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Note

Who's the Boss?: Charge Nurses and "Independent Judgment" After National Labor Relations Board v. Health Care & Retirement Corporation of America

R. Jason Straight*

In 1994, the United Industry Workers petitioned the National Labor Relations Board (NLRB) for an election to allow forty-five licensed practical nurses (LPNs) to vote on whether or not they wished to unionize. Their employer, operator of the Ten Broeck Commons nursing home, objected to the petition, claiming that the LPNs were "supervisors" as defined by section 2(11) of the National Labor Relations Act (NLRA) and thus were ineligible to unionize under the statute.

The NLRA is intended to protect the rights of any employee who wishes to unionize, but does not include any individual employed as a supervisor. Section 2(11) defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The NLRB has interpreted section 2(11) to require a three-step analysis to determine whether a particular worker is a supervisor under the Act. First, the worker must perform one or more of the twelve supervisory activities listed. Second, the

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3. Id. § 152(3).

4. Id. § 152(11).

5. See id.
activity must be performed in the interest of the employer. The third step ensures that employees who perform minor supervisory functions in a routine manner are not unfairly exempted for the Act by requiring that supervisory authority be exercised using independent judgment.

The LPNs at Ten Broeck Commons, who earned approximately $11 per hour, took turns functioning as charge nurses during the evening, late-night and weekend shifts. During a rotation as charge nurse, an LPN's duties included "overseeing the [nurses' aides], making rounds to be sure that the residents are being properly cared for, consulting with [doctors], ordering medications from the pharmacy as instructed by the doctor, picking up orders, filling out charts, and updating patient information." Because each of the forty-five LPNs at Ten Broeck commons served as a charge nurse at one time or another, the employer argued that all of the LPNs were excluded from the coverage of the NLRA.

For two decades, the NLRB routinely found that LPN charge nurses, such as those at Ten Broeck Commons, were not statutory supervisors under the NLRA. The Board conceded that charge nurses performed supervisory functions under section 2(11), but reasoned that the charge nurses did not perform these functions "in the interest of the employer," as required by the second prong of the test, but instead acted in the interest of "patient care."

In 1994 the Supreme Court rejected the Board's "patient care" analysis in National Labor Relations Board v. Health

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6. See id.
7. See id.
9. Id. at 807.
10. See id. at 806.
11. Many hospitals identify some of their Registered Nurses (RNs) as charge nurses as well. This Note, however, focuses on LPN charge nurses employed at nursing homes. For a detailed comparison of charge nurses in hospitals with those in nursing homes, see generally Jonathan Edward Motley, Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home, 73 IND. L.J. 711 (1998).
12. See Beverly Enters., 313 N.L.R.B. 491, 493 (1993) (noting that the NLRB has "utilized the 'patient care' analysis as an aid to determining supervisory status of charge nurses" since 1974).
13. Id. at 493-94.
Care & Retirement Corporation of America,¹⁴ holding that all tasks performed by employees in the line of duty are, by definition, performed in the interest of the employer.¹⁵

After the Health Care decision forced the Board to abandon its "patient care" analysis, the Board shifted the focus of its analysis to section 2(11)’s requirement that "independent judgment" be exhibited in the performance of a supervisory task.¹⁶ In the Ten Broeck Commons case, which was one of the first charge nurse cases heard by the Board after Health Care, the Board held that the charge nurse LPNs did not demonstrate the requisite independent judgment in performing their supervisory tasks.¹⁷ Instead, the Board determined that their authority was "narrowly circumscribed to giving rather general routine directions to lesser skilled employees."¹⁸ Consequently, the Board ruled that the LPNs were free to unionize under the protection of the NLRA.¹⁹ Although the Board’s "independent judgment" analysis is textually consistent with the Health Care decision, the Federal Circuit Courts of Appeals are currently split on the issue of whether the Board’s analysis is nevertheless inconsistent with the spirit and intent of Health Care.²⁰

This Note argues that the Board’s "independent judgment" analysis is consistent both with the text and purpose of the NLRA and controlling precedent. Part I briefly outlines the history of the NLRA and discusses the origins of the supervisors’ exemption. Part II analyzes the interpretations the Board and the courts have applied to the Act, and the nature of the current dispute among the circuit courts and the Board. Part III argues that the Supreme Court misinterpreted, or at the very least misrepresented, its own precedent in Health Care. This Part also contends that the circuit courts have further confused the issue by adopting a broader reading of Health Care than is warranted by the holding. Part IV concludes that the Supreme Court can and should clarify the

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15. See id. at 576-78.
18. Id. at 811-12.
19. See id. at 814.
20. See infra Part II.C.
issue by validating the Board's independent judgment test and admonishing the lower courts to defer to the Board's analysis.

I. HISTORY OF THE NLRA

A. ORIGINS OF THE SUPERVISOR EXEMPTION

The NLRA, as originally enacted, protected employees' rights to organize collectively and form unions for the purpose of engaging in collective bargaining with their employers. The Act was intended to increase the bargaining power of workers negotiating terms and conditions of employment with employers. The opening section of the NLRA contains the following statement of purpose:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce ....

The Act created the NLRB and charged it with, inter alia, certifying bargaining units and supervising union representation elections. When a union files a petition for an election with the Board, the Board is required to examine the job classifications and respective duties of the workers seeking representation to determine whether each bargaining unit conforms to the NLRA. One of the determinations the Board must make during this stage is whether or not there are any supervisors contained in the prospective bargaining units.

The only two categories of individuals defined in the 1935 Act were "employer" and "employee." A worker was entitled to protection under the Act if he was not an "employer," at term defined in section 2(2) as "any person acting in the interest of

24. See id. § 159.
25. See id.
26. See id.
27. See id. § 2(3), 49 Stat. 449, 450 (current version at 29 U.S.C. § 152(3)). The definition of "employee" contained in the NLRA as adopted in 1935 included "any employee." The only workers explicitly excluded under the original definition were agricultural laborers, workers in the "domestic service of any family or person at his home or any individual employed by his parent or spouse." Id.
an employer directly or indirectly." The question of whether supervisors were employers was not addressed until seven years after the passage of the NLRA. When the Board finally began to receive requests to certify bargaining units made up of supervisors beginning in 1942, it was unable to formulate a consistent stance on the issue of certification. After flip-flopping its position twice, the Board eventually approved the creation of supervisors' unions.

The Supreme Court affirmed the NLRB's recognition of supervisors' right to organize in 1947, in Packard Motor Car Co. v. National Labor Relations Board. In Packard, the Supreme Court pointed out that the definition of employer was circular because "[e]very employee, from the very fact of employment in the employer's business, is required to act in [the employer's] interest." As a result, Packard held that "[t]he context of the Act . . . leaves no room for a construction of this section to deny the organizational privilege to employees because they act in the interest of an employer." The Court's remarkably broad interpretation of the phrase "in the employer's interest" rendered section 2(2) meaningless as a criterion for certifying bargaining units and opened the door for unionizing efforts by virtually any classification of worker—including management.

31. For a description of the Board's early decisions addressing the certification of supervisors' unions, see H.R. REP. No. 80-245 (1947). Congress, in 1942, responding to the Board's initial acceptance of bargaining units composed of foremen, considered a bill creating an exemption for foremen under the NLRA. This bill was abandoned, however, when the Board appeared to reverse its policy in 1943 by refusing to certify a group of supervisors. See Maryland Drydock Co., 49 N.L.R.B. 733 (1943). It was not until 1945 and the Supreme Court's decision in Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), that the alarm was again sounded by industrial employers, prompting Congress to again take up the cause.
32. 330 U.S. at 491-93.
33. Id. at 488.
34. Id.
35. Justice Douglas's dissent in Packard reflects the overblown fear expressed by employers over the implications of the Packard decision. See id. at 493-501 (Douglas, J., dissenting). Stating that the majority opinion "tends to obliterate the line between management and labor," Douglas suggests that "if foremen are 'employees' [under the NLRA], so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president."
The concern with allowing supervisors to unionize is based on the fear that supervisors’ unions, even those that claim to be independent, may be effectively controlled by rank and file unions. Any alliance between a supervisors’ organization and a rank and file union would seriously compromise the ability of the employer to rely on these supervisors as their loyal agents in the workplace. The supervisors’ allegiance would be split between the employer whom they ostensibly represent and the employees with whom they would be joined in solidarity fighting for better working conditions.36

Congress recognized that management unions contradicted the purpose of equalizing bargaining power between rank and file workers and the employer.37 Consequently, Congress enacted the Taft-Hartley Amendments and unequivocally overrode Packard by creating an explicit exclusion for supervisors and modifying the definition of employer.38 Under the new

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36. See David M. Rabban, Distinguishing Excluded Managers from Covered Professionals Under the NLRA, 89 COLUM. L. REV. 1775, 1785 (1990); cf. Frederick J. Woodson, Note, NLRB v. Health Care & Retirement Corp. of America: Signaling the Need for Revision of the NLRA, 14 J.L. & COM. 301, 312 (1995) (acknowledging that conflicts of interests are an issue in any employment relationship but pointing to the trend toward participative management as evidence that such conflicts are not as serious as had been previously suggested).

37. The committee report accompanying the Taft-Hartley provision that finally succeeded in exempting supervisors stated:

The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be “independent” of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.


38. See National Labor Relations Act, ch. 120, tit. I, § 10, 61 Stat. 136, 137 (1947) (current version at 29 U.S.C. § 149-187 (1994)). Congress actually attempted to nullify the Packard decision directly with the Case Bill—a bill that was considered before Congress voted on the larger Labor Management Relations Act. Both houses of Congress easily passed the Case bill, which specifically exempted supervisors from coverage under the NLRA. See H.R. REP. NO. 80-245, at 14 (1947). Despite this clear showing that the Packard decision was contrary to congressional intent, President Truman vetoed the
definition of "supervisor" contained in section 2(11) of the Act, workers who possessed the independent authority to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, discipline, direct or adjust the grievances of other employees in the interest of the employer were deemed supervisors.39

It is clear both from the legislative history of the Taft-Hartley amendments and the nature of the workforce in 1947 that the supervisor exemption was primarily aimed at excluding industrial shop foremen and other low-level managers in the manufacturing sector.40 Congress appeared to have a certain type of employee in mind when it described the employees who fall under the definition of "supervisors":

Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such "security." It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the levelling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism.41

By excluding supervisors, Congress intended to correct a "development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process."42 In enacting the exclusion, however, Congress was careful to note that certain employees with "minor supervisory duties" face employment issues which override their supervisory role and justify coverage by the Act.43 The Senate Report issued with the 1947 amendments

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40. See, e.g., H.R. REP. NO. 80-245, at 13-17; S. REP. NO. 80-105, at 3-5 (1947) (discussing the problems of unionizing foremen in industry); cf. NLRB v. Yeshiva Univ., 444 U.S. 672, 694 (1980) (remarking that the purpose of the exclusion is to prevent management representatives from influencing rank and file's selection of bargaining representatives and union leaders); Schnuck Mkts., Inc. v. NLRB, 961 F.2d 700, 703 n.7 (8th Cir. 1992) (proposing that the purpose of excluding supervisors from the Act is to enable employers to use them to continue production during strikes by the rank and file).
42. S. REP. NO. 80-105, at 3.
43. Id. at 4.
recognized that the Act distinguished between minor supervisory employees and supervisors with “genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.” The legislative history makes clear that since the very birth of the supervisor exclusion, Congress was cognizant of its inability to make a bright line distinction between true supervisors and employees. Distinguishing genuine supervisors from those who are merely employees who perform limited supervisory functions was a task left to the NLRB.

B. THE STATUS OF PROFESSIONALS AFTER TAFT-HARTLEY

The Taft-Hartley amendments created a new protected class under the Act called “professional employees.” These professionals generally had completed advanced training or education programs and engaged in primarily intellectual work requiring the exercise of considerable discretion and judgment. The purpose of this provision was to provide employees who fit the definition of “professional” with the option of maintaining a bargaining unit separate from less skilled employees. Nurses were one of the groups that Congress specifically sought to protect with this provision.

44. Id. (emphasis added).
45. See id.
46. See id.
47. The definition of “professional employee” now contained in the Act is:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

48. See id.
49. See id. § 159(b); see also S. REP. No. 80-105, at 11 (1947). The Act states that no bargaining unit may be certified by the Board “if such unit
1. Supervisors vs. Professionals

There is considerable overlap between the types of workers who satisfy the definition of "professional employee" contained in section 2(12) and those that fit the description of "supervisor" under section 2(11). Indeed, the same attributes that distinguish a professional employee from a rank and file employee, such as increased autonomy, discretion and responsibility, greater skill and training, and higher salaries, also tend to make these workers resemble supervisors.\(^5\)

Perhaps the most delicate and significant distinction made in separating supervisors from mere professional employees is distinguishing true supervisory work involving supervisory tasks and requiring the exercise of "independent judgment"\(^5\) from a professional's "predominantly intellectual" work requiring "the consistent exercise of discretion and judgment in its performance."\(^5\)

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\(^5\) See Rabban, supra note 36, at 1778. Rabban describes the problems inherent in applying the NLRA, designed for industrial workers of the 1930s, to professional employees who "have more autonomy from hierarchical control and more involvement in organizational decisionmaking than the workers for whom the statute was initially intended." Id.

\(^5\) Id. § 152(12); see also Beverly Enters., 313 N.L.R.B. 491, 493 (1993) ("Deciding whether an individual possesses any 2(11) indicia of supervisory authority often calls for making delicate, difficult, and even fine distinctions, and there are frequently gray areas.").
2. The Supreme Court and Supervisors: *Yeshiva*

The Supreme Court struggled with this issue in *NLRB v. Yeshiva University*. The Court conceded that "[t]here may be some tension between the [NLRA's] exclusion of managerial employees and its inclusion of professionals since most professionals in managerial positions continue to draw on their special skills and training." In an attempt to clarify this distinction, the Supreme Court has said that "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management" and thus a supervisor according to the Act. The tasks many professionals perform may bear a resemblance to the exercise of management authority when these tasks are actually an ordinary professional duty of the job and reflect no true management power. The Court nevertheless rejected the Board's contention that university faculty members were simply exhibiting their professional judgment in determining curricula, establishing grading and admissions policies, and setting tuition rates, stating bluntly that "it is difficult to imagine decisions more managerial than these."

II. CHARGE NURSES AND THE NLRA

Charge nurses are a prime example of workers in the murky region where the professional and supervisor definitions overlap. The typical hierarchical structure of a private nursing home consists of an Administrator overseeing the entire operation at the top, a registered nurse (RN) acting as the Director of Nursing (DON) who reports to the Administrator, and an Assistant Director of Nursing (ADON) who may be a Licensed Practical Nurse (LPN). Patient care responsibilities are carried out by LPNs and nurses' aides who make up the front line of the nursing home staff. Generally,

54. 444 U.S. 672 (1980).
55. *Id.* at 686.
56. *Id.* at 690. The Court stated that this analysis "accurately capture[s] the intent of Congress." *Id.*
57. *See id.* at 683-84.
58. *Id.* at 686.
59. *See Motley, supra* note 11, at 712-13 (discussing the NLRB's inconsistent interpretations of the Act in cases involving the "difficult issue as to whether nurses are professional employees or supervisors").
the DON and ADON are present during daytime shifts, but not at night. Although the DON and ADON are typically "on call" during the night shifts, the charge nurse LPNs are the most skilled and experienced employees physically present inside the nursing home at night.

Looking at their specialized training and the general nature of their work, charge nurse LPNs appear to be professionals. Once on the job, charge nurses are typically engaged in work requiring the exercise of discretion and judgment in attending to the various needs of nursing home patients. On the other hand, a closer examination reveals duties and responsibilities that could place charge nurses within the Act's definition of "supervisor." Typical supervisory duties of charge nurses include assigning aides to particular patients, calling in additional aides if there is a staff shortage, asking aides to work overtime and providing advice to the aides as necessary to provide patient care. Many charge nurses, because they work closely with the aides, are also involved to some degree in evaluating the aides' performance. In light of this, it is unclear whether a charge nurse is exercising "independent judgment" in carrying out these tasks, or merely exhibiting the "discretion and judgment" necessarily displayed by any professional employee.

The NLRB and, in turn, the courts, repeatedly have attempted to resolve this question. The Supreme Court in Yeshiva confirmed that a worker may be both a professional and a supervisor. In that case the University pointed to the supervisory exclusion and refused to bargain with a union composed of faculty members. The University did not dispute that the faculty were professionals under the Act, but insisted that the faculty could still be excluded from the Act because they were also "'supervisors' who use independent judgment in overseeing other employees in the interest of the employer or under the judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy." The Court rejected the Board's finding that the faculty members were merely exercising the "independent professional judgment" inexorably tied to their professional

61. See, e.g., id. at 367.
62. See, e.g., id.
64. Id.
duties. The majority opinion made clear that the Court was “not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress’ expressed intent to protect them.”

A. THE 1974 AMENDMENTS

When it amended the NLRA to cover all health care facilities in 1974, Congress intended that the Board take the lead to protect health care professionals from being unfairly excluded by the supervisor exception. It may be reasonably inferred from Congress’s decision not to amend section 2(11) to exclude professionals that it acquiesced in the Board’s method of handling supervisor cases in the health care setting. The Senate committee report that accompanied the 1974 amendment supports this conclusion:

Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of “supervisor.” The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of “supervisor” to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional’s treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.

65. See id. at 683-84.
66. Id. at 690.

In enacting the amendments, Congress was concerned with the quality of health care provided by health care facilities that were governed, until 1974, by the states' labor laws. See Kathryn L. Hays, Note, NLRB v. Health Care & Retirement Corporation of America: A "Narrow" Decision?, 55 LA. L. REV. 987, 994 (1995). Congress believed that enabling health care workers, including health care professionals, to freely unionize would help to remedy perceived problems in the industry. See id. These problems included “low wages, poor
B. THE "PATIENT CARE" ANALYSIS

For some twenty years after the 1974 amendments, the Board obeyed Congress's clearly expressed mandate and evaluated each case to determine whether a nurse was a supervisor under the Act. The Board's three-step evaluation emphasized the second step: section 2(11)'s "in the interest of the employer" language. Drawing the line between professional and supervisor required the Board to determine whether health care workers who directed other employees as part of their duty to provide patient care were also acting as supervisors in the interest of the employer. The Board claimed that to the extent charge nurses' purported supervisory responsibilities merely reflected their professional commitment to patient care, it was in the patients' interest rather than in the interest of the employer that these duties were carried out. Therefore, argued the Board, as long as charge nurses are exercising independent professional judgment, charge nurses were not required to choose between the employer's interests and the interests of other employees, "because the two sets of interests will rarely diverge." The Board believed that only when charge nurses possessed the authority to effectively promote, demote, award raises or discipline other employees should they be classified as exempt supervisory employees.

The Board's approach became known as the "patient care" analysis. This analysis presumed that employers hired nurses, both RNs and LPNs, for their professional skills in working conditions, and a lower standard of patient care." Id.

69. See Beverly Enters., 313 N.L.R.B. at 493; Motley, supra note 11, at 722-23.
70. See Beverly Enters., 313 N.L.R.B. at 493.
71. See id.
72. Id.
73. See id. at 494. The Board stated that:
in the health care field, as in other industries, the authority on the part of more skilled and experienced employees to assign and direct other employees in the interest of providing high quality and efficient service generally is not found to confer supervisory status, whereas the authority to promote, demote, award raises, or discipline (or to effectively recommend those actions) is invariably found to confer supervisory status.

Id.

74. See G. Roger King, Where Have All the Supervisors Gone?—The Board's Misdiagnosis of Health Care & Retirement Corp., 13 LAB. LAW. 343, 344-46 (1997).
patient care and that the exercise of such judgment should not exclude professional employees from the protections of the Act.75

C. THE CIRCUIT SPLIT OVER “PATIENT CARE”

The Circuit Courts of Appeal split on the issue of whether the NLRB’s “patient care” analysis was consistent with the Act. The Second,76 Seventh,77 Eighth,78 Ninth79 and Eleventh80 Circuits approved the Board’s test while the Sixth Circuit squarely rejected it.81 The courts upholding the findings of the NLRB judged the Board’s analysis to be a permissible construction of the Act. The Seventh Circuit, for instance, expressed support for the Board’s analysis, stating that “[s]upervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company’s profit-maximizing objectives.”82

Representative of the position taken by the circuits endorsing the Board’s patient care analysis is the Second Circuit’s decision in Misericordia Hospital Medical Center v. National Labor Relations Board.83 Before addressing the substance of the Board’s finding, the court noted that the Board’s determination was “entitled to special weight” and was “to be accepted if it ha[d] ‘warrant in the record’ and a reasonable basis in law.”84 The court then proceeded to hold that “[t]he evidence was sufficient to allow the Board to find that in practice, as well as in theory, [the nurses’] authority

75. Beverly Enters., 313 N.L.R.B. at 492.
77. See NLRB v. Res-Care, Inc., 705 F.2d 1461 (7th Cir. 1983).
78. See Waverly-Cedar Falls Health Care Ctr. v. NLRB, 933 F.2d 626 (8th Cir. 1991).
79. See NLRB v. Doctors’ Hosp., 489 F.2d 772 (9th Cir. 1973).
80. See NLRB v. Walker County Med. Ctr., 722 F.2d 1535 (11th Cir. 1984).
81. See Health Care & Retirement Corp. of Am. v. NLRB, 987 F.2d 1256 (6th Cir. 1993); see also Hays, supra note 68, at 987.
82. Children’s Habilitation Ctr. v. NLRB, 887 F.2d 130, 134 (7th Cir. 1989).
83. 623 F.2d 808 (2d Cir. 1980).
84. Id. at 816 (citations omitted).
was primarily exercised in providing patient care, not in supervising employees on behalf of management." The court affirmed the Board's decision despite conceding that the head nurse in question "had twenty-four hour responsibility for [her] unit" and that "three assistant nurses and approximately ten other nurses and ten aides and technicians" reported to her. The court explained that the nurse's supervisory responsibilities, which included "the duty to assign and evaluate professionals and nonprofessionals ... can justifiably be considered to be incidental to the head nurse's primary duty to maintain the welfare of the patients in the unit."

In sharp contrast to the approach of the court in Misericordia, the Sixth Circuit took a firm stance against the patient care analysis. In the case that would inspire the Supreme Court to address the charge nurse question, the Sixth Circuit recited the established rule in that circuit: "If a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because she was engaged in 'mere patient care.'" The court then scolded the Board, stating, "It is unfortunate that this court must repeatedly remind the Board that it is the courts, and not the Board, who bear the final responsibility for interpreting the law."

The Sixth Circuit focused primarily on the first step of the Board's three-step test. The court found that certain of the nurses responsibilities made them supervisors under section 2(11) of the Act. These duties included assigning aides to specific patients, finding a replacement when an aide fails to report for work, offering aides the option of working overtime when necessary and assigning or approving breaks and lunches. The court then concluded that "[t]he job duties of the LPNs ... require the use of independent judgment and are taken in the interests of the employer."

With the holdings of the Second and Sixth Circuits representing the extreme poles of the circuit split, the issue

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85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. See id. at 1261.
91. Id.
was ripe for Supreme Court clarification. In 1994, the Supreme Court granted certiorari and examined the Sixth Circuit's rebuke of the patient care analysis.

D. HEALTH CARE AND THE "FALSE DICHOTOMY"

1. The Majority Opinion

In *National Labor Relations Board v. Health Care & Retirement Corporation of America,* the Court applied a strictly textual analysis to hold that the NLRB's "patient care" test was inconsistent with the NLRA. In a five-to-four decision, the Court held that the test created a "false dichotomy" in distinguishing between the patients' interests and those of the employer: "Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer."

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92. *511 U.S. 571* (1994). The Court was reviewing a decision by the Board holding that three LPNs were entitled to the protection of the NLRA. The nurses, who had been fired after complaining to an administrator about alleged problems at their nursing home, were found not to be supervisors under the Act notwithstanding the employer's contention that the LPNs were vested with supervisory authority over the aides at the facility. *See Health Care & Retirement Corp. of Am.*, 306 N.L.R.B. 63 (1994).

93. *See Health Care,* 511 U.S. at 584. In the first paragraph of the majority decision, Justice Kennedy makes it clear that the Court will employ a strictly textual analysis by stating, "In this case, we decide the narrow question whether the [Board's] test for determining if a nurse is a supervisor is consistent with the statutory definition." *Id.* at 573; *see also* William N. Eskridge, Jr., "Fetch Some Soupmeat," 16 CARDOZO L. REV. 2209, 2213 n.19 (1995) (citing Health Care as an example of the Supreme Court's "hard-to-defend textual dogmatism").

94. *Health Care,* 511 U.S. at 577. The majority's reasoning in Health Care closely parallels that expressed earlier by the Sixth Circuit in the cases that created the circuit split on the issue. *See NLRB v. Beacon Light Christian Nursing Home,* 825 F.2d 1076 (6th Cir. 1987). The Court also quotes from another Sixth Circuit case and agrees that "the notion that direction given to subordinate personnel to ensure that the employer's nursing home customers receive 'quality care' somehow fails to qualify as direction given 'in the interest of the employer' makes very little sense to us." *Health Care,* 511 U.S. at 575 (quoting Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1552 (6th Cir. 1992)); *cf.* Beverly Enters., 313 N.L.R.B. 491, 494 (1993) (finding the reasoning that the Court would later apply in Health Care "too simplistic" and pointing out that the mere fact that actions of charge nurses "usually are consistent with the entrepreneurial goals of the employer does not detract from the professional or technical nature of the actions").
The Court rejected all the Board’s references to the legislative history and the purpose of the Act. In an astonishingly bold expression of judicial supremacy, the Court stated that “[i]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature to say what an enacted statute means.” The Court dismissed the Board’s reliance on the legislative history of the 1974 amendments to the NLRA by stating that “[t]hose amendments did not alter the test for supervisory status in the health care field.” The Court also noted that Congress could not have intended to approve of the Board’s “patient care” analysis because “it is far from clear that the Board in fact had a consistent test for nurses before 1974.” In conclusively rejecting the Board’s use of legislative history, the Court stated that “[i]f Congress wishes to enact the policies of the Board, it can do so without indirection.”

The Court quickly moved away from legislative history to review judicial precedent. The majority in Health Care condemned the Board’s patient care analysis as “inconsistent with Yeshiva, [Packard], and the ordinary meaning of the phrase ‘in the interest of the employer.” The majority emphasized the similarities between the Board’s “patient care” analysis and the approach the Board took in Yeshiva. The Court found the “patient care” analysis substantially similar to the Board’s argument in Yeshiva that the “faculty authority ‘was exercised in the faculty’s own interest rather than in the interest of the university or [employer],’” and created the same impermissible dichotomy in Health Care as it had in Yeshiva.

The Health Care Court also cited Packard to support its reading of the statute. The Court likened the Board’s position to that taken by the dissenters in Packard who

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95. See Health Care, 511 U.S. at 581-82. The Court notes the Board’s reliance on an “isolated statement in the 1974 Committee Report” to support its conclusions and states that such reliance is misguided. Id.
96. Id. at 582 (quoting Pierce v. Underwood, 487 U.S. 552, 566 (1988)).
97. Id. at 581-82.
98. Id.
99. Id. at 582.
100. Id.
101. See id. at 576.
102. Id. at 577.
103. See id. at 576-77.
104. See id. at 578.
"advanced the proposition that the phrase ["in the interest of the employer"] covered only 'those who acted for management... in formulating [and] executing its labor policies."\textsuperscript{105} 

The Court then noted that the Court in \textit{Packard} "determined that acts within the scope of employment or on the authorized business of the employer are in the interest of the employer."\textsuperscript{106} Thus, the Court concluded, the Board's "patient care" analysis was inconsistent with \textit{Packard}\textsuperscript{107}

The Court was particularly troubled that the Board did not rely on the "in the interest of the employer" prong in other supervisor cases concerning professionals, but had used its "patient care" form of analysis only in the health care field.\textsuperscript{108} The Court stated that in "almost all" the cases in other industries where the Board had drawn a "distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives... the Board's decisions did not result from manipulation of the statutory phrase 'in the interest of the employer,' but instead from a finding that the employee in question had not met the other requirements for supervisory status under the Act."\textsuperscript{109}

2. Justice Ginsburg's Dissent in \textit{Health Care}

Justice Ginsburg's well-crafted dissent in \textit{Health Care} stated that the Board's patient care analysis was not a "rudderless rule" reserved only for nurses, but rather a consistent application of the Board's approach in other contexts.\textsuperscript{110} Justice Ginsburg noted that the Board "has employed the distinction between authority arising from professional knowledge, on one hand, and authority encompassing front-line management prerogatives, on the other" in analyzing cases involving "doctors, faculty members, pharmacists, librarians, social workers, lawyers, television station directors, architects... and engineers."\textsuperscript{111} In contrast to the majority's use of \textit{Yeshiva}, the dissent cited the case to support the Board's

\begin{footnotes}
\item \textsuperscript{105} \textit{Id.} (quoting Packard Motor Car Co. v. NLRB, 330 U.S. 485, 496 (1947) (Douglas, J., dissenting)).
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{See id.}
\item \textsuperscript{108} \textit{Id.} at 582.
\item \textsuperscript{109} \textit{Health Care}, 511 U.S. at 583.
\item \textsuperscript{110} \textit{Id.} at 590 (Ginsburg, J., dissenting).
\item \textsuperscript{111} \textit{Id.} at 590-92.
\end{footnotes}
general approach to the Act’s application to professionals.\textsuperscript{112} Justice Ginsburg emphasized the following passage from Yeshiva:

The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress . . . .\textsuperscript{113}

The dissent went on to show that the Board had construed the phrase “in the interest of the employer” “in diverse contexts, to convey more than the obligation all employees have to further the employer’s business interests, indeed more than the authority to assign and direct other employees pursuant to relevant professional standards.”\textsuperscript{114}

3. The Anticipated Impact of Health Care

Although the Health Care decision was decided by the narrowest of margins, the ruling was nonetheless expected to alter significantly the way the NLRB determined the status of charge nurses under the Act.\textsuperscript{115} The majority attempted to quash fears that the decision would have such far-reaching implications: “Because the Board’s interpretation of ‘in the interest of the employer’ is for the most part confined to nurse cases, our decision will have almost no effect outside that context. Any parade of horribles about the meaning of this decision for employees in other industries is thus quite misplaced . . . .”\textsuperscript{116} Justice Ginsburg, however, disputed the majority’s statement and warned that “[t]he Court’s opinion has implications far beyond the nurses involved in this case. If any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few

\textsuperscript{112} Id. at 592.

\textsuperscript{113} Id. (quoting NLRB v. Yeshiva Univ., 444 U.S. 672, 690 n.30 (1980)).

\textsuperscript{114} Id. at 594.

\textsuperscript{115} See, e.g., Hays, supra note 68, at 988 (predicting that the impact of the Supreme Court’s Health Care decision would be felt immediately in the health care profession, causing employers to withdraw recognition from unions representing nurses).

\textsuperscript{116} Health Care, 511 U.S. at 583-84.
professionals employed by organizations subject to the Act will receive its protections.”

E. THE NLRB’S REACTION TO HEALTH CARE

Despite Justice Ginsburg’s predictions that the Health Care decision would dramatically alter the Board’s approach to supervisor cases, and to health care professionals in particular, the Board continued to find charge nurses to be non-supervisors. In Nymed the Board announced its intended response to Health Care. The Board first acknowledged the demise of the “patient care” analysis, but emphasized the narrowness of the Health Care holding. It next noted that

117. Id. at 598 (Ginsburg, J., dissenting); see also Dana J. Chase, Note, National Labor Relations Board v. Health Care & Retirement Corporation of America: The Debate Continues As to Whether Nurses Are Professionals or Supervisors, 4 J. PHARM. & L. 225, 235 (1995) (concluding that Health Care could likely have a negative impact on other professionals as well as nurses); Woodson, supra note 36, at 301 (noting that the Health Care decision was widely criticized by unions and labor lawyers who feared it would have wide-ranging effects on other employees who perform limited supervisory functions).

118. Nymed, Inc. (Ten Broeck Commons), 320 N.L.R.B. 806 (1996). The Nymed decision draws extensively from an earlier Board decision, Beverly Enterprises, 313 N.L.R.B. 491 (1993). The Beverly Enterprises decision is interesting because it arose in late 1993, after the Circuit split had developed on the issue, when it was clear that the Supreme Court was likely to grant certiorari on the question. The long, thoughtful decision by Chairman Stephens and Members Devaney and Raudaubaugh serves two important functions. First, it reads as an effective amicus brief to the Supreme Court defending the Board’s “patient care” analysis—anticipating many of the objections raised by the appellant in Health Care. See id. at 493. Indeed, it appears from the repeated cites to Beverly Enterprises contained in Health Care that the Court accepted Beverly Enterprises as a clear statement of the Board’s position. See Health Care, 511 U.S. at 574, 588. Second, it provides a preview of the “independent judgment test” that would succeed the “patient care” test:

Our “patient care” analysis in the health care industry is not materially different from that used in the “leadman” cases, albeit we have usually employed different terminology in a setting in which the “shop floor” is a patient ward and the “product” is patient care rather than, say, ball bearings. Charge nurses in hospitals and nursing homes are, in our experience, on a par with “leadmen” [outside the health care industry] . . . . For the same reasons we find, in other settings, that the authority to give such assignments and directions, without more, does not confer supervisory status, so also we find that the possession of that authority . . . does not confer supervisory status in the health care industry.

Id.

119. See id. at 810.
the Court agreed with the Board's argument that phrases such as 'independent judgment' and 'responsibly to direct' are ambiguous and thus the Board needs a wide latitude in its application of these indicia to various categories of employees.120 In sum, the Board interpreted Health Care as an admonishment by the Court to treat health care professionals the same as all other professionals.121 Accordingly, the Board announced that from then on, "[i]n determining whether [charge nurses'] direction of work meets the definition of Section 2(11), we shall decide whether such direction requires the use of independent judgment or whether such directions are merely routine."122 The Board in Nymed applied its reconfigured analysis and concluded that the forty-five LPNs in question did not exercise independent judgment when assigning, directing, disciplining, evaluating, and transferring other employees, and therefore found that the nurses were not supervisors under section 2(11).123

The "independent judgment" analysis, rather than emphasizing the question of whose interest is served by the alleged supervisory activity, asks simply whether the nurse is exercising independent judgment in carrying out the act.124 The Board distinguishes between decisions made relating to supervisory duties that require the nurse to exercise individual discretion and those nominally supervisory tasks so clearly dictated by employer policy as to be merely routine and not really "decisions" at all.125 In a case decided in 1996, the Board illuminated this distinction:

120. Id.
121. See id.
122. Id.
123. Id. at 806; see also Peter R. Macleod, Status of Nurses As "Supervisors" Under the National Labor Relations Act: Nymed, Inc., 38 B.C. L. REV. 323, 326-32 (1997) (detailing the Board's holding in Nymed and noting that the case is "important because the Board purported to enunciate the guidelines by which it will analyze future health care supervisor cases").
124. See Nymed, 320 N.L.R.B. at 809 ("To meet [the § 2(11)] definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that function is not routine but requires the use of independent judgment.").
125. Many commentators have disapproved of the Board's new test, saying it has the same shortcomings of its previous "patient care" analysis. See, e.g., Ann M. Benedetto, Note, NLRB v. Health Care and Retirement Corp. of America: Analysis and Disapproval of the National Labor Relations Board's Determination of Supervisory Status of Nurses, 12 J. CONTEMP. HEALTH L. & POLY 701, 730 (1996) (contending that the Board's "independent judgment"
when a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the staff that implements that plan.\textsuperscript{126}

F. THE CIRCUIT COURTS' INTERPRETATION OF HEALTH CARE

Not only did the \textit{Health Care} decision fail to deter the NLRB, it also failed to resolve the circuit split. The division among the Circuit Courts of Appeals on whether the Board's test for supervisory status in the health care setting is more pronounced now than it was before the \textit{Health Care} decision. Prior to \textit{Health Care}, only the Sixth Circuit had rejected the Board's "patient care" analysis. Now, the Third, Sixth,\textsuperscript{127} and Seventh\textsuperscript{128} Circuits have lined up against the Board's new "independent judgment" test. Reflecting the dissension that exists with regard to the issue, the Fourth Circuit has alternately followed\textsuperscript{129} and rejected\textsuperscript{130} the Board's new test.

analysis is "in direct contradiction to the explicit wording of the NLRA"); King, \textit{supra} note 74, at 356 (describing the Board's new test as merely "a disguised restatement of the Board's 'patient care' analysis"); Macleod, \textit{supra} note 123, at 334 (suggesting that the Board's current analysis is "unclear", and "ignores important precedent"). \textit{But see} Colleen A. Manning, \textit{Status of Charge Nurses As "Supervisors" Under the National Labor Relations Act: Providence Hospital \& Alaska Nurses Ass'n, 38 B.C. L. REV. 335, 346 (1997) (describing two 1996 NLRB decisions finding nurses not to be supervisors and suggesting that such an interpretation is "the most fair and consistent with the statute").}

\textsuperscript{126} Providence Hosp., 320 N.L.R.B. 717 (1996).


\textsuperscript{128} See NLRB v. Grancare, Inc., 158 F.3d. 407 (7th Cir. 1998), \textit{enforced}, 170 F.3d 662 (7th Cir. 1999). The court notes that when this case was originally decided by the Board under its "patient care" analysis (the case was remanded after the \textit{Health Care} decision was issued), the Board found that the nurses did exercise some "independent judgment." Because the Board, on remand, "reached the same result but relied on a different statutory factor," the court found "little reason to accord significant deference to the Board." \textit{Id.} at 413.

\textsuperscript{129} See Beverly Enters. v. NLRB, 136 F.3d 361, 363 (4th Cir. 1998) (approving of the Board's analysis and finding adequate support in the record that charge nurses were not exercising independent judgment in their performance of routine job duties), \textit{rev'd}, 165 F.3d 290 (4th Cir. 1999).

\textsuperscript{130} See Glenmark Assocs. v. NLRB, 147 F.3d 333 (4th Cir. 1998). In \textit{Glenmark Associates}, Judge Williams launched a scathing attack on the Board's new test in a lengthy footnote:

This issue of the supervisory status of nurses serves as another
After that court's recent en banc decision in *Beverly Enterprises v. NLRB*, however, it appears that, for the time being, seven out of twelve jurists on the Fourth Circuit have rejected the independent judgment analysis. On the opposite side, the Eighth, Ninth and District of Columbia Circuits have accepted the Board's formulation.

1. Description of Opposition

The circuits that have rejected the Board's analysis have adopted the *Health Care* Court's one-dimensional textual approach to the Act. These courts refused to acknowledge the ambiguity in the language of section 2(11) or to consider the purpose of the Act in their decisions.

As it was in opposing the Board's "patient care" analysis, the Sixth Circuit is the standard bearer for the courts that

example of the NLRB's continuing effort to modify the plain language of § 2(11). . . .

We are not the first court to wonder whether this new interpretation is an end run around an unfavorable Supreme Court decision in order to promote policies of broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair labor practice findings it makes rather than explicate a well-reasoned interpretation of the NLRA.

. . . [T]he Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the Third Branch.

*Id.* at 339-40 n.8. The court concluded that the Board's "independent judgment" analysis was "incorrect" in that it "fail[ed] to appreciate the distinction between using skill and professional judgment to perform a complex job and using related skills and judgment to manage others." *Id.* at 340.

131. 165 F.3d 290 (4th Cir. 1999).

132. See *id*.

133. See *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1045 (8th Cir. 1998) (approving of the NLRB's "independent judgment" test and noting that the *Health Care* decision did not affect the test previously established in *Schnuck Markets v. NLRB*, 961 F.2d 700, 703 (8th Cir. 1992), which did not rely on the "patient care" element).

134. See *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 552 (9th Cir. 1997) (accepting and applying the Board's "independent judgment" test). The dissent in *Providence Alaska Medical Center* accused the Board of "seriously distort[ing] the statute" and insisted that "[w]hat the Board has done is exactly analogous to what it did in its earlier test disapproved in *Health Care.*" *Id.* at 556 (Noonan, J., dissenting); see also *King*, supra note 74, at 350.

135. See *Beverly Enters. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997) (agreeing with the Board's finding that the employer failed to show that the charge nurses in question exercised supervisory authority).
have rejected the "independent judgment" analysis. The Sixth Circuit's view of the Board's analysis is accurately summarized in the following passage:

Just as the supposed taint of "patient care" does not, in our view, mean that individuals who responsibly direct others in providing such care are somehow acting other than in the interest of the employer, the use of independent judgment does not become "merely routine" when exercised in the interest of patients housed in the employer's nursing home.

Similarly, in *NLRB v. Grancare, Inc.*, the Seventh Circuit referred to the Board's "well attested manipulativeness" in supervisory cases concerning charge nurses and afforded the Board's interpretation little deference. The court held that the LPNs' "independence" was not reduced merely because they relied on their professional expertise in carrying out supervisory tasks.

The Fourth Circuit has recently joined the Seventh and Sixth Circuits in opposing the Board's independent judgment analysis. The court's en banc decision in *Beverly Enterprises v. NLRB* represents the most thoughtful, complete, and reasoned rejection of the Board's analysis on record. Unlike the Sixth and Seventh Circuits, the *Beverly Enterprises* court described in detail the three-part test applied by the Board, and the history of the Board's interpretation of section 2(11) as applied to charge nurses from the "patient care" analysis through *Health Care* and the emergence of the independent judgment analysis. The court found that the Board's position that LPNs are not supervisors manifested an "irrational consistency" even though LPNs are the highest-ranking employees present for a majority of the time and can recommend disciplinary action. The court quoted its own precedent, noting that the Fourth Circuit is "not the first court

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136. See, e.g., Mid-America Care Found. v. NLRB, 148 F.3d 638, 640 (6th Cir. 1998) (noting that "in six prior reported decisions, we have vacated NLRB decisions that found nurses not to be supervisors within the meaning of the NLRA"); Grancare, Inc. v. NLRB, 137 F.3d 372, 376 (6th Cir. 1998).


138. 158 F.3d 407 (7th Cir. 1998), enforced, 170 F.3d 662 (7th Cir. 1999).

139. See id. at 413.

140. See id. at 414.

141. 165 F.3d 290 (4th Cir. 1999).

142. See id. at 294-96.

143. Id. at 295-96.
to wonder whether this new interpretation is an end run around an unfavorable Supreme Court decision in order to provide policies of broadening the coverage of the Act."144 The Beverly Enterprises court concluded that assigning work, directing, and disciplining are not simply professional medical tasks but are instead "part and parcel of what it means to be a manager and a supervisor."145

2. Circuit Courts Favorable to the Board’s “Independent Judgment” Analysis

Taking an opposing view, the D.C. Circuit has expressed its support for the independent judgment analysis. The D.C. Circuit identified the key issue in determining supervisory status: independent judgment depends on the “degree of discretion” needed to perform the statutory duties, and not upon a bright line dividing complete independence from mere obedience.146 Likewise, the Eighth Circuit has approved of the Board’s current approach to charge nurse cases, affirming in one case the Board’s finding that the LPNs in question “merely follow[ed] routine procedures while they [were] ‘in charge.’”147 The court also noted that although the nurses reassigned duties and re-prioritized work when changes in patient care or personnel dictated, “such authority [did] not require the use of independent judgment but [was] instead narrowly circumscribed by an elaborate system of procedures, policies, and protocol regarding patient care.”148

Finally, the Ninth Circuit has endorsed the independent judgment test. In finding that charge nurses were exercising their professional judgment rather than independent judgment, the court noted that “[e]ven though a supervisory nurse may not be physically present during the evening, night, and weekend shifts, a supervisory nurse is on call at all times during these shifts. This indicates that the ultimate responsibility rests with the supervisory nurse, not with the charge nurse.”149

144. Id. at 296 (quoting Glenmark Assocs. v. NLRB, 147 F.3d 333, 340 n.8 (4th Cir. 1998)).
145. Id. at 298.
147. Beverly Enters. v. NLRB, 148 F.3d 1042, 1048 (8th Cir. 1998).
148. Id. at 1047.
149. Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 555 (9th Cir. 1997).
Despite the Sixth Circuit's strong position against the "independent judgment" test, there is a quiet mutiny swelling within its ranks.\textsuperscript{150} Although compelled to concur with the majority by controlling Sixth Circuit precedent, two judges have recently expressed their discomfort and even displeasure with the circuit's continued rejection of the Board's latest test through its use of a strict textual approach.\textsuperscript{151} One of these dissenters, Judge Moore, has voiced her "fear [that the Sixth Circuit's] precedent obliterates any distinction between those with minor supervisory duties and true supervisors" in contravention to the purpose of the Act and the intent of Congress.\textsuperscript{152} Judge Moore noted that her colleagues' broad categorical definition of independent judgment to encompass "all discretionary or reasoned decision-making" would limit the Act's protections to very few professionals.\textsuperscript{153} Judge Moore applauded the Board's "effort to harmonize Congress's clear intent to exclude supervisors from the Act's coverage while including professionals within the class of covered employees."\textsuperscript{154} The dissent concluded that insofar as the Board's construction of the statute was a permissible one, the court was compelled to defer to the Board's interpretation.\textsuperscript{155}

\textbf{III. THE SUPREME COURT'S TEXTUAL ANALYSIS FAILS TO EFFECT THE INTENT OF CONGRESS AND THE PURPOSE OF THE NLRA}

The tension created by the overlapping definitions of "supervisor" and "professional employee" cannot be justly resolved through a strictly textual interpretation of the National Labor Relations Act. When the text of the Act is considered as a whole, ambiguities and inconsistencies in its language frus-
trate such a narrow approach. On the one hand, the language of the Act communicates the clear desire of Congress to exclude from coverage workers who are truly supervisors representing the employer's interest in the workplace. On the other hand, the Act explicitly states Congress's desire to protect professional employees who may exhibit some of the same characteristics as the excluded supervisors.

Following *Health Care*, the Board's supervisor analysis requires an affirmative response to three questions:

1. Does the worker perform any one of the twelve activities enumerated in section 2(11)?

2. Does the worker perform these activities in the interest of the employer?

3. Does the exercise of authority require the use of "independent judgment" or is it instead "of a merely routine or clerical nature"?

Consistent with the NLRA's purpose to facilitate and protect workers' right to organize, the Board has used this test to apply the supervisor definition narrowly. The Board has held that although nursing professionals often possess the authority to perform some of the tasks contained in Section 11 of the Act, such authority does not always require the exercise of independent judgment.

In one representative case, the Board refused to exclude as supervisors LPNs who had the authority to assign work to aides, to designate lunch and break times, to assign extra duties to aides, and to direct and monitor the work of aides.

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158. *See id.* § 152(11); NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 517, 574 (1994); *see also supra* notes 4-7 and accompanying text.

159. That is, the power to hire, transfer, suspend, lay-off, recall, promote, discharge, assign work, discipline, responsibly direct work, or adjust grievances. *See* 29 U.S.C. § 152(11); *see also Health Care*, 511 U.S. at 574; Grancare, Inc. v. NLRB, 158 F.3d 372, 411 (6th Cir. 1998) (emphasizing that a worker need only possess the authority to perform one of the twelve listed activities).


161. *See supra* notes 122-26 and accompanying text.

162. *See Nymed, Inc. (Ten Broeck Commons)*, 320 NLRB 806, 813-14 (1996). The Board also noted that the LPNs in question had many responsibilities that did not involve supervising aides. It concluded that "the LPNs' supervision of [aides] is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of their work. This type of authority is typical of that of the industrial
The Board explained that nurses who are using their "technical expertise and judgment to prepare a comprehensive health care plan for each resident" do not exhibit "independent judgment" when they direct aides in carrying out the plan.  

The Board's three-pronged test is well-suited to balancing an employer's interest in maintaining a core of management loyalists against the employee's statutory right to organize and bargain collectively over the terms and conditions of employment. Unfortunately, the Health Care decision essentially shortened the test by rendering moot the question of whether the supervisory task is performed "in the interest of the employer."  

A. Health Care's Failures

The Court, by rejecting the Board's "patient care" analysis, failed to appreciate the subtle distinction the Board was attempting to make between acting in the interest of the employer as a supervisor and acting in the interest of patient care as a professional. The Board was attempting to articulate with its patient care analysis that some tasks performed by health care professionals that appear "supervisory" in some contexts are merely incidental to the routine performance of their professional duties and are thus inexorably linked to the job.  

1. Health Care's Strict Textual Analysis Is Inappropriate

The Supreme Court's analysis failed by considering only the second prong of the Board's test. In contrast to the NLRB's thoughtful analysis, the Supreme Court begged the question. Rather than attempting to discern the delicate distinction Congress was attempting to make in drafting the amendment which contained the overlapping definitions of supervisor and "professional employee," the Court interpreted this language as completely immaterial.

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straw boss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor." Id. at 811-12 (citations omitted).

163. Id. at 811.
164. See supra notes 92-95 and accompanying text.
165. See supra notes 110-14 and accompanying text.
166. See supra notes 50-68 and accompanying text.
167. The only example provided in Health Care of an employee who does not perform supervisory duties in the interest of the employer is a union
Despite the overlapping definitions of supervisor and professional employee, the duties of the charge nurses more closely resemble those of the industrial "strawbosses, leadmen... and other minor supervisory employees" whom Congress intended to protect under the NLRA.168 The Board interpreted the Act as excluding only employees possessing the authority to act as a proxy for the employer in the workplace. True supervisors, according to the Board, made independent decisions affecting the employment conditions of other employees.169 The direction of nursing aides' work that is incidental to the conscientious performance of the charge nurses' duties ought not to deny them the protections of the Act.

2. The Court Misread Its Own Precedent

The Supreme Court in Health Care misleadingly suggested that its decision was supported by Packard Motor Car Co. v. National Labor Relations Board,170 "the case that gave impetus to the statutory provision now before us."171 Packard, like Health Care, interpreted the phrase "in the interest of the employer" broadly. Unlike Health Care, however, Packard did so to protect the rights of workers to organize under the Act, not to exclude workers from its protection.172

The question before the Court in Packard was whether industrial foremen, as a class, were entitled to collective bargaining rights under the NLRA. After analyzing the text (particularly the meaning of "in the interest of the employer") and purpose of the Act, the Court was compelled to affirm the Board's interpretation: the answer to the question was "yes." After all, it was the Packard Court's decision to resolve the

steward authorized to adjust grievances. NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 517, 579 (1994). If Congress had intended to exclude only union stewards from the definition of supervisor, it could have done so simply and explicitly.

168. See supra note 43 and accompanying text; see also Beverly Enters. v. NLRB, 136 F.3d 353, 358 (4th Cir. 1998) ("Lest the chiefs far outnumber the Indians, Congress crafted § 2(11)'s enigmatic standard, intending to exempt true management from the Act while still protecting the § 7 rights of "straw bosses, leadmen and set-up men, and other minor supervisory employees."). (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974)).

169. See Rabban, supra note 36, at 1803.
171. Health Care, 511 U.S. at 578.
172. See supra notes 32-35 and accompanying text.
textual ambiguity in favor of workers that prompted Congress to amend the NLRA to avoid the negative consequences of management unions. The Packard Court considered the remedial purpose of the Act in reaching its conclusion. Furthermore, the Packard Court deferred to the Board's interpretation in expanding the coverage of the Act. The Packard Court noted that the decision as to what constitutes an appropriate bargaining unit "involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." Health Care, on the other hand, disregarded the Board's broad interpretation and effectively restricted the coverage of the Act. In short, Packard and Health Care interpreted the same statutory language to reach opposite conclusions about two similar groups of workers. The Court's reliance on Yeshiva in the Health Care decision is equally misplaced. The university faculty members at issue in Yeshiva were excluded by the "judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy." Although noting that the supervisor and managerial employee exemptions share the same concern—that an employer is entitled to the undivided loyalty of its representatives—the Court explicitly refused to resolve the "supervisor" issue.

173. See id.
174. 330 U.S. at 491.
175. See Health Care, 511 U.S. at 582.
176. The Court in Packard described the supervisory duties of foremen this way:

Foremen carry the responsibility for maintaining quantity and quality of production, subject, of course, to the overall control and supervision of the management. Hiring is done by the labor relations department, as is the discharging and laying off of employees. But the foremen are provided with forms and with detailed lists of penalties to be applied in cases of violations of discipline, and initiate recommendations for promotion, demotion and discipline.

330 U.S. at 487.
178. See supra notes 99-103 and accompanying text.
179. Yeshiva, 444 U.S. at 682 (citations omitted). Managerial employees were recognized as "so clearly outside the Act that no specific exclusionary provision was thought necessary." NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974).
180. Yeshiva, 444 U.S. at 682.
To be sure, the arguments advanced by the Board in Health Care and Yeshiva were similar. The Board contended that the professionals at issue in both cases were performing managerial or supervisory duties in their professional capacity and not in the interest of the employer. There are, however, some significant differences in the underlying facts of the two cases. To the extent that the Board argued in Yeshiva that "a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer,"\(^{181}\) the analyses in the two cases is substantially similar. The Yeshiva Court, however, granted substantial weight to the policy basis for the managerial exemption: preventing divided loyalty. Yeshiva discussed the issue at length, describing the "acute" problem of divided loyalty in the university setting.\(^{182}\) In contrast, the Court in Health Care limited its consideration of divided loyalty to a single sentence, concluding vaguely that "[n]ursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction."\(^{183}\)

The faculty members at issue in Yeshiva performed dramatically different roles at the university than do charge nurses at a nursing home. The faculty members met regularly to address institutional and professional concerns.\(^{184}\) The faculty determined the university's curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.\(^{185}\) They also made decisions affecting faculty hiring, tenure, termination, and promotion.\(^{186}\) The Board argued in Yeshiva that although faculty members may seem to exercise managerial authority, the faculty were not sufficiently "aligned with management" to exempt them

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181. Id. at 688.
182. Id. at 687-90 (stating that divided loyalty is a particularly severe problem where "[t]he university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy").
184. Yeshiva, 444 U.S. at 676.
185. See id. The Court noted that the faculty possess, and occasionally exercise, the authority to overrule decisions made by college administrators. See id. at 676 n.4.
186. See id. at 677.
from the Act.\textsuperscript{187} One of the pillars of \textit{Yeshiva}'s rejection of the Board's independent professional judgment test was the Court's inability to identify a consistent application of the test in any of the Board's prior decisions.\textsuperscript{188}

The charge nurses at issue in \textit{Health Care} obviously did not possess the same sort of managerial authority as the faculty members in \textit{Yeshiva}. Accordingly, both the Board and the Court relied on the supervisory exemption and not the implied managerial exception employed in \textit{Yeshiva}. Unlike the test the Board applied in \textit{Yeshiva} and other faculty cases, the Board's "in the interest of the employer" analysis had been applied consistently over a long period of time in various contexts.\textsuperscript{189} The dissent in \textit{Health Care} noted that the "in the interest of the employer" language has been interpreted consistently in cases involving not only nurses, but also social workers, pharmacists, and attorneys.\textsuperscript{190}

The most obvious indication that \textit{Health Care} cites \textit{Yeshiva} for a proposition the latter fails to support is found in a statement limiting the scope of \textit{Yeshiva}'s holding. The Court noted in \textit{Yeshiva} that Board decisions recognizing "that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty... accurately capture the intent of Congress."\textsuperscript{191} The Court listed as an example of such permissible constructions of the Act decisions in the "health-care context" in which the Board has employed its "patient care" analysis.\textsuperscript{192}

By selectively reading its own precedents in \textit{Packard} and \textit{Yeshiva}, the \textit{Health Care} Court creates the illusion that its decision rested on solid judicial foundations. With these two supportive legs knocked out, the \textit{Health Care} decision is left teetering on the edge of total collapse.

\textsuperscript{187} See \textit{id.} at 683-84.
\textsuperscript{188} See \textit{id.} at 685 (stating that the independent professional judgment test "does not appear clearly in any Board opinion").
\textsuperscript{189} See \textit{Health Care}, 511 U.S. 594-95 & n.13 (Ginsburg, J., dissenting).
\textsuperscript{190} See \textit{id.}
\textsuperscript{191} \textit{Yeshiva}, 444 U.S. at 690.
\textsuperscript{192} See \textit{id.} at 690 n.30. The Court also noted that Congress "expressly approved" the Board's test in 1974. \textit{Id.} (citing S. REP. NO. 93-766, at 6 (1974)).
B. Circuit Courts Rejecting the "Independent Judgment" Test Are Blindly Following Health Care's Textual Analysis

The courts may not substitute their own judgment for that of the NLRB when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo."\textsuperscript{193} The Board is entitled to judicial deference when it interprets ambiguous language in the Act.\textsuperscript{194} Yet some courts clearly have imposed their own interpretation of the Act in reversing the Board. For example, the Board has held that charge nurses with the authority to send an aide home for drunkenness or patient abuse are not necessarily supervisors.\textsuperscript{195} This type of conduct is such a flagrant violation of employer policies that a charge nurse need not exercise any independent judgment in sending the worker home.\textsuperscript{196} The Third Circuit, however, could "see little to commend a distinction based upon how flagrant the violation happens to be."\textsuperscript{197} The court found instead that a charge nurse's action in sending an aide home "could not be considered a routine or clerical function; it consists of a Charge Nurse imposing her independent judgment upon, and exercising her authority over a subordinate, however subtle or flagrant the violation."\textsuperscript{198}

In \textit{Caremore, Inc. v. National Labor Relations Board},\textsuperscript{199} the Board determined that charge nurses who "exercised their authority to assign, direct, evaluate, and recommend discipline only occasionally" and "sporadically" were the type of minor supervisory employees Congress intended to protect under the Act.\textsuperscript{200} The Sixth Circuit cast aside the Board's interpretation, stating that "[i]t is the existence of [a statutorily listed] authority that counts under the statute, and not the frequency

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\textsuperscript{193} Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).
\textsuperscript{195} \textit{See} Beverly Enters., 313 N.L.R.B. 491, 497 (1993).
\textsuperscript{196} \textit{See id.} (finding that flagrant acts such as drunkenness and patient abuse "are obvious violations of the employers' policies and speak for themselves").
\textsuperscript{197} Passavant Retirement & Health Ctr. v. NLRB, 149 F.3d 243, 249 (3rd Cir. 1998).
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} 129 F.3d 365 (6th Cir. 1997).
\textsuperscript{200} \textit{Id.} at 369.
\end{flushleft}
After imposing its interpretation, supported by Sixth Circuit precedent, to find the charge nurses to be supervisors, the court seized the opportunity "to remind the NLRB that it is the courts, and not the [NLRB], who bear the final responsibility for interpreting the law."\textsuperscript{202}

The courts that reject the Board's "independent judgment" analysis do not consider the realities of the workplace in reaching their conclusions. They instead rely on a strict reading of the section 2(11) criteria in determining whether a charge nurse is a supervisor. The NLRB, on the other hand, argues that the question is not so simple. The Board recognizes a class of workers in between front-line employees and true supervisors. The existence of this middle class of workers has long been acknowledged by the Board to consist of "employees who possess greater skills or experience than their fellow employees [and who] often give instructions and directions to other employees on the shop floor regarding what to do next."\textsuperscript{203} These workers were traditionally termed "leadmen."\textsuperscript{204} Historically, leadmen have been permitted to unionize under the Act because they have "been found to be lacking in supervisory authority even though they direct employees' work, assign tasks, convey reports on employees' progress, and report rules infractions."\textsuperscript{205}

The question the Board seeks to answer with its "independent judgment" analysis is the same as that previously addressed via the "patient care" approach: are charge nurses vested with "genuine management prerogatives?"\textsuperscript{206} The courts rejecting the Board's analysis view the Board's attempt to reach the same result in charge nurse cases after Health Care that it did before that decision as "an end run around an unfavorable Supreme Court decision."\textsuperscript{207} These courts ignore the fact that the Board is obliged to interpret the language of

\textsuperscript{201} Id. (quoting Beverly Cal. Corp. v. NLRB, 970 F.2d 1548, 1550 n.3 (1992)).

\textsuperscript{202} Id. at 371 (quoting Health Care & Retirement Corp. v. NLRB, 987 F.2d 1256, 1260 (6th Cir. 1993)).

\textsuperscript{203} Beverly Enters., 313 N.L.R.B. 491, 494 (1993).

\textsuperscript{204} See id.; see also supra notes 42-46 and accompanying text.

\textsuperscript{205} Beverly Enters., 313 N.L.R.B. at 494 n.13 (citing Higgins Indus., 150 N.L.R.B. 106, 111-12 (1964), among other Board decisions).

\textsuperscript{206} See supra note 44 and accompanying text.

\textsuperscript{207} Glenmark Assocs. v. NLRB, 147 F.3d 333, 340 n.8 (4th Cir. 1998).
the Act, whenever possible, to further the mission of the Act—to protect the rights of working people to unionize.

The Board reads Health Care as leaving room for the identification of employees who fit into the middle or leadman category. Applying a textual approach of its own, the Board emphasizes the narrowness of Health Care's holding. According to the Board, Health Care rejected the Board's distortion of the statutory language of section 2(11), but not the policy represented by the patient care analysis. In Providence Hospital the Board condensed Health Care's holding:

In Sum, the Court held that the Board's patient care analysis relying on "in the interest of the employer" was an impermissible shortcut, that there are no hard-and-fast rules, but that the Board should analyze the 12 listed statutory indicia in detail and on a case-by-case basis.

The Board also picked up on Health Care's suggestion that other admittedly ambiguous language was fair game for the Board in developing an alternative analysis. Providence Hospital introduced the "independent judgment" analysis by stating that "the Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact."

Some of the circuit courts read Health Care differently. In Beverly Enterprises, the Fourth Circuit advanced the notion that the Board was exhibiting an impermissible "policy bias" in its recent decisions. The court did not cite any specific holding of Health Care to support this argument, but seemed to infer that Health Care's approach precluded the Board's consideration of congressional intent and statutory purpose in interpreting the Act. Under this reading, it would be impos-

208. See Nymed, Inc. (Ten Broeck Commons), 320 N.L.R.B. 806, 810 (1996).
209. See id.
210. See id.
212. See Nymed, 320 N.L.R.B. at 810.
214. 165 F.3d 290 (4th Cir. 1999).
215. See id. at 296.
216. See id. The court quoted the statement in Health Care that "[i]t is the function of the courts . . . to say what an enacted statute means." Id. (quoting
sible for the Board to give effect to Congress's recognition of the middle level "strawbosses and minor supervisory employees." Not only is this reading of Health Care unjustifiably broad, but it also is in direct conflict with the role of the NLRB in interpreting and applying the Act.

C. THE "INDEPENDENT JUDGMENT" TEST IS CONSISTENT WITH HEALTH CARE

1. The Supreme Court Did Not Preclude the "Independent Judgment" Analysis

The Board followed the instructions handed down in Health Care by skipping over the second prong of the supervisor test and moving directly to the independent judgment analysis. The refocused test accomplishes essentially the same result as the old one, but it relies on statutory language the Court found more acceptable.

The Court in Health Care invited the Board to modify its test to focus on the "independent judgment" language of the statute. The Court took care to note that while it found no ambiguity in the "interest of the employer" language, it considered other phrases in section 2(11) (such as "independent judgment") ambiguous. Accordingly, the Court said the

NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 571, 582 (1994)).

217. See supra notes 42-46 and accompanying text.

218. See Russell L. Weaver, Some Realism About Chevron, 58 MO. L. REV. 129, 172-73 (1993) (noting that "several post-Chevron decisions [suggest] that, if an interpretive question involves a policy choice, then the agency responsible for the regulatory scheme should be free to make that choice").

219. See 29 U.S.C. § 152(11) (1994). Prior to Health Care, however, the Board generally ended its analysis after finding that the duty was not performed in the interest of the employer in the second part of the test. After Health Care, the Board has been forced to continue its analysis and ask the third question. See, e.g., Beverly Enters. v. NLRB, 136 F.3d 353, 357-58 (4th Cir. 1998) (explaining the Board's three part test and noting that Health Care requires the Board to extend its analysis to the "independent judgment" test which is "by far the most difficult"). But see Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 556 (9th Cir. 1997) (Noonan, J., dissenting) (claiming that it was not until after Health Care's rejection of the patient care analysis that the independent judgment test saw "the light of day," and that "[d]eference should not be accorded an interpretation that [the Board] has taken 50 years to reach and ... [that] has been brought forward as an end run around [Health Care]").

220. See Health Care, 511 U.S. at 579.

221. See id.
Board should be given "ample room" to apply this phrase appropriately for various types of workers.222

Health Care should be taken at face value: it is a very narrow decision. Health Care rejects only the patient care analysis. The independent judgment test is not a new test invented by the Board to effect an "end run" around Health Care. The independent judgment test has long been a part of the Board's analysis. It is not at all clear that the Supreme Court would reject this analysis.223

The Court in Health Care refused even to acknowledge that the "in the interest of the employer" language was vague or ambiguous. Consequently, the Court was able to avoid according the Board the type of deference appropriate when interpreting ambiguous statutory language, especially when the language involves a technical subject that is squarely within the agency's realm of expertise.224 The overlap between the definitions of "supervisor" and "professional employee" contained in the Act establishes sufficient ambiguity to make deference appropriate in charge nurse cases.225 Moreover, the Board has always applied a consistent three-part test in analyzing supervisor cases involving health care professionals. The Board has applied this test countless times under various circumstances since 1974. In the face of such ambiguity and given the existence of a test that has been applied consistently by the Board, the Court's best option in Health Care would have been to defer to the Board. As indicated by its response to the Packard decision, Congress is willing to and capable of reversing administrative positions it considers contrary to legislative intent.

222. See id.
223. See id.
224. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Chevron doctrine has become the standard courts use to examine administrative statutory interpretations. The test consists of a two part inquiry. First, if it is determined that Congress has directly spoken to the issue, the reviewing court must give effect to the will of Congress irrespective of any contrary agency interpretation. See id. at 842-43. If, however, the intent of Congress on a matter of statutory meaning is ambiguous, the court is to proceed to ask whether the agency's interpretation is a permissible construction of the statute. See id. at 843; see also Mid-America Care Found. v. NLRB, 148 F.3d 638 (6th Cir. 1998) (discussing the relationship between the Chevron doctrine and NLRB rulings).
225. See supra notes 51-66 and accompanying text.
2. The Legislative History Supports the "Independent Judgment" Analysis

The independent judgment test is further supported by the legislative history of the NLRA.\textsuperscript{226} Despite the Court's dismissal in \textit{Health Care} of this history, Congress's intent in creating the supervisor exemption is crucial in examining the Board's latest approach. The Board's test is consistent with \textit{Health Care}'s narrow holding and it successfully integrates the intent of Congress and the purpose of the Act rather than ignoring it as \textit{Health Care} did.

As discussed above, Congress acted to clarify the purpose of the Act after \textit{Packard} by trying to draft statutory definitions which accurately captured the relationships between management and employees in order to balance the interest of workers in unionizing against management's interest in maintaining loyal representatives in the workplace. Congressional history shows that it is the relationship, and not the specific duties performed, that is crucial in this analysis. The Supreme Court failed to notice this entirely while the NLRB has struggled to craft policy to protect those relations.

Employer concern over misplaced or divided loyalty caused by unionization of charge nurses should be eased upon a deeper inspection of the patient care analysis. In accordance with the express desire of Congress to exclude only those workers possessing "such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action,"\textsuperscript{227} the patient care analysis required the Board to distinguish charge nurses whose unionization would truly threaten the employer's entitlement to loyal supervisors from those performing perfunctory professional duties. To fail to make this important distinction would be to unfairly exclude a large proportion of "professional employees" from the protections of the Act.\textsuperscript{228}

\textsuperscript{226} \textit{See supra} note 43 and accompanying text.

\textsuperscript{227} \textit{Health Care}, 511 U.S. at 589 (Ginsburg, J., dissenting) (quoting S. REP. NO. 80-105, at 3-4 (1947)).

\textsuperscript{228} \textit{See id.} at 585-88 (noting that "most professionals supervise to some extent" and suggesting that if the term "supervisor" is interpreted as broadly as the majority interprets it, the inclusion of "professionals" would be mooted).
3. The History and Experience of the NLRB Should Be Accorded Great Weight

The Board’s vast experience in discerning and evaluating the subtleties and complexities of the employer-employee relationship make it deserving of more judicial deference than the Supreme Court accorded it in Health Care. The NLRB received 5,668 representation petitions in 1996 alone. Although the Board would not necessarily need to separate supervisors from employees in relation to all of these petitions, they certainly would with respect to many of them. Of these petitions, 278 were specifically for “unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units.”

When the agency interpretation being reviewed by the court involves a “technical and complex” subject, the agency’s decision should be accorded greater weight.

The Board has been explicitly authorized to define bargaining units appropriate for collective bargaining under the NLRA and should be afforded adequate discretion to do so. The Board, though lacking the legislative authority of Congress, is uniquely qualified to resolve textual ambiguities in the statute in a manner consistent with the various purposes of the Act. The role of the courts in reviewing a decision of the NLRB is limited to determining whether the Board’s conclusion is “supported by substantial evidence on the record considered as a whole.” In making this determination, the courts should be mindful of the Board’s superior knowledge of the facts and familiarity with the circumstances in which labor disputes arise. The reasoning employed by the courts advocating deference is perhaps best described in this dissenting opinion of Justice Brennan:

229. For support of this view, see NLRB v. Yeshiva University, 444 U.S. 672, 692-93 (1980) (Brennan, J., dissenting). In noting the tension created by the NLRA’s “explicit inclusion, on the one hand, of ‘professional employees’ . . . and its exclusion, on the other, of ‘supervisors,’” Justice Brennan concludes that “primary authority to resolve these conflicts and to adapt the Act to the changing patterns of industrial relations was entrusted to the Board, not to the judiciary.” Id.


231. Id.


234. Id. § 160(e).
Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act. And through its continuous oversight of industrial conditions, it is the Board that is best able to formulate and adjust national labor policy to conform to the realities of industrial life. Accordingly, the judicial role is limited; a court may not substitute its own judgment for that of the Board. The Board’s decision may be reviewed for its rationality and its consistency with the Act, but once these criteria are satisfied, the order must be enforced. 235

4. The Board’s Expertise Makes It Uniquely Qualified To Make Difficult Decisions

Charge nurses represent a layer of authority between front-line workers (the nurses’ aides) and the true supervisors in the nursing home hierarchy. 236 Charge nurses undoubtedly perform some of the supervisory duties enumerated in section 2(11), but the language of the Act makes it clear that not all workers who perform these duties are to be excluded from the protection of the Act. The duties must be performed “in the interest of the employer” and must require the nurse to exercise “independent judgment” in order for the performer to be deemed a true supervisor. There is no question that distinguishing “independent judgment” from other types of judgment is exceedingly difficult. The language of the statute provides no guidance in this task. If a charge nurse is authorized to send an aide home when the aide is obviously intoxicated, must the charge nurse exercise “independent judgment” to determine if an aide is drunk? 237 When a charge nurse is instructed to call in aides to replace absent co-workers, is the nurse exercising “independent judgment” in deciding which aide to call? Or, instead, are these decisions merely routine? When a charge nurse fills out an evaluation form for aides in her unit, is she exercising independent judgment? What if the nursing director never looks at the form in making decisions about the promotion or retention of the aide? What if the nursing director refers to the form, but does not rely on it in performing an independent review of the aide?

235. Yeshiva, 444 U.S. at 693-94 (Brennan, J., dissenting) (citation omitted).
236. See supra note 60 and accompanying text.
237. See supra notes 195-98 and accompanying text.
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The NLRB has dutifully answered these types of questions since its creation in 1935. In answering such questions, the Board takes into account the policy behind the Act, the intent of the enacting and amending Congresses and, importantly, the Board's vast experience in adapting the Act to the realities of the modern workplace.

IV. IT IS NOT TOO LATE TO RESCUE CHARGE NURSES FROM THE DEFICIENCIES OF HEALTH CARE

The Supreme Court did not consider the "independent judgment" language in Health Care. On the contrary, the Court explicitly and deliberately declined to interpret this concededly ambiguous language. As a result, the problem of determining the status of charge nurses under the NLRA was not resolved by Health Care, but rather was aggravated by the decision. The Board has taken its cue from Health Care and reconfigured its charge nurse analysis in a way that is consistent with the Supreme Court's textual interpretation of the Act, while taking care to integrate the policy underlying the Act in its interpretation of the ambiguous "independent judgment" language.

The Supreme Court need not overrule Health Care in order to reverse the damage done by the decision. The Court has left itself ample room to approve the Board's current analysis. The Supreme Court can and should provide some stronger guidelines to the Board and the lower courts.

Another method of clarifying the issue would be for Congress to revisit the NLRA and amend it to make clear its intent with respect to minor supervisory employees such as charge nurses. Congress may be content to wait for the Supreme Court to issue a more definitive ruling on the issue before taking up an amendment to the statute. As Congress demonstrated with its quick and decisive reaction to the Court's Packard decision, it is willing and able to take action if it feels the Act's intent and purpose is not being adequately served.

In the meantime, if nursing home operators truly believe the divided loyalties of LPN charge nurses threaten the integrity of their operations, they are free to alter the respon-

238. See supra notes 220-23 and accompanying text.
239. See supra notes 220-23 and accompanying text.
sibilities of charge nurses and grant them real authority to act as supervisors in the workplace. Employers may be reluctant to make this change, however, because it would likely require them to pay the charge nurses more than $11.00 per hour.

CONCLUSION

Despite the close vote on the case and the considerable shortcomings of the majority opinion, the NLRB's "patient care" analysis is dead after Health Care and will not likely be revived. The Health Care decision, however, by its own insistence, must be interpreted narrowly. The circuit split, and the splits within individual circuits, that have emerged in the wake of Health Care are clear evidence that reasonable minds differ as to the proper interpretation of the "independent judgment" language in section 2(11). All of this suggests that the proper response to the Board's test is deference. The Supreme Court should admonish the lower courts to defer to the Board in supervisor cases absent any clear mistake of law and thus shift the burden to the legislature to take action if it feels the NLRB is acting in derogation of the Act.