No. 00-927

# In the Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,
PETITIONER

*v.*

MALLARD BAY DRILLING, INC.

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

## BRIEF FOR THE PETITIONER


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## QUESTION PRESENTED

Whether the United States Coast Guard has "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" concerning the "working conditions of employees" (29 U.S.C. 653(b)(1)) on "uninspected vessel[s]" (46 U.S.C. 2101(43)) so as to displace application of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 212 F.3d 898. The decision and order of the Occupational Safety and Health Review Commission (Pet. App. 8a-19a, 20a-21a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 2, 2000. A petition for rehearing was denied on August 8, 2000 (Pet. App. 66a-67a). On October 27, 2000, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including December 6, 2000. The petition was filed on December 6, 2000, and was granted on February 20, 2001. 121 S. Ct. 1076. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), provides, in relevant part:

> Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

## STATEMENT

1. a. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). Each employer covered by the Act has a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). Each employer must also comply with applicable occupational safety and health standards promulgated by the Secretary of Labor. 29 U.S.C. 654(a)(2). The Secretary has delegated her authority under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). See 65 Fed. Reg. 50,017 (2000).

The OSH Act applies to "employment performed in a workplace in a State," as well as in specified territories and "Outer Continental Shelf lands." 29 U.S.C. 653(a). When the Act was passed, certain federal agencies already had statutory authority to regulate the occupational safety and health of employees in particular

fields, such as transportation and mining. To avoid duplication of effort, Congress provided in Section 4(b)(1) of the Act that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

OSHA regulations explain that:

> Section 4(b)(1) of the Act provides that the statute shall be inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions. Therefore, a person may be considered an employer covered by the Act, and yet standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority.

29 C.F.R. 1975.1(b). The regulations further explain that, in enacting Section 4(b)(1), "Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection." 29 C.F.R. 1975.3(c).

b. The United States Coast Guard "administer[s] laws and promulgate[s] and enforce[s] regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department." 14 U.S.C. 2. The extent of the Coast Guard's

statutory authority over a vessel depends in large part on whether the vessel is "inspected" or "uninspected." See generally 46 U.S.C. 2101 *et seq.*, Subtit. II (1994 & Supp. IV 1998) (vessels and seamen). "Inspected" vessels, listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998), include, for example, freight vessels, passenger vessels, seagoing motor vessels, tank vessels and certain types of barges. See also 46 U.S.C. 2101 (1994 & Supp. IV 1998) (definitions of different vessel types). "Uninspected vessel[s]" are vessels not subject to inspection under Section 3301 that are not recreational vessels. 46 U.S.C. 2101(43).

"[T]o secure the safety of individuals and property on board" inspected vessels, the Secretary of Transportation has comprehensive rulemaking authority over those vessels, including their design, construction, alteration, repair, and operation. 46 U.S.C. 3306(a) (1994 & Supp. IV 1998). The Coast Guard has exercised that authority on behalf of the Secretary by issuing comprehensive regulations. See generally 46 C.F.R. Ch. I; 49 U.S.C. 108(b) (Commandant of Coast Guard shall exercise powers delegated by Secretary of Transportation); 49 C.F.R. 1.46(b) (delegating authority to Commandant).

In contrast to its broad authority over inspected vessels, the Coast Guard's statutory authority to issue regulations for uninspected vessels is limited to specific topics, including fire extinguishers, life preservers, flame arrestors or backfire traps, ventilation, and emergency locating equipment. See 46 U.S.C. 4102 (1994 & Supp. IV 1998). The occupational safety and health of workers on uninspected vessels, therefore, are largely unregulated by the Coast Guard, as Coast Guard regulations cover only a limited range of health and safety hazards on only certain uninspected vessels. See

primarily 46 C.F.R. Pts. 24-26 (implementing 46 U.S.C. 4102 (1994 & Supp. IV 1998)).[1] Of particular relevance here, the Coast Guard has not regulated, and does not have authority to regulate, hazards presented by oil drilling operations on uninspected vessels operating on inland waters.

In light of the foregoing statutory and regulatory provisions, OSHA and the Coast Guard have entered into a memorandum of understanding (MOU) that clarifies the division of authority over working conditions on vessels. 48 Fed. Reg. 11,365 (1983), *reprinted in* Pet. App. 62a-65a. The MOU explains that the Coast Guard generally has exclusive authority over the working conditions of seamen aboard inspected vessels. *Id.* at 63a. The MOU specifically states, however, that it does not apply to uninspected vessels. *Id.* at 62a. Consequently, OSHA generally exercises authority over such vessels unless a Coast Guard regulation applies to the

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[1] The Coast Guard is authorized to require reporting and to conduct investigations of marine casualties involving both inspected and uninspected vessels. 46 U.S.C. 6101-6104; 46 U.S.C. 6301-6308 (1994 & Supp. IV 1998). The Coast Guard has exercised that authority. See 46 C.F.R. Pt. 4. Other Coast Guard regulations also apply to uninspected vessels under certain circumstances. To the extent that those regulations address occupational safety and health hazards, they generally apply only to particular types of vessels engaged in particular activities. See, *e.g.*, 33 C.F.R. Ch. I, Subch. N (regulating mineral exploration and production activities of vessels operating on the outer continental shelf) (promulgated under authority of 43 U.S.C. 1333); 46 C.F.R. Pt. 197, Subpt. B (regulating commercial diving operations connected with a deepwater port, a deepwater port safety zone, or the outer continental shelf, as well as those conducted from any inspected vessel) (promulgated under authority of 33 U.S.C. 1509 (1994 & Supp. IV 1998); 43 U.S.C. 1333; 46 U.S.C. 3306 (1994 & Supp. IV 1998); 46 U.S.C. 3703).

specific working condition at issue. See OSHA Instr. CPL 2-1.20(R) at 14 (Nov. 8, 1996) (Secretary's Exhibit C-2).

2. a. Respondent Mallard Bay Drilling, Inc., conducts oil and gas drilling operations. Pet. App. 10a. On June 16, 1997, four of respondent's employees were killed and two others seriously injured in an explosion on the *Mr. Beldon*, a drilling barge located on Little Bayou Pigeon, a navigable waterway within the State of Louisiana. *Id.* at 2a. The drilling barge, which does not carry passengers for hire, was classified by the Coast Guard as an uninspected vessel. *Id.* at 6a, 27a. Near the end of the drilling operation, the well blew out. *Id.* at 11a. The off-duty crew evacuated, but the on-duty crew stayed aboard in an unsuccessful attempt to regain control of the well. *Id.* at 23a. Thirty to forty minutes later, the explosion occurred. *Id.* at 32a.

The Coast Guard conducted a marine casualty investigation of the incident. See note 1, *supra*. The Coast Guard determined that explosive concentrations of natural gas had spread throughout the atmosphere of the barge as a result of the blowout. Pet. App. 32a. It found that the explosion most likely originated in the pump room, where a motor was operating that could have produced sparks to ignite the natural gas. *Id.* at 34a-35a. The Coast Guard concluded that respondent had not issued any specific directions regarding blowout control; that respondent's supervisory personnel had not followed respondent's existing emergency procedures; and that they had not recognized the hazard of explosive gas accumulations on the barge and had not ordered the evacuation of on-duty personnel. *Id.* at 48a-50a. Because the Coast Guard had not promulgated regulations governing those matters, how-

ever, it took no enforcement action and referred the matter to OSHA. *Id.* at 12a, 24a-25a.

b. Based on the report and other information from the Coast Guard, OSHA cited respondent for three violations of the OSH Act. Pet. App. 2a. OSHA alleged that respondent had violated the Act's general duty clause, 29 U.S.C. 654(a)(1), by failing to evacuate employees in a timely manner after the well blowout. Pet. App. 9a. OSHA also alleged that respondent had violated particular OSHA standards by failing to develop and to implement an emergency response plan, as required by 29 C.F.R. 1910.120(q)(1), and by failing to train employees in emergency response, as required by 29 C.F.R. 1910.120(q)(6). Pet. App. 9a.

Respondent did not contest the merits of the citation but argued before the Occupational Safety and Health Review Commission (Commission) that respondent was not subject to the OSH Act for two reasons. First, respondent contended that the drilling barge was not a "workplace in a State" under 29 U.S.C. 653(a); and, second, respondent argued that the Coast Guard regulatory scheme rendered the OSH Act inapplicable under 29 U.S.C. 653(b)(1). Pet. App. 2a.

The administrative law judge (ALJ) affirmed the citation. Pet. App. 8a-19a. The ALJ held that the barge was a "workplace in a State" because it was located within the territorial boundaries of Louisiana. *Id.* at 12a-13a. With respect to preemption of OSHA authority under 29 U.S.C. 653(b)(1), the ALJ held that OSHA authority is preempted only as to those working conditions actually covered by another agency's regulations. Pet. App. 14a-15a. Because respondent made no showing that any Coast Guard regulations addressed evacuation and emergency response to releases of hazardous substances on uninspected vessels, *id.* at 15a,

16a, the ALJ concluded that the Coast Guard had not exercised authority to regulate the working conditions at issue and that OSHA authority was therefore not preempted under 29 U.S.C. 653(b)(1). Pet. App. 18a. The Commission declined review, and the ALJ's decision became final agency action. *Id.* at 20a-21a (citing 29 U.S.C. 661(j)).

c. Respondent sought review of the Commission's decision in the United States Court of Appeals for the Fifth Circuit, which reversed. Pet. App. 1a-7a. The court of appeals held that OSHA lacks authority to regulate the working conditions of respondent's employees under 29 U.S.C. 653(b)(1). Pet. App. 3a, 7a. The court therefore declined to address respondent's alternative contention that the barge was not a "workplace in a State" within the meaning of 29 U.S.C. 653(a). Pet. App. 7a.

The court noted that, under Fifth Circuit precedent, "OSHA regulations do not apply to *working conditions* of *seamen* on *vessels* in navigation" because "the Coast Guard has exclusive authority over the working conditions of seamen." Pet. App. 3a-4a (citing *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983), and *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120, 1121 (5th Cir. 1980)). The court rejected the Secretary's contention that those cases were distinguishable because they involved inspected, rather than uninspected, vessels. Pet. App. 4a-6a. The court found "no indication from *Clary* that the barge in that case was inspected," and the court emphasized that "the broad language of *Clary* does not turn on any such distinction." *Id.* at 5a.[2] The court noted that the Coast

[2] In fact, the United States flag vessel in *Clary* was a mobile offshore drilling unit operating on the outer continental

Guard is expressly authorized by 46 U.S.C. 4102 (1994 & Supp. IV 1998) to issue certain safety regulations for uninspected vessels and that the Coast Guard has exercised that authority. Pet. App. 5a-6a (citing 46 C.F.R. 25.01 *et seq.* and 46 C.F.R. 26.01 *et seq.*).[3] The court of appeals therefore reaffirmed its conclusion in *Texaco* that "the Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry-wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters." *Id.* at 6a (quoting 720 F.2d at 826).[4]

**SUMMARY OF ARGUMENT**

A. The Occupational Safety and Health Act of 1970 (OSH Act or Act) applies to the working conditions in this case because the Coast Guard has not exercised statutory authority to regulate them, as Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), requires in order for the Secretary's authority under the OSH Act to be displaced. The plain language of that Section provides

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shelf. *Clary* v. *Ocean Drilling & Exploration Co.*, 429 F. Supp. 905, 906 (W.D. La. 1977), aff'd, 609 F.2d 1120, 1122 (5th Cir. 1980). As such, it was a "seagoing barge[]" subject to inspection under the Act of May 28, 1908 (Seagoing Barge Act), ch. 212, § 10, 35 Stat. 428 (as amended by Act of June 4, 1956, ch. 350, § 3, 70 Stat. 225), the predecessor to 46 U.S.C. 3301(6).

[3] The regulations cited by the court of appeals govern life preservers and other lifesaving equipment, emergency locating equipment, fire extinguishers, flame arrestors, backfire traps, engine ventilation, cooking, heating, and lighting systems, garbage discharge and some operating procedures on certain uninspected vessels. See also p. 4, *supra* (describing hazards addressed by 46 U.S.C. 4102).

[4] *Texaco* also involved a vessel (an oil tanker) subject to Coast Guard inspection. See *Donovan* v. *Texaco, Inc.*, 535 F. Supp. 641, 642 (E.D. Tex. 1982), aff'd, 720 F.2d 825 (5th Cir. 1983).

that OSHA's authority is displaced only when another agency has "exercise[d]" its authority to promulgate or enforce standards or regulations affecting occupational health or safety. The agency may "exercise" its authority either by affirmatively promulgating regulations or by articulating a policy determination that regulatory requirements are not warranted. Section 4(b)(1) further provides that the OSH Act is displaced only as to the "*working conditions* * * * with respect to *which*" the other agency has exercised its authority. 29 U.S.C. 653(b)(1) (emphasis added). The history surrounding the enactment of Section 4(b)(1) shows that Congress rejected bills that would have allowed the mere possession of statutory authority by another agency to preempt the OSH Act or that would have made preemption turn on whether the agency has regulated any working conditions of the affected employees.

Thus, the correct inquiry to determine whether the OSH Act is displaced under Section 4(b)(1) is whether another federal agency has actually exercised its statutory authority—either by promulgating standards or regulations governing the working conditions at issue or by articulating a policy that requirements not be imposed with respect to those conditions. That inquiry reflects Section 4(b)(1)'s goal of avoiding duplicative federal regulation of occupational safety and health without undermining the OSH Act's purpose to ensure "every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). Section 4(b)(1)'s preemption rule is similar to one that the Court has used to determine whether federal law preempts state law in situations in which the federal statutory scheme embodies a balance of interests similar to the balance that underlies Section 4(b)(1). See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89,

110 (2000) (relevant preemption inquiry under Title I of the Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.*, is "whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all").

B. The court of appeals therefore erred in concluding that Section 4(b)(1) creates an industry-wide exemption from the OSH Act for seamen serving on all vessels (including uninspected vessels) by virtue of the Coast Guard's regulation of some working conditions on certain vessels. Under the appropriate Section 4(b)(1) analysis, Coast Guard action has not displaced the OSH Act with respect to the working conditions involved in this case. The Coast Guard has comprehensive statutory authority over *inspected* vessels, and it has exercised that authority so as to displace OSH Act coverage of all working conditions of seamen on those vessels. See Pet. App. 63a. The Coast Guard, however, does not have and has not exercised comprehensive authority over the working conditions on *uninspected* vessels. Therefore, whether OSH Act coverage is displaced with respect to the working conditions on the uninspected vessel in this case turns on whether the Coast Guard has addressed the particular working conditions at issue.

The Secretary and most courts of appeals interpret the term "working conditions" to mean occupational safety and health hazards that an employee encounters on the job. Those hazards include not just physical hazards, but also environmental hazards, such as toxic chemicals and fumes in an employee's surroundings. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974). In this case, the relevant working conditions are the conditions faced by employees on an uninspected

barge engaged in inland oil drilling operations when a well backs up, spreads natural gas into the vessel's atmosphere, and thereby creates the risk of explosion. Because the Coast Guard's statutory authority to regulate occupational safety and health on uninspected vessels is limited, its regulations cover only a limited range of hazards, and they do not address hazards presented by oil drilling operations on inland waters. The Coast Guard also has not decided, and has no statutory authority to decide, that those hazards should not be subject to particular safety and health requirements. Accordingly, there is no Section 4(b)(1) preemption under the Secretary's interpretation of "working conditions."

The Third and Fourth Circuits have adopted a different interpretation of "working conditions" that equates that term with an environmental area in which an employee customarily works, and those courts consequently find preemption whenever an agency regulates that physical area. That interpretation inappropriately defines "working conditions" without reference to the OSH Act's specific concern with conditions affecting occupational safety and health and mistakenly focuses on a physical *area* instead of on conditions *within* that area. Furthermore, the area-based definition of working conditions results in gaps in worker protection that are inconsistent with the OSH Act's purpose to provide comprehensive protection. The courts of appeals that have adopted this "area" definition have applied it narrowly, however, so that the focus is on the particular area presenting a hazard rather than on the entire worksite. Therefore, use of those courts' area-based definition would make no difference in this case. The relevant area would be the atmosphere on an uninspected barge operating on inland waters. The

Coast Guard has neither regulated that area nor determined that regulatory requirements should not be imposed.

C. To the extent that the language of Section 4(b)(1) is ambiguous, the Court should accept the Secretary's interpretation of the Section because that interpretation best furthers the OSH Act's central purpose to assure as far as possible that every working man and woman in the Nation has safe and healthful working conditions. The Secretary's interpretation furthers that purpose by preventing gaps in coverage. In contrast, the interpretation adopted by the court of appeals would frustrate that purpose by creating gaps in worker protection, because the OSH Act would be displaced for working conditions that the Coast Guard and other federal agencies do not—and in this case cannot—regulate. As a result, thousands of employees would be left without federal regulatory protection from workplace health and safety hazards. The Secretary's interpretation is also fully consistent with Section 4(b)(1)'s goal of preventing OSHA and other federal agencies from regulating the same health or safety conditions.

The Secretary's interpretation is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Secretary administers and enforces the OSH Act. Her interpretation of Section 4(b)(1) is set out in thirty years of citations in enforcement proceedings, as well as in a long history of regulatory coordination with other agencies, longstanding regulations, and a statutorily-mandated report to Congress. To the extent that there is ambiguity concerning the proper interpretation of Section 4(b)(1), the Secretary's reasonable interpreta-

tion should therefore control. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).

## ARGUMENT

### THE OCCUPATIONAL SAFETY AND HEALTH ACT APPLIES TO THE WORKING CONDITIONS IN THIS CASE BECAUSE THE COAST GUARD HAS NOT EXERCISED STATUTORY AUTHORITY TO REGULATE THEM

The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.*, "establishes a comprehensive regulatory scheme designed 'to assure so far as possible . . . safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin* v. *OSHRC*, 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. 651(b)). Consistent with that design, the Act generally applies to all employment performed in any workplace in the several States and territories, as well as on outer continental shelf lands. 29 U.S.C. 653(a). At the time the Act was passed, however, certain federal agencies already had statutory authority to regulate the occupational safety and health of employees in particular fields. Congress therefore provided in Section 4(b)(1) of the OSH Act, as an exception to the general rule of universal coverage, that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

The question in this case is whether the United States Coast Guard, through its limited regulations concerning uninspected vessels (as defined in 46 U.S.C. 2101(43)), has exercised authority over the working conditions of employees on those vessels so as to

displace application of the OSH Act to all the working conditions of those employees. The court of appeals held that the Coast Guard's regulation of some working conditions on certain uninspected vessels creates an "industry-wide exemption [from the OSH Act] for seamen" on all vessels. Pet. App. 6a (quoting *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 826 (5th Cir. 1983)). In so holding, the court of appeals departed from the long-standing view of the Secretary and the consensus of other courts of appeals that Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), does not confer an industry-wide exception to the Act's coverage based on limited regulation of the safety and health of employees in the industry by another agency. See pp. 16-19 & note 8, *infra* (citing cases).

As we explain below, the interpretation of Section 4(b)(1) adopted by the court of appeals in this case is inconsistent with the statutory text and the history surrounding Section 4(b)(1)'s enactment. Under Section 4(b)(1) properly construed, the Occupational Safety and Health Administration (OSHA) retains authority to regulate the working conditions at issue here because the Coast Guard's regulations of occupational safety and health on uninspected vessels do not address those working conditions. To the extent that there is any ambiguity about the correct interpretation of the OSH Act, the Secretary's long-standing interpretation of Section 4(b)(1) should control because, unlike the interpretation embraced by the court of appeals, the Secretary's interpretation furthers the purpose of the OSH Act and is entitled to deference.

### A. The OSH Act is displaced only when another federal agency has exercised its statutory authority with respect to the working conditions at issue

Section 4(b)(1) provides that the OSH Act does not apply "to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. 653(b)(1). Under the terms of that Section, and in accordance with the longstanding interpretation by the Secretary and the courts of appeals, OSH Act coverage is displaced only when another agency has actually exercised its statutory authority with respect to the working conditions at issue. See, *e.g.*, *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir.), cert. denied, 479 U.S. 883 (1986); Pet. App. 55a-58a (1980 Report of the Secretary of Labor to Congress Pursuant to Section 4(b)(3) of the OSH Act (Secretary's Report)); 29 C.F.R. 1975.1(b), 1975.3(c). Displacement can occur with regard to either a specific working condition or a set of working conditions with respect to which an agency has comprehensive statutory authority and has indicated that its exercise of that authority is sufficient.[5]

Section 4(b)(1)'s preemption rule gives primacy to authority exercised under "other Federal laws which, to various degrees, deal with worker safety and health issues," but without undermining the OSH Act's purpose to ensure "'every working man and woman in the

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[5] Further, if the other agency has exercised its statutory authority, OSH Act coverage is displaced regardless of whether the other agency's requirements are the same as or different from, or are more or less stringent than, the requirements that would apply under the OSH Act. See Pet. App. 56a.

Nation safe and healthful working conditions.'" Pet. App. 55a-56a (Secretary's Report) (quoting 29 U.S.C. 651(b)). Workers are not "denied protection under the OSH Act for *all* hazards they face because their industry happens to be regulated in part by another federal agency which has issued rules for *some* worker hazards." *Id.* at 57a. "Under this framework, gaps in employee protections are avoided while at the same time the regulatory activity of [other agencies with authority to regulate occupational safety and health in particular industries] is not affected." *Id.* at 56a. Section 4(b)(1) thus reflects Congress's intent "to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection," but at the same time not "to grant any general exemptions under the Act." 29 C.F.R. 1975.3(c).[6]

1. That understanding of Section 4(b)(1) follows from its text, which states that OSH Act coverage is displaced when another federal agency "*exercise[s]* statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1) (emphasis added). As all the courts of appeals to address the question have agreed, that language indicates that another agency's mere possession of statutory authority to regulate occupational safety and health is not sufficient to oust OSHA juris-

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[6] See also *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 780 (2d Cir. 1984) (rejecting interpretation of Section 4(b)(1) that would result in coverage gaps), cert. denied, 470 U.S. 1003 (1985); *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976) (per curiam) (same); *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 391 (5th Cir. 1976) (same), cert. denied, 434 U.S. 874 (1977); *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 338 (4th Cir.) (same), cert. denied, 429 U.S. 999 (1976).

diction. The other agency must also have actually "exercise[d]" that authority.[7]

An agency generally exercises its authority by promulgating standards or regulations that address particular occupational safety and health hazards. See, *e.g.*, *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 917 (3d Cir. 1980) (discussing regulations issued by the Department of Transportation's Office of Pipeline Safety to address the risk of gas ignition during a "hot tap" of a natural gas pipeline). But an agency may also "exercise" its authority by articulating a policy that existing regulation is sufficient and no additional requirements are warranted. See *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1530; *Southern Pac. Transp. Co.* v. *Usery*, 539 F.2d 386, 391-392 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977). Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (explaining that state law is preempted when the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"); cf. also pp. 22-23, *infra*.

The text of Section 4(b)(1) also makes clear that a federal agency's exercise of authority to regulate some working conditions of some employees within an industry does not create an industry-wide exemption from OSH Act coverage. By its terms, the text limits pre-

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[7] See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586 (D.C. Cir. 1994); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1530 (11th Cir.); *Red Star Marine Servs., Inc.*, 739 F.2d at 778 (2d Cir.); *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Columbia Gas of Pa., Inc.* v. *Marshall*, 636 F.2d 913, 915 (3d Cir. 1980); *Southern Ry.*, 539 F.2d at 336-337 (4th Cir.); *Southern Pac. Transp. Co.*, 539 F.2d at 389 (5th Cir.).

emption to "*working conditions* of employees with respect to *which*" other federal agencies exercise authority. 29 U.S.C. 653(b)(1) (emphasis added). If Congress had intended to create industry-wide exceptions to OSH Act coverage based on limited regulation by other agencies, Congress could have provided that the Act would not apply to "*industries* in which" other agencies regulate occupational safety and health. Or Congress could have displaced OSH Act coverage of "working conditions of employees with respect to *whom*" other agencies exercise such authority. Congress's decision not to do so reinforces the conclusion that the Act displaces OSH Act coverage only of those particular working conditions "with respect to which" another agency has exercised regulatory authority. 29 U.S.C. 653(b)(1).

The courts of appeals have been virtually unanimous in reaching that conclusion as well.[8] Indeed, although the Fifth Circuit reached a contrary conclusion in this case, see Pet. App. 6a, a quarter of a century ago, in a case concerning the railway industry, it also espoused the position that has been endorsed by all other courts of appeals to consider the question. See *Southern Pac. Transp. Co.*, 539 F.2d at 389-390.

2. Review of the legislative process that culminated in Section 4(b)(1)'s enactment reinforces the above reading of the statutory text. First, the drafting history shows that a federal agency with authority to

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[8] See *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1245 (9th Cir. 1998); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1531 (11th Cir.); *Red Star Marine Servs., Inc.*, 739 F.2d at 778 (2d Cir.); *Columbia Gas of Pa., Inc.*, 643 F.3d at 915-916 (3d Cir.); *PBR, Inc.*, 643 F.2d at 896 (1st Cir.); *Baltimore & Ohio R.R.*, 548 F.2d at 1053-1054 (D.C. Cir.); *Southern Ry.*, 539 F.2d at 338 (4th Cir.).

regulate health and safety must exercise that authority before its actions will displace the OSH Act's coverage. Several bills under consideration would have precluded OSH Act enforcement whenever another agency "has" statutory authority. See S. 2788, 91st Cong., 1st Sess. § 15, at 32 (1969); H.R. 843, 91st Cong., 1st Sess. § 13, at 22 (1969); H.R. 4294, 91st Cong., 1st Sess. § 13, at 13 (1969); H.R. 13373, 91st Cong., 1st Sess. § 15, at 32 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 62, 620, 671, 710 (Comm. Print 1971) (*Leg. Hist.*). The versions reported in both the House and Senate, see S. 2193, 91st Cong., 2d Sess., as reported, § 4(b)(1), at 33-34 (1970), *reprinted in Leg. Hist.* 236-237; H.R. 16785, 91st Cong., 2d Sess. (1970), as reported, § 22(b), at 83 (1970), *reprinted in Leg. Hist.* 975, like the text that was ultimately enacted, however, precluded OSH Act enforcement only when another agency "exercise[s]" such authority. A colloquy on the House floor emphasized that the use of the word "exercise" was deliberate and was intended to make clear that "the mere existence of statutory authority" does not result in an exemption from OSH Act coverage. See *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 337 (4th Cir.) (quoting *Leg. Hist.* 1019), cert. denied, 429 U.S. 999 (1976); 116 Cong. Rec. 38,381 (1970).

The history surrounding Section 4(b)(1)'s enactment also shows that Congress rejected industry-wide exceptions from the OSH Act's coverage based on limited exercises of regulatory authority by other federal agencies. The bill initially passed by the House of Representatives would have provided such exceptions by preempting "working conditions of employees with respect to *whom*" other agencies exercise statutory

authority to prescribe or enforce standards or regulations affecting occupational safety or health. See H.R. 16785, *supra*, § 25(b) (1970) (emphasis added), *reprinted in Leg. Hist.* 1109. Congress, however, did not adopt the language in the House bill. Instead Congress chose the language in the Senate bill, which used "which" instead of "whom." See S. 2193, *supra*, § 4(b)(1), at 5, *reprinted in Leg. Hist.* 533. As the Senate Report explained, that language limits preemption to "*particular* working conditions regarding which another Federal agency exercises statutory authority." S. Rep. No. 1282, 91st Cong., 2d Sess. 22 (1970) (emphasis added), *reprinted in Leg. Hist.* 162. The Conference Committee recognized the difference in the language between the House and Senate versions and chose the Senate language. See H.R. Conf. Rep. No. 1765, 91st Cong., 2d Sess. 32-33 (1970), *reprinted in Leg. Hist.* 1185-1186. Thus, "consideration of the way in which Congress arrived at the statutory language," *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198 (1974), confirms that exemptions from OSH Act coverage under Section 4(b)(1) depend on whether another federal agency has exercised statutory authority with respect to the "particular working conditions" at issue. S. Rep. No. 1282, *supra*, at 22, *reprinted in Leg. Hist.* 162.

3. In light of the statutory text and drafting history, the court of appeals erred in recognizing "an industry-wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters," Pet. App. 6a (quoting *Texaco, Inc.*, 720 F.2d at 826), including seamen serving on uninspected vessels, by virtue of the Coast Guard's regulation of some working conditions on certain vessels. The Coast Guard does have comprehensive statutory authority over the working conditions of seamen on *inspected* vessels. As recognized in

a 1983 Memorandum of Understanding (MOU) between the Coast Guard and OSHA, it has exercised that authority so as to displace OSH Act coverage of all working conditions of seamen on those vessels. See Pet. App. 63a (noting that the Coast Guard's "comprehensive standards and regulations" include "extensive specific regulations governing the working conditions of seamen aboard inspected vessels as well as ample general authority regulations to cover these seamen with respect to all other working conditions that are not addressed by the specific regulations"). With respect to the working conditions of employees on *uninspected* vessels, however, the Coast Guard does not have and has not exercised comprehensive authority. Therefore, the proper inquiry under Section 4(b)(1) is whether the Coast Guard has regulated the particular working conditions with respect to which OSHA seeks to enforce its own safety or health standards or has articulated a policy that those working conditions should not be regulated.

Section 4(b)(1)'s rule governing when other federal regulation displaces the OSH Act is similar to a rule that Congress and the courts have applied in certain contexts to determine when federal law preempts state law. Under that rule, the existence of federal regulatory authority in a certain field is not sufficient to occupy that entire field and displace all state regulation. But when federal authority is exercised over a particular subject within the field, state law is displaced with respect to that subject. The exercise of federal authority need not entail affirmative regulation; it can instead consist of a determination that no requirements concerning the subject are appropriate. But it must constitute an actual exercise of authority over the subject.

This Court has used this approach to preemption to determine whether and to what extent state law has been preempted under Title I of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. 1221 *et seq.* See *United States* v. *Locke*, 529 U.S. 89, 110 (2000) (relevant preemption inquiry under Title I of the PWSA is "whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all").[9] As the Court explained in *Locke*, this approach to preemption is appropriate when the federal statutory scheme reflects strong interests both in maintaining uniformity of regulation by the federal agency charged with oversight of a particular field and in preserving an important role for the residual powers of the States when the federal agency has not exercised its statutory authority. See *id.* at 108-109.

As we have explained, see pp. 16-17, *supra*, Section 4(b)(1) reflects an analogous confluence of interests. It is designed in part to avoid duplicative federal regu-

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[9] See also, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 352 (2000) (state law is generally preempted under the Federal Railroad Safety Act of 1970 when federal regulation "'cover[s]' the same subject matter"); *Bethlehem Steel Co.*, 330 U.S. at 774 (States are "permitted to use their police power in the interval" until a federal agency either acts affirmatively or decides that "no * * * regulation is appropriate," if the state regulation "relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment"); cf., *e.g.*, *Fidelity Fed. Sav. & Loan* v. *De La Cuesta*, 458 U.S. 141, 152-159 (1982) (regardless whether the Federal Home Loan Bank Board's regulations occupy the field of federal savings and loan regulation, the Board's regulation of the due-on-sale practices of federal savings and loan associations preempts state regulation of those practices because the Board intended its regulation on that subject to be exclusive).

lation of occupational safety and health. Thus, when a federal agency other than OSHA has authority to regulate an industry, including occupational safety and health in that industry, Section 4(b)(1) provides that the other agency's exercise of its specialized authority will prevail. But Section 4(b)(1) is also designed to give OSHA the role of overseeing worker safety and health and preventing gaps in worker protection. Therefore, consistent with the approach to preemption of state law in *Locke* and similar cases, Section 4(b)(1) provides that OSH Act coverage is not displaced unless the other agency has actually exercised its statutory authority either by imposing regulatory requirements with respect to the working conditions at issue or by determining that such requirements are not warranted.

### B. No Coast Guard regulations cover the working conditions in this case, and the Coast Guard has expressed no policy against imposing regulatory requirements

Under Section 4(b)(1) properly construed, Coast Guard action has not displaced the OSH Act with respect to the working conditions involved in this case. The OSH Act does not define the term "working conditions," and the courts of appeals have utilized two somewhat divergent definitions. Under either definition, however, Coast Guard regulations do not cover the working conditions at issue here, and the Coast Guard has not articulated any policy that no regulatory requirements should be imposed.

1. The Secretary has long taken the view that "working conditions," as used in Section 4(b)(1), means the particular physical and environmental hazards encountered by an employee in the course of his or her job activities. See *Southern Ry.*, 539 F.2d at 339 (describing Secretary's interpretation); Pet. App. 56a-57a

(equating working conditions as used in Section 4(b)(1) with "particular hazards"). Several courts of appeals have resolved questions under Section 4(b)(1) using that understanding of "working conditions." See *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1530-1531 (11th Cir.); *Donovan* v. *Red Star Marine Servs., Inc.*, 739 F.2d 774, 778-780 (2d Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); cf. *Cearley* v. *General Am. Transp. Corp.*, 186 F.3d 887, 892 (8th Cir. 1999) (OSHA's safety regulations "may fill the gaps" in another agency's safety regulations "if, and only if, the [agency] has not exercised its statutory authority to prescribe or enforce standards or regulations affecting the relevant area of occupational safety or health"); *Southern Pac. Transp. Co.*, 539 F.2d at 391 (5th Cir.) (essentially adopting a hazard-based test but noting that "hazards" can sometimes be expressed as "a location (maintenance shop)"). Under a second definition, adopted by two courts of appeals, "working conditions" refers somewhat more broadly to "the environmental area in which an employee customarily goes about his daily tasks." *Southern Ry.*, 539 F.2d at 339 (4th Cir.); see also *Columbia Gas of Pa. Inc.*, 643 F.2d at 916 (3d Cir.).

Although resolution of the disagreement about the meaning of "working conditions" is not necessary to resolve this case, the hazard-based definition is correct. In isolation, the term "working conditions" might encompass a range of "'circumstances' or 'state of affairs' attendant to one's performance of a job." *Fort Stewart Schs.* v. *Federal Labor Relations Auth.*, 495 U.S. 641, 645 (1990). See *Webster's Third New International Dictionary* 473 (1969) (defining "conditions" as "attendant circumstances" or "existing state of affairs"). The

term's precise meaning as it is used in Section 4(b)(1) of the OSH Act, however, must be determined with reference to the statutory context in which the term appears. See, *e.g.*, *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 210-211 (1964) (looking to industrial practice and the purposes of the National Labor Relations Act to determine the meaning of "conditions of employment" under the NLRA); *Manning* v. *American Airlines, Inc.*, 329 F.2d 32, 35 (2d Cir.) (Friendly, J.) (interpreting "working conditions" that are subject to mediation under the Railway Labor Act in light of the purposes of that Act), cert. denied, 379 U.S. 817 (1964).

For example, this Court has concluded that, as the term "working conditions" is used in 5 U.S.C. 7103(a)(14), which concerns collective bargaining, it includes "'conditions of employment' in the sense of qualifications demanded of, or obligations imposed upon, employees." *Fort Stewart Schs.*, 495 U.S. at 646. The Court has also noted, however, that "working conditions" may be used as a "term[] of art" with a "more specific meaning in the language of industrial relations." *Corning Glass*, 417 U.S. at 201, 202 (interpreting the Equal Pay Act of 1963). When it is used in that sense, "working conditions" encompasses "surroundings," which include "the elements, such as toxic chemicals or fumes, regularly encountered by a worker," and "hazards," which include "the physical hazards regularly encountered." *Id.* at 202. As the Court noted in *Corning Glass*, "[t]his definition of working conditions is * * * well accepted across a wide range of American industry." *Id.* at 202 & n.21 (citing, *e.g.*, 2 United States Dep't of Labor, *Dictionary of Occupational Titles* 656 (3d ed. 1965) (defining working conditions to include factors such as whether the job is

performed indoors or outside; exposure to heat or cold; exposure to water, or other liquids, or humidity; exposure to noise and vibration; physical hazards; and exposure to fumes, odors and toxic conditions).[10]

As used in Section 4(b)(1) of the OSH Act, the term "working conditions" most naturally refers to occupational safety and health hazards that an employee encounters on the job. That definition is essentially the same as the "term of art" recognized in *Corning Glass*, because such hazards include both physical hazards and environmental hazards, such as toxic chemicals and fumes, which the Court in *Corning Glass* identified as "surroundings." 417 U.S. at 202.

Construing "working conditions" to mean occupational safety and health hazards is appropriate because the OSH Act in general, and Section 4(b)(1) in particular, address only those "working conditions" that "affect[] occupational safety or health." 29 U.S.C. 653(b)(1).[11] And, because Section 4(b)(1) addresses

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[10] In *Corning Glass*, the Court held that "working conditions," as used in the Equal Pay Act, does not include consideration of whether an employee works a day or night shift, although a lay person might assume that time of day worked is one aspect of a job's "working conditions." 417 U.S. at 202-203.

[11] See also, *e.g.*, 29 U.S.C. 651(b)(1) (OSH Act's purpose is to ensure "safe and healthful working conditions" "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions"); 29 U.S.C. 651(b)(2) ("employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions"); 29 U.S.C. 651(b)(4) (OSH Act builds on existing initiatives for providing "safe and healthful working conditions"); 29 U.S.C. 670(c) (education and training programs for preventing "unsafe or

"working conditions" that OSHA or another agency may regulate, it specifically concerns those conditions that may *adversely* affect worker health and safety. See *ibid.* See generally *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) (explaining that the words of a statute should be interpreted in a manner consistent with their neighbors to avoid giving the statute an unintended breadth). Conditions that may adversely affect occupational safety or health are hazards. See *Black's Law Dictionary* 719 (6th ed. 1990) (defining "hazard" as "[a] risk or peril"). Accordingly, the term "working conditions," as used in Section 4(b)(1), refers to occupational safety and health hazards.

The alternative interpretation—under which "working conditions" means "the environmental area in which an employee customarily goes about his daily tasks," *Southern Ry.*, 539 F.2d at 339—has several flaws. First, it is inconsistent with the ordinary meaning of the word "conditions." See p. 25, *supra.* An "area" is not a "condition." Instead, conditions (including those affecting occupational safety and health) exist within an area. Consistent with that ordinary understanding, the OSH Act distinguishes between "conditions" and "places of employment." See 29 U.S.C. 652(8) ("'occupational safety and health standard' means 'a standard which requires conditions * * * reasonably necessary or appropriate to provide safe or healthful employment and places of employment'").

Second, the area-based definition of "working conditions" is inconsistent with the statutory text in which

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unhealthful working conditions"); 29 U.S.C. 670(d)(4)(C) (Supp. V 1999) (employer may obtain an exemption from a workplace inspection by establishing, among other things, procedures to achieve "safe and healthful working conditions").

those words appear. As we have explained, the use of the phrase "working conditions with respect to which" in Section 4(b)(1) indicates that the OSH Act is displaced only with respect to those "*particular* working conditions" over which the other agency has exercised its statutory authority. S. Rep. No. 1282, *supra*, at 22 (emphasis added). And the process by which Congress arrived at that phrase confirms that conclusion. See pp. 18-19, 20-21, *supra*.

Third, an area-based definition of "working conditions" is inconsistent with the OSH Act's purpose to provide comprehensive protection from occupational safety and health hazards because it results in significant gaps in worker protection. For example, another federal agency may have regulated one hazard in an area, such as fire or ventilation, but not regulated, or even considered, other hazards, such as noise, in the same area. See *Association of Am. R.R.* v. *Department of Transp.*, 38 F.3d 582, 586-587 (D.C. Cir. 1994) (noting the difference between the Federal Railroad Administration's regulation of some hazards on railroad bridges and OSHA's regulation of others); *Red Star Marine Servs., Inc.*, 739 F.2d at 779-780 (recognizing the difference between OSHA's regulation of noise and the Coast Guard's regulation of petroleum gas, ventilation requirements, backfire flame control, and fire extinguishers on a tugboat). If the OSH Act were displaced because of any regulation by another agency of any aspect of the workplace, workers would face significant numbers of unregulated hazards.

2. If this case is analyzed using the hazard-based interpretation of "working conditions," it is clear that the OSH Act has not been displaced by any exercise of Coast Guard authority. The working conditions at issue are the conditions faced by employees on an unin-

spected vessel engaged in oil drilling operations on inland waters—in particular, the risk of explosion caused by the presence of natural gas in the atmosphere of the vessel. The Coast Guard has not regulated the risk of explosion caused by the presence of natural gas on an uninspected drilling barge operating on inland waters, and it does not have statutory authority to do so. As we have explained, the Coast Guard's statutory authority to regulate uninspected vessels is limited to specific subjects. Coast Guard regulations for those vessels therefore cover only a limited range of health and safety hazards, and they do not address hazards relating to oil drilling operations on inland waters. See pp. 4-5, *supra*. Further, the Coast Guard has not made (and has no statutory authority to make) any determination that no standards or regulations should be adopted as a matter of policy with respect to the working conditions involved in this case. Thus, under the hazard-based definition of "working conditions" adopted by the Secretary, the Coast Guard has not exercised any authority to regulate the working conditions in this case so as to displace application of the OSH Act.

The OSH Act also would not be displaced even under the area-based definition of "working conditions." Courts using that definition have construed the relevant "area" narrowly, perhaps to avoid the gaps in worker protection that would arise if any regulation by another agency of any aspect of an employee's workplace were sufficient to displace all OSHA regulation in that area. Those courts limit the "area" that they regard as the relevant "working conditions" to that portion of the worksite that presents the relevant hazard. See, *e.g.*, *Pennsylvania Elec. Co.* v. *FMSHRC*, 969 F.2d 1501, 1504 (3d Cir. 1992) (relevant area is the point on a

conveyor belt where guards are required to prevent injury—"the 'environmental area,' that might pose a potential danger to [the employer's] workers"); *Columbia Gas of Pa., Inc.*, 636 F.2d at 918 (relevant "working conditions" are "the 'hot tap' of a pipeline transporting natural gas," the discrete area that poses a risk of fire or explosion); *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191, 1194 (4th Cir. 1982) (relevant area is the part of the passenger lounge entry into which and exit from which pose various risks).[12]

Using that approach, the relevant "area" in this case is the atmosphere of the *Mr. Beldon*, which exposed the employees on board to a risk of explosion from natural gas. The Coast Guard has not promulgated any regulations addressing the atmosphere of an uninspected barge operating on inland waters, such as the *Mr. Beldon*.[13] Nor has the Coast Guard articulated a policy

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[12] The Fourth Circuit also has concluded that the "area" test does not always apply in determining Section 4(b)(1) preemption. See *Reich* v. *Muth*, 34 F.3d 240, 243-244 (1994) (discussing holding in *Taylor* v. *Moore-McCormack Lines, Inc.*, 621 F.2d 88, 91-93 (1980), that OSHA can regulate the working conditions of longshore workers on a ship even though the Coast Guard regulates the same conditions as they apply to seamen). In this case, however, the Fourth Circuit's exception to the area test for longshore workers would not apply, because the court of appeals determined that the employees on the *Mr. Beldon* were seamen. Pet. App. 4a; see also *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548, 554 (1997) (discussing test for seaman status).

[13] Coast Guard regulations address some hazards in the atmosphere of vessels (including uninspected vessels), facilities, and other units operating on the outer continental shelf. See 33 C.F.R. Ch. I, Subch. N (promulgated under authority of 43 U.S.C. 1333). Coast Guard regulations also address ventilation on certain other types of uninspected vessels. See 46 C.F.R. 25.40 (motorboats or motor vessels) (implementing 46 U.S.C. 4102(d)); 46 C.F.R. 28.340

that requirements should not be imposed for that area. Accordingly, the Coast Guard has not exercised any authority that would displace application of the OSH Act, even under an "environmental area" definition of "working conditions." See also *Herman* v. *Tidewater Pac., Inc.*, 160 F.3d 1239, 1245-1246 (9th Cir. 1998) (finding it unnecessary to choose between the hazard-based and area-based definitions of "working conditions" because even under "the Third and Fourth Circuits' [area-based] definition, it is apparent that the Coast Guard regulation of uninspected vessels is not so pervasive as to preempt the Secretary's jurisdiction as to any particular portion of such vessels nor as to such vessels in whole").

### C. The Secretary's interpretation of Section 4(b)(1) best furthers the OSH Act's purpose and is entitled to deference

For the reasons we have explained, the Secretary's interpretation of Section 4(b)(1) is the best reading of that provision. Under that interpretation, the Coast Guard has not exercised any authority that displaces application of the OSH Act in this case, and, therefore, the decision of the court of appeals should be reversed. To the extent that there is any ambiguity about the proper interpretation of Section 4(b)(1), however, the Secretary's interpretation best furthers the purpose of the OSH Act and is entitled to deference.

1. As described above, the OSH Act's fundamental purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful work-

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(commercial fishing industry vessels) (implementing 46 U.S.C. 4502(a)(4)). See also 33 C.F.R. 175.201, 183.601-183.630 (addressing ventilation on recreational vessels) (promulgated under authority of 46 U.S.C. 4302).

ing conditions." 29 U.S.C. 651(b); see also *Martin*, 499 U.S. at 147 (OSH Act establishes "a comprehensive regulatory scheme"); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 12 (1980) (OSH Act is "prophylactic in nature" and designed "to prevent deaths or injuries from ever occurring"). The Secretary's interpretation of Section 4(b)(1) furthers the Act's central purpose by preventing the existence of gaps in worker protection. In contrast, the interpretation of Section 4(b)(1) adopted by the court of appeals would create significant gaps in coverage, because it would displace OSHA's regulation of working conditions even when the Coast Guard (or another federal agency) does not—and sometimes cannot—regulate those conditions.

Even if the court of appeals' interpretation were applied only to the working conditions of seamen on uninspected vessels, it would put at risk the safety and health of many thousands of employees. According to data maintained by the Coast Guard, approximately 68,000 vessels nationwide—including barges, fishing vessels, tugboats, towing vessels, and other commercial vessels—are classified as "documented" but "uninspected."[14] Coast Guard marine casualty reporting records show that an average of 100 deaths and 600

[14] To be eligible for documentation, a vessel must be at least five net tons and meet certain other statutory requirements. See 46 U.S.C. 2101(10) (definition); 46 U.S.C. 12102 (1994 & Supp. IV 1998) (requirements). To be subject to inspection, a vessel must fall into one of the categories listed in 46 U.S.C. 3301 (1994 & Supp. IV 1998). Some vessels, such as fishing vessels smaller than five net tons, are neither inspected nor documented by the Coast Guard. As a result, the Coast Guard data understate the number of uninspected vessels.

injuries occur every year on uninspected vessels.[15] Thus, if there were an "industry-wide exemption [from the OSH Act] for seamen serving on vessels operating in navigable waters," Pet. App. 6a, thousands of employees on uninspected vessels would have no federal regulatory protection from serious threats to their occupational safety and health, except for the few Coast Guard rules that address a limited range of hazards on some of those vessels. See *Tidewater Pac., Inc.*, 160 F.3d at 1241 (holding that employees on a tugboat were protected by OSHA standards governing confined-space entry procedures, machine guarding, and bloodborne pathogen exposure, none of which was regulated by the Coast Guard); *In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1531 (noting that "no federal agency would have the authority to regulate the safety of crane equipment aboard uninspected vessels" if the OSH Act did not apply); *Red Star Marine Servs., Inc.*, 739 F.2d at 780 (explaining that, if the OSH Act did not apply, "neither OSHA nor the Coast Guard would exercise authority over the uninspected vessel fleet, to the detriment of those employees exposed to the hazard of excessive noise"); *Secretary of Labor* v. *Alaska Trawl Fisheries Inc.*, 15 O.S.H. Cas. (BNA) 1699, 1701 (1992) (concluding that the OSH Act protects em-

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[15] Those figures are based on Coast Guard records for fiscal years 1996 through 2000. The Coast Guard defines a reportable injury as one "that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties." 46 C.F.R. 4.05-1(a)(6). Not all marine casualties occur in circumstances under which the vessel is subject to OSH Act coverage. For example, if an accident occurs while a vessel is on the high seas, it is beyond the geographical scope of the OSH Act. See 29 U.S.C. 653(a).

ployees on "factory ships" used to clean, process, freeze, and package fish from hazards presented by those activities, which are not regulated by the Coast Guard).

If the rationale of the court of appeals were extended to permit industry-wide exemptions based on sporadic regulation by other federal agencies in other fields, employees in many other large industries, such as railroad and airline employees, would face similar gaps in protection. See, *e.g.*, *PBR, Inc.*, 643 F.2d at 893 (employee killed by an unguarded machine used to repair railroad tracks); *Southern Ry.*, 539 F.2d at 336 (employees working in a railroad repair shop). Reading Section 4(b)(1) to leave "thousands of workers * * * exposed to unregulated industrial hazards would * * * utterly frustrate the legislative purpose." *Id.* at 338; see also *Red Star Marine Servs., Inc.*, 739 F.2d at 780; *Baltimore & Ohio R.R.* v. *OSHRC*, 548 F.2d 1052, 1054 (D.C. Cir. 1976) (per curiam).

In contrast, the Secretary's interpretation of Section 4(b)(1) ensures the comprehensive coverage that Congress intended the OSH Act to provide. At the same time, the Secretary's reading of the Section gives full force to its specific purpose to prevent the inefficiencies that would result from duplicative regulation of the same hazards by multiple federal agencies. See *Reich* v. *Muth*, 34 F.3d 240, 243 (4th Cir. 1994); *Columbia Gas of Pa., Inc.*, 636 F.2d at 915; *American Petroleum Inst.* v. *OSHA*, 581 F.2d 493, 510 (5th Cir. 1978), aff'd on other grounds, 448 U.S. 607 (1980); *Organized Migrants in Cmty. Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975); 29 C.F.R. 1975.3(c). The Secretary's interpretation avoids that duplication because another federal agency will displace OSH Act coverage if it adopts standards or regulations governing the working

conditions at issue or articulates a policy determination that such requirements are not warranted.[16]

Accordingly, there is no merit to respondent's contentions (Br. in Opp. 21, 22, 25) that the government's approach is a "nook and cranny" theory. See also *Texaco, Inc.*, 720 F.2d at 826 n.1; *Southern Ry.*, 539 F.2d at 338. As we have explained, see p. 16, *supra*, OSH Act coverage of a *set* of working conditions is displaced if another agency has comprehensive statutory authority over those working conditions and has indicated that its exercise of that authority is sufficient. That is why OSHA and the Coast Guard agree that Coast Guard regulation *has* displaced OSH Act coverage of the working conditions of seamen on *inspected* vessels. See Pet. App. 63a. But OSHA and the Coast Guard also agree that the Coast Guard's limited

[16] When another federal agency promulgates a regulation that makes compliance with an OSHA regulation a physical impossibility, the other agency has thereby articulated a policy that the working conditions to which OSHA's regulation would otherwise apply should not be regulated, at least not in the manner called for by the OSHA regulation. See *U.S. Air, Inc.*, *supra* (Federal Aviation Administration regulation requiring airport doors to be kept closed to prevent terrorism preempts OSHA regulation requiring doors to be kept open to allow escape in case of fire). Section 4(b)(1) does not authorize an OSHA regulation to override or to displace a safety or health regulation promulgated by another federal agency. We note, however, that Congress anticipated that Section 4(b)(1) might result in some residual uncertainty and duplication of enforcement efforts. See 29 U.S.C. 653(b)(3) (requiring Secretary to report to Congress "recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this chapter and other Federal laws"); *Baltimore & Ohio R.R.*, 548 F.2d at 1055. As we discuss *infra*, OSHA and other federal agencies have been able to work together to reduce uncertainty and duplication while ensuring that employees remain protected.

regulation of some working conditions on some uninspected vessels has not displaced OSH Act coverage of other working conditions on all of those vessels.

2. Permitting the court of appeals' decision to stand would interfere with long-standing, settled decisions regarding the lawful and most effective division of safety and health regulatory responsibilities between the Departments of Transportation and Labor. Those decisions are both workable and entitled to deference under the principles reflected in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), because they represent the views of the agency charged with administering and enforcing the OSH Act. See *Martin*, 499 U.S. at 147, 157.

With the consent and active cooperation of the Coast Guard, OSHA historically has enforced the OSH Act nationwide with respect to working conditions of employees on uninspected vessels (except in the occasional case in which the Coast Guard has a regulation applicable to uninspected vessels that addresses the same occupational safety or health hazard).[17] OSHA inspects such vessels in response to employee complaints, fatalities, and referrals, and OSHA inspectors often accom-

[17] The Coast Guard has repeatedly disclaimed comprehensive authority to regulate uninspected vessels. See *Tidewater Pac., Inc.*, 160 F.3d at 1241 (noting Coast Guard's amicus brief in which it "unequivocally disclaims comprehensive regulation of uninspected vessels generally, regulation of the cited conditions, and statutory authority to promulgate such regulations"); *Alaska Trawl*, 15 O.S.H. Cas. (BNA) at 1703 (noting Coast Guard's view, and Secretary's agreement, concerning Coast Guard's authority to regulate "traditional maritime safety items, not factory conditions").

pany Coast Guard personnel when they respond to marine casualties.[18]

The Secretary has expressed her understanding of Section 4(b)(1) on numerous occasions since shortly after enactment of the OSH Act. Most notably, the Secretary's interpretation of Section 4(b)(1) is embodied in three decades of citations for OSH Act violations that OSHA has issued to employers operating in industries regulated in part by other federal agencies. That history of citations is illustrated by the citations in this case and in the court of appeals decisions discussed above (see pp. 17-19 & notes 6-8 *supra*). The Secretary's interpretations "embodied in a citation * * * assume[] a form expressly provided for by Congress." *Martin*, 499 U.S. at 157. They are therefore "as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *Ibid.* Such formal exercises of delegated lawmaking power warrant deference if they are reasonable interpretations of an ambiguous statute. See *Chevron U.S.A. Inc.*, 467 U.S. at 842-843; *e.g.*, *In re Sealed Case*, 223 F.3d 775, 779-781 (D.C. Cir. 2000) (*Chevron* deference applies to agency's determination whether to bring enforcement action); *Reich* v. *D.M. Sabia Co.*, 90 F.3d 854, 859-860 (3d Cir. 1996) (deferring

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[18] OSHA and the Coast Guard have coordinated their enforcement in other areas as well. See, *e.g.*, Pet. App. 62a-65a (MOU concerning inspected vessels); 62 Fed. Reg. 40,142, 40,154 (1997) ("OSHA coordinated with, and received support from," Coast Guard on OSHA's standards for handling cargo aboard vessels); 48 Fed. Reg. 30,886, 30,887 (1983) (OSHA "worked closely" with Coast Guard in developing OSHA standards for marine terminals); 42 Fed. Reg. 37,650, 37,654 (1977) (OSHA and Coast Guard coordinated in regulating commercial diving).

to Secretary's interpretation of OSH Act in light of *Chevron* and *Martin*).[19]

The Secretary has also expressed her views on the meaning of Section 4(b)(1) in a variety of other formats. In long-standing OSHA regulations, the Secretary has explained that, in enacting Section 4(b)(1), "Congress did not intend to grant any general exemptions under the Act; its sole purpose was to avoid duplication of effort by Federal agencies in establishing a national policy of occupational safety and health protection." 29 C.F.R. 1975.3(c); see also 29 C.F.R. 1975.1(b) (because the Act is "inapplicable to working conditions to the extent they are subject to another Federal agency's exercise of different statutory authority affecting the occupational safety and health aspects of those conditions," "standards issued under the Act respecting certain working conditions would not be applicable to the extent those conditions were subject to another agency's authority"). Consistent with that understanding, the Secretary has regulated the working conditions of employees in a working environment that was also subject to the Coast Guard's authority, to

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[19] Giving *Chevron* deference to the Secretary's interpretations of the OSH Act made in enforcement proceedings is also consistent with the general rule that an agency receives such deference when it adjudicates a case. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995). Under the OSH Act, adjudication is the responsibility of the Occupational Safety and Health Review Commission, an agency that does not receive deference. See *Martin*, 499 U.S. at 151-154. A failure to defer to the Secretary's views expressed through enforcement of a citation would mean that no agency would receive deference when the Secretary interprets the OSH Act through enforcement of a citation and the Commission adjudicates the appropriateness of that interpretation.

the extent that those working conditions were not addressed by the Coast Guard's regulatory efforts. See 48 Fed. Reg. 30,886, 30,887 (1983) (discussing the Secretary's view of Section 4(b)(1) in promulgating standards to address hazards in the marine terminal environment).[20]

The Secretary of Labor also set forth her interpretation of Section 4(b)(1) in 1980 in a statutorily-mandated report concerning the Secretary's "recommendations for legislation to avoid unnecessary duplication and to achieve coordination between [the OSH Act] and other Federal laws." 29 U.S.C. 653(b)(3). The Secretary explained in the report that "industries as such are not preempted from OSHA; rather, the preemption rule of section 4(b)(1) applies only to particular hazards." Pet. App. 57a. In light of that interpretation, the Secretary recommended that Congress make no changes to Section 4(b)(1), and Congress did not revise the Section after receiving the Secretary's report. See *id.* at 61a. The Secretary's longstanding and consistently-held interpretation of Section 4(b)(1), as expressed in numerous citations, other enforcement efforts, regulations, and that report, is entitled to deference.

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[20] Other federal agencies also recognize that OSHA may retain authority over employees working in areas subject to the other agencies' regulations. See 59 Fed. Reg. 30,879, 30,880-30,881 (1994) (regulation by OSHA and Federal Railroad Administration of conditions on railroad bridges); *Association of Am. R.R.*, 38 F.3d at 586-587 (upholding that interpretation of Section 4(b)(1)); 57 Fed. Reg. 38,102, 38,123, 38,132 (1992) (EPA's protection of agricultural workers against pesticides in light of OSHA's field sanitation and hazard communication standards).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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