

No. 11-60057

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

NEW ORLEANS DEPOT SERVICES, INCORPORATED

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR;  
NEW ORLEANS MARINE CONTRACTORS; and SIGNAL  
MUTUAL INDEMNITY ASSOCIATION, LIMITED

Respondents

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On Petition for Review of an Order of the Benefits  
Review Board, United States Department of Labor

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SUPPLEMENTAL BRIEF OF THE FEDERAL RESPONDENT  
FOR REHEARING EN BANC

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## INTRODUCTION

On November 20, 2012, this Court granted rehearing en banc of the panel decision in *New Orleans Depot Servs., Inc. v. Director, OWCP*, 689 F.3d 400 (5th Cir. 2012). In that decision, a divided panel upheld the decisions of the administrative law judge and the Benefits Review Board, both of which found that Juan Zepeda was covered by the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §§ 901- 50. Zepeda worked as a cargo container repair mechanic for New Orleans Depot Services, Inc. (NODSI). He was injured while working at NODSI's "Chef Yard," where seagoing cargo containers were stored and repaired. The panel held that the Chef Yard was a covered "situs" under 33 U.S.C. § 903(a) (an area adjoining navigable waters that is "customarily used by an employer in loading [or] unloading . . . a vessel"); and that Zepeda held the "status" of a maritime "employee" under 33 U.S.C. § 902(3) (one who engages in maritime employment), 33 U.S.C. § 902(3).

NODSI challenges both holdings, as well as the standard of review applied in reaching them. As to status, NODSI contends – despite the ALJ's finding that Zepeda's repair of seagoing containers "was a significant maritime activity necessary for the process of loading and unloading cargo," Record Excerpts (RE) at Tab 5 at 22, *see id.* at 25– that his work was not integral to the loading or unloading of ships. As to situs, NODSI argues that this Court's interpretation of

the phrase “other adjoining area” in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), is incorrect and should be abandoned in favor of the Fourth Circuit’s interpretation in *Sidwell v. Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995). Alternatively, NODSI argues that, even if correct, the panel misapplied *Winchester* in finding NODSI’s facility a covered maritime situs. As to standard of review, NODSI argues that both coverage questions should be reviewed de novo.

### **STATEMENT OF THE ISSUES**

- I. STANDARD OF REVIEW:** The Supreme Court has held that coverage questions under the Longshore Act are mixed questions of law and fact, that the issue for appellate review is whether the facts found by the administrative officer meet the court-defined legal standard, and that if reasonable persons could differ as to whether they do, it is a question for the fact-finder. Applying that standard of review, should the ALJ’s status and situs determinations be affirmed?
- II. STATUS:** The Supreme Court has ruled that a worker who repairs equipment integral to ship-loading holds the status of a maritime employee. The ALJ applied that standard, and consistent with analogous Board and courts of appeals precedent, concluded that Zepeda’s container-repair activities were integral to the loading of cargo onto container ships at the Port of New Orleans. Could a reasonable person have reached that conclusion?

**III. SITUS:** In *Winchester*, the en banc Court determined that the “other adjoining area” clause of section 3(a) consists of two elements: a geographic nexus (whether the area adjoins navigable waters) and a functional nexus (the area’s customary use).

**A.** *Winchester* held, based on the language of the statute and congressional intent, that the geographic nexus was satisfied where the site of injury “is close to or in the vicinity of navigable waters, or in a neighboring area,” and rejected any requirement that the site have absolute contiguity with navigable waters. 632 F.2d at 514. Arguably, the Fourth Circuit applies a strict contiguity requirement, which no other court of appeals has adopted. The issue is whether this Court should, after more than thirty years of jurisprudence, reject its well-reasoned, well-regarded, and well-established en banc *Winchester* decision for the Fourth Circuit’s outlier approach.

**B.** Applying *Winchester*’s two-prong standard, the ALJ concluded that NODSI’s Chef Yard was a maritime situs. Could a reasonable person conclude that NODSI’s Chef Yard – which is 300 yards from the New Orleans Industrial Canal and is customarily used to store and repair sea-going containers – has the requisite geographic and functional links to navigable waters?

## STATUTORY PROVISIONS AT ISSUE

I. **STATUS:** 33 U.S.C. § 902(3) provides that, subject to specified exclusions not relevant to this case, “[t]he term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .”

II. **SITUS:** 33 U.S.C. § 903(a) provides that:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

## STATEMENT OF THE CASE

Zepeda sought benefits under the Longshore Act for hearing loss. Before the ALJ, the parties’ stipulated that Zepeda had a compensable 11.3% binaural hearing loss that was caused by workplace noise. RE Tab 5 at 3. The only issue was whether NODSI or a prior employer, New Orleans Marine Contractors (NOMC), was liable for benefits. NOMC conceded that its employment of Zepeda met the requirements for coverage under the Longshore Act, but claimed Zepeda’s subsequent employment with NODSI was also covered, making NODSI liable

under the “last employer rule.”<sup>1</sup> The ALJ agreed and found NODSI was liable for Zepeda’s benefits. RE Tab 5.

NODSI moved for reconsideration, but the ALJ denied the motion. RE Tab 6. NODSI appealed to the Board. The Board affirmed the ALJ’s decision in a decision and order dated December 3, 2010. RE Tab 4. NODSI timely petitioned this Court for review on January 31, 2011. RE Tab 2. A divided panel affirmed.

### **COUNTER STATEMENT OF FACTS**

Although NODSI characterizes its statement of the facts as undisputed, it conspicuously omits the two ALJ factual determinations on which this case turns, and which the panel adopted: first, that some of the containers stored and repaired at NODSI’s Chef Yard facility had been offloaded from, or were to be loaded onto, ships at the Port of New Orleans, RE Tab 5 at 20; Panel Decision, 689 F.3d at 407; and second, that NODSI’s customary repair of those marine containers “was a significant maritime activity necessary for the process of loading and unloading cargo.” RE Tab 5 at 22; Panel Decision, 689 F.3d at 409. A more complete statement of the facts, adopted from the Director’s panel response brief, appears below.

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<sup>1</sup> In the context of hearing loss, the last employer rule places liability for a worker’s benefits on the last maritime employer to expose him to harmful levels of noise. *Id.* at 15; *see Avondale Indus., Inc. v. Director, OWCP*, 977 F.2d 186, 189-90 (5th Cir. 1992); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955).

**I. ZEPEDA’S EMPLOYMENT**

Zepeda worked for NOMC for about five months in 1996, and for NODSI from 1996 until 2002. Tr. 20-21, 31. For both employers, he repaired and maintained shipping containers and chassis. Tr. 19-23.<sup>2</sup>

**A. NODSI**

NODSI was created to serve as a depot for shipping container storage and repair for Evergreen Shipping Agency Corporation, a shipping conglomerate “specializing in the transportation of oceangoing cargo in a fully containerized atmosphere.” RE Tab 5 at 13; Tr. 44, 49-50, 86.<sup>3</sup> It served Evergreen exclusively

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<sup>2</sup> In *Atlantic Container Svc, Inc. v. Coleman*, 904 F.2d 611, 612 (11th Cir. 1990), the court explained what containers and chassis are.

Containers are essentially very large metal boxes which are used to store and transport cargo. While on board ship they serve to carry cargo. When the ship docks, the containers can be put to continued use in several different ways. Some are unloaded and emptied upon arrival, and the cargo stored. Others are unloaded, then attached “as is” to the tractor/trailer, and hauled by land to their final destination. Or, the containers can be loaded directly onto railroad cars to continue their journey “piggy-back” style by rail.

A chassis is the wheeled support frame used to transport the container overland. In other words, a chassis is what most laypersons would call the “trailer” portion of a tractor/trailer rig, while the container is the box that sits upon it.

*Id.*; see NOMCX-8 at 31.

<sup>3</sup> According to its website, Evergreen is a “a regularly scheduled global marine and intermodal shipping carrier, transporting containerized cargo between ports and destinations in more than 80 countries aboard its extensive merchant fleet, using its

until 2002, shortly before the end of Zepeda's employment with NODSI, when it contracted with another company to provide similar services. Tr. 113. For its part, Evergreen used NODSI as well as other local contractors for its storage and repair services. NOMCX-10 at 19; NOMCX-9 at 24; RE Tab 5 at 20-22. Although Evergreen ships did not dock in the Port of New Orleans, its containers arrived on another company's ships under a space sharing agreement. NOMCX-10 at 8-12. Additional Evergreen shipping containers, which NODSI serviced, came to New Orleans by truck or rail. See NOMCX-11 at 19..

In accordance with its master contract with the International Longshoremen's Association (ILA), Evergreen required NODSI to employ ILA members to repair its containers. NOMCX-10 at 17-18; NOMCX-8 at 24, Tr. 46. Zepeda was a union member, and worked exclusively on Evergreen containers until February 2002. NOMCX-8 at 24; Tr. 46. At that time, Evergreen asked that

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own worldwide service network." It "employs a large number of terminals, ramps and depots in many major and out-of-the-way locations." <http://www.evergreen-shipping.us/egsweb/servlets/FAQlist.jsp#01>. The corporate name "Evergreen" is the unified common trade name for the four shipping companies of the Evergreen Group. The brand 'Evergreen Line' is used for international marketing purposes for Evergreen Marine Corp. (Taiwan) Ltd., Italia Marittima S.p.A., Evergreen Marine (UK) Ltd. and Evergreen Marine (Hong Kong) Ltd. and was established on May 1, 2007 in response to the request and expectations of global customers. A fifth ocean carrier, Evergreen Marine (Singapore) Pte Ltd., has also signed the joint service agreement, effective May 1, 2009. Evergreen Line operates the fourth largest container fleet in the world, with over 180 ships having a total capacity of approximately 650,000 TEUs [twenty-foot container equivalent unit]. <http://www.evergreen-line.com/static/jsp/whats.jsp>

union employees stop working on their containers. NOMCX-8 at 22-25. Zepeda then switched from union to non-union labor, but his duties remained the same.

Tr. 94.

NODSI has two facilities in New Orleans: the “Chef Yard” on Chef Menteur Highway near the Industrial Canal; and the “Terminal Yard” on Terminal Road adjacent to the Mississippi River Gulf Outlet, which NODSI leases from the Port of New Orleans. Tr. 43, 49. Zepeda spent ninety- five percent of his NODSI employment at the Chef Yard, and the other five percent at the Terminal Yard (where Zepeda worked on truck chassis exclusively). Tr. 34, NOMCX-8 at 25, 39-40; CX 1 at 8 (condensed p. 27).

The Chef Yard is approximately 300 yards from the Industrial Canal.<sup>4</sup> See NOMCX-3, 4, NODSIX-4. The Canal’s waterfront is accessible by road, NOMCX-8 at 40, but the Yard does not have any docks, piers or wharves, and NODSI’s employees do not use the Industrial Canal in their daily work. Tr. 35, 88-89. NODSI uses the Chef Yard to repair and store shipping containers and chassis. The containers come to the Yard by truck or chassis, and are empty when they arrive. NOMCX-7 at 29. NODSI executives testified that they were not

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<sup>4</sup> The Industrial Canal is a shipping lane that connects the Mississippi River to Lake Pontchartrain and includes slips and docks. The Chef Yard was characterized as an “in-land depot.” Such depots are typically used to “relieve congestion at port facilities” by allowing storage and repair of empty equipment at the depot rather than at the marine terminals. NOMCX-9 at 25.

provided with any documentation concerning how the containers were damaged or whether they came from a ship or from land transportation. NOMCX-6 at 8; NOMCX-7 at 9-10, 12-13.<sup>5</sup> But an executive for Evergreen, Dominic Obrigkeit, testified that Evergreen sent both rail and marine containers to its local contractors for repair. NOMCX-10 at 19; RE Tab 5 at 20-22. In addition, Eric Jupiter, an executive for Ports America (formerly NOMC) testified that he was not aware of any local contractor that repaired only containers that were used solely in rail or truck transportation. NOMCX-9 at 24.<sup>6</sup>

The area surrounding the Chef Yard consisted of a mixture of warehouses, shipping container facilities, marine facilities, and automotive shops. RE Tab 5 at 22 (ALJ summarizing testimony of various witnesses).

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<sup>5</sup> The ALJ noted that he was not able to verify this testimony through NODSI records, which NODSI representatives testified were lost during Hurricane Katrina and an earlier computer failure. RE Tab 5 at 15 n.18.

<sup>6</sup> When Zepeda worked for NOMC in 1996, it was owned by Gulf Services. In 1999, Gulf Services sold its operations to P&O Ports. P&O Ports subsequently sold those operations to High Star, which later became Ports America. NOMCX-9 at 6-7. Eric Jupiter worked for NOMC in 1997. At the time he testified, he was the marine manager of Ports America's New Orleans terminal. *Id.* at 5.

## B. NOMC

NOMC was a stevedore that operated from a terminal on France Road. NOMCX-9 at 8.<sup>7</sup> France Road is located across the Industrial Canal from NODSI, and runs parallel to the Canal. NOMCX-4 (map). NOMC loaded and unloaded container ships at the terminal. NOMCX-9 at 9. It also had a container repair division that operated at the terminal. *Id.* at 10. The container owner decided where a given container would be repaired, *id.* at 32-34, but NOMC repaired containers owned by the Lykes and Hapag-Lloyd shipping lines. *Id.* at 28, 34.

## II. ADMINISTRATIVE DECISIONS

To be covered under the Longshore Act, a claimant must be: (1) injured upon the navigable waters of the United States, including any area that adjoins such waters that is customarily used in loading or unloading vessels, 33 U.S.C. § 903(a); and (2) a maritime “employee” within the meaning of section 2(3) of the Act, 33 U.S.C. 902(3). These requirements are commonly referred to as the “situs” and “status” requirements for coverage. The situs requirement defines the geographic scope of the Act’s coverage while the status requirement focuses on the nature of the worker’s activities. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th

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<sup>7</sup> Mr. Jupiter testified that, after the various mergers described above in note 6, NOMC’s successor closed the France Road terminal in 2001 or 2002, and consolidated operations on the Mississippi River. NOMCX-9 at 8.

1999) (en banc). The ALJ discussed the evidence bearing on these requirements at length and found that Zepeda's work with NODSI satisfied both.

**A. ALJ's Decision and Order Awarding Benefits**

1. Situs

The ALJ recognized that, under this Court's decision in *Winchester*, a situs must have both a geographic and a functional nexus with the water to be covered under section 3(a) of the Act as an "other adjoining area customarily used" in loading or unloading of vessels. RE Tab 5 at 20. Because the Chef Yard is only 300 yards from the Industrial Canal, the ALJ concluded that it had a sufficient geographic nexus with navigable waters. RE Tab 5 at 20.

Turning to the functional nexus, the ALJ looked to both *Winchester* and *Coastal Production Services, Inc. v. Hudson*, 555 F.3d 426, 434 (5th Cir. 2006), for guidance. He noted this Court's holding in *Hudson* that an area can satisfy the functional inquiry if it is associated with items used to load vessels, even if loading and unloading is not actually conducted there. RE Tab 5 at 19. Because he found that NODSI "customarily repaired Evergreen marine containers, a process which was a significant maritime activity necessary for the process of loading and unloading cargo," the ALJ found that the Chef Yard had a functional nexus sufficient to qualify it as a covered situs under *Winchester*. *Id.* at 20-22. He

consequently concluded that the Chef Yard was an “other adjoining area,” and thus a maritime situs under section 3(a) of the Act. 33 U.S.C. § 903(a).

2. Status

The ALJ determined that Zepeda, a longshoremen’s union member, repaired Evergreen’s shipping containers, and that these containers had been, or would be, used in maritime commerce, either before or after repair. RE Tab 5 at 20, 25. The ALJ further found that the cargo containers were essential to the loading and unloading of ships. *Id.* at 25. He thus concluded that because Zepeda repaired equipment essential to the loading process, he was engaged in maritime employment, and thus had status as an “employee” under section 2(3). In support, he cited the Supreme Court’s decision in *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 47 (1989) (workers who repaired loading equipment covered), and this Court’s decisions in *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981) (carpenter erecting scaffolding that would be used by others to repair a turntable used for loading was engaged in maritime employment even though he was using non-maritime skills and was not, himself, repairing loading equipment), and *Winchester*, 632 F.2d at 508 (gear man’s job repairing and maintaining the gear used by the longshoremen sufficient to give him status). RE Tab 5 at 23-25.

**B. ALJ's Decision and Order Denying Reconsideration**

NODSI moved for reconsideration, contending that the ALJ misapplied *Winchester* and *Hudson* in finding that the Chef Yard met the situs requirement, specifically the functional-nexus component. RE 6 at 1, 4. NODSI argued that under this case precedent, an area can be a covered “adjoining area” only if it: (1) is actually used for loading, unloading, building or repairing a vessel; or (2) is part of the employer’s overall vessel loading, unloading, building or repairing operations. *Id.* at 1-2. Because these activities did not take place at the Chef Yard, and NODSI did not have its own loading operations, NODSI argued that the Chef Yard could not be considered a maritime situs.

The ALJ denied reconsideration. He noted that both *Winchester*, 632 F.2d at 515, and *Hudson*, 555 F.3d at 432, held that an area need not be used exclusively for maritime activities, as long as it is “customarily used for significant maritime activity.” RE Tab 6 at 4. Rejecting NODSI’s assertion that “significant maritime activity” could mean only loading, unloading, building or repairing of a vessel, he stated that coverage extended to “services integral to these four main functions.” *Id.* (relying on *Winchester* where an area was a covered situs even though no loading, unloading, building or repairing of vessels took place because the work performed there was integral to loading operations).

The ALJ also reviewed the findings he had made regarding NODSI's operations. He found that NODSI provided services that were integral to the loading of Evergreen's containers onto ships. Noting that Evergreen ships did not dock in New Orleans – its containers came to the port under a space-sharing agreement with other carriers, NOMCX-10 at 8-12 – he found that NODSI “was essential to Evergreen's shipment process” because “without the repair work of NODSI and the stevedoring work of another contractor, Evergreen would have been unable to transport its cargo into and out of the Port of New Orleans.” RE Tab 5 at 3. The ALJ again rejected NODSI's argument that the Chef Yard could be a maritime situs only if the work performed there supported NODSI's loading operations – of which there were none – as opposed to Evergreen's. He concluded the functional-nexus test concerned the function itself, not the entity for whom the function is performed. *Id.* at 5-6. Because the Chef Yard was used to repair marine containers – and was thus “associated with items used as part of the loading process” – the ALJ concluded that it met the functional nexus requirement. *Id.* at 6 (*citing Hudson, 555 F.3d at 434*).

**C. Board's Affirmance**

The Board affirmed the ALJ's decisions. RE Tab 4. With regard to situs, it held that the ALJ had properly applied Fifth Circuit precedent. It found the geographic nexus element satisfied because the Chef Yard was within 300 yards of

the navigable waters of the Industrial Canal, and thus “in the vicinity” of navigable waters. *Id.* at 5. It also affirmed the ALJ’s finding that the Chef Yard met the functional nexus requirement because it was used to repair marine containers used in the loading process. *Id.* at 5-6. The Board reasoned that the Chef Yard was associated with items used in the loading process, and did not have to “be directly involved in loading or unloading a vessel or physically connected to the point of loading and unloading” to be a covered situs. *Id.* at 6 (*citing Hudson*, 555 F.3d at 434).

The Board also affirmed the ALJ’s finding that Zepeda met the status requirement for coverage. It agreed that marine containers are essential to loading, and that repair of equipment essential to the loading process is covered maritime employment. RE Tab 4 at 6 (*citing Schwalb*, 493 U.S. 40; *Coleman*, 904 F.2d 611; *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980)).

### **III. PANEL DECISION**

A divided panel affirmed.

#### **A. The Majority**

The majority, relying on *Hudson*’s interpretation of *Winchester*, treated the ALJ’s findings of situs and status as factual determinations subject to substantial evidence review. 689 F.3d at 405. As to situs, the panel first outlined the basic components of the situs determination:

liability may be imposed on NODSI only if its facility constitutes an ‘other adjoining area,’ 33 U.S.C. § 903. In this circuit, when deciding whether a location satisfies the situs component of L[ongshore Act] coverage, courts consider both the geographic proximity to the water’s edge and the functional relationship of the location to maritime activity.

Id. at 406.

The panel noted that NODSI had “conceded that the Chef Yard satisfies the geographic proximity requirement,” and challenged only the Yard’s functional requirement. *Id.* It then discussed the legal standard, set forth in *Winchester* and reiterated in *Hudson*, under which an “adjoining area” can be considered to have a functional relationship with maritime activity. *Id.* at 407. Specifically, it restated this Court’s standard that an area can be a covered situs even if a vessel cannot dock there, and even if it is not “directly involved in loading or unloading or physically connected to the point of loading or unloading,” so long as the area is “associated with items used as part of the loading process.” *Id.* (quoting *Hudson*, 555 F.3d at 434).

The panel then addressed the facts on which the ALJ based his determination that the Chef Yard was a maritime situs:

The ALJ found that . . . some of the Evergreen containers repaired by NODSI were *used for marine transportation and were offloaded at the Port of New Orleans*. NODSI initially serviced only Evergreen containers, and was required, pursuant to Evergreen’s labor contract, to hire unionized maritime workers, including Zepeda. Accordingly, the ALJ determined that the functional nexus requirement was satisfied because Evergreen’s marine containers, *which were used for*

*marine transportation or had previously been used for marine transportation, were stored and repaired at the Chef Yard.*

*Id.* at 407 (emphases added). The panel also independently reviewed the record and found additional support for the ALJ’s situs determination, notably the testimony of Thomas Brooks, who identified “the presence of marine facilities in the area surrounding the Chef Yard.” *Id.* Considering all the evidence of record, the panel ruled that “the ALJ’s situs determination is supported by substantial evidence in the record as a whole.” *Id.*

Concerning status, the panel looked to both the Supreme Court’s decision in *Schwalb*, 493 U.S. at 47, and its own decision in *Carroll*, 659 F.2d at 753, for the principle that employees who repair or maintain equipment necessary to loading or unloading are covered employees. *Id.* at 408-09. It found the ALJ’s reasoning consistent with this case law: that because Zepeda worked on containers that came from or were bound for ships at the Port of New Orleans, his repair of those containers was essential to loading and unloading. *Id.* at 409.

## **B. The Dissent**

The dissent disagreed with the majority with regard to both situs and status. With regard to the functional requirement for situs, the dissent stated that “[t]he relevant inquiry is . . . whether the work done at the Chef Yard, storing and repairing cargo containers, is customarily part of the loading or unloading process.” *Id.* at 410. The dissent conceded that “loading and unloading” must be

construed “broadly to include not only the physical movement of cargo on and off ships but also those additional related functions that contribute to the overall loading or unloading process by making the physical loading and unloading possible.” But the dissent concluded that container repair is “operationally separate and distinct” from loading “because it happens either before such containers are filled with cargo or after they are empty,” and that “[f]rom the point of view of stevedores . . . the container (whatever may be inside it) is simply part of the cargo: it is the thing to be loaded.” *Id.* at 411. Thus, the dissent distinguished *Winchester* on the ground that the gear room “was used by a stevedore company as an indispensable part of its loading operations, and was therefore part of the same “overall loading process.” By contrast, “[t]he Chef Yard was not integrated into any loading process because the work done there – container repair – is not part of the work that must be done by those who are charged with loading vessels.” *Id.*

Regarding status, the dissent argued that “[c]ontainer repair cannot possibly be ‘integral’ to loading because the two processes happen separately and neither is dependent on the other,” and because they are not conducted or overseen by the same entity. *Id.* The dissent further argued that container repair could not be considered integral to ship-loading unless that loading would stop without the repairs. *Id.* at 413-14.

Finally, the dissent distinguished *Carroll*, 650 F.2d 755-56, where the Court held that a worker, who built scaffolding for others to stand on while repairing loading equipment, was engaged in maritime employment, even though the worker was using non-maritime skills and was not, himself, repairing the loading equipment. *Id.* at 414. She argued that Zepeda “was not similarly a part of loading or unloading operations because his work was not something that a loading company would have to arrange or commission in order to load ships.” *Id.*

## **SUMMARY OF THE ARGUMENT**

### **I. STANDARD OF REVIEW**

Questions of coverage under the Longshore Act are mixed questions of law and fact. *See McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951). Where the proper construction of a statutory term is at issue, it is the Court’s duty to define the appropriate legal standard. But if reasonable persons, applying that legal standard, could differ over whether a worker is covered, it is a question for the fact-finder.

### **II. STATUS**

A worker who is not directly involved in loading or unloading is engaged in maritime employment when he is “injured while maintaining or repairing equipment essential to the loading or unloading process.” *Schwalb*, 493 U.S. at 47.

The ALJ found that some of the equipment repaired by Zepeda – cargo containers used or to be used on ships – were essential to the loading of those ships. This is a conclusion that could be reached by a reasoning mind and should, therefore, be affirmed.

### **III. SITUS**

This Court’s definition of the legal standard for what constitutes an “other adjoining area” properly considers both the geographic proximity of the area to navigable waters, as well as whether it has been customarily used for significant maritime activity – here, activity that is integral to the loading or unloading of ships. The ALJ concluded that NODSI “customarily repaired Evergreen marine containers, a process which was a significant maritime activity necessary for the process of loading and unloading cargo.” RE Tab 5 at 22. Because Evergreen is a “fully containerized” shipper, NOMCX 10 at 9 – and because cargo cannot be loaded onto container ships without containers – the ALJ’s conclusion that the repair of Evergreen’s containers is integral to the loading of its ships is one that could be reached by a reasoning mind, and should be affirmed.

The Court should reject NODSI’s invitation to abandon *Winchester’s* “adjoining area” legal standard and adopt a “strict contiguity” to navigable waters test. *Winchester* soundly rejected this approach based on the statutory text and Congressional intent, neither of which has changed since the 1972 amendments.

Moreover, the other courts of appeals that have considered the issue have largely rejected a strict contiguity approach and apply an interpretation consistent with the *Winchester* approach. In short, requiring strict contiguity would be contrary to what this Court – and a substantial majority of other courts of appeals – have found Congress intended when it expanded coverage in 1972.

## ARGUMENT

**I. STANDARD OF REVIEW: WHETHER A WORKER MEETS THE REQUIREMENTS FOR COVERAGE UNDER THE LONGSHORE ACT IS A MIXED QUESTION OF LAW AND FACT. IF REASONABLE PERSONS, APPLYING THE COURT-DEFINED LEGAL STANDARD, COULD DIFFER AS TO WHETHER A COVERAGE REQUIREMENT IS MET, IT IS A QUESTION FOR THE FACT-FINDER.**

NODSI claims that the panel erred in applying the substantial evidence standard of review because this case concerns the “jurisdiction” of the Longshore Act and “issues of statutory interpretation under undisputed facts.” Supp. Br. at 9. It asserts that the Court’s review should be de novo. NODSI, however, misconceives the nature of the case and the issues before the panel.<sup>8</sup>

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<sup>8</sup> A consequence of the Court adopting de novo review in cases like this one would be that the Board would likewise engage in de novo review. 33 U.S.C. § 921(b)(3); *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 1030 (5th Cir. 1997) (Board and courts of appeals employ same standard of review of ALJ decisions). Thus, there would be three separate de novo determinations on coverage questions in Longshore Act cases, and four separate ones in cases arising under the Defense Base Act, 42 U.S.C. § 1651 *et seq.* See *AIFA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111 (5th Cir. 1991) (providing for intervening district court review of Board decisions arising under the Defense Base Act). Such redundant findings hardly comport with the statutory purpose of resolving

As a threshold matter, this case is about *coverage* under the Longshore Act, which is a separate issue from administrative or judicial “jurisdiction.” *Ramos v. Universal Dredging*, 653 F.2d 1353, 1355-56 (9th Cir. 1981); *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1100 (9th Cir. 1982); see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006). Second, NODSI *conceded before the panel* the primary statutory construction argument it now raises: that strict contiguity with navigable waters is required to establish geographic proximity. 689 F.3d at 406-07.<sup>9</sup>

As to the actual issues before the panel, these were mixed questions of law and fact – namely the application of the Supreme Court’s *Schwalb* standard regarding maritime status and *Winchester’s* functional nexus prong for maritime situs (again, NODSI conceded the geographic nexus prong). The panel reviewed both issues for substantial evidence. Supreme Court cases dealing with Longshore Act coverage confirm that substantial evidence review was correct.

For Longshore coverage to exist, three basic requirements must be met: the worker must have the status of a maritime “employee,” 33 U.S.C. § 902(3); the

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Longshore claims expeditiously. *Galle v. Director, OWCP*, 246 F.3d 440, 450 (5th Cir. 2001).

<sup>9</sup> The Director agrees that if NODSI has not waived the argument, the Court should review de novo whether an adjoining area must be strictly contiguous to “adjoin” navigable waters.

injury must occur on a maritime situs, 33 U.S.C. § 903(a); and the injury must arise “out of and in the course of employment,” 33 U.S.C. §902(2). The standard of review for all three of these questions is the same.

The Supreme Court first addressed the standard of review for Longshore coverage questions in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) (abrogated in part by *Wilander*, 498 U.S. 337). At issue was whether a deckhand on a vessel that supplied coal to steamboats was a maritime “employee” covered by the Act, or was excluded from that definition as “a master or member of a crew of any vessel.” See 33 U.S.C. § 902(3)(G). The deputy commissioner found that the worker was a covered employee.<sup>10</sup> The Court held that whether the worker “was or was not ‘a member of a crew’ turns on questions of fact” and that “the authority to determine such questions has been confided by Congress to the deputy commissioner.” 309 U.S. at 257. It thus held that if there was evidence to support the administrative factual finding, that finding was “conclusive” on the reviewing court. 309 U.S. at 258. In effect, the Court found that status would be reviewed as a factual question.

The Court refined its understanding of the standard of review for coverage questions in *Wilander*, 498 U.S. at 356 (1991). In clarifying *Bassett*’s conclusion

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<sup>10</sup> Prior to 1972, deputy commissioners held the formal hearings, and issued the post-hearing decisions, that are now the responsibility of ALJs. See 33 U.S.C. § 919(c), (d).

that status is a question of fact, it stated that “the question of who is a ‘member of a crew,’ . . . is better characterized as a mixed question of law and fact.” Under that standard, where statutory terms are at issue, “[i]t is for the court to define the statutory standard.” *Id.* But with fact-specific inquiries like status, the Court held that “[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a ‘member of a crew,’ it is a question for the [fact finder].” *Id.*; accord *Chandris v. Latsis*, 515 U.S. 347, 368, 376 (1995).

The status question here – whether the injured worker is a maritime employee under the Longshore Act – is a coverage question like those at issue in both *Bassett* and *Wilander*.<sup>11</sup> The standard of review, therefore, is also the same. Thus, if the ALJ applied the correct legal standard, and reasonable persons could disagree over his conclusion that Zepeda is a covered “employee,” the Court must affirm the ALJ’s determination.

In *O’Leary*, 340 U.S. at 508, the Court considered whether a worker’s death while trying to rescue another swimmer arose “out of and in the course of employment,” another fundamental requirement for coverage under the Act. *See*

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<sup>11</sup> Although the Court in *Wilander* was reviewing a case that arose under the Jones Act, which covers “seamen”, it recognized that the question under review in Longshore Act cases is the same. 498 U.S. at 356. This is so because courts use the Longshore Act’s “member of a crew” exclusion to determine whether a worker is a “seaman,” a term the Jones Act uses but does not define. *Chandris*, 515 U.S. at 356.

33 U.S.C. § 902(2).<sup>12</sup> Its analysis comports with *Wilander*'s later, explicit conclusion, namely that the Longshore Act's coverage requirements involve mixed questions of law and fact.

The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of 'fact.' Doing so only serves to illustrate once more the variety of ascertainties covered by the blanket term 'fact.' Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, *the inferences presuppose applicable standards for assessing the simple, external facts.* Yet the standards are not so severable from the experience of industry *nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'*

*O'Leary*, 340 U.S. at 507-08 (emphasis added). The Court then concluded, despite the mixed nature of the question, that substantial evidence review was appropriate. *Id.* at 508 (the standard to be applied "is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.").<sup>13</sup>

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<sup>12</sup> Although *O'Leary* arose under a statutory extension of the Longshore Act, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq.*, the DBA adopts the provisions of the Longshore Act "except as modified," 42 U.S.C. § 1651(a), and does not modify the requirement that an injury arise out of and in the course of employment.

<sup>13</sup> See also *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 478-79 (1947) (also considering a deputy commissioner's finding that a worker's injury arose out of and in the course of employment, the Court stated that, "[e]ven if such an inference be considered more legal than factual in nature, the reviewing court's function is

The Court’s application of substantial evidence review is particularly significant because at issue was an ultimate coverage determination: whether the worker’s injury arose “out of and in the course of employment.” Put simply, this means that, if the fact finder’s conclusion on the ultimate fact of coverage could be reached by a reasoning mind, it should not be disturbed by the reviewing court. *Id.* at 508-09 (fact finder’s inference that worker’s death arose from his employment should not be disturbed if it is rational, even if it is not compelled by the evidence).

*Winchester* applied this same standard of review to situs, the third coverage requirement. It stated that, “[i]f the situs determination is supported by substantial evidence on the record as a whole, it will not be set aside by this court.”

*Winchester*, 632 F.2d at 515. In doing so, *Winchester* properly relied on *O’Leary*, 340 U.S. at 508, and *Cardillo*, 330 U.S. at 478-79, both of which treated the ultimate fact of coverage to be a mixed question of law and fact.<sup>14</sup>

*Winchester’s* adoption of this same standard for situs questions makes sense, as it renders all issues of coverage – whether an injury was sustained by a maritime employee, arose out of and in the course of employment, and occurred on a

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exhausted when it becomes evident that the Deputy Commissioner’s choice has substantial roots in the evidence and is not forbidden by the law.”)

<sup>14</sup> Admittedly, *Winchester’s* reference to substantial evidence has caused some confusion over whether situs is a purely factual determination. *See, e.g., Hudson*, 555 F.3d at 430 and n.10 (interpreting *Winchester* as holding that the ultimate conclusion as to situs is a question of fact).

covered situs – subject to the same standard of review. Under that standard, “[i]t is for the court to define the statutory standard,” but “[i]f reasonable persons, applying the proper legal standard, could differ . . . it is a question for the [fact-finder].” *Wilander*, 498 U.S. at 356. This allows the reviewing court to remedy legally incorrect outcomes, but requires it to affirm an ALJ’s finding of coverage if the ALJ applied the correct legal standard and reached a reasonable conclusion, even if it is one that the Court would not necessarily have reached.

**II. STATUS: THE ALJ APPLIED THE CORRECT LEGAL STANDARD FOR DETERMINING WHETHER ZEPEDA WAS A MARITIME “EMPLOYEE,” AND REACHED A CONCLUSION THAT COULD BE REACHED BY A REASONING MIND. HIS DETERMINATION, THEREFORE, SHOULD BE AFFIRMED.**

**A. The ALJ correctly applied the *Schwalb* standard to find that Zepeda – a land-based worker who repairs equipment integral to the loading process – is a covered maritime employee.**

It is undisputed that Zepeda repaired shipping containers that were used in maritime commerce. The ALJ found, consistent with a long line of container repair cases and the Supreme Court’s decision in *Schwalb*, that such repair was integral to the loading process. The ALJ’s status determination was reasonable and should therefore be affirmed.

In *Schwalb*, the Supreme Court considered whether two janitorial employees who cleaned up coal beneath a conveyor system that loaded coal from railway cars to a ship, and a pier mechanic who repaired the conveyor, were covered “employees.” Despite the fact that these employees were land-based, and that

none actually loaded ships, the Court found all three covered. It held that “employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires.” *Id.* at 47.<sup>15</sup>

The courts of appeals – both before and after *Schwalb* – have understood and applied this general principle to a variety of other repair or maintenance employees. *See Winchester I*, 554 F.2d 245 (gear man), *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978) (same); *Carroll*, 650 F.2d 750 (carpenter constructing scaffold to be used in the repair of loading equipment); *Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 126 (4th Cir. 1994) (welder repairing pipelines that transported steam, water and fuel to vessels); *Consolidation Coal Co. v. Ben. Rev. Bd.*, 629 F.3d 322, 330-31 (3d Cir. 2010) (mechanic repairing equipment used both for loading and other purposes); *Graziano v. Gen. Dynamics Corp.*, 663 F.2d 340, 341-44 (1st Cir. 1981) (mason-laborer maintaining shipyard buildings); *see also Schwalb*, 493 U.S. at 50 (Stevens J., concurrence) (observing that the Federal Courts of Appeals have “established a

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<sup>15</sup> The Court thus rejected a status test covering only those workers “who are directly involved in moving freight onto and off ships, or in building, repairing, or destroying ships.” 493 U.S. at 50 (Stevens J., concurrence). *Compare* NODSI Supp. Br. at 39 (arguing that Zepeda is not covered *inter alia* because he was not “directly involved in the movement of cargo between ship and land”).

reasonably clear rule of law” by “consistently interpret[ing] the Act’s status requirement to encompass repair and maintenance workers”).

And the Eleventh Circuit has specifically applied the *Schwalb* test to find that a container repairman has status. *Coleman*, 904 F.2d at 617; *cf.* panel decision, 689 F.3d at 409 n.6 (observing that not covering Zepeda would create a circuit split). Moreover, the Eleventh Circuit was not the first tribunal to find container repair covered maritime employment. Indeed, the Board reached that conclusion ten years before *Schwalb*. *Cabezas v. Oceanic Container Svc., Inc.*, 11 BRBS 279, 281 (1979); *DeRobertis v. Oceanic Container Serv., Inc.*, 14 BRBS 284, 286-287 (1981). And while *Schwalb* did not involve container repair, the Supreme Court specifically cited the Board’s container-repair decisions in *Cabezas* and *DeRobertis* as support for its conclusion that “repair and maintenance employees are engaged in maritime employment.” *Schwalb*, 494 U.S. at 47-48.

Put simply, it has been settled for over thirty years that container repair – even when performed for contractors like NODSI or directly for a shipping company – is covered employment. *Cabezas*, 11 BRBS at 281; *DeRobertis*, 14 BRBS at 286-287; *Arjona v. Interport Maint. Co., Inc.*, 31 BRBS 86, 89 (1997 WL 441651 at \*1, 3-4) (1997); *Insinna*, 12 BRBS at 773; *Coleman*, 904 F.2d at 617. No court has held otherwise. It was reasonable for the ALJ to reach the same conclusion here.

**B. NODSI disregards the ALJ’s reasonable finding on status; the panel dissent relies on facts that are neither dispositive nor in the record.**

NODSI and the panel dissent contend that Zepeda did not have status, based on the independent finding that Zepeda’s container repair work was not integral to shiploading. Supp. Br. at 39; 689 F.3d at 413. This contention, of course, is contrary to the ALJ’s determination on the issue. *See* RE Tab 5 at 22 (the repair work done by Zepeda “was a significant maritime activity necessary for the process of loading and unloading cargo.”); *id.* at 25 (finding that Zepeda repaired sea-going containers, and that “marine container repair is an essential function to the loading and unloading process as to qualify as maritime employment.”). Under the relevant standard of review, therefore, NODSI’s desired reversal of the ALJ’s determination would not be proper unless the ALJ’s determination is unreasonable. As discussed above, it is not.

NODSI and the dissent assert that the container repair was not integral to shiploading because the containers were empty, and thus the failure to repair them would not halt loading. NODSI Supp. Br. at 41; 689 at 413-14. This argument reaches too far. A loading stoppage while a piece of equipment is repaired is certainly sufficient to establish its integrality, but it is not necessary or required. Indeed, whether a stoppage occurs is largely a function of an employer’s economic acumen, namely, whether there is a backup for the broken piece of equipment. For

example, if several cranes are available to load a ship, loading does not stop because one of them breaks down.<sup>16</sup> But that does not mean that cranes are not essential to the loading of ships. The redundancy with containers is even greater – the Chef Yard alone serviced over a thousand containers per year just for Evergreen, NOMCX 6 at 14, and there are currently 17 million container units in global shipping fleet. See <http://www.worldshipping.org/about-theindustry/containers>. Thus, if a single container becomes unusable from damage, loading will not immediately be halted. But if repairs stop, so, eventually, will loading.

The dissent further attempts to disjoin container repair from loading by suggesting that “[c]ustomarily, container repair and ship loading are not conducted, organized, coordinated, overseen, or commissioned by the same person or entity.” 689 F.3d at 413. The source for this assertion is unclear, but the record here suggests otherwise, *see supra* at 9-10 (describing NOMC’s operations as stevedoring and container repair), as does the case law. See, e.g., *Motoviloff v. Director, OWCP*, 692 F.2d 87, 88 (9th Cir. 1982) (employer operated dockside terminals, receiving, loading and unloading metal containers, and repaired and

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<sup>16</sup> For example, four cranes were damaged in a sudden, violent thunderstorm at a South Carolina port this summer. But port authorities assured the public that loading would continue with 7 rather than 11 cranes. See <http://finance.yahoo.com/news/damaged-sc-port-cranes-could-152949277.html>

refurbished containers both dockside and at a separate facility); *Sidwell v. Virginia Intern. Terminals, Inc.*, 372 F.3d 238, 240 (4th Cir. 2004) (holding stevedore liable for former container repairman's compensation for hearing loss); *Ceres Marine Terminals, Inc. v. Knight*, 162 F.3d 1154 (4th Cir. 1998) (Table, unpublished).

Moreover, whether the same company that repairs the containers also loads them is insignificant. The relevant question is whether the work being done by the employee – regardless of whether he works for a stevedore – is “maritime employment.” 33 U.S.C. 902(3). This Court made that clear in *Carroll*, where the employee's maritime status derived from his work for an employer other than his own. *Carroll*, 650 F.2d at 757 (finding a carpenter covered for the building of a scaffold which would be used by another company's employees to repair a piece of loading equipment).

In keeping with this principle, numerous cases have held that container repair performed for an entity other than the one that actually loads ships is covered. *See Coleman*, 904 F.2d at 612-13 (employee worked for a contractor that repaired containers for a shipper); *Cabezas*, 11 BRBS at 281 (same); *DeRobertis*, 14 BRBS 284 (same); *Insinna*, 12 BRBS at 773 (same); *Arjona*, 31 BRBS at 86 (employee worked for a contractor who repaired containers for their owner, which leased them to shippers). Put simply, repairing containers is the same work no

matter the entity for whom it is performed, and does not become any more or less maritime based on the identity of the employer.

**III. SITUS: BECAUSE THE ALJ APPLIED THE CORRECT LEGAL STANDARD FOR AN “OTHER ADJOINING AREA” AND BECAUSE A REASONABLE PERSON, APPLYING THAT STANDARD, COULD CONCLUDE THAT THE CHEF YARD IS A MARITIME SITUS, THE ALJ’S FINDING OF SITUS SHOULD BE AFFIRMED.**

**A. *Winchester* correctly defined the legal standard for an “adjoining area” based on the statutory text and Congressional intent.**

In *Winchester*, the en banc Court undertook a thorough analysis of the 1972 amendments to the Act to determine the meaning of Section 3(a)’s catchall clause “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” NODSI now challenges that well-informed and reasoned decision.

The Court’s analysis was generally guided by the Supreme Court’s prior interpretation of the 1972 amendments: “The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage.” *Winchester*, 632 F.2d at 510 (quoting *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977)). Moreover, the Court emphasized that examining “all the circumstances” would “best effectuate” Congress’s twin purposes of extending coverage to land-based maritime operations and making coverage uniform. *Winchester*, 632 F.2d at 513. Thus, the Court rejected arguments that fence lines, nearby buildings, or labels placed on an area would be

determinative of situs. *Id.* at 513-14. Nonetheless, the Court cautioned against extending a maritime area to extremes, and thus held that “[t]he site must have some nexus with the waterfront.” *Id.* at 514.

The Court then focused on the specific text of the “other adjoining area” clause. The Court broke it down into two elements: one geographic (whether the area adjoins navigable waters), and one functional (the area’s customary use).

The clause’s geographic aspect rested largely on the term “adjoining.” The Court recognized that “adjoining” required proximity to the water, but observed that “adjoin” could mean “contiguous to,” or “near,” “close to” and “neighboring.” *Id.* at 514. It rejected the narrower definition – absolute contiguity – because it would “frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity.” *Id.* at 514-15. It thus held that “[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee’s injury can come within the [Longshore Act].” *Id.* at 514.

The Court’s analysis, however, did not stop at resolving the meaning of “adjoining,” because the phrase “area” required definition as well.<sup>17</sup> To answer that, the Court again turned to the statutory text – the area’s “customary use” – and

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<sup>17</sup> Indeed, the Court noted that, even if it had required strict contiguity, the overall area where the gear room was located was contiguous with the water. *Id.* at 515. “The question,” the Court said, “is where to draw the lines around the ‘area’ in a given case.” *Id.*

the functional component of the clause. It held that the “perimeter of an area is defined by function,” meaning it must be customarily used for “significant maritime activity,” including loading or unloading a vessel. *Id.* at 515. The Court thus held that the place of injury (a gear room where equipment used in loading and unloading was stored and repaired), even though it was five blocks from the nearest gate to the docks “was not clearly outside the waterfront area used by employers for gear rooms,” and found substantial evidence for the ALJ’s determination that the gear room operations were part of the loading process. *Id.*<sup>18</sup> The Court concluded, therefore, that “[n]ot only does that area adjoin the navigable waterway, but the gear room itself has a sufficient nexus to the waterfront” to be a covered situs. *Id.*

In short, the Court’s approach in *Winchester* is correct because it gave effect to each part of the statute, relied on definitions of the statutory terms that are consistent with congressional intent, and abided by the Supreme Court’s guidance to take an expansive view of the post-1972 coverage provisions. The propriety of this Court’s *Winchester* approach is supported by the fact that the courts of appeals to have addressed the issue have largely applied a similarly broad definition of “adjoining area” and declined to interpret “adjoining” as requiring physical

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<sup>18</sup> In-land depots, like NODSI’s, are located outside the dock proper for the same reason that the gear room in *Winchester* was located beyond it, namely the lack of sufficient space at the dock. *Compare supra* n.4 with 632 F.2d at 507.

contiguity. *See Herron*, 568 F.2d at 140-41; *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 100 (2d Cir. 1991); *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 1057-58 (11th Cir. 2002); *Cunningham v. Director, OWCP*, 377 F.3d 98, 104-05 (1st Cir. 2004); *Consolidation Coal*, 629 F.3d at 330; *but see Sidwell*, 71 F.3d at 1138-39.

**B. NODSI's arguments for discarding *Winchester's* interpretation of "adjoining area" are without merit.**

Despite the weight of authority comports with *Winchester* (and its concession before the panel that the geographic nexus was satisfied), NODSI argues that the Court should discard *Winchester's* geographic test in favor of a strict contiguity test.

NODSI first asserts that *Winchester* is "nebulous and unworkable." Supp. Br. at 11. But *Winchester* has proven to be neither. Indeed, the standard is clear enough that, since *Winchester* was decided thirty-two years ago, there have been only six reported cases in this circuit where the meaning of "adjoining area" was contested. *Alford v. American Bridge Division, United States Steel Corp.*, 642 F.2d 807, *modified in part*, 655 F.2d 86, *motion for clarification granted*, 668 F.2d 791 (5th Cir. 1981); *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843 (5th Cir. 1989); *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (5th Cir. 2002); *Thibodeaux v. Grasso Prod. Management Inc.*, 370 F.3d 486 (5th Cir. 2004); *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180 (5th Cir. 2004); *Hudson*, 555 F.3d 426. In only

one of those cases was there even a dissent. *Hudson*, 555 F.3d at 441. And that dissent, notably, did not involve a disagreement over a contiguity requirement, but over whether an oil platform with two functions – production and loading – should be treated as two separate areas. *Hudson*, 55 F.3d at 441.<sup>19</sup>

NODSI next argues that *Winchester* should be discarded because it has caused the Board to “issue[] numerous decisions with contradictory holdings under virtually identical facts depending on which circuit governs the case.” Supp. Br at 13. Although NODSI is correct that the Board must apply the law of the circuit where the injury occurred, adopting a strict contiguity approach would only would *deepen* the alleged circuit split and therefore *exacerbate* the problem of inconsistent Board decisions. *See supra* at 36.

In sum, *Winchester* adopted a broad reading of “adjoin” because it was consistent with the statutory text and congressional intent. Neither has changed nor should the Court’s interpretation.

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<sup>19</sup> Indeed, as the entire platform in *Hudson* was surrounded by navigable waters, the contiguity of the area was not in dispute. 555 F.3d at 432.

**C. The ALJ properly applied *Winchester* to conclude that the Chef Yard had both a geographical and functional nexus to the waterfront.**

NODSI's second argument is that, if the Court does not discard the *Winchester* standard for an "other adjoining area," it should nevertheless find that the Chef Yard does not meet the standard. Supp. Br. at 27. But the ALJ found otherwise, and did so by reasonably applying the Court's requirements that a situs must have both a geographical and functional nexus to the waterfront.

1. Geographical nexus

There is no dispute that the Chef Yard is "in the vicinity of navigable waters, or in a neighboring area," as *Winchester* requires. 632 F.2d at 514. Indeed, NODSI conceded before the panel that the Chef Yard satisfies the geographic component of the *Winchester* situs inquiry. Pet. Br. at 9. Thus, unless the Court abandons *Winchester's* interpretation of "adjoining area," the geographic component of the situs inquiry is met.<sup>20</sup>

2. Functional Nexus

As discussed above, *Winchester* defined "area" in terms of function and its customary use by an employer in loading, unloading, repairing, or building a vessel. 632 F.2d at 515. It specifically found that the gear room where the injury

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<sup>20</sup> The Chef Yard is a good deal closer to navigable waters – 300 yards from the Industrial Canal – than was the gear room in *Winchester*, which was five blocks from the gates to the nearest dock.

occurred was a covered situs (despite the absence of a ship or actual loading or unloading) because “the ALJ found that the gear room’s operations were part of the ongoing overall loading process.” Based on that finding, the Court concluded that “the gear room itself ha[d] a sufficient [functional] nexus to the waterfront.” *Id.*<sup>21</sup>

The analysis with regard to the Chef Yard is the same. Like the gear room in *Winchester*, no ships could dock at the Chef Yard, so no actual loading or unloading occurred there. But just as the ALJ in *Winchester* concluded that the gear room’s operations – repair and storage of loading equipment – were part of the loading process, the ALJ here concluded that the Chef Yard’s operations – repair and storage of marine cargo containers – “was a significant maritime activity necessary for the process of loading and unloading cargo.” RE Tab 5 at 22. This conclusion is based on the ALJ’s factual finding that some of the containers repaired at the Chef Yard were seagoing containers sent from, or bound for, container ships at the Port of New Orleans.<sup>22</sup> And because cargo cannot be loaded onto container ships without containers, the ALJ’s conclusion that those containers

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<sup>21</sup> This was consistent with the panel decision, which held that the “gear room, housing the gear used in loading and unloading cargo from ships, was a situs customarily used for maritime purposes.” *Winchester I*, 554 F.2d at 247.

<sup>22</sup> During the time that Zepeda worked for NODSI, there were only two container terminals on the Industrial Canal. Hearing Tr. 24.

were “necessary for the process of loading and unloading cargo” is reasonable.

Because the ALJ applied the correct legal standard, and reached a conclusion that could be reached by a reasonable person, that conclusion should be affirmed.<sup>23</sup>

**D. The dissent misconceives the nature and use of shipping containers in maritime commerce.**

In disagreeing with the majority’s decision to uphold the ALJ’s finding on situs, the dissent concedes that “loading and unloading” must be construed

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<sup>23</sup> The Director reads *Winchester* as allowing the functional nexus to be established in either of two ways – through the precise location of injury or the maritime character of the overall area. 632 at 515-516. Although not the best reading, *Winchester* could be understood to require that, where a specific site’s functional relationship to the waterfront is based not on actual loading, but on an activity that is integral to loading – *i.e.*, the repair and storage of loading equipment – that specific site must also be within a larger overall area where actual loading takes place. The Court found that the gear room in *Winchester* met both of these elements, but did not expressly state that both were required. 632 F.2d at 515 (“Substantial evidence exists to support a finding that the Avenue N gear room was in an area customarily used by employers for loading. Not only does that area adjoin the navigable the waterway, but the gear room itself has a sufficient nexus to the waterfront.”). The ALJ here found that the Chef Yard had a functional relationship with the waterfront, like the gear room in *Winchester*, based on the repair of loading equipment. But he did not define the “overall area” or characterize it as maritime. *See* RE Tab 5 at 22-23 (describing testimony regarding the nature of “neighboring business[es]”); *but cf.* 689 F.3d at 407 (panel majority’s independent review of record revealed presence of maritime facilities in the area surrounding NODSI facility). It is also not clear here whether the “marine facilities” and “terminals that have marine containers and trucks stationed on them” – or the “coffee roasting plant” adjacent to both the canal and the Chef Yard, on which there may also have been containers, Tr. 80 – were used for the loading or unloading of a vessel. To put this question in context, however, it is apparent that *Winchester* considered a large overall area – including both sides of the Houston Shipping Channel – in which many employers’ gear rooms were located. *See Winchester*, 632 F.2d at 517 (map).

“broadly to include not only the physical movement of cargo on and off ships but also *those additional related functions that contribute to the overall loading or unloading process by making the physical loading and unloading possible.*” 689 F.3d at 411 (emphasis added). The dissent argues, however, that container repair is “operationally separate and distinct” from loading and therefore does not contribute to making loading and unloading possible. There are several problems with this assertion.

Preliminarily, the dissent is simply taking issue with the ALJ’s conclusion that “NODSI customarily repaired Evergreen marine containers, a process which was a significant maritime activity necessary for the process of loading and unloading cargo.” RE Tab 5 at 22. As with the ALJ’s finding on status, the relevant standard of review precludes disregarding the ALJ’s conclusion if it was decided under the correct legal standard and is reasonable. And for the reasons discussed above, both of those requirements are met.

More important, there is no evidence that container repair is “customarily” separate from loading and unloading. Indeed, prior to the advent of containerization, longshoremen customarily repaired the broken boxes and bags into which cargo was packed (the pre-containerization analogues). *In re Internat’l Longshoremen’s Ass’n*, 266 NLRB 230, 233 (1983). And relevant case law indicates that container repair is sometimes performed by stevedores (like

Zepeda's prior employer NOMC, *see supra* n. 10); sometimes performed by contractors at terminals (*supra* at 28 (*Coleman*, 904 F.2d at 612-13; *Cabezas*, 11 BRBS at 281; *DeRobertis*, 14 BRBS 284)); and sometimes performed away from the terminals, either by stevedores, *Motoviloff*, 692 F.2d at 88, or, as here, by a contractor like NODSI. *See also Internat'l Ass'n of Machinists and Aerospace Workers, District Lodge 94 v. Internat'l Longshoremen's and Warehousemen's Union, Local 13*, 781 F.2d 685, 686-87 (9th Cir. 1986) (rough cleaning and temporary patching of containers performed by longshoremen while container repair performed by machinists who were also "responsible for the repair and maintenance of mechanical cargo handling equipment such as trucks, tractors, lift trucks and mobile cranes."). In all cases, however, container repair is functionally the same work – indeed, Zepeda testified that he did the same work for NOMC that he did for NODSI – and is at least as necessary to the loading of cargo onto container ships as the repair of the "spreader bars, pallets, wire cable slings, tow motors, [and] forklifts" in *Winchester*, 632 F.2d at 507 n.1.

The dissent contends, to the contrary, that containers are not cargo-loading *equipment*, but are, themselves, the thing to be loaded, *i.e.*, cargo. 689 F.3d at 412. The panel majority, however, correctly rejected this "narrow distinction" as unsupported by the Act, its broad construction, and contrary to the court's deferential standard of review. 689 F.3d at 407 n.4. In any event – though the

dissent characterizes her view of containers as cargo to be the view of stevedores – it is clear that, historically, stevedores have drawn a very bright line between cargo and container, as they first fought against the use of containers, then fought for as much of the container stuffing and stripping work as possible in order to preserve their workload. *See generally In re ILA*, 266 NLRB at 242 (addressing the validity of rules that gave the longshoremen’s union the right to stuff or strip containers if that work was to be performed within the 50-mile geographic area of the port); Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Lab.L.J. 397 (1970); *Caputo*, 432 U.S. 249 (finding coverage for checker who marked cargo being stripped from a container and a terminal worker who, among other jobs, loaded and unloaded containers).

The dissent finally worries that the panel majority’s interpretation is “gradually swallowing every employer in the vicinity of a port,” 689 F.3d at 412 n.3, including the nearby carwash, because that business would have to be considered as part of the same area as the Chef Yard. *Id.* at 412. But it is clear that simply being in the same overall area as a maritime situs does not make every other business in that area maritime. *Cf. Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985) (recognizing that “the nature of particular job is defined in part by its location,” but refusing to classify work as maritime simply because it occurred on covered situs). The business itself must still be engaged in activities related to

the loading of vessels, and those that are not – like a carwash – will not meet the functional nexus requirement<sup>24</sup> Thus, the dissent’s concern about untoward or irrational expansion of Longshore Act coverage is unfounded.

### CONCLUSION

For the foregoing reasons, the Court should affirm the decisions below finding that Zepeda was covered by the Longshore Act at the time of his injury.

Respectfully submitted,

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<sup>24</sup> Regarding the dissent’s other examples, it seems clear that shoe repair is not essential to loading because loading can occur without shoes, whereas loading cannot occur without containers. As for container manufacture, the Supreme Court has extended coverage to repair and maintenance functions, which necessarily involve items already in use in the overall loading process. Items being manufactured would not fit into that category.

## CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013, the foregoing brief was electronically filed and served through the Court's CM/ECF system on:

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## COMBINED CERTIFICATES OF COMPLIANCE

I certify that:

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