ARE NURSES SUPERVISORS? A CRITICAL LOOK AT THE CIRCUIT SPLIT AFTER NLRB v. HILLIARD DEVELOPMENT CORPORATION

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INTRODUCTION

Whether nurses should be considered "supervisors" under the National Labor Relations Act1 ("NLRA" or "Act") is an important legal question, which has divided the circuits. A growing number of people will need nursing home and hospital care in the upcoming years.2 However, health care is experiencing many changes, including increased competition.3 Since labor costs comprise sixty percent of overall hospital costs, many employers are looking for ways to downsize.4 Therefore, employees are losing job security and are turning to unions to provide it. Despite National Labor Relations Board ("Board" or "NLRB") decisions which hold that nurses are not supervisors and thus are covered under the NLRA, some circuits have overruled the Board.5 Part I of this note discusses the background of the NLRA and its coverage of supervisors. Part II explains the Supreme Court decision in 1994, which invalidated the old patient care test. Part III discusses the current circuit split over the new "independent judgment" test. Part IV analyzes the detrimental effect on unions if the nurses are declared supervisors. Part V analyzes this effect on physicians. Part VI calls for the courts to follow congressional intent and employ a presumption that nurses are not supervisors. It also analyzes the decision in

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4. Id. at 344.
5. See, e.g., Mid-America Care Found. v. NLRB, 148 F.3d 638 (6th Cir. 1998); Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333 (4th Cir. 1998); Passavant Ret. Health Ctr. v. NLRB, 149 F.3d 243 (3rd Cir. 1998).
NLRB v. Hilliard and concludes that it was correctly decided. Finally, it calls for Congress to amend the NLRA and declare nurses non-supervisory.

I. BACKGROUND: SUPERVISORS, PROFESSIONALS, AND THE NLRA

A. NLRA and Supervisors

The NLRA affords employees the basic right to organize collectively and engage in collective bargaining free from employer retaliation. The Act imposes a duty on employers to bargain in good faith with the elected/designated representative union. It was intended to aid unions in their struggle to bargain with management.

The NLRA also established the NLRB, an administrative agency charged with the responsibility of enforcing the Act and ensuring employees’ rights. The power to determine appropriate bargaining units was vested in the NLRB.

As it was originally passed in 1935, the Act covered all employees. Supervisors were given the right to organize in bargaining units and negotiate with the employer. However, employers were concerned that supervisors’ loyalties would be divided between management and the union.

The Supreme Court was hesitant to exclude supervisors from...
coverage. Accordingly, in 1947 the Court in *Packard Motor Car v. NLRB*,\(^{16}\) held that supervisors were covered by the Act until there was a congressional mandate to the contrary.\(^{17}\) In this case, the NLRB found that foremen on an assembly line were employees in spite of their supervisory authority.\(^{18}\) At that time, the Act defined an employer as "any person acting as an agent of an employer."\(^{19}\) In *Packard*, the Court held that Congress did not intend to classify supervisors as employers just because they acted in the interest of their employers.\(^{20}\)

The congressional mandate the Court was waiting for became a reality soon after the *Packard* decision. In 1947, Congress passed the Taft-Hartley Amendments to the NLRA, which excluded supervisors from the definition of an employee.\(^{21}\) The rationale underlying the amendments was that supervisors' loyalties would be split between the employer, for whom he was an agent, and the employees with whom he was fighting with against management.\(^{22}\) This logic contradicts the purpose of the NLRA which is to equalize bargaining power.\(^{23}\) Although supervisors are excluded from coverage under the NLRA, they can still be in a union.\(^{24}\) However, an employer is under no duty to bargain with them.\(^{25}\) The Act expressly

17. *Id.* at 489.
18. *Id.* at 488.
19. *Id.* At this time an employee was defined as:

   any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

21. 330 U.S. at 488. The Court held that a literal reading of the statute would render all employees of a master's business "employers," because they all act in his best interests. *Id.* The dissent argued that if supervisors were covered by the Act, the consequence would alter industrial philosophy up until this point and eliminate the line between management and labor. *Id.* at 494 (Douglas, J., dissenting).
24. *Id.* 164(a) (1994).
25. *Id.* § 158(a)(1). It is an unfair labor practice to bargain in bad faith with employees. *Id.* It is also an unfair labor practice to interfere with, restrain or coerce employees in the exercise of their right to self-organize, their right to form, join or assist labor organizations, their right to bargain collectively, or their right to engage in concerted activities for the
defines who is considered a supervisor and the NLRB is charged with the responsibility of interpreting the Act.\textsuperscript{26} The Act 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 adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.\textsuperscript{27}

Congress intended this definition to exclude those employees that had minor supervisory duties and only include those with genuine management prerogatives.\textsuperscript{28} The committee distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees and supervisors that have genuine management power to hire, fire, and promote.\textsuperscript{29} The definition of "supervisor" was not meant to include all of those who voluntarily gave up the rank and file and began working on management side.\textsuperscript{30}

Therefore, to be considered a supervisor under the NLRA, the Board asks three questions: (1) whether an employee exercises authority in the interest of an employer; (2) whether an employee uses independent judgment; and (3) whether an employee performs any of the twelve enumerated functions.\textsuperscript{31} The Board is given great deference in determining purpose of collective bargaining or other mutual aid or protection. Id. § 158(a).

26. Id. § 152(11). There is a policy in favor of construing the definition of supervisor narrowly because an employee who is a supervisor loses protection under the NLRA. McDonnell Douglas Corp. v. NLRB, 655 F.2d 932, 936 (9th Cir. 1981).

27. 29 U.S.C. § 152(11) (1994). An employee need only possess the authority to perform one of these functions, regardless of whether he actually exercises it or the frequency with which he utilizes it. James Nederlander, 276 N.L.R.B. 32, 34 (1985); 23 NLRB ANN. REP. 40 (1958).


Whether an employee is a supervisor because of its special competence in applying the Act to everyday life.\textsuperscript{32}

**B. NLRA and Professional Employees and the Tension with Supervisors**

In 1947, Congress amended the NLRA to exclude supervisors and include professionals in the definition of employee.\textsuperscript{33} This amendment gave the NLRB’s prior ruling that professionals were covered by the Act the power of law.\textsuperscript{34} Professionals have separate bargaining units due to their unique interests.\textsuperscript{35} When Congress explicitly extended coverage of the NLRA to supervisors, it stated that the types of professionals to be covered under this new definition were “engineers, chemists, scientists, architects, and nurses.”\textsuperscript{36} Clearly, nurses are considered professionals and thus should be covered by the NLRA. However, once professional status is determined there is another hurdle to overcome before the individual is covered by the Act. The Supreme Court ruled in *NLRB v. Yeshiva University*\textsuperscript{37} that professionals may also be considered supervisors if they fit the definition and, therefore, would not be protected by the NLRA.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{32}Northeast Util. Serv. Corp. v. NLRB, 35 F.3d 621, 623 (1st Cir. 1994).
  \item \textsuperscript{33}Taft-Hartley Amendments, Ch. 120, Title I, § 101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 151-166 (1982)).
  \item \textsuperscript{34}In re Gen. Cable Corp., 57 N.L.R.B. 1651, 1653 (1944). For a definition of “professional employee,” see 29 U.S.C. § 152(12) (1994), which defines a “professional employee” as:
    \begin{enumerate}
      \item any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical works; (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).
    \end{enumerate}
  \item \textsuperscript{35}29 U.S.C. § 159(b)(1) (1994). The Act provides that if a unit includes both professional and non-professional employees, then the unit cannot be certified unless a majority of such professional employees vote for inclusion. \textit{Id.} This is to insure that professionals want to be unionized, because collective agreements may not suit their needs. \textit{Id.}
  \item \textsuperscript{36}S. Rep. No. 80-105, at 19 (1947).
  \item \textsuperscript{37}444 U.S. 672 (1980).
  \item \textsuperscript{38}\textit{Id.} at 681.
\end{itemize}
The Board looks to section 2(11) in ascertaining whether an employee is a supervisor within the meaning of the Act. The Board has distinguished between a professional’s non-supervisory exercise of authority related to the employee’s professional functions, and the exercise of real supervisory authority to affect conditions of employment.\(^{39}\)

In *Yeshiva*, the Supreme Court seemingly rejected the distinction created by the Board.\(^{40}\) The Board previously held that university professors who exercised independent judgment in determining curriculum, grading systems, admission, and other academic policies were not excluded because they were supervisors.\(^{41}\) The Board also held that the faculty exercised this independent judgment in its own professional interest and not in the interest of its employer.\(^{42}\) The Supreme Court rejected this distinction and held that the faculty interests could not be separated from those of the university.\(^{43}\) Although the Court found that these particular employees were supervisors, it did not rule that all professionals were supervisors and, therefore, excluded from the Act’s coverage.\(^{44}\) The Court held that it would consider professional duties to be managerial only if they fell outside the scope of duties “routinely performed by similarly situated professionals.”\(^{45}\) Recognizing the difference between the routine discharge of professional duties and the exercise of real supervisory authority, the Court looked to cases dealing with architects and engineers.\(^{46}\) It is interesting to note that the *Yeshiva* opinion not only acknowledges the “incidental to patient care” test used by the Board at that time to determine if nurses were supervisors, but appears to endorse it.\(^{47}\) The Court later reversed this endorsement in *NLRB v. Health Care & Retirement Corp. of America*\(^{48}\) and declared the “incidental to patient care” test invalid and inconsistent with the NLRA.\(^{49}\) However, the Court did not overtly acknowledge this reversal in its *Health Care* opinion.\(^{50}\)

C. The 1974 NLRA Amendments

In 1974 Congress amended the NLRA to cover private profit and non-

\(^{39}\) Benedetto, *supra* note 22, at 705.
\(^{40}\) 444 U.S. at 672.
\(^{41}\) *Id.* at 679. The faculty committees also made recommendations to the administration regarding faculty hiring and tenure. *Id.* at 677.
\(^{42}\) *Id.* at 688.
\(^{43}\) *Id.*
\(^{44}\) *Id.* at 681-82.
\(^{45}\) *Id.* at 690.
\(^{46}\) *Id.* at 690 n.30.
\(^{47}\) *Id.*
\(^{48}\) 511 U.S. 571 (1994).
\(^{49}\) *Id.* at 576.
\(^{50}\) *See id.*
profit hospitals.\footnote{Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended in scattered sections of 29 U.S.C.).} Congress could see no reason for excluding these employees since the NLRA covers all industries involved in interstate commerce.\footnote{The legislative history reveals that "[t]he Committee could find no acceptable reason why 1,427,012 employees of non-profit, non-public hospitals, representing 56% of all hospital employees, should continue to be excluded from the coverage and protections of the Act." S. REP. No. 93-766, at 3 (1974).} The amendments were designed to end labor problems at hospitals and other health care facilities.\footnote{120 CONG. REC. 12,934 (1974). The amendment was designed to help hospitals, falling on difficult times. Many lobbied that the amendment would help ease the difficulties of these non-profit organization. \textit{Id.} at 12,941.} By this time, hospitals had become big business and were experiencing labor strife in the early 1970s.\footnote{\textit{Id.} at 12,937. \textit{See generally}, Elizabeth Grace, \textit{House-Staff Officers: Collective Bargaining in the Health Care System}, 2 J. LEGAL MED. 415, 417-18 (1981). The final goal of the amendments was to establish a uniform set of rules that would apply to all health care institutions. 120 CONG. REC. 12,934 (1974).} By giving the employees a voice, the potential for strikes decreases. When Congress decided to amend the NLRA, its intention was to protect health care professionals from being unfairly excluded as supervisors under the NLRA.\footnote{Straight, \textit{supra} note 30, at 1938.} However, by not explicitly stating this in the amendment, over twenty years after its passage, nurses in some circuits are being excluded as supervisors.\footnote{\textit{See generally} Passavant Ret. & Health Ctr. v. NLRB, 149 F.3d 243 (3rd Cir. 1998); Mid-America Care Found. v. NLRB, 148 F.3d 638 (6th Cir. 1998); NLRB v. St. Mary's Home, Inc., 690 F.2d 1062 (4th Cir. 1982).} 

During the hearings for these amendments, the American Nurses Association ("ANA") and others expressed concern that if the definition of "supervisor" is read broadly, then nurses would be automatically classified as supervisors under the NLRA because they are required by state licensing laws to exercise judgment with respect to patients' needs.\footnote{Extension of \textit{NLRA} to \textit{Non-Profit Hospital Employees: Hearings on H.R. 1236 Before the Special Subcomm. on Education and Labor, 93rd Cong. 21-24 (1973).} However this would defy Congress' original intention that nurses be considered professionals and be covered by the Act unless they exercise authority not typically associated with other similar professionals.

The Committee on Labor and Public Welfare (the "Committee") considered adopting an amendment specifying its intent to cover health care professionals.\footnote{Straight, \textit{supra} note 30, at 1938.} However, the Committee reports stated that a specific amendment was not necessary.\footnote{\textit{Id.}} The Committee's opinion was based on previous Board decisions which held that these professionals were not
The Committee expressed approval of the Board’s distinction between a health care professional, who gives direction to others based on professional judgment, and one who exercises supervisory authority solely in the interests of the employer. The Committee went on to conclude that it intended for the Board to continue to evaluate health care cases in this manner. Although the Supreme Court in *Health Care* would later rule that these committee reports do not carry the weight of law, they remain a profound expression of Congress’ intent to exclude health care professionals from the definition of “supervisor.”

In the *Health Care* decision, the Supreme Court refused to give weight to those committee statements (and therefore refused to give deference to the Board) despite law to the contrary. The Court has held that when Congress re-enacts a statute and fails to revise an agency’s interpretation of that statute, that is evidence that the agency’s current interpretation is Congress’s intention. Although the “incidental to patient care” test used by the Board was later declared invalid, the plain intent of Congress to have nurses excluded from the definition of “supervisor” should be noted. The Supreme Court declared the test utilized by the NLRB to be invalid, not the policy that Congress wanted nurses included in the Act. It is unfortunate that Congress found it unnecessary to specifically exclude nurses as supervisors. Congress lacked the foresight to realize that exactly twenty years later the Supreme Court would invalidate the test it relied on and put the status of nurses into question for years to come.

II. “INCIDENTAL TO PATIENT CARE” TEST AND THE SUPREME COURT’S INVALIDATION IN *NLRB v. HEALTH CARE & RETIREMENT CORP. OF AMERICA*

A. *Circuit Split After the 1974 Amendments*

After the passage of the 1974 amendments, the Board interpreted the first prong of the analysis to declare that nurses were not supervisors. The Board consistently held that nurses exercised professional judgment when

61. Id.
62. Id.
63. 511 U.S. 571, 582 (1994).
64. Id. at 582-583.
67. See id.
they directed other employees and not supervisory authority as required under the NLRA. The Board’s rationale in upholding this distinction and giving effect to the congressional intent that nurses are not supervisors manifested itself in the “incidental to patient care” test. The “incidental to patient care” test asks whether an employee directs others incidental to the professional’s treatment of patients or in the interest of the employer. The Board used this test to effectuate Congress’ intent when it passed the supervisory exclusion in 1947. Congress intended, and the Board found, that only when nurses possess real authority to fire, promote, and discipline should they be designated as supervisors.

The Supreme Court eventually held that the “incidental to patient care” test utilized by the Board represented an attempt to afford special treatment to nurses and displayed the bias of the Board toward granting non-supervisory status. However, this argument overlooks the fact that the Board has utilized this test outside of the health care field. The Board has applied this test to architects, engineers, editors, and television directors. Therefore, by declaring that nurses are not supervisors, the Board is not displaying bias. It is merely giving weight to the distinction Congress developed between straw bosses and those which actually side with management, whether they be nurses, architects, or lawyers.

In the early eighties, the Sixth Circuit refused to apply the “incidental
to patient care" test in NLRB v. Beacon Light Christian Nursing Home,75 ruling that it was inconsistent with the NLRA.76 In Beacon Light, the Board determined that Licensed Practical Nurses ("LPNs") directed aides in the interest of patient care, and not in the interest of the employer.77 It is important to note that, prior to Beacon Light, the NLRB had used the "independent judgment" test to determine if nurses were supervisors, but then switched to the "incidental to patient care" test following the Yeshiva case.78 This provides further evidence that the Board was not biased, and did not flip-flop tests just to declare that nurses are not supervisors.

In Beacon Light, the Board utilized the "incidental to patient care" test, and the Sixth Circuit reversed.79 However, the court held that "where nurses otherwise meet the statutory definition of supervisors, they are not disqualified because the activity they are supervising is patient care."80 This analysis somewhat misses the point. The Board was trying to rule that the nurses were not supervising at all, but merely exercising their professional duties.

Following their rationale in Beacon Light, the Sixth Circuit took one more swing at the "incidental to patient care" test in Beverly California Corp. v. NLRB.81 The issue in that case was whether a group of Registered Nurses ("RNs") were considered supervisors under the NLRA.82 The Board had found that they were not supervisors because their duties were generally limited to directing the quality treatment of patients, and did not include the supervisory duties envisioned by the NLRA.83 The Sixth Circuit overturned the Board's order and held that, as a "matter of economics," the interests of the employer were the best interests of the patients as well.84 The court went on to conclude that the use of independent judgment is not merely routine just because it is exercised in

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75. 825 F.2d 1076 (6th Cir. 1987).
76. Id. at 1079.
77. Id.
78. See Keller, supra note 29, at 593.
79. Beacon Light, 825 F.2d at 1076.
81. 970 F.2d 1548 (6th Cir. 1992).
82. Id. at 1548-49.
83. Id. at 1549.
84. Id. at 1552. The court stated that:

[u]nder the statute, . . . the question is whether the individual has "authority," pure and simple, responsibility to direct others in the interest of the employer—and 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.

Id.
the interests of patients.\textsuperscript{85}

Again, this misreads the Board’s intended meaning. The Board was arguing that the nurses did not exercise independent judgment at all because their duties were based on professional norms, and not supervisory authority.\textsuperscript{86} Congress, by believing a specific health care amendment was unnecessary in 1974, thought there was a well-settled distinction between professional duties and supervisory authority.\textsuperscript{87} The Board was trying to give effect to that distinction by separating duties exercised in a professional capacity as opposed to duties which directly further management’s objectives.

While some have criticized the Board for flip-flopping tests, one rarely hears about the Sixth Circuit’s flip-flop in declaring the “incidental to patient care” test invalid. The Sixth Circuit in \textit{Beverly Enterprises v. NLRB}\textsuperscript{88} remanded the case to determine if LPNs were supervisors.\textsuperscript{89} The court stated that LPNs were not supervisors because they either did not exercise independent judgment, or their independent judgment was exercised professionally, not because the judgment was in the interest of the employer.\textsuperscript{90} This case expanded the use of the “incidental to patient care” test to LPNs.\textsuperscript{91} The court attempted to reconcile its decision in \textit{Beverly Enterprises} with its later decision in \textit{Beverly California}, but some still do not believe the two can be read consistently.\textsuperscript{92}

An overwhelming number of circuits had approved the “incidental to patient care” test before the Supreme Court declared it invalid. The Seventh Circuit in \textit{NLRB v. Res-Care, Inc.}\textsuperscript{93} ruled that the LPNs in question did not have formal authority to hire, fire, or promote and, therefore, were not supervisors.\textsuperscript{94} It agreed with the Board’s determination that the NLRA was not intended to exclude all employees with supervisory power, but only those vested with managerial judgment as to the interests of the employer.\textsuperscript{95} In the companion case of \textit{NLRB v. American Medical Services, Inc.},\textsuperscript{96} the court held that RNs were supervisors because their authority was

\textsuperscript{85.} Id.
\textsuperscript{86.} Id. at 1552, 1553.
\textsuperscript{87.} Keller, supra note 29, at 588; see also S. REP. No. 93-766, at 6 (1974).
\textsuperscript{88.} 661 F.2d 1095 (6th Cir. 1981).
\textsuperscript{89.} Id. at 1101.
\textsuperscript{90.} Id.
\textsuperscript{91.} \textit{Beverly Cal. Corp.}, 970 F.2d at 1553-54.
\textsuperscript{92.} Id.
\textsuperscript{93.} 705 F.2d 1461 (7th Cir. 1983).
\textsuperscript{94.} Id. at 1466.
\textsuperscript{95.} Id. at 1467. It is important to note that the court came to this conclusion despite the fact that the LPNs were the highest-ranking employees at the nursing home during their shift. Id.
\textsuperscript{96.} 705 F.2d 1472 (7th Cir. 1983).
more than "ministerial"—it truly was supervisory in nature. However, the court maintained the distinction between truly supervisory authority and the authority exercised as a matter of professionalism. True supervisory authority was found to exist in this case.

The Fourth Circuit in NLRB v. St Mary's Home, Inc. also ruled that nurses were considered supervisors, but it upheld the "incidental to patient care" test. The court held that, because the LPNs had complete responsibility of the home, they possessed the necessary authority to be defined as "supervisors." However, the court upheld the distinction between judgment based on professional service and judgment which is exercised in addition to their professional services.

In Misericordia Hospital Medical Center v. NLRB, the Second Circuit ruled that a head nurse was not a supervisor under the NLRA. The nurse did not have full responsibility for the unit, but instead reported to the Director of Nursing. The court distinguished between the responsibility to maintain patient care and responsibility to supervise employees.

The Eighth Circuit also upheld the Board’s "incidental to patient care" test in Waverly-Cedar Falls Health Care Center v. NLRB. The court ruled that LPNs were not supervisors because their duties called for professional judgment in the interests of patients, and not judgment as to the employer's best interest. It relied on the distinction between those that carry out the policies of management and those who actually design and effectuate management policies.

97. Id. at 1474. The court also relied on the ratio of supervisors to employees test. If the RNs were not considered supervisors, then the ratio of supervisors to employees would be one in twenty-seven, compared to one in eight in the Res-Care case. Id. at 1466, 1473.
98. Id.
99. Id. Unlike the nurses in Res-Care, the nurses here were in charge. In fact, months at a time would pass before the nurses had any contact with the supervisor above them. Id. at 1473.
100. 690 F.2d 1062 (4th Cir. 1982).
101. Id.
102. Id. at 1067.
103. Id. at 1067-68.
104. 623 F.2d 808 (2d Cir. 1980).
105. Id.
106. Id. at 816.
107. Id. at 810, 816.
108. 933 F.2d 626 (8th Cir. 1991).
109. Id. at 630.
110. Id. The court followed the Res-Care decision and declared that the nurses were not supervisors even though at times they were the highest-ranking employees on the premises. There was always someone higher who could be reached by phone and any decisions made were based on routine procedures and not independent judgment. Id.
Finally, in *NLRB v. Doctors' Hospital of Modesto*,¹¹¹ the Ninth Circuit expressed approval for the NLRB's "incidental to patient care" test.¹¹² The court held that the nurses in question were not supervisors because they gave minor orders and were not an integral part of management.¹¹³ Taking it one step further, the court stated that the use of occasional independent judgment by professionals does not render them supervisors under the Act.¹¹⁴

On the eve of the Supreme Court's decision in 1994 that declared the "incidental to patient care" test invalid, there was a circuit split over the test. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits all approved the test and held it consistent with the policies of the NLRA.¹¹⁵ The Sixth Circuit was the lone dissenter, and, as we have seen, its position was not consistent through the years.¹¹⁶ Of the Circuits that adopted the test, only two held nurses to be supervisors under the "incidental to patient care" test.¹¹⁷ Based on this breakdown, one can conclude that the Board did not have a hidden agenda in declaring all nurses supervisors when it established the "incidental to patient care" test; it merely tried to resolve the tension between professionals and supervisors.

B. The Supreme Court's Decision in *NLRB v. Health Care & Retirement Corp. of America Invalidates the "Incidental to Patient Care" Test*

In this landmark decision, the Supreme Court was reviewing a decision by the NLRB, which found that LPNs were not supervisors under the NLRA.¹¹⁸ Three nurses who were discharged brought unfair labor practice charges against the nursing home.¹¹⁹ The employer argued that the nurses did not have a remedy because they were not employees under the Act, but supervisors.¹²⁰ The Board, applying the patient care analysis, held that the nurses' duties were those of a minor supervisory employee and, therefore, not meant to be excluded by the Act.¹²¹

The Board's "incidental to patient care" test arose from its interpretation of the NLRA; therefore, the standard of review imposed by

¹¹¹. 489 F.2d 772 (9th Cir. 1973).
¹¹². Id. at 776.
¹¹³. Id.
¹¹⁴. Id.
¹¹⁵. Straight, supra note 30, at 1940.
¹¹⁶. Id. at 1940, 1941.
¹¹⁷. The Seventh and Second Circuits, in *Am. Med. Sens., Inc. and St. Mary's Home, Inc.*, respectively, ruled that under the "incidental to patient care" test, the nurses in question were supervisors.
¹¹⁹. Id. at 574.
¹²⁰. Id. at 575.
¹²¹. Id.
the Supreme Court was whether the test was rational and consistent with the Act. In a five-to-four decision the Supreme Court ruled that the "incidental to patient care" test was inconsistent with the NLRA. The Court relied on Yeshiva and held that the false dichotomy of patients' interests and employer interests could not be squared with the language of the NLRA. The Court reasoned that patient care is the business of the employer and, therefore, when nurses attend to the needs of patients, they are acting in the interest of the employer. However, as Justice Ginsburg points out in her dissent, the Court in Yeshiva expressly approves the Board's test as consistent with the NLRA.

The conclusion that employee and employer interests always coincide is far too simplistic for a professional employee. A professional employee usually has a code of ethics within his or her given field that regulates the field, and often one's allegiance to it may conflict with managerial business objectives. Oftentimes, nurses are asked to mediate the difference between bottom-line management objectives and the best care for their patients.

The Health Care Court rejected all inferences the Board made to the legislative history of the Act, even though its analysis addresses whether the interpretation is consistent with the Act. The Court rejected the committee reports which stated Congress' views that a specific health care amendment was unnecessary because of the Board's existing decisions. The Court reasoned 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." This statement is harsh, for it is Congress who wrote the law, and its intent regarding the law's meaning should weigh into the Court's analysis. While it may not carry the full weight of law, it should weigh heavily in the interpretation of who the Act was intended to include and exclude.

123. Id. at 576-77.
124. Straight, supra note 30, at 1943 (citing Yeshiva, 444 U.S. 672 (1980)). The Court in Yeshiva had ruled that the distinction between the interests of professionals and the interests of the employer made no sense. Yeshiva, 444 U.S. at 672.
125. Health Care, 511 U.S. at 577.
126. Keller, supra note 29, at 600 n.144.
128. Id. at 1134-35. For example, when a policy is profitable economically, but is not wise in terms of quality patient care, a divergence occurs. If nurses are considered supervisors, then they have to follow management prerogatives because they are not protected by the Act. This may severely compromise patient care. Id. at 1134, 1144.
129. Health Care, 511 U.S. at 581-82.
130. Id. at 582 (citing Pierce v. Underwood, 487 U.S. 552, 556 (1988)).
131. Id.
The Court rejected all of the policy arguments that the Board raised. The Court expressed concern that there would be divided loyalty if the nurses were deemed not to be supervisors.\textsuperscript{132} As I will discuss later, the deference afforded to the Board’s factual findings by the Court in \textit{Chevron U.S.A., Inc. v. Natural Resource Defense Council}\textsuperscript{133} preempts the Court from merely arriving at a different conclusion.\textsuperscript{134}

The final problem the Court had with the Board’s “incidental to patient care” test was that it was only utilized in the health care field.\textsuperscript{135} The Court found that in all other industries where the Board distinguished between professional knowledge and management prerogatives, it did not rely on the phrase “in the interest of the employer.”\textsuperscript{136} This is an extreme example of a court relying on form over substance. Although the Board may not have used the exact words “in the interest of the employer,” there are many decisions that distinguish between professional judgment and supervisory authority.\textsuperscript{137} Therefore, the Court’s prediction that its holding would not have far-reaching consequences outside the health field is mistaken.

The Court concluded that its holding was limited to the “incidental to patient care” test and did not stand for the proposition that all nurses were supervisors.\textsuperscript{138} The Court stated in dicta that the Board cannot manipulate the phrase “in the interest of the employer” to arrive at the conclusion that nurses are not supervisors.\textsuperscript{139} Leaving the door wide open, the Court found that other language in the definition of supervisor was ambiguous and, therefore, subject to the Board’s interpretation.\textsuperscript{140}

\textsuperscript{132.} \textit{Id.} at 583.

\textsuperscript{133.} 467 U.S. 837, 842 (1984) (granting broad deference to agency decisions where Congress has not clearly spoken on the matter).

\textsuperscript{134.} \textit{NLRB v. Bell Aerospace Co.}, 416 U.S. 267, 274-75 (1974) (stating that “great weight” is to be given to an agency’s interpretation if Congress fails to modify such interpretation when passing the amending legislation; here, the amending legislation was the 1974 health care amendments to the NLRA).

\textsuperscript{135.} \textit{Health Care}, 511 U.S. at 582.

\textsuperscript{136.} \textit{Id.}

\textsuperscript{137.} See \textit{e.g.}, \textit{Westinghouse Broadcasting Co., Inc.}, 215 N.L.R.B. 123, 126 (1974) (holding that employees of television stations—including staff, freelance producers, directors, associate and assistant directors—constitute units appropriate for collective bargaining); \textit{General Dynamics Corp.}, 213 N.L.R.B. 851, 857 (1974) (noting that “managerial authority is not vested in professional employees merely by virtue of their professional status . . .”); \textit{Wurtser, Bernardi, & Emmons, Inc.}, 192 N.L.R.B. 1049, 1051 (1971) (finding that professional architectural employees “have a sufficient community of interest to constitute a unit appropriate for the purposes of collective bargaining”).

\textsuperscript{138.} \textit{Health Care}, 511 U.S. at 583-84.

\textsuperscript{139.} \textit{Id.} at 583.

\textsuperscript{140.} \textit{Id.} at 579 (holding that the language “independent judgment” and “responsibly to direct” is ambiguous, and, therefore, the Board should have room to interpret these terms).
C. Justice Ginsburg’s Dissent

Justice Ginsburg’s dissent in Health Care emphasized that separating supervisors from professionals, under the Act, is a task that “Congress committed to the National Labor Relations Board.” Along with Justices Blackmun, Stevens, and Souter, Ginsburg’s dissent poignantly emphasized the deference that the Board deserves. The dissent found the Board’s “incidental to patient care” test rational and consistent with the NLRA.

Justice Ginsburg, unlike the majority, gave proper weight to the legislative history of the NLRA. She cited the Senate and House reports, which illustrated the intent of Congress not to include minor supervisory employees within the definition of “supervisor.” Particularly persuasive are the statements of the author who inserted the words “responsible to direct” into the 1947 amendment. The author explained that only employees who have essential management duties and rank above the level of straw bosses and other minor supervisory employees are supervisors. The dissent probed behind the actual words “in the interest of the employer” and identified the policy the Board used to determine supervisory status. The key question the Board was asking in order to determine supervisory status was whether an employee possesses key managerial authority or merely control attributable to her professional status. Despite the label “incidental to patient care test,” Justice Ginsburg recognized the policy behind it and, therefore, came to the correct conclusion that the “test” is used in a variety of fields.

Justice Ginsburg also points out that Yeshiva can be reconciled with the “incidental to patient care” test. In Yeshiva, the Court acknowledged

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141. Id. at 585. The dissent states that since Congress delegated this responsibility to the NLRB, its rulings should not be disturbed unless they are not rational or consistent with the NLRA. Id. at 586.
142. Id. at 586.
143. Id. at 587 (citing S. REP. NO. 80-105, at 19 (1947)). The Senate Committee Report states that the definition of a supervisor has to be framed to assure that “the employees excluded from coverage of the act [would be] truly supervisory.” Id.
144. 93 CONG. REC. 4678 (1947).
145. Id. (remarks of Sen. Flanders).
146. Health Care, 511 U.S. at 585-86.
147. Id. at 590.
148. Id. at 591-92. Ginsburg cites a number of cases where the Board has employed the same distinction between professionalism and supervisors. Id. nn.6-12. See generally Detroit Coll. of Bus., 296 N.L.R.B. 318 (1989); Marymount Coll. of Va., 280 N.L.R.B. 486 (1986); Youth Guidance Ctr., 263 N.L.R.B. 1330 (1982); Sav-On Drugs, Inc., 243 N.L.R.B. 859 (1979); Neighborhood Legal Serv., Inc., 236 N.L.R.B. 1269 (1978); Golden-West Broadcasters-KTLA, 215 N.L.R.B. 760 (1974).
149. Keller, supra note 29, at 603 (discussing how the faculty members in Yeshiva had absolute power in all academic matters, and how the LPNs’ authority was severely limited).
the distinction between professional and supervisory judgment.\textsuperscript{150} The Yeshiva Court declared that “employees whose decisionmaking is limited to routine discharge of professional duties ... cannot be excluded from coverage ... Only if an employees' activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.”\textsuperscript{151} The dissent argued that the “incidental to patient care” test is merely a replication of this distinction, acknowledged in Yeshiva.\textsuperscript{152}

The dissent concluded that the majority’s opinion will have implications that stretch beyond the health care field because the Board’s analysis is utilized in many professional fields.\textsuperscript{153} As the courts broaden the definition of supervisor, they will decrease the number of employees protected as professionals under the Act.\textsuperscript{154} The broad definition of “supervisor” will be applied to all professional employees because the “incidental to patient care” test was just another name for the independent analysis the Board had been conducting.\textsuperscript{155}

The Supreme Court’s invalidation of the “incidental to patient care” test has cast a large cloud over whether nurses are considered supervisors. This dark cloud has extended to other professions as well, notably doctors. As will be discussed later, it is now more difficult for doctors to organize, and, in that respect, Justice Ginsburg was correct in her prediction.\textsuperscript{156}

The majority’s main concern in Health Care was that the “incidental to patient care” test would eventually lead to all nurses being deemed non-supervisory.\textsuperscript{157} First, that may not be a bad thing. After all, Congress, in the committee reports which the Court wished to dismiss, implicitly approved that concept.\textsuperscript{158} Secondly, the majority fails to perceive the potential consequence of their invalidation—all professionals are now in danger of being excluded from protection of the Act.

\textsuperscript{150} NLRB v. Yeshiva Univ., 444 U.S. 672, 690 (1980).
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 691-706 (Brennan, J., dissenting).
\textsuperscript{153} Id. at 605.
\textsuperscript{154} Id.
\textsuperscript{155} Barker, supra note 31, at 363.
\textsuperscript{156} Health Care, 511 U.S. at 598-99.
\textsuperscript{157} Id. at 579.
\textsuperscript{158} S. REP. No. 93-766, at 6 (1974). Congress implicitly approved the concept of nurses being considered non-supervisors by stating that a specific health care amendment, exempting nurses from the definition of supervisor, was unnecessary given existing Board decisions. Id.
III. THE CURRENT CIRCUIT SPLIT CAUSED BY NLRB v. HEALTH CARE & RETIREMENT CORP. OF AMERICA

A. Predictions After the Supreme Court Decision

The NLRB and nurses everywhere feared that the Health Care decision would quash attempts by nurses and other professionals to effectively unionize. Although the majority predicted that the decision would have no effect outside of the health care context, many still worried. Indeed, there have been some residual effects, as I will discuss later, in physician unionization.

Despite the setback in Health Care, nurses continue to unionize and fight for their rights under the NLRA. The Board simply returned to the test it used prior to the patient care analysis. The prior test asked whether or not nurses exercise independent judgment in directing others or, instead, use professional norms. The "independent judgment" analysis asks whether the employee uses independent judgment or whether her/his direction to others is merely routine. The Board distinguished between decisions that required individual discretion and those which were dictated by company policy, and were thus not decisions at all. However, by leaving open the question of what constitutes independent judgment, the Supreme Court once again split the circuits over whether or not nurses are supervisors.

Some say that the "independent judgment" test is an attempt by the Board to circumvent the Health Care decision and declare that nurses are supervisors.

159. Keller, supra note 29, at 604-05 n.177.
160. See generally id. at 582-87.
162. Id.
165. Nymed Inc., 320 N.L.R.B. at 810. The Supreme Court stated that the term "independent judgment" was ambiguous and the Board needed wide latitude in applying it to various industries. The Third, Sixth, and Seventh Circuits have lined up against the "independent judgment" test and the Eighth, Ninth, and District of Columbia Circuits have accepted the test. Passavant Ret. & Health Ctr. v. NLRB, 149 F.3d 243 (3rd Cir. 1998) (rejecting the "independent judgment" test); Edgewood Nursing Ctr., Inc. v. NLRB, 142 F.3d 433, 1998 WL 96595, at *4 (6th Cir. Feb. 24, 1998) (unpublished opinion) (rejecting the "independent judgment" test); NLRB v. Grancare, Inc., 158, F.3d 407 (7th Cir. 1998) (rejecting the "independent judgment" test); Beverly Enters. v. NLRB, 148 F.3d 1042, 1045 (8th Cir. 1998) (accepting the "independent judgment" test); Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 549 (9th Cir. 1997) (accepting the "independent judgment" test); Beverly Enters.-Pennsylvania, Inc. v. NLRB 129 F.3d 1269, 1270 (D.C. Cir. 1997) (accepting the "independent judgment" test).
not supervisors.\textsuperscript{166} However, the test was already in place before the Board switched to the patient care analysis.\textsuperscript{167} Also, the various tests are merely attempts by the Board to effectuate the intent of Congress not to include those who exercise professional judgment in the definition of “supervisors.”\textsuperscript{168} Perhaps it is time for critics to realize that the reason why nurses are consistently held by the Board not to be supervisors is not due to the bias of the Board, but the fact that they truly are not supervisors within the meaning of the NLRA. The fact that the Board consistently finds nurses not to be supervisors, the deference entitled to them, and the legislative history and congressional intent of the Act should be utilized in an effort to resolve the current circuit split.

B. The Early Cases After the Health Care Decision.

In one of the first decisions after the \textit{Health Care} case, the Board and the Ninth Circuit held that the nurses in question were not supervisors. In \textit{Providence Alaska Medical Center v. NLRB},\textsuperscript{169} the Ninth Circuit concluded that the nurses duties were neither clerical nor supervisory.\textsuperscript{170} In that case, the title of “charge nurse” rotated among the RNs in dispute whenever the supervisory RN was not available.\textsuperscript{171} The charge nurse’s duties included coordinating work schedules and making overtime assignments.\textsuperscript{172} However, the supervisory RN always prepared the monthly work schedule.\textsuperscript{173} Therefore, the Board concluded that these duties did not include the exercise of independent judgment.\textsuperscript{174} The Board held that it was not the intention of the Act to have every act of assignment constitute

\begin{itemize}
\item \textsuperscript{166} See Keller, \textit{supra}, note 29, at 617-20.
\item \textsuperscript{167} Id. at 593.
\item \textsuperscript{168} See \textit{S. REP. NO. 80-105}, at 3-4 (1947). The committee stated:
\begin{quote}
[we are] not unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees on one hand and a supervisor vested with true, genuine management prerogatives.
\end{quote}
\item \textsuperscript{169} 121 F.3d 548 (9th Cir. 1997).
\item \textsuperscript{170} Id. at 551-54. The Ninth Circuit deferred to the Board’s interpretation to determine if an employee is a supervisor. The Board utilized a number of guiding principles which included: length of time spent supervising, the skill levels of those being directed, and the routine nature of the tasks. Id.
\item \textsuperscript{171} Id. at 551.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Providence Hosp., 320 N.L.R.B. 717, 725 (1996).
\item \textsuperscript{174} Id. The Board stated that it is critical to explain the nurses’ authority without detracts from the professional responsibility of a RN for patient care. Id. \textit{See also} King, \textit{supra} note 3, at 349.
\end{itemize}
supervisory authority.\textsuperscript{175} It then turned its analysis to the term “responsibly to direct.”\textsuperscript{176} The Board noted the difference between a professional giving direction and a supervisor that performs one of the twelve enumerated functions in section 2(11).\textsuperscript{177}

The Ninth Circuit agreed with the Board and held that the nurses did not exercise independent judgment because they must work within the supervisory nurse’s parameters when assigning work.\textsuperscript{178} Therefore, their authority was more clerical than supervisory.\textsuperscript{179} The Ninth Circuit promulgated a test to determine whether nurses were supervisors.\textsuperscript{180} The test asks whether an employee represents the interests of the employer vis-à-vis other employees and, therefore, is not perceived as one of the other employees who gave routine directions.\textsuperscript{181} The Board and the Court determined that “work assignments made to equalize employee’s work on a rotational or other rational basis are routine assignments . . . [and] not necessarily supervisory.”\textsuperscript{182} The Board also argued that if one employee directs another to perform tasks stemming from one’s own experience and higher skill level, that direction is not supervisory.\textsuperscript{183}

It is clear that reasonable people can disagree whether certain duties rise to the level of independent judgment, even when given the same set of facts. A strong dissent was filed in this case which argued that the professional judgment used by the nurses rose to the level of supervisory authority.\textsuperscript{184} The dissent argued that the Board was manipulating the phrase “independent judgment,” just as it tried to manipulate the phrase “in the interest of the employer.”\textsuperscript{185}

\textsuperscript{175} Providence Hosp., 320 N.L.R.B. at 727.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 730. The Board held that “the essence of professionalism requires the exercise of expert judgment and the essence of supervision requires the exercise of independent judgment . . . . [T]he alleged supervisory independent judgment of charge nurses when examined in detail becomes indistinguishable from the professional judgment exercised by all RNs.” Id.
\textsuperscript{178} Providence Alaska Med. Ctr., 121 F.3d at 551-54.
\textsuperscript{179} Id. at 553.
\textsuperscript{180} See generally id. at 551-55.
\textsuperscript{181} King, supra note 3, at 351. This test achieves the congressional policy of not including minor supervisory employees in the statutory definition of “supervisor.” Id.
\textsuperscript{182} Providence Hosp., 320 N.L.R.B. at 731.
\textsuperscript{183} Id. at 729. An example the Board utilizes is that of a surgeon directing his/her assistants during a surgery. This type of direction is not supervisory, but comes from professional expertise in work. Id. at 718.
\textsuperscript{184} Id. at 736. The Board went on to state that the charge nurse’s approval of break requests was based on her view of the workload of the entire unit, not on her view of her own workload, and, therefore, was a routine clerical judgment. Id. at 732.
\textsuperscript{185} Id. (Cohen, M., dissenting). Cohen declared that the Board had ignored the substantial independent judgment that the nurses utilized in order to “transform charge nurses into employees.” Id. at 737.
On the heels of the *Providence Hospital* decision regarding RNs, the Board decided another case: *Nymed, Inc.* This latter case dealt with forty-five LPNs who performed duties that included updating patient information, completing approvals for long-term plans for residents, and performing certain medical treatments. The Board first looked at the authority of the LPNs to assign work. The Board held that the assignments were routine because they were based on a set rotation dictated by management. Plus, there was little independent judgment required because all of the certified nursing assistants ("CNAs") possessed equal skill levels. The Board then examined the circumstances in which the LPNs direct the CNAs work and concluded that no independent judgment was utilized due to the repetitiveness of their duties.

Unlike *Providence*, the Board in this case examined other indicia of supervisory authority. The Board found that the LPNs did not discipline or effectively recommend disciplinary action because their reports were mere recommendations. The head nurses and supervisory personnel reviewed the reports and maintained authority to discipline as they saw fit. The Board concluded that this lack of immediate action rendered the nurses' recommendations not supervisory in nature. Using a similar rationale, the Board also found that the nurses' ability to transfer aides was not supervisory because ultimate responsibility for the transfer lay above them.

The dissent in this case stated that the Board was stretching the language of section 2(11) in order to exclude nurses from the definition of supervisors. The dissent argued that the nurses did effectively recommend discipline because the head nurse usually did not conduct an independent investigation and usually relied on the LPN's report. However, the dissent missed the Board's point that the LPNs did not have the discretion or authority to enact disciplinary measures because the head nurse retained that right. Whether or not the head nurse followed the

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187. *Id.* at 807-09.
188. *Id.*
189. *Id.* at 810.
190. *Id.*
191. *Id.* at 811. The Board stated that because of the charge nurse's additional duties, the employer intended the direction of the aides to be narrowly circumscribed, general, and routine. *Id.* n.9.
192. *Id.* at 812.
193. *Id.*
194. *Id.*
195. *Id.* at 813 (finding that the transfers of aides were based on all factors involved and not just the recommendation of the LPN).
196. *Id.* at 814 (Cohen, J., dissenting).
197. *Id.*
LPN's recommendation was subject to the whims of that particular head nurse; therefore, it can hardly be said that the LPNs recommend discipline. This dissent exemplifies the trend of examining the same set of facts and coming to exactly the opposite conclusion.\footnote{198}

It was apparent that even after the \textit{Health Care} decision, the Board was not going to declare nurses supervisors. The \textit{Nymed} and \textit{Providence Hospital} cases set forth the "independent judgment" test that the Board would use to decide future cases involving health care supervisors. By utilizing the "independent judgment" test, the Board is trying to further the congressional intent not to include minor supervisory employees in the definition of supervisor. However, some circuits have overruled the Board, despite the deference it is due, and declared nurses to be supervisors.\footnote{199} Here, again, we find a circuit split that is ripe for congressional amendment or a Supreme Court decision.

\section*{IV. THE CURRENT CIRCUIT SPLIT & NLRB V. HILLIARD DEVELOPMENT CORP.}

\subsection*{A. The Third Circuit}

The Third Circuit in \textit{Passavant Retirement \& Health Center v. NLRB}\footnote{200} overruled the Board\footnote{201} and found the disputed nurses to be supervisors under the NLRA.\footnote{202} In \textit{Passavant}, the charge nurses in question oversaw the work of the aides, but were supervised by head nurses.\footnote{203} The Board held that they were not supervisors even though they could send aides home for flagrant conduct violations such as resident abuse.\footnote{204} The Board found that this limited authority was not enough to warrant the label of "supervisor."\footnote{205} However, the Third Circuit overruled the Board and cited a non-health care case where this type of authority was

\begin{footnotes}
\footnote{198. Jonathan Edward Motley, \textit{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, 736 (1998) (stating that "[t]he majority and dissenting opinions seem to describe two completely different sets of employees and duties even though they address exactly the same charge nurses")}
\footnote{199. \textit{See, e.g.}, Glenmark Assoc. v. NLRB, 147 F.3d 333 (4th Cir. 1998); Mid-Am. Care Found. v. NLRB, 148 F.3d 638 (6th Cir. 1998); Passavant Ret. \& Health Ctr. v. NLRB, 149 F.3d 243 (3rd Cir. 1998).}
\footnote{200. 149 F.3d 243 (3rd Cir. 1998).}
\footnote{201. \textit{Passavant Ret. \& Health Ctr.}, 323 N.L.R.B. 598 (1997).}
\footnote{202. \textit{Passavant}, 149 F.3d at 245.}
\footnote{203. \textit{Id.} at 245, 248.}
\footnote{204. \textit{Id.} at 245, 248.}
\footnote{205. \textit{Id.} at 248.}
\end{footnotes}
ARE NURSES SUPERVISORS?

The case cited by the court does not take into account the unique character of the health care field, and there are many other cases to the contrary. The Board in a previous case had also found that the nurse’s resolution of minor grievances did not rise to the level of adjusting grievances under the Act. However, the court disagreed and held that no matter how flagrant a violation is, sending an employee home is discipline using independent judgment. It is interesting to note that the court did not give reasons as to why this involved independent judgment, but only stated that it did.

B. The Fourth Circuit

The Fourth Circuit in *Glenmark Associates Inc. v. NLRB* also overruled the Board’s findings that nurses were not supervisors. *Glenmark*, a consolidated decision, involved LPNs who rotated through the position of charge nurse. The LPNs’ duties included reporting patient conditions, reassigning CNAs to ensure adequate staff, and filing verbal correction notices if there was misconduct. The Board found the nurses not to be supervisors because they were directing the work of lesser skilled employees and not supervising within the meaning of the Act. Despite the entitlement of deference owed to the Board, the court overruled the Board and held that the nurses were supervisors. The court held that the

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206. *Id.* (citing Warner Co. v. NLRB, 365 F.2d 435, 439 (3d Cir. 1966)).

207. Although cases to the contrary exist, they are not precedent in the Third Circuit. See e.g., *Manor West*, 313 N.L.R.B. 956, 957 (1994) (stating that “the independent judgment exercised by the LPNs is merely incidental to their function, as technical employees, of treating patients and thus is not supervisory authority in the interest of the employer”); *Dad’s Foods, Inc.*, 212 N.L.R.B. 500, 501 (1974) (stating that the limited authority of the “most experienced employee” of a food packaging plant to discharge employees for intoxication “is only a very restricted, and sporadic kind of authority,” which does not confer supervisory authority).

208. *Manor West*, 313 N.L.R.B. at 959. The Board concluded that higher management, not the LPNs, decided the responses and positions taken in respect to grievances. *Id.* This is consistent with other Board decisions such as *Illinois Veterans Home at Anna, L.P.*, 323 N.L.R.B. 161 (1997) and *Ohio Masonic Home, Inc. v. Teamsters Local Union No. 957*, 295 N.L.R.B. 390 (1989).

209. *Passavant*, 149 F.3d at 249.

210. 147 F.3d 333 (4th Cir. 1998).

211. *Id.* at 335.

212. *Id.*

213. *Id.* at 336.

214. *Id.* at 339 (holding that they were merely sharing knowledge and expertise with lesser skilled employees).

215. *Id.* at 337 (commenting that the Board is entitled to deference and can only be overturned if there is no substantial evidence in the record as a whole to support its findings). *See also* Chevron U.S.A., Inc., v. Natural Res. Def. Council, 467 U.S. 837 (1984) (establishing the degree of deference owed to “judicial” decisions of administrative bodies).
nurses had no power to make scheduling decisions and put certain employees to work when and where they were needed.\textsuperscript{216} They also had the power to recommend disciplinary action.\textsuperscript{217} Despite the fact that these recommendations were reviewed, and that the nurses did not have final say, the court still found this authority to be supervisory.\textsuperscript{218}

Based on the same facts the dissent came to the opposite conclusion. The dissent correctly stated that the intent of Congress was to differentiate between straw bosses and actual management.\textsuperscript{219} The test advocated by the dissent does not look to whether an employee has discretion, but what degree of discretion she/he has.\textsuperscript{220} The dissent also argued that when authority is constrained by superiors it is not considered the exercise of professional judgment.\textsuperscript{221} The dissent states a valid point: the LPNs cannot effectively adjust grievances because a collective bargaining agreement controls that.\textsuperscript{222} The Fourth Circuit devotes an entire page to describing and admonishing the Board for being biased, but fails to mention that earlier in the year, they expressed approval for the Board's results.\textsuperscript{223}

C. The Sixth Circuit.

In \textit{Mid-America Care Foundation v. NLRB}\textsuperscript{224}, the Sixth Circuit became the third circuit to overturn a Board order declaring nurses not to be supervisors. The disputed LPNs were the highest-ranking employees at the facility during night shifts and on the weekends.\textsuperscript{225} They evaluated CNAs and reassigned them if there was a staffing shortage.\textsuperscript{226} The Board found that these duties, again, did not rise to the level of supervisory

\begin{footnotesize}
\begin{itemize}
\item[216.] Glenmark, 147 F.3d at 341.
\item[217.] Id. at 342-43.
\item[218.] Id. at 342 (noting that "the NLRA does not preclude supervisory status simply because the recommendation is subject to a superior's investigation"). While the NLRA does not preclude supervisory status in that situation, it is a factor to consider in determining status. \textit{Id.}
\item[219.] Id. at 345.
\item[220.] Id. The dissent states that there are numerous professional employees who make complex decisions exercising professional judgment, and that that alone is not enough for them to be supervisors. \textit{Id.} at 345, 346.
\item[221.] Id. at 346. The dissent points out that the LPNs are given set procedures to follow and their disciplinary powers are limited. The dissent also looks to what the LPNs do not do: they have no authority to schedule CNAs, to decide when a CNA will be fired, or decide when a CNA can take a vacation. \textit{Id.}
\item[222.] Id.
\item[223.] \textit{See}, e.g., Beverly Enters. v. NLRB, 136 F.3d 361, 361 (4th Cir. 1998) (approving an order of the board declaring nurses to be non-supervisors).
\item[224.] 148 F.3d 638 (6th Cir. 1998).
\item[225.] Id. at 639.
\item[226.] Id. at 640.
\end{itemize}
\end{footnotesize}
The court vacated this determination and found that the nurses had statutory authority to direct the aides. They also held that the nurses effectively disciplined the aides by filling out evaluation forms, even though the forms did not bind management.

In the span of eleven years the Sixth Circuit has vacated six NLRB decisions finding nurses not to be supervisors. This particular opinion is very brief and relies solely on the precedent of different cases with different facts. It seems as if the Sixth Circuit ruled on the issue eleven years ago and has not reevaluated its position since, despite different fact patterns. Just recently, it overturned another Board order declaring nurses not to be supervisors in Integrated Health Services of Michigan v. NLRB.

D. The Seventh Circuit

The Seventh Circuit in NLRB v. Grancare, Inc. used the "independent judgment" test and secondary factors to uphold the NLRB’s determination that nurses were not supervisors. They also warned against construing the definition of supervisor too broadly because those who were declared supervisors lose an important right. The nurses in this case communicated with doctors and worked with and directed the CNAs, but an RN was always present. Therefore, the Board found supervisory authority lacking. The court upheld the Board’s position and declined to look for sinister motives or bias of the Board in using the "independent judgment" test. The court stated, "[i]t is not our task to conjecture about whether the Board has tried to do an end run around an unfavorable Supreme Court decision." The standard of review is whether their decision was arbitrary or capricious.

227. Id. at 643.
228. Id. at 641.
229. Id. (finding that the sensitive judgments in evaluating nurses aides, “coupled with the power to run the nursing home without any other on site supervision,” at times mandates a conclusion that they utilize independent judgment).
230. Id. at 640.
231. 191 F.3d 703 (1999).
232. 170 F.3d 662 (7th Cir. 1999).
233. Id.
234. Id. at 666 (citing Accord Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) (stating that reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansive as to deny protection to workers that the Act was designed to reach)).
235. Id. at 664.
236. Id. at 670.
237. Id. at 666.
238. Id. The court stated that its job is to decide whether the Board’s reason for concluding that the LPNs were not supervisors is a reasonable conclusion to draw from the evidence. Id.
239. Id.
The court went on to look at the ratio of supervisors to non-supervisors, a secondary factor, in order to bolster their finding that the nurses were not supervisors.\textsuperscript{240} If the nurses were considered supervisors then the ratio of supervisors to non-supervisors would be fifty-nine to ninety, which is extraordinarily top-heavy.\textsuperscript{241} The court concluded that “the Board must draw a line separating the lowest level of true supervisors—those who are part of management’s team—from those valuable employees who are just on the other side of the line.”\textsuperscript{242}

The dissent argued that the Board was not entitled to deference because it has been manipulative in interpreting the terms of the Act.\textsuperscript{243} The dissent also argued that if the Board was granted deference, its actions would not be vulnerable.\textsuperscript{244} However, this point is misplaced because deference does not mean rubber-stamping; the standard of review is whether substantial evidence on the record supports the decision.\textsuperscript{245}

E. The Eighth Circuit

In \textit{Beverly Enterprises v. NLRB},\textsuperscript{246} the Eighth Circuit joined a growing number of courts, including the Seventh Circuit, that upheld a NLRB decision declaring nurses not to be supervisors.\textsuperscript{247} The nurses in this case lacked authority to require CNAs to report to work or authorize them to leave the facility.\textsuperscript{248} In monitoring the CNAs, they followed established guidelines and only verbally reprimanded them.\textsuperscript{249} Therefore, the Board found them not to be supervisors.\textsuperscript{250} The court agreed and concluded that their disciplinary authority was extremely limited and “not sufficient for supervisory status.”\textsuperscript{251} The court also reviewed the number of supervisors and non-supervisory employees and found that the ratio would be too high if the nurses were considered supervisors.\textsuperscript{252} Finally, the court cited a number of cases that upheld non-supervisory status, even though the nurses were the highest-ranking employees on the shift.\textsuperscript{253}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{240} \textit{Id.} at 667.
\item \textsuperscript{241} \textit{Id.} (quoting NLRB v. Am. Med. Serv., Inc., 705 F.2d 1472, 1473 (7th Cir. 1983)) (stating that the “highly improbable ratio of bosses to drones ‘raises a warning flag’”).
\item \textsuperscript{242} \textit{Id.} at 668.
\item \textsuperscript{243} \textit{Id.} at 669.
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{Id.} at 666.
\item \textsuperscript{246} 148 F.3d 1042 (8th Cir. 1998).
\item \textsuperscript{247} \textit{Id.} at 1048.
\item \textsuperscript{248} \textit{Id.} at 1046.
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} \textit{Id.} at 1047, 1048.
\item \textsuperscript{253} \textit{Id.} at 1047 (citing NLRB v. Res-Care, 705 F.2d 1461, 1467 (7th Cir. 1983)).
\end{itemize}
\end{footnotesize}
F. The First Circuit & The Latest Decision: NLRB v. Hilliard Development Corp.\textsuperscript{254}

In a decision handed down only last year, the First Circuit added to the division among the circuits. The court upheld a Board order declaring nurses not to be supervisors.\textsuperscript{255} The nurses in this case oversaw the work of aides underneath them, and during the night shift were the highest-ranking employees on the premises.\textsuperscript{256} The nurses assigned the aides to predetermined groups and redistributed work if there was a shortage of employees.\textsuperscript{257} Their disciplinary authority was limited to documenting misconduct and issuing verbal warnings.\textsuperscript{258} Therefore, the Board found them not to be supervisors.\textsuperscript{259}

The First Circuit agreed and stated that the evidence failed to show that nurses effectively evaluated aides.\textsuperscript{260} Only when there was a direct correlation between evaluations and merit bonuses would supervisory authority be found.\textsuperscript{261} The court also held that, while the nurses possessed some assignment power, it was so limited that it did not rise to the level of independent judgment.\textsuperscript{262} The court stated that “such hemmed-in, limited authority to assign work—authority which is confined by predetermined groupings and schedules and is subject to post-action recission by a Unit Manager—is not the independent judgment required by the Act.”\textsuperscript{263} The court then examined the nurse’s ability to adjust grievances.\textsuperscript{264} Since they could only resolve minor grievances, the court found that this did not amount to supervisory authority.\textsuperscript{265}

This court reversed the whole picture of the organization, including what the nurses were not responsible for or capable of doing.\textsuperscript{266} They did

\begin{itemize}
\item \textsuperscript{254} 187 F.3d 133 (1st Cir. 1999).
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Id. at 138.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id. (noting that the nurses could send aides home, but only for flagrant violations, and the nurse had to notify those above them of the action).
\item \textsuperscript{259} Id. at 139, 140.
\item \textsuperscript{260} Id. at 143-44 (stating that although there is some relationship between merit pay increases and the evaluations, the relationship is not sufficient to declare them supervisors). Furthermore, not all the nurses filled out the evaluation forms, and many did not know of their effect. Id. at 143.
\item \textsuperscript{261} Id.
\item \textsuperscript{262} Id. at 146 (finding that the nurses make assignments within the confines of the predetermined groups set by management).
\item \textsuperscript{263} Id. (citing Northeast Utils. Serv. Corp. v. NLRB, 35 F.3d 621, 625 (1st Cir. 1994)).
\item \textsuperscript{264} Id. at 147.
\item \textsuperscript{265} Id. (citing Northeast Utils. Serv. Corp. v. NLRB, 35 F.3d 621, 625 (1st Cir. 1994)) (stating that the resolution of disputes does not amount to supervisory authority, especially if they do not have ultimate responsibility for the resolution).
\item \textsuperscript{266} Id.
\end{itemize}
not speak for the organization, assert any financial control, or resolve any service disputes.\textsuperscript{267} Those activities were reserved for true management.\textsuperscript{268} The court then looked at the policy reasons for excluding supervisors.\textsuperscript{269} Exclusion of supervisors was supposed to benefit both management and labor; it was supposed to avoid conflicts of interest.\textsuperscript{270} However, no such conflict exist here.\textsuperscript{271} The court held that there was no reason to believe that collective bargaining would transform these employees into disloyal ones.\textsuperscript{272} Finally, the court stated that there was no reason to believe that the Board was biased or trying to apply a special test to nurses.\textsuperscript{273} It did not matter that the test utilized seemed to resolve the question against the employer most of the time. The court stated that if this test was meant to resolve decisions in favor of the employer, then “the remedy is in Congress. So long as Congress has assigned this interstitial policy-making role to the Board, we adhere to our usual rules of deference.”\textsuperscript{274}

G. Remarks

The \textit{Hilliard} decision adds another opinion to the circuit split surrounding whether nurses are supervisors under the NLRA. The Ninth Circuit added its opinion in June of 1999, holding that the nurses were not supervisors.\textsuperscript{275} The ANA was concerned that the \textit{Health Care} decision would be a major setback for collective action by nurses.\textsuperscript{276} However, nurses continued to unionize and the Board consistently found them not to be supervisors.\textsuperscript{277} It turns out that the Supreme Court decision was not a setback for nurse unionization, but the subsequent decisions of the circuit courts are a setback.\textsuperscript{278} These circuit courts are reversing the Board’s decisions and leaving nurses outside the protection of the Act.

\textsuperscript{267} Id. at 147.
\textsuperscript{268} Id. (finding that the central responsibility of the nurses was to care for the patients, and that their supervisory role over aides was too miniscule to amount to real supervisory status).
\textsuperscript{269} Id.
\textsuperscript{270} Id. at 148.
\textsuperscript{271} Id.
\textsuperscript{272} Id. (assuming that nurses will not sacrifice their professional norms for the labor movement).
\textsuperscript{273} Id. at 141.
\textsuperscript{274} Id.
\textsuperscript{275} Northern Mont. Health Care Ctr. v. NLRB, 178 F.3d 1089, 1093-97 (9th Cir. 1999) (discussing why the court upheld the NLRB’s decision finding nurses were not supervisors).
\textsuperscript{276} Benedetto, supra note 22, at 724.
\textsuperscript{277} Id.
\textsuperscript{278} Several circuits have found that nurses are supervisors. For examples of cases that have held LPNs to be supervisors under the definition of the NLRA, see Beverly Enters.-W. Va. v. NLRB, 165 F.3d 307 (4th Cir. 1999); NLRB v. Atleboro Assoc., Ltd, 176 F.3d 154 (3rd Cir. 1999); Caremore, Inc. v. NLRB, 129 F.3d 365 (6th Cir. 1997).
Different judges in the same circuit have taken the same set of facts and come to opposite conclusions as to whether or not nurses are supervisors. In this “war[] of the nurses” it is not fair to leave such an important question up to the luck of whatever judges happen to be sitting on the bench that day. If it is reasonable to decide the cases either way based on the facts, then the next step should be to look at the policy implications of each decision.

V. THE IMPLICATIONS ON UNIONS AND THE LABOR MOVEMENT IF NURSES ARE CONSIDERED SUPERVISORS

Justice Ginsburg sparked a debate over the fate of professional unions in her dissent in NLRB v. Health Care & Retirement Corp. of America. She warned that if courts construe the definition of “supervisor” too broadly, then professionals would not receive coverage from the Act. If the courts whittle away the distinction between independent judgment and professional judgment, then virtually all professionals would lose the coverage of the Act. Therefore, professional unions, not only for nurses, but also architects and engineers, will cease to exist.

If there is an established union in place already, some commentators have argued that many employers would not “take on the union” and try to declare that their nurses are supervisors. However, this is contradicted by the plethora of cases where nursing homes have asserted that their nurses are supervisors. Employers stand to gain a lot if their nurses are declared supervisors. The nurses lose protection of the NLRA and in many cases, removal of nurses from the bargaining unit will defeat the union. The growing number of circuits that are vacating Board judgments and declaring nurses supervisors will only add fuel to employers’ fire in contesting bargaining units. As more employers challenge the nurses’ coverage, it is less likely that nurses will want to unionize because of the

279. See, e.g., Caremore, 129 F.3d at 369.
280. Hilliard, 187 F.3d at 144.
282. Id. at 598.
283. Id. (stating 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 professionals employed by organizations subject to the Act will receive its protections.”)
285. See generally id. (mentioning many cases in which nursing homes have asserted that their nurses are supervisors).
286. See Glenmark Assoc. v. NLRB, 147 F.3d 333, 337 (4th Cir. 1998) (finding that where nine nurses—LPNs and RNs—voted for union representation, thus giving the union a majority, if any number of the nurses are excluded as supervisors, the majority may disappear).
uncertainty and instability it brings. Some commentators also say that nurses can bargain to have the employer declare them non-supervisors. However, many nurses do not reach that point if they cannot receive union representation because they are considered supervisors.

A. The Implications of Nurses Being Classified as Supervisors

If nurses are declared supervisors, they will not have the protections of the Act, and, therefore, will have little incentive to join unions. Roughly twenty-four percent of the 3.6 million full-time employees in hospitals are RNs; this is a large number of employees for the labor movement to lose. Furthermore, since only twenty percent of RNs are unionized, the labor movement also loses the potential it had to organize the remainder of RNs. It would be a huge boost to the labor movement if unions could organize nurses because currently, ninety percent of the 10.5 million health care workers are not unionized. If the supervisory status classification of nurses spreads to other fields, professional unions will be virtually non-existent. Hence, the labor movement will receive another blow at a time when it is in crisis. Forty years ago, one in three private employees belonged to a union, but that number has since dropped to one in ten. As the labor movement declines, inequality increases.

Because the labor movement has been in trouble for many years, some have proposed radical measures in order to revitalize it. Declaring nurses to be non-supervisory is not radical; it was Congress’s intent and will help breathe new life into the movement. As the long-term health care industry continues to grow, the labor movement can organize it and, therefore, gain

287. Paul F. Gleeson, Collective Action and Unionization in Health Care: A Management Attorney’s View, 41 ST. LOUIS U. L.J. 915, 916 (1997) (stating that turmoil scares employees and thus impedes unionization because employees associate instability with unions). Employers often use this fear as a tactic to discourage unionization. Id.
290. Benedetto, supra note 22, at 725.
291. Id. This potential of organizing the remainder of RNs was just starting to be realized by the labor movement. The ANA approved collective action of nurses and recognized them as professionals, which helped pave the way for organization. Id.
292. Gleeson, supra note 287, at 915.
293. See generally id.
295. Id. at 166 (advocating that the labor movement needs to address the surge in inequality that has occurred due to the decrease in union representation).
296. Marion Crain, Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment, 74 MINN. L. REV. 953, 960-961 (1990) (proposing that all supervisors should be considered employees).
strength.297

In addition, in an effort to revitalize, the labor movement is experimenting with new systems, including labor-management partnerships.298 Labor is facing a catch-twenty-two in this respect. In order for these attempts to be successful, employees have to assume more responsibility on the job.299 However, if the definition of “supervisor” is broadly interpreted, then employees who assume this responsibility will jeopardize their coverage under the Act. Therefore, they may not want to assume more responsibility, thus hindering the progress of the labor movement.

B. The Specific Effect if LPNs are Considered Supervisors

As the economy changes, more and more people yearn for secure, long-term employment. However, the reality of downsizing and competition has lead more employers to hire “contingent workers.”300 These workers can be skilled, but are not part of an employer’s core workforce.301 Therefore, they do not carry much bargaining power. CNAs fall within this category of employees.302 RNs and LPNs are usually part of the employer’s core workforce and possess skills employers need.303 Therefore, they possess greater bargaining power then the CNAs.304 By putting LPNs and CNAs in the same bargaining unit, the union, as a whole, has more power and leverage in a bargaining session.305 However, if nurses are declared supervisors, they will not have any leverage because they are not covered by the Act. In addition, CNAs, because of their lower skill level, may not want to take the chance of organizing alone in the first place because of fear of employer retaliation.306 The LPNs in the group help to strengthen solidarity and curb illegal firings.307

The health care industry has undergone reconstruction in the past decade, moving away from public healthcare toward privatization.308

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297. Motley, supra note 198, at 711 (stating that organized labor has targeted the nursing-home industry for intensive organizational activity in order to gain more strength in the service economy).
298. Hiatt & Jackson, supra note 294, at 165, 169.
299. Id. at 170.
300. Id. at 167.
301. Id. at 171.
302. Id.
303. Id. at 168.
304. Id.
305. Id.
306. Id.
307. Id. at 174 (stating that the Dunlop Commission estimated that in organizing drives with unskilled workers, illegal firings occur in one out of every four organizing drives).
308. Jewett, supra note 127, at 1143.
Therefore, medicine and hospitals have become big business.\textsuperscript{309} As the industry is in turmoil, many may look to unions to provide them with security.\textsuperscript{310} However, the division within the courts negatively impacts the perception of unions; many now see unions as a conflict-causing force.\textsuperscript{311}

VI. THE IMPLICATIONS OF PHYSICIAN UNIONIZATION IF NURSES ARE CONSIDERED SUPERVISORS

Until recently, physicians did not organize in large numbers.\textsuperscript{312} Many thought it unnecessary as they were viewed as independent contractors and not employees.\textsuperscript{313} With the rise of Health Maintenance Organizations ("HMOs"), doctors now have less autonomy in patient care and look more like employees than independent contractors.\textsuperscript{314} Economic pressures and HMOs now make decisions that had typically been reserved for physicians.\textsuperscript{315} However, the lengthy training and educational process that doctors endure creates a strong belief that they should control patient care.\textsuperscript{316} Therefore, doctors are now attempting to unionize in large numbers to deal with the changing face of health care.\textsuperscript{317} Unionized physicians now comprise 42,000 of the 756,000 physicians in this country.\textsuperscript{318}

Physicians advance arguments similar to those of nurses. They claim that HMOs have taken away a substantial portion of their discretion, resulting in a lack of independent judgment.\textsuperscript{319} The Board apparently agreed and held that doctors are not supervisors because they had minimal authority to direct the work of other employees.\textsuperscript{320}

\textsuperscript{309} Id. at 1144.
\textsuperscript{310} Id. at 1145.
\textsuperscript{311} NLRB v. Healthcare & Retirement Corp. of Am., 511 U.S. 571, 598 (1994) (pointing out that in other industries, where there is less division, employees usually seek unions to offer them stability and security).
\textsuperscript{312} Jewett, supra note 127, at 1136.
\textsuperscript{313} Id. (stating that physicians are typically paid more and, therefore, have less incentive to organize).
\textsuperscript{314} Id.
\textsuperscript{315} Id. at 1144.
\textsuperscript{316} Id.
\textsuperscript{317} See generally Chris Phan, Physician Unionization, 20 J. LEGAL MED. 115 (1999). Phan discusses that the labor movement has not seen such a surge in unionization since the 1970s. Physicians started to organize in 1970 when managed care started to encroach on their decision-making. They formed the longest-lasting physicians union, the Union of American Physicians and Dentists ("UAPD"). However, unionization in the medical field decreased in the 1980s. The 1990s then saw the reemergence of physician unions due to cuts in staff and lack of autonomy in patient care. Id. at 129-131.
\textsuperscript{318} Id. at 130.
\textsuperscript{319} Id. Therefore, they argue, they are not independent physicians, but merely employees, and thus, labor laws should protect them.
\textsuperscript{320} Id. at 131.
In 1997 the American Medical Association ("AMA") announced its support for physician unions. They believe that unions are necessary to bargain collectively on issues such as compensation and decision-making power. To achieve this end they are trying to establish the first union ever organized under the AMA. Critics of physician unions fear that patient care will suffer if doctors are permitted to strike. However, as it stands, doctors will continue to have less leverage to demand more patient care rights and that will have a disastrous effect on the quality of health care in this country. There also may be a solution in the form of a professional association that does not resort to strikes, but at a minimum will give physicians a voice.

Physicians are professionals and, therefore, should be able to unionize. However, if courts find that nurses are supervisors under the Act, then doctors will undoubtedly be declared supervisors as well. Currently, the courts are split, as they are in the nurse cases, as to whether doctors are supervisors or not. If courts rule nurses "responsibly direct" aides, then it can be argued that doctors direct nurses. If nurses are supervisors, one finds it hard to believe that doctors could avoid a similar classification. However, this contradicts Congress' intent to exclude professionals from the definition of supervisor.

As HMOs grow, physicians will lose more rights and their bargaining power will dwindle. Unions can combat this inequality of bargaining power and the labor movement can also revitalize itself in the process. The

322. Id. at 137 (claiming that the AMA believes their union will allow physicians to bargain collectively on vital issues).
323. Id.
325. Jewett, supra note 127, at 1144 (stating that the widespread changes in the structure of health care delivery have caused decisions about patient care to be dictated by economic pressures to minimize services and cut costs).
326. Phan, supra note 317, at 139 (suggesting that new laws permitting professional organizations for physicians under the AMA would increase their bargaining power without resorting to union tactics).
327. Id. at 126.
328. Id. at 126-29 (reporting that the District of Columbia Circuit has upheld a Board decision declaring that doctors were not supervisors, while an Illinois Appellate Court has vacated a Board decision declaring the doctors in question were not supervisors).
329. Id. at 122 (stating that the factors to consider in determining whether a doctor is a supervisor are: degree of skill needed for job, authority to hire and discharge workers, control over compensation of other employees, and whether the premises are controlled by the employer).
330. Id. at 137 (stating that physicians lost decision-making rights and, thus, bargaining power, as a result of HMO growth).
circuits, given the same facts, are split as to whether both nurses and
doctors are supervisors. As a result, both positions have facts and law to
support it and are, therefore, reasonable.

There are major policy reasons for finding nurses not to be
supervisors. The most profound one is the intent of Congress to exclude
them from the statutory definition of supervisor. Given that an extremely
valuable right is at stake and deference to the Board is warranted, Congress
should amend the NLRA to establish a rebuttable presumption that nurses
are not supervisors. In the meantime, the courts should give effect to
congressional intent, by instituting a rebuttable presumption that nurses are
not supervisors and deferring to the NLRB.

VII. ANALYSIS: A REBUTTABLE PRESUMPTION THAT NURSES ARE NOT
SUPERVISORS

As it stands, different circuits have taken similar facts and arrived at
different conclusions as to whether nurses are supervisors. This distinction
seems to depend on where one lives and what circuit has jurisdiction there.
Once the hurdle of residing in a circuit that declares nurses non-supervisory
has been cleared, the struggle is not over. The specific panel of judges in a
given case could be outcome determinative, since judges in the same circuit
have taken exactly the same facts and reached opposite conclusions.

Therefore, if you are a nurse fighting for representation, your fate may
depend on who is sitting on the bench that day.

Although the ANA believes that nurses are not supervisors, some
courts have given little deference to this qualified opinion. The ANA states
that it perceives nurses to be professionals under the NLRA, but not
professionals exercising supervisory authority. It claims that nurses give
professional direction to other aides and do not exercise traditional
supervisory power. Although the ANA is not entitled to the deference
that the Board is, its opinion of what its colleagues do on a daily basis
should factor into a court’s determination of whether or not nurses are
considered supervisors.

The right to be protected under the NLRA is too important to be left

331. Id. at 126-29.
332. See Glenmark Assocs. Inc. v. NLRB, 147 F.3d 333, 345 (4th Cir. 1998) (Jones, J.,
dissenting) (reaching a conclusion opposite to that of the majority, based on the same facts).
333. Brief of Amici Curiae American Nurses Association at 9, NLRB v. Health Care &
334. Id. Although nurses exercise independent judgment in directing others, it is
considered professional authority and not the typical supervisory authority to recommend
hiring, firing, promotion, and discharge required in order to be considered a supervisor
under the NLRA. Id.
up to chance.\textsuperscript{335} Sensible people can look at the objective facts of what these nurses do and arrive at starkly different conclusions. Both interpretations may be reasonable, and if they are, which one wins? If both are reasonable interpretations, I argue that we first look to the consequences of each one, and then to congressional intent to come up with the correct answer. I believe that in almost all cases, Congress did not intend for nurses to be supervisors. Therefore, the courts should give deference to the Board and congressional intent and apply a rebuttable presumption that nurses are not supervisors. The employer has a chance to rebut this presumption in the rare case where the nurses truly are supervisors. This threshold should be fairly high so that courts do not circumvent congressional intent and declare nurses supervisors. Finally, Congress should pass the specific amendment to the NLRA they thought was not needed in 1974, and declare nurses not to be supervisors.

A. Courts Should Employ A Presumption That Nurses Are Not Supervisors

The Board has consistently held that nurses are not supervisors.\textsuperscript{336} However some circuits have vacated the Board’s decision and found nurses to be supervisors.\textsuperscript{337} The whole issue has become, in the words of the Hilliard court, a “war between the nurses.”\textsuperscript{338} In order to establish uniformity, the courts, whether they agree with the decision or not, should give deference to the Board, until there is a congressional mandate otherwise. They should also give deference to congressional intent and employ a presumption that nurses are not supervisors.

The Board is to be given deference when a statute is ambiguous.\textsuperscript{339} The Supreme Court ruled that the term “independent judgment” was ambiguous.\textsuperscript{340} In \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council},\textsuperscript{341} the Supreme Court held that when an administrative agency is charged with enforcing a statute, judicial review of that agency’s decision is a two-step process.\textsuperscript{342} The first question is whether Congress has directly

\textsuperscript{335} NLRB v. Grancare, Inc., 170 F.3d 662, 666 (7th Cir. 1998) (quoting Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970)) (stating that the board has a duty not to construe supervisory status too broadly because an employee who is declared a supervisor loses a valuable right).

\textsuperscript{336} Although some circuits have overruled the Board’s decision in every case in this comment, the Board found the nurses in question not to be supervisors.

\textsuperscript{337} \textit{See}, e.g., \textit{Grancare}, 170 F.3d at 666.

\textsuperscript{338} NLRB v. Hilliard Dev. Corp., 187 F.3d 133, 144 (1st Cir. 1999).


\textsuperscript{340} \textit{Id}.

\textsuperscript{341} 467 U.S. 837 (1984).

\textsuperscript{342} \textit{Id.} at 842-43.
spoken on the issue. If it has, courts must give effect to the will of Congress. The Supreme Court has already ruled that the Committee Reports of 1974 are not entitled to the full weight of law, therefore, Congress has not spoken directly on the issue. The next inquiry is whether the agency’s interpretation is a permissible construction of the statute. If it is, then the agency’s findings are awarded deference. The Board’s findings here that nurses are supervisors is a reasonable construction of the statute given the committee reports and the fact that half of the circuits have upheld their decisions. Thus, the standard of review for an appellate court is whether the Board’s determination is supported by substantial evidence.

Given very similar facts, other circuits, including the First Circuit in Hilliard, have ruled that there is substantial evidence that nurses are not supervisors. The nurses in all of the cases did not have the power to make any final decisions concerning pay, hiring, or firing. The fact that they were the highest-ranking employees on the premises during the night shift did not necessarily indicate that they were supervisors. In most cases, a supervisor was on call or could be reached if any significant decisions had to be made. Therefore, there was substantial evidence supporting the Board’s finding of non-supervisory status. It does not matter if two conclusions can be drawn from the evidence, as long as their decision is supported by substantial evidence. Although some circuits come to different conclusions, because there is substantial evidence supporting the Board’s decision it should be awarded deference.

Some circuits do not want to award deference to the Board because they feel that the Board is biased, and is manipulating the definition of supervisor to purposefully exclude nurses. The fact that the Board’s

343. Id. at 842.
344. Health Care, 511 U.S. at 582. The committee reports of 1974 were statements made by senators in Congress, and, therefore, can be considered an indirect statement of congressional intent. They felt a specific amendment was not needed in order to exempt health care professionals from the Act due to previous Board decisions. S. REP. No. 93-766, at 6 (1974).
345. Chevron, 467 U.S. at 843.
346. Id. at 844.
347. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (holding that Congress has stated that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find evidence supporting the decision).
349. See, e.g., NLRB v. Grancare, Inc., 170 F.3d 662, 666 (7th Cir. 1999) (addressing the status of nurses as supervisors and non-supervisors).
351. See, e.g., id. at 341.
353. For one example, see Glenmark, 147 F.3d at 338 (stating that the “independent judgment” test is an end run around an unfavorable Supreme Court decision). However, this
decisions are consistent does not support this conclusion. They are consistent because the Board is trying to give effect to the congressional policy not to include nurses as supervisors. If a test tends to favor one side, the remedy lies with Congress and not the courts.\textsuperscript{354} Also, it is not the court’s role to speculate whether the Board is biased.\textsuperscript{355} The First Circuit stated that “there is no reason, from the facts of this case, to believe that the Board continues de facto, if not de jure, to apply a special test to nurses.”\textsuperscript{356} Their role is to decide if the Board has drawn a reasonable conclusion from the evidence and defer to them on factual questions.\textsuperscript{357} The Board has been making these types of decisions since 1935, when Congress vested it with the power to interpret ambiguities in the Act.\textsuperscript{358} Whether nurses are supervisors is, in part, a question of fact, and, therefore, deference should be given to the Board.\textsuperscript{359}

In addition to deference to the Board, the courts should give effect to congressional intent and utilize a presumption that nurses are not supervisors. When Congress passed the amendments to the NLRA in 1974, they debated whether or not to pass a specific amendment exempting nurses from the definition of supervisor.\textsuperscript{360} Both the House of Representatives and the Senate agreed with previous Board determinations that the professional judgment exercised by nurses was not supervisory authority.\textsuperscript{361} However, they felt an amendment would be unnecessary given existing Board decisions regarding health care employees.\textsuperscript{362} The committee noted that “the Board has carefully avoided applying the definition of supervisor to a health care professional who gives direction to others in the exercise of professional judgment . . . and thus is not the exercise of supervisory authority.”\textsuperscript{363} They then advised the Board to continue evaluating cases in the same fashion.\textsuperscript{364} It is evident, therefore, that Congress did not intend to include nurses in the statutory definition of supervisor.

Although the reports do not carry the full weight of law, they ignores the fact that the Board utilized the “independent judgment” test before the “incidental to patient care” test. Therefore, this was not a new test that the Board created to avoid the Health Care decision. Keller, supra note 29, at 593.

\textsuperscript{354} Hilliard, 187 F.3d at 141.
\textsuperscript{355} Id.
\textsuperscript{356} Id.
\textsuperscript{357} NLRB v. Grancare, Inc., 170 F.3d 662, 666 (7th Cir. 1999) (stating that the court declines to look for sinister motives).
\textsuperscript{358} Id. at 266.
\textsuperscript{359} Id.
\textsuperscript{360} Id.
\textsuperscript{363} Id.
\textsuperscript{364} Id.
undoubtedly express Congress' intent to narrow the definition of supervisor. In addition, prior to 1974, the Board had consistently held that nurses were not supervisors because they exercised professional and not supervisory judgment. When Congress re-enacted the statute in 1974 it did not alter this interpretation. The Supreme Court has held that when Congress re-enacts a statute without changing an agency's existing interpretation, great weight is given to that interpretation.

When Congress initially passed the exclusion for supervisors it made a distinction between those who have minor supervisory duties and those vested with genuine management power. Congress did not mean to include all employees who direct others in the definition of supervisor; supervisors must have adequate control over their employment conditions. The limited authority that these nurses possess does not rise to that level of management. They simply direct others in accordance with their professional norms and do not possess any real power over employees. There must be a distinction between professional judgment and supervisory authority or the inclusion of professionals in the Act will cease to exist. The policy of the NLRA is to include as many employees as possible in order to offer adequate protection within the workplace. Therefore, the general policy of the NLRA itself supports a presumption that nurses are not supervisors.

Due to deference to the Board and the intent of Congress, the Supreme Court should resolve this circuit split by instituting a rebuttable presumption that nurses are not supervisors. All courts would have to follow this presumption until Congress definitively states its intention. This presumption can be rebutted by compelling evidence that the nurses in question are truly supervisors. This presumption may discourage employers from challenging Board decisions and thus, decrease the amount of litigation in this area. Also, if the status of nurses remains in flux, then employers currently have incentive to place just enough supervisory authority in the job description to have them declared supervisors.

The presumption will also help the health care industry as a whole. When nurses collectively bargain, they often negotiate for better patient

365. Id.
366. Id.
368. Benedetto, supra note 22, at 702.
369. Id. at 708.
370. NLRB v. Grancare, Inc., 170 F.3d 662, 666 (7th Cir. 1999) (stating that nurses are, if not full-fledged professionals, at least sub-professionals, and some supervisory authority does rise from that, but it is not enough to declare them supervisors).
The presumption that nurses are not supervisors will allow this bargaining to occur. The presumption would also benefit employees. As the health care market rapidly changes, employees are left without job security. As costs increase and competition tightens, employers downsize to maintain profits. Unions are needed to protect workers. However, with this circuit split and confusion over whether nurses are supervisors, nurses are fearful of organizing. Employers constantly challenge the bargaining units and if they are found to be supervisors, they may suffer retaliation. The presumption may restore nurses' confidence to organize at a time when they need it most. The presumption would also increase solidarity among the different levels of nurses, and, therefore, improve patient care. There should not be a fear of divided loyalty between management and nurses because nurses do not make final decisions regarding pay, hiring, or firing. Some argue that if nurses are not supervisors, then they will not reprimand aides and patient abuse may rise. However, nurses are professionals and there is no reason to doubt their ethics. If employers wanted nurses to remedy problems of patient abuse, then management would have given them genuine authority to discipline.

Finally, adhering to the legislative intent that nurses are not supervisors helps maintain the separation of powers. The judiciary is supposed to look first to congressional intent when interpreting statutes. In this debate, Congress clearly intended for nurses not to be supervisors. A presumption that nurses are not supervisors fulfills Congress' intent until they assert a different position on the issue.

B. NLRB v. Hilliard Was Correctly Decided

The First Circuit's opinion in Hilliard contained a thorough analysis and accurately touched on the important policy issues behind this debate. The court held that the nurses were not supervisors because their authority was limited. The court went on to state that there needs to be a distinction between professional judgment, which these nurses exercise,
and independent judgment that supervisors employ.\textsuperscript{379} If courts eliminate this distinction, then professionals in general will lose coverage under the Act.\textsuperscript{380} The court also gave the correct amount of deference to the Board in stating that they "defer to that interpretation as a 'permissible construction' of ambiguous language."\textsuperscript{381}

The court thoroughly examined each duty the nurses had and concluded that they were not supervisory in nature.\textsuperscript{382} Next, they looked at what powers the nurses lacked in order to prove that they were not truly part of management.\textsuperscript{383} The fact that the nurses have no input in policies and assert no financial control over the organization reinforced the court's view that the nurses were not supervisors.\textsuperscript{384} The court then took a step back and viewed the whole picture; it looked at the policy behind supervisor exclusion.\textsuperscript{385} The Act was designed to cover all those who were not vested with genuine management authority.\textsuperscript{386} The court held that the real responsibility of nurses is to care for their patients, and whatever supervisory authority they may have is modest compared with that responsibility.\textsuperscript{387} This relative analysis supports the goal of the NLRA to cover as many workers as possible.\textsuperscript{388}

The court concluded that while nurses may play an important role in the hospital or nursing home, that does not make them supervisors.\textsuperscript{389} The court pointed out that important roles are played by many people who are not supervisors.\textsuperscript{390} This highlights the distinction between minor supervisory roles that some employees occupy and possession of true management power. While there is no clear line between those two, the court in \textit{Hilliard} properly looked at the policy behind the NLRA and placed nurses were they belong—on the non-supervisor side.

\textbf{C. Congress Should Amend the NLRA to Exclude Nurses As Supervisors}

Courts should employ the presumption that nurses are not supervisors until there is a congressional mandate to the contrary. In 1974, when they passed the health care amendments to the NLRA, Congress debated passing

\textsuperscript{379} \textit{Id.} at 142.
\textsuperscript{381} \textit{Hilliard,} 187 F.3d at 143.
\textsuperscript{382} \textit{Id.} at 147.
\textsuperscript{383} \textit{Id.}
\textsuperscript{384} \textit{Id.}
\textsuperscript{385} \textit{Id.} at 148.
\textsuperscript{386} S. REP. NO. 80-105, at 4 (1947).
\textsuperscript{387} \textit{Hilliard,} 187 F.3d at 146. Therefore, the court concluded there would be no divided loyalty. \textit{Id.} at 148.
\textsuperscript{388} Keller, \textit{supra} note 29, at 578-83.
\textsuperscript{389} \textit{Hilliard,} 187 F.3d at 148.
\textsuperscript{390} Keller, \textit{supra} note 29, at 585-86.
a specific amendment that would exempt health care workers from the definition of supervisor. However, given Board decisions at that time they thought it unnecessary. Perhaps they did not envision that circuits would vacate Board decisions, or that the Supreme Court would declare the "incidental to patient care" test invalid. Whatever the reason, the amendment that was unnecessary then now is needed to resolve a circuit split.

Congress should give binding legal effect to the legislative intent they had in 1947 and 1974. In 1947, when it excluded supervisors, Congress never meant to exclude those employees that had minor supervisory duties. In these cases, the nurses do have some supervisory duties, but they are minor compared to the rest of their responsibilities. The authority they do have is limited by upper management and requires little independent judgment.

If Congress needed to be persuaded beyond their own intent in 1974 and 1947, they could examine the policy reasons why nurses should be declared non-supervisory. Currently there is a circuit split among the courts and valuable NLRA rights are decided by geography. There is an immense inequality because nurses with similar duties are supervisors in one circuit, but not in another. Reasonable people can come to opposite conclusions as to whether nurses are supervisors. If each conclusion is reasonable, then Congress should weigh the effect of each decision on the labor movement and other professionals. These considerations tip the scale in support of the conclusion that nurses are not supervisors. The number of professional workers in unions has increased substantially in recent years. This may be the new blood that the labor movement needs to gain momentum. However, if nurses are declared supervisors, then it will be more difficult for doctors to argue that they are not supervisors. Hence, the labor movement will lose not only the health care members it has organized, but the potential to organize the rest of the industry.

391. *Id.* at 587.
392. *Id.* n.65.
395. *Id.* n.54.
396. King, supra note 3, at 358 (stating that "[a] determination of whether a nurse is a supervisor within the meaning of Section 2(11) may very well depend on which federal court the parties litigate their case").
VIII. CONCLUSION

The issue of whether nurses are supervisors has divided the circuits in some fashion for over twenty years. Rather than resolving the split, the Health Care decision, by invalidating the “incidental to patient care” test, created another one. Now circuits battle over the meaning of independent judgment. While they fight it out, an inequality is permeating the country. Nurses with similar duties in one state are declared supervisors, and, therefore, are not covered by the Act, while those in other states enjoy NLRA protection:

The Board has consistently found nurses not to be supervisors within the meaning of Section 2(11) for a variety of reasons. The Seventh Circuit summed it up in stating, “the Board must draw a line separating the lowest level of true supervisors . . . from those valuable employees who are just on the other side of the line. Those just on the other side of the line are employees who exercise some authority but not enough to be considered more than part of the regular work force.”

This line is hard to draw, especially in industries where employees exercise professional judgment. But given the Board’s expertise in this area and the fact that Congress vested it with the power to enforce the NLRA, courts should defer to the Board.

Courts should also give effect to the congressional intent not to include nurses within the definition of supervisor, and employ a presumption that they are not supervisors. Although the legislative history of the amendments was discredited in the Health Care decision, the dissent and many circuits since then have held it to be of great value in determining congressional intent. It holds the answer as to whether Congress intended to include nurses within the definition of supervisors. Those that do not like the answer, discredit it. However, “legislative history is an authoritative product of the work of Congress and represents the way Congress has chosen to communicate with the outside world. To second guess Congress’ chosen form of communication . . . arguably infringes on the separation of powers doctrine.”

The presumption that nurses are not supervisors may have to be evaluated in the future as nurses are vested with more power. However as it stands now their authority does not rise to the statutory definition of supervisor. Courts should examine the consequences of the circuit split,

398. NLRB v. Grancare, 170 F.3d 662, 667-68 (7th Cir. 1999).
401. See MacLeod, supra note 161, at 334 (stating that the trend is to hold nurses more accountable for what occurs in health care facilities).
and the inequality it creates, and employ the presumption that nurses are not supervisors.