees share an overwhelming community of interest with the cosmetics and fragrances employees." Pet. App. 62a. Rather, petitioner argued "that the smallest

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[3] Petitioner also challenges (Pet. 21-22) the weight the Board accorded to the evidence that the cosmetics and fragrances employees work in a separate department with distinct supervision, locations, functions, and minimal contact and interchange with other departments. But those factors have long been relied upon to support a finding of community of interest. See *United Operations,* 338 N.L.R.B. at 125-126; *e.g.*, *Dreyer's*, 821 F.3d at 495-497 (separate departments and functions and lack of interchange); *NLRB* v. *HeartShare Human Servs. of N.Y., Inc.*, 108 F.3d 467, 471 (2d Cir. 1997) (separate immediate supervision and lack of contact and interchange).

appropriate unit includes *all* selling employees." *Ibid.* (emphasis added). And the Board explained in detail that the record did not support petitioner's claim that the only appropriate unit was the broad unit it sought, because the record "show[ed] only that some petitioned-for employees share similarities with some other selling employees." *Id.* at 62a. "[T]he mere fact that all petitioned-for employees share certain community of interest factors with some (but not all) other selling employees, or that some (but not all) petitioned-for employees share similarities with some (but not all) other selling employees," the Board explained, "does not demonstrate the 'almost complet[e]' overlap of factors required to establish an overwhelming community of interest between all the petitioned-for employees and all the other selling employees." *Id.* at 63a (brackets in original). "In any event," the Board found that partial overlap with other employees to be "outweighed by the separate department, the structure of the department that includes counter managers, separate supervision, separate work areas, and lack of significant contact and meaningful interchange." *Id.* at 63a-64a.

Accordingly, unlike in *Constellation Brands*, the Board's discussion of the relative weight of the similarities and differences between the petitioned-for unit and the alternative unit proposed by petitioner (all selling employees) cannot be described as "conclusory" or "implausible." The Board's analysis is detailed and replete with discussion of the record evidence and prior Board precedent (including specifically in the context of department stores); and includes a back-and-forth with the dissenting Board member addressing his concerns and explaining why the majority disagreed. See, *e.g.*, Pet. App. 51a ("Although there are some differences

among the petitioned-for employees, we find, in contrast to our dissenting colleague, that they are insignificant compared to the strong evidence of community of interest that they share."). There is accordingly no conflict here. Indeed, in *Constellation Brands*, the Second Circuit cited the Fifth Circuit's decision here favorably, 842 F.3d at 787 n.1, and did not hint that it disagreed with the Fifth Circuit's determination that the Board's explanation was adequate.

Moreover, even if there were some tension between the decision below and *Constellation Brands*, a claim of a conflict would be premature, given that the Second Circuit vacated and remanded to the Board for a further explanation. The nature and extent of any disagreement between the Second and Fifth Circuits over the analysis required under *Specialty Healthcare* will not be clear until the Board responds to the Second Circuit's remand, and there is judicial review of any supplemental decision the Board issues.

c. Contrary to petitioner's suggestion (Pet. 17-18), the decisions of the Third, Fourth, Seventh, and Eighth Circuits with respect to step one of the *Specialty Healthcare* framework do not support its claim of a conflict warranting this Court's review. Those courts applied standards comparable to the standards the Fifth Circuit articulated, and upheld the Board's unit determinations. See *FedEx Freight, Inc.*, 839 F.3d at 637-638; *FedEx Freight, Inc.*, 832 F.3d at 445-446; *Dreyer's*, 821 F.3d at 496-497; *FedEx Freight, Inc.*, 816 F.3d at 527. To the extent there may be differences in the courts' emphasis or phrasing of the test, the unanimity of the decisions upholding the Board's application of the test belies any claim that the Fifth Circuit's identical

result here is out of step with other courts or that the Board is systematically misapplying its test.

4. Petitioner's remaining arguments lack merit and do not support this Court's review. Petitioner contends (Pet. 23-24) that "[t]he manner in which the Fifth Circuit applied step one of the *Specialty Healthcare* analysis" violated 29 U.S.C.159(c)(5) by making the "extent of organization" controlling. But the court of appeals considered this argument and rejected it on the facts of this case. Pet. App. 18a-19a. "[W]here the Board 'rigorously weigh[s] the traditional community-of-interest factors to ensure that the proposed unit was proper under the NLRA,'" the court explained, the Board's application of *Specialty Healthcare* is consistent with the Act. *Id.* at 19a (brackets in original) (quoting *Dreyer's*, 821 F.3d at 499). And, the court concluded, "[t]hat is precisely what the Board did in the instant case." *Ibid.*

The court of appeals' decision also does not (Pet. 25) "undermine[] an employee's right to 'refrain'" from collective bargaining. Unit employees had the right to vote for or against union representation, and the other store employees have the right, as well as the opportunity, to organize or refrain from doing so, regardless of whether or not some of their colleagues unionize. Cf. *Laidlaw Waste Sys., Inc.* v. *NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (certification of unit of drivers, which excluded mechanics, protected the rights of both groups).

Petitioner posits (Pet. 25) that because the union lost prior elections in larger units at this store, the "right to refrain" by those employees who voted against the union in this election was impaired. But as this Court has recognized, see *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 610 (1991), the Act recognizes that there can be more than one appropriate unit in any given

workplace, and as long as the union complies with statutory requirements for filing representation petitions, the Act does not preclude a union from seeking to represent employees in different appropriate units.[4] Thus, employees who exercised their right to vote against the union here are in no different position than any other employees who vote against a union that a majority of their co-workers select as the unit's representative. Moreover, they have the same opportunity to seek to decertify the union at an appropriate time. See 29 U.S.C. 159(c)(1)(A)(ii) (authorizing petition for decertification of a certified labor organization).

5. Petitioner also overstates the importance of the Board's decision here. See Pet. 26-30. As the Board emphasized, its decision was "based solely on the facts before [it] in this case," and it expressly declined to "reach the question of whether other subsets of selling employees at this, or any other, retail department store may also constitute appropriate units." Pet. App. 26a-27a. Any future petition to represent a distinct group of employees would likewise be considered on its own facts. See *NLRB* v. *WKRG-TV, Inc.*, 470 F.2d 1302, 1311 (5th Cir. 1973) ("[A] determination of a unit's appropriateness will invariably involve factual situations peculiar to the employer and unit at issue," which is why "the Board has been given great discretion in ruling on these matters."). Petitioner's concern that the Board's deci-

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[4] See, *e.g.*, 29 U.S.C. 159(c)(3) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.").

sion will lead to a proliferation of units that are supposedly too small is accordingly unfounded and premature.[5]

In particular, the Board did not face any question regarding the propriety of approving "a dozen micro-units within a retail store's salesforce." Pet. App. 151a (Jolly, J., dissenting from denial of rehearing en banc). The unit here is the only one approved at this store. The Board also did not approve (or suggest that it would approve) a unit consisting of "three bowtie salesman" selling at a separate counter. Pet. 27 (quoting Pet. App. 151a (Jolly, J., dissenting from denial of rehearing en banc)). The unit here consists of all 41 employees in a department petitioner established and defined, not a small subgroup of that department. See Pet. App. 48a ("They are all the employees in the three nonsupervisory classifications in the cosmetics and fragrances department."); cf. *id.* at 53a ("It is readily apparent that there are clear distinctions between the petitioned-for employees and other selling employees."); *id.* at 59a ("[T]he petitioned-for unit is not a fractured unit.").

Moreover, the premise of petitioner's argument is flawed. Courts have long recognized that there is no statutory preference for a particular unit size, because "very large" and "small" units may present their own advantages and disadvantages in terms of how best to further the objectives of the statute. *Purnell's Pride*, 609 F.2d at 1156; see, *e.g.*, *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 155 (1941) (observing that "[m]uch

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[5] Petitioner's reliance (Pet. 27) on a Board regional director's recent approval of nine separate teacher bargaining units at Yale University, *Yale Univ.*, Nos. 01-RC-183014 *et al.* (NLRB Region 1, Jan. 25, 2017), is misplaced. That decision has not been reviewed by the Board and thus does not constitute Board precedent.

may be and was said upon either side of the issue as to whether [a single plant] or the flat glass division [comprised of six plants] would be the most efficient collective bargaining unit."); *Oil, Chem. & Atomic Workers, Int'l Union* v. *NLRB*, 486 F.2d 1266 (D.C. Cir. 1973) (upholding the employer's preference to bargain with the union in 19 separate units, rather than in multi-unit or company-wide negotiations). Accordingly, the size of a proposed unit is "not alone a relevant consideration, much less a sufficient ground," for finding an otherwise appropriate unit to be inappropriate. *Specialty Healthcare*, 357 N.L.R.B. at 943-944. Indeed, this Court has explained that a "cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining" and prevents "a minority group interest from being submerged in an overly large unit." *NLRB* v. *Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (citations omitted).[6]

As the court of appeals noted, Pet. App. 13a, 23a, nothing in the Act prohibits the Board from approving

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[6] Concern about a possible "proliferation" of bargaining units is not, in any event, a legal basis for overturning a Board unit determination. The legislative history of the 1974 healthcare amendments to the Act admonished the Board to give "due consideration" "to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (footnote omitted). The concern was limited to health care units, and even in that context, this Court squarely held that the "admonition" was not binding on the Board and does not have "the force of law." *American Hosp. Ass'n*, 499 U.S. at 616; see *id.* at 616-617 ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute"); *id.* at 608-609 (approving Board's rule providing that, with limited exceptions, eight defined employee units are appropriate for collective bargaining in acute care hospitals).

multiple units at the same employer. Indeed, the Act recognizes that a unit consisting of a "subdivision" of employees may be appropriate. 29 U.S.C. 159(b). In any event, petitioner provides no support for its conjecture that approving the cosmetics and fragrances unit in this particular case—a unit of 41 employees out of 120 sales employees—will result in excessive administrative burdens and unproductive bargaining, or undermine employees' organizational rights. Pet. 28-30. As the court of appeals observed, the Board, with judicial approval, has certified multiple units at a single employer without the grave effects prophesied here. Pet. App. 13a (citing *Teledyne Econ. Dev.* v. *NLRB*, 108 F.3d 56, 57 (4th Cir. 1997) (enforcing Board's decision certifying two units at one employer), and *Banknote Corp. of Am., Inc.* v. *NLRB*, 84 F.3d 637, 647 (2d Cir. 1996) (three units), cert. denied, 519 U.S. 1109 (1997)).

Indeed, the record shows that petitioner has experience administering units covering only a subset of selling employees at a particular store—and that treat cosmetics and fragrances employees differently. For example, "[o]ne agreement covers selling, support, and alterations employees at a store in Boston, but does not cover that store's cosmetics and fragrances department." Pet. App. 41a. Similarly, a single collective bargaining agreement covers selling employees at five of petitioner's department stores in Massachusetts—but that agreement historically excluded cosmetics and fragrances employees and even now includes a number of provisions that are unique to them. *Id.* at 41a-42a.

The court of appeals (Pet. App. 22a-23a) also properly rejected amici's contention (Br. 5-13) that the departmental unit approved here is contrary to a pre-

sumption in favor of "store-wide" units in the retail industry. Rather, as the court observed, the recognition of a presumptively appropriate unit does not mean there is only one appropriate unit. Pet. App. 22a-23a (citing *Specialty Healthcare*, 357 N.L.R.B. at 940). Accordingly, the court noted, even when the Board has acknowledged storewide units as "basically appropriate," it has long permitted, based on traditional community-of-interest principles, a "'variety' of less-than-storewide units representing various 'occupational groupings' in department stores." *Id.* at 14a (quoting *Stern's Paramus*, 150 N.L.R.B. 799, 802-803, 806 (1965)); see *id.* at 68a-76a (discussing additional Board precedent permitting less-than-store-wide units). As the court of appeals explained, so doing is consistent with the Board's discretion to "'certify 'a unit' that is 'appropriate' —not necessarily the single most appropriate unit.'" *Id.* at 14a (quoting *American Hosp. Ass'n*, 499 U.S. at 610).

Finally, petitioner errs in asserting (Pet. 30) that the court of appeals' decision "encourage[s] union gerrymanders" to organize in smaller units. The employer has control over nearly all of the community-of-interest factors that the Board assesses, as those factors "focus[] almost exclusively on how the employer has chosen to structure its workplace." *Specialty Healthcare*, 357 N.L.R.B. at 942 n.19; see *International Paper Co.*, 96 N.L.R.B. 295, 298 n.7 (1951) ("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees."). All of the relevant factors in this case—departmental lines, supervision, job classifications, lo-

cation, interchange and contact, skills and training, compensation, and other terms and condition of employment —were determined by the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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