UNITED STATES DISTRIC COURT
SOUTHERN DISTRICT OF NEW YORK

STEEL INSTITUTE OF NEW YORK Plaintiff	:	
v.	:	09-CV-6539 (CM)
THE CITY OF NEW YORK Defendant	:	(filed by ECF)

MEMORANDUM OF LAW OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT

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MEMORANDUM OF LAW OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT

PRELIMINARY STATEMENT

This suit concerns the potential preemptive effect of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*. (the OSH Act or the Act), on various New York City ordinances governing the operation of cranes within the City. Plaintiff Steel Institute, representing building contractors, maintains that these New York City crane ordinances are preempted by the OSH Act, because they regulate issues addressed by the Occupational Safety and Health Administration's (OSHA) cranes and derricks standard and other OSHA construction standards. The text and history of the OSH Act, OSHA's longstanding and consistent interpretation of the OSH Act, and important policy considerations support the conclusion that Congress did not intend such a sweeping preemptive effect. Moreover, under Supreme Court jurisprudence, laws of general applicability, such as New York City's crane ordinances, which regulate the conduct of both workers and non-workers alike, escape preemption.

STATEMENT OF INTEREST

The Labor Department has a strong interest in limiting the scope of OSH Act preemption of local ordinances such as the City's. Work practices and conditions pose a

variety of serious hazards to the public, including mechanical, electrical, chemical and biologic hazards. Local jurisdictions have enacted a network of industrial codes, such as building and electrical codes, and inspection requirements that touch on issues for which there are OSHA standards. If the City's crane operation ordinances are preempted because of their incidental impact on worker safety, building and electrical codes and many other types of local regulation will also be in jeopardy.

ISSUE PRESENTED BY THE AMICUS CURIAE

Whether New York City's crane ordinances escape preemption by the OSH Act because the ordinances are municipal building requirements of general applicability that Congress did not intend to preempt.

BACKGROUND

A. *The Steel Institute Suit and Motion for Partial Summary Judgment*

Plaintiff Steel Institute of New York, a steel industry membership organization, Complaint ¶ 3, challenges, *inter alia*, numerous provisions included in Building Code § 3319 (cranes and derricks), § 3316 (hoisting equipment), and the Reference Standard R-2 (power operated cranes and derricks). Complaint ¶ 7. The suit alleges these provisions are preempted by the OSH Act because they "regulate[] occupational safety and health issues for which federal standards have been promulgated," *e.g.*, Complaint ¶ 34, and "[t]he State of New York does not have an OSH Act approved State plan." Complaint ¶ 43.

In its motion for partial summary judgment, Plaintiff argues that absent an approved state plan, any state regulation of an occupational safety and health issue for which a federal standard exists is preempted. Motion at 5 *citing Gade v. National Solid*

Wastes Management Ass'n, 505 U.S. 88, 102 (1992). Plaintiff does not assert that the New York City ordinances "actually conflict" with OSHA's cranes and derricks standard in the sense that compliance with both is impossible, but rather that the City may not establish additional requirements. Plaintiff then delineates the impermissible "overlap" between particular City ordinances and their OSHA standard counterparts. Motion at 5 *citing Statement of Undisputed Material Facts*. Finally, Plaintiff argues that even where the City ordinances have a dual purpose, such overlap is impermissible, and that the City must obtain OSHA approval to implement its safety laws. Motion at 6 – 7.

B. *The Crane Regulations*

1. *OSHA's Cranes and Derricks Standards*

The OSHA standard on cranes and derricks, 29 C.F.R. § 1926.550, is derived from Construction Safety Act standards in effect during the first two years of the Act's existence. 73 Fed. Reg. 59714 (October 9, 2008) (Proposed new Cranes and Derricks Rule). The OSHA standard relies heavily on national consensus standards in effect in 1971 and remains largely unchanged, although a rulemaking to amend it is underway.[1]

Section 1926.550(a) requires that a competent person inspect all machinery and equipment and that any deficiencies be corrected prior to use. Hoisting machinery must be inspected annually by a competent person or by a government or private agency recognized by the Department. There are also specific requirements for critical

[1] OSHA is revising its cranes and derricks standard. It published a proposed rule in October 2008, 73 Fed. Reg. 59714 (October 9, 2008), and expects to publish a final rule in July 2010. 74 Fed. Reg. 64281 (Dec. 7, 2009) (Department of Labor's Regulatory Agenda). The proposed rule includes new standards for the assembly and disassembly of cranes, for power wire safety, certification and training requirements for crane operators and minimum qualifications for signal persons. 73 Fed. Reg. at 59936-59939.

equipment, such as belts, gears, ropes, windows and platforms, and requirements governing certain operations, such as minimum clearance requirements for operations near energized power lines. 29 C.F.R. § 1916.550(a).

Hammerhead tower cranes (but not other types of tower cranes) must meet "the applicable requirements for design, construction, installation, testing, maintenance, inspection, and operation as prescribed by the manufacturer." 29 C.F.R. § 1926.550(c)(5). Fall protection is required for employees working on the horizontal booms of such cranes. *Id*. at (c)(2). There are no specific requirements for training or certification of operators or riggers.

Crawler, locomotive and truck cranes must meet the design, inspection, construction and testing requirements prescribed in ANSI B30.5-1968 "Safety Code for Crawler, Locomotive and Truck Cranes." *Id*. at (b)(5). The employer must inspect these types of cranes monthly and prepare a certification record including the date of the inspection and the signature of the person who conducted the inspection. *Ibid.*

2. *New York City's Crane Ordinances*

The use of cranes in building construction in New York City is largely governed by NYC Administrative Code Title 28 (Building Code). Most of the Building Code's crane regulations are found in Chapter 33, titled "Safeguards during Construction or Demolition." The chapter defines its scope: "The provisions of this chapter shall govern the conduct of all construction or demolition operations with regard to the safety of the public and property. For regulations relating to the safety of persons employed in construction or demolition operations, OSHA standards shall apply." Building Code § 3301.1.

Building Code § 3316, governing all hoisting equipment, including cranes and derricks, sets general requirements that hoisting equipment shall be operated and maintained according to the manufacturer's specifications and to avoid hazards to the public or property. Building Code §§ 3316.7.1, 3316.8, 3316.2.

Building Code § 3319 contains specific requirements for cranes and derricks, and requires three different certificates for crane use: a certificate of approval, a certificate of operation and a certificate of on-site inspection, and delineates the procedure and requirements for obtaining the certificates.

In 2008, the City Council added new requirements for tower and climber cranes. (Other requirements discussed predate the OSH Act.) The new Building Code provisions require that: (1) a licensed engineer prepare and submit to the Building Department a plan for erecting, jumping, or dismantling tower cranes, § 3319.8.1; (2) the general contractor hold safety coordination and pre-jump meetings and keep a log of the dates and times of all such meetings together with other required information, § 3319.8.2-6; and (3) the engineer of record, prior to jumping or climbing a tower crane, provide the Department with a certified, signed and sealed report stating, among other things, that the engineer has inspected the crane and found no hazardous conditions, § 3319.8.7. The 2008 Building Code amendments also prohibit the use of synthetic slings unless they are recommended by the manufacturer, and require a 30-hour training course for all workers engaged in erecting, jumping, or dismantling a climber or tower crane. The training course must be conducted pursuant to a registered New York State Department of Labor training program or by a provider approved by the department. §§ 3319.8.9, 3319.10.

Additional sections of the Building Code further flesh out the crane regime. Building Code § 3310.8.2 requires a general site safety plan and manager, with special attention to the requirements for cranes. Building Code § 1607.12 limits crane loads to their rated capacity and sets a maximum load based on wheel load and directional forces. There is also a Reference Standard on cranes and derricks that requires, among other things, later model mobile cranes to be designed and constructed in accordance with certain American or European consensus standards. Building Code Reference Standard 19-2, § 4.1.2. The City's regulations prohibit the operation of a crane or derrick in unsafe manner, or without the required certificates, 1 RCNY § 102-01, and its Department of Transportation has rules governing the siting and movement of cranes on streets or sidewalks. 34 RCNY § 2-05(l)(i); NYC Administrative Code § 19-126.

Chapter 2 of the Building Code provides for the general enforcement of its requirements, including the issuance of stop work orders, and 15 RCNY § 31-103 contains penalties for Building Code violations.

C. *Occupational Safety and Health Act*

Congress enacted the OSH Act "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). To achieve that objective, Section 6(a) of the Act authorizes the Secretary of Labor to promulgate "occupational safety [and] health standard[s]." 29 U.S.C. § 655. An "occupational safety and health standard" is defined as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe and healthful employment and places of employment.

29 U.S.C. § 652(8).

The role of the States in regulating occupational safety and health issues is addressed in Section 18 of the OSH Act. 29 U.S.C. § 667. Section 18(a) provides that a State may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. § 667(a). Section 18(b) further provides that if a State "desires to assume responsibility for development and enforcement" of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6 of the OSH Act, 29 U.S.C. §655]" the State "shall submit" a state plan concerning such standards. 29 U.S.C. § 667(b). The remaining subsections of Section 18 prescribe the requirements for, and federal supervision of, state plans. 29 U.S.C. §§ 667(c) – (h).

D. *The Supreme Court's Interpretation of Section 18*

In *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88 (1992), the Supreme Court addressed the preemptive effect of OSHA's hazardous waste standard on state laws establishing training and licensing requirements for hazardous waste equipment operators and laborers. The Illinois laws, which were intended to both promote job safety and protect the general public throughout the state, imposed more rigorous experience requirements on operators of equipment used in hazardous waste handling than the OSHA standard. Among other things, five hundred days (4000 hours) of experience were required for a state license to operate a hazardous waste crane, whereas only a minimum of three days experience was required under the federal standard. A federal district court found the 4000-hour requirement not preempted because, apart from its effect on worker safety, the requirement advanced a substantial

state interest in protecting public safety and the environment. The Seventh Circuit disagreed, holding that when an OSHA standard exists, state law on the same issue is preempted if the law regulates worker safety in a direct, clear and substantial way, unless the state has submitted a state plan for approval.

The Supreme Court affirmed by a five to four vote. The Court first rejected the claim that the Act does not preempt supplementary state regulation of issues addressed by an OSHA standard. In two separate opinions that disagreed in key respects, a five-justice majority read the language of Section 18 relating to state plans to indicate a congressional intent to preempt state occupational safety and health regulation relating to an issue for which a federal standard is in effect, absent an approved state plan. The majority rejected the argument that the Section 18 provisions merely describe the circumstances under which a state can assume exclusive jurisdiction, ousting federal regulation.

A four-justice plurality found that such supplementary state regulation is impliedly preempted. The plurality relied principally on the language of Section 18(b). Section 18(b) provides that if a state "desires to assume responsibility for development and enforcement… of occupational safety and health standards" that relate to an issue addressed by an OSHA standard, the state "shall submit" a state plan covering such standards. According to the plurality, the unavoidable implication of this language is that a state may not enforce its own standards absent such a submission. The plurality believed this reading was bolstered by the language in other parts of Section 18. For example, Section 18(a) provides that a state may assert "jurisdiction ... over any occupational safety or health issue with respect to which no [federal] standard is in effect." The plurality considered that the natural implication is that a state may not

assume jurisdiction if a federal standard is in effect. Section 18(c) prohibits the Secretary from approving a state plan standard that would impose an undue burden on interstate commerce. If supplementary state regulation outside the state plan approval process were allowed, the plurality said, this protection for interstate commerce could easily be undercut.

The plurality reasoned that Congress sought to promote occupational safety and health while avoiding duplicative regulation. It noted that Congress had provided substantial funding for state plans. The plurality concluded that to allow supplementary state regulation would be inconsistent with the congressional purposes of establishing uniform federal standards, on the one hand, and encouraging states to assume full responsibility for their own OSH programs, on the other. *Id.* at 103.

In a separate opinion, Justice Kennedy found that the language of Section 18(b), considered in conjunction with the other parts of Section 18, is sufficiently clear to expressly preempt supplementary state regulation. He did not agree that supplemental regulation would create a conflict with the purposes of the federal scheme so as to be impliedly preempted, since both the federal and state regulation would serve the same basic purpose of protecting worker safety. 505 U. S. at 110-111. Despite this disagreement, he joined in the plurality's conclusion that the Act is intended to preempt all state occupational safety and health standards on issues addressed by an OSHA standard, unless the state obtains the Secretary's approval of a state plan under Section 18(b). 505 U.S. at 102, 111.

The Court next considered whether a state law that addresses public safety as well as occupational safety is an "occupational safety and health standard" subject to

preemption. Five justices, including Justice Kennedy, joined this part of the opinion. The Court noted that “any state law requirement designed to promote health and safety in the workplace falls neatly within the Act’s definition” of such a standard. *Id.* at 105. The mere fact that a state has articulated a purpose other than, or in addition to, workplace health and safety would not divest the OSH Act of its preemptive force. Preemption law looks to the effects as well as the purpose of a state law, and a dual impact state law cannot avoid OSH Act preemption simply because the regulation serves several objectives. Adopting the Seventh Circuit’s test, the Court ruled that, absent a state plan, “the OSH Act preempts all state law that ‘constitutes in a direct, clear and substantial way regulation of worker health and safety.’” 505 U.S. at 107. The Court, however, qualified its ruling by excluding non-conflicting laws of general applicability:

> On the other hand, state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be preempted. Although some laws of general applicability may have a ‘direct and substantial’ effect on worker safety, they cannot fairly be characterized as ‘occupational’ standards, because they regulate workers simply as members of the general public.

Ibid.

Four Justices dissented, finding no "clear congressional purpose [in the OSH Act] to supplant exercises of the States' traditional police powers," *Id*. at 115, and concluding that the Illinois laws were neither expressly nor impliedly preempted.

ARGUMENT

The OSH Act does not preempt municipal building codes like New York City's crane ordinances. First, federal preemption of local law is generally disfavored -- the analysis begins with a presumption *against* preemption and preemption may be found

only when it is Congress's clear and manifest purpose to do so. The pertinent statutory text in the OSH Act, as construed in *Gade*, the OSH Act's legislative history, OSHA's longstanding and consistent interpretation of the OSH Act, as well as important policy considerations, support the conclusion that Congress did not intend to preempt local building codes. Furthermore, under *Gade*, there is no preemption of laws of general applicability, such as New York City's crane ordinances, which regulate the conduct of both workers and non-workers alike.

A. *Congress Did Not Intend to Preempt Local Building Codes.*

It is a fundamental principle that preemption is ultimately a question of congressional intent. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009). Analysis begins with the presumption that Congress did not intend to displace state and local law, especially when a statute operates in an area within the states' traditional police powers, such as protection of health and safety and regulation of land use. *See Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996). The City's building code, including provisions designed to protect the public and neighboring structures from the hazards of cranes, is squarely within the area of traditional local police power. In such cases, preemption will be found only where that is the clear and manifest purpose of Congress. *Ibid*.

1. *The Act's Text Does Not Show a Clear Intent to Preempt Such Ordinances.*

There is no clear indication in the OSH Act that Congress intended to preempt municipal building codes. The text of Section 18, which refers to states but not to localities, does not evince a clear intention to preempt local building codes. The *Gade* decision addresses state laws and does not explicitly consider local laws. Prior to *Gade*, the courts of appeals, while agreeing that Section 18 expressly preempted supplementary

state regulation, disagreed as to whether the state's political subdivisions were included within that preemption. Compare *Ohio Mfrs Ass'n v. City of Akron,* 801 F.2d 824, 831 (6th Cir. 1986) (local laws not included) with *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (local laws expressly preempted).[2] In *Gade,* however, eight Justices agreed that Section 18 does *not* expressly preempt state laws. Only Justice Kennedy believed that Section 18(b) evinces express preemption of state laws, and it is doubtful that he would include local laws within that conclusion in light of Section 18's plain text. *See* 505 U.S. at 111 ("[t]he necessary implication of finding express preemption in this case is that the pre-emptive scope of the OSH Act is defined by the language of §18(b)"). That language allows only the states themselves to submit a state plan for approval. Local jurisdictions may not submit their ordinances. In any event, it is clear now that the OSH Act does not expressly preempt local building code ordinances.

[2] This Court is not bound by *Environmental Encapsulating*, which predates the Supreme Court's decision in *Gade*. The *Encapsulating* court's decision that local law is preempted was part of its analysis that the OSH Act expressly preempts state laws, but not those laws that have a substantial purpose apart from worker safety. *Gade* overturned both parts of this analysis. This Court must start afresh to determine whether the Act impliedly preempts local laws like the crane ordinance that have an unquestionably strong public safety purpose. The portions of the *Encapsulating* opinion that deal with implied preemption take a narrow view of its scope. 855 F. 2d at 58-59. And finally, the *Encapsulating* court stated that "perhaps [the] most important" basis for its decision to include local law within what it thought was the express preemption of state law was the fact that OSHA itself had expressly stated in a regulatory text (of a different standard, its hazard communication standard, 29 C.F.R. § 1910.1200(a)(2)) that both state and local law was preempted. *Id.* at 55. The paramount need for uniform and comprehensive regulation present in OSHA's hazard communication standard, *see* 48 Fed. Reg. 53,283 – 284 (Nov. 25, 1983), simply does not apply here. *See infra* at p. 19 (discussing agency's unique position to opine on whether local laws interfere with objective of federal law).

The Act also does not impliedly preempt municipal building codes. Four Justices concluded that Section 18 impliedly preempts supplementary state laws that are not part of an approved state plan, because that Section evinces twin congressional purposes to avoid duplicative federal and state regulation over the same issue and to encourage states to assume responsibility through the state plan process. Justice Kennedy, however, disagreed that the indicia the plurality relied on were strong enough to support implied preemption or that supplementary state regulation would conflict with the "purposes" of the Act. On the contrary, he understood that OSHA standards and supplementary state regulation shared a common purpose of protecting worker safety and health. 505 U.S. at 110 – 11. Thus, there was no majority consensus as to the preemptive effect of the Act on supplementary laws not expressly covered by Section 18.

2. *State Plans Are Not Available to Municipalities.*

Moreover, the reasons relied on by the plurality for concluding that state laws are impliedly preempted do not apply with equal measure to municipal building code ordinances. In finding preemption, the plurality relied substantially on the availability of the state plan mechanism; stricter worker safety and dual purpose state laws protecting the public and employees were not conclusively disapproved. On the contrary, Congress wanted to encourage states to assume full regulation of safety and health issues by adopting state plans. 505 U.S. at 103-104. "The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways it can do so." *Id.* at 103. "If the State wishes to enact a dual impact law … for which a federal standard is in effect, § 18 of the Act requires that the State submit a plan

for approval of the Secretary." *Id. at* 108. Unlike states, however, cities have no power to submit a state plan. Many provisions of Section 18 make it clear that only the state itself may submit a plan and that the plan must apply throughout the state. 29 U.S.C. §§ 667(c)(1), 667(c)(3), 667(c)(6); *see also* 29 U.S.C. §§ 652(7), 672(c). If overlapping local building codes are preempted, they cannot be saved through the state plan mechanism.

Nor would a state such as New York have reason to submit a plan applying building code requirements tailored to the unique conditions of a densely populated urban environment to employers throughout the state.[3] Many of the provisions of the New York City building code, including the crane provisions, may not be necessary or practical for smaller cities and urban areas. At the same time, the City's code requirements serve vital local interests. Cranes are operated in the most densely populated areas of the city, and their masts, booms and loads pose a clear danger to public safety. The City's density makes it generally impossible to locate a crane or derrick so that it will not operate over or adjacent to crowded streets, sidewalks and occupied buildings. For the same reason, mobile cranes, which can have booms hundreds of feet in length, must park on and operate from, the street. A recent study concluded that a tower crane operating in NYC poses a risk to 12 to 15 surrounding buildings, several streets, and 1000-1500 people. *See* comment no. 404.1, Docket ID OSHA-2007-0066 (Dept. of Buildings of the City of New York, June 18, 2009) (Attachment 1). A crane

[3] In addition, OSHA has taken the position that a state may not submit a plan limited only to a single narrow matter, such as cranes. In OSHA's view, a state wishing to gain approval of a plan under Section 18 must agree to assume responsibility for a significant portion of occupational safety and health regulation in the state.

accident on March 15, 2008 killed a civilian in a brownstone one block away, destroyed eighteen buildings and damaged many more within a several-block radius, and forced hundreds of people from their homes. *Id.* A second accident in April 2008 heavily damaged an apartment building across the street. *Id.* Twelve members of the public were injured in crane accidents between 2006 and 2008. *Id.* Traditionally, building codes are adopted and adapted by local jurisdictions to meet their own needs. There is no clear indication in the text of Section 18 that Congress sought to displace this practice with federal regulation.

To be sure, preempting building code provisions related to federal standards would serve the purpose identified by the plurality of avoiding duplicative layers of regulation. The saliency of this concern with respect to local building codes, however, is called into question by the easy coexistence to date of local building code requirements with federal and state plan standards. There is no indication that Congress was concerned about the existence of both local building codes and federal or state plan safety regulations.

3. *Legislative History and the Secretary's Long-Standing Interpretation Support Non-Preemption of Municipal Building Codes.*

The legislative history supports the conclusion that in enacting Section 18, Congress did not intend to displace local building codes. In presenting a substitute bill containing what was essentially the final version of Section 18, Rep. William Steiger, a primary sponsor of the legislation, stated:

> The substitute will not supplant local building codes. It is conceivable that there will be some overlap between certain standards developed under the bill and local regulations which cover the same substantive areas. For example, a standard might be promulgated . . . dealing with the necessity for, or placement of, fire exits in a plant. A local building code might also have regulations in this area.

> Whether the Federal standard would apply would depend upon the existence and operation of an applicable State plan. In addition, in the promulgation of such a Federal standard, it would be appropriate to consult local building codes and building safety officials in an effort to accommodate those codes as far as possible.

116 Cong. Rec. 38,373 (1970), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 91st Cong., Legislative History of the Occupational Safety and Health Act of 1970, at 998 (1971) (Attachment 2). This statement by a principal sponsor of Section 18 reflects his understanding that Sections 18(a) and (b) permit local jurisdictions to continue to enforce their building codes despite the promulgation of federal standards on issues covered by the local codes. *See also Township of Greenwich v. Mobil Oil Corp.*, 504 F. Supp. 1275, 1279-80 (D.N.J. 1981) (holding that township's enforcement of local zoning code and state construction code is not preempted under the OSH Act and citing legislative history).

The Secretary has similarly long interpreted the Act as not preempting laws such as building codes. This understanding is reflected in a virtually contemporaneous agency interpretation on federal preemption of fire marshal activities:

> [I]t was not Congress' intent in passing the Act to preempt these extensive activities with respect to places of employment covered by the Act. While there is some overlap in jurisdiction in workplaces, [OSHA] feels that the much broader goals of fire marshals' activities preclude their being preempted, despite the promulgation of Section 6 standards substantially the same as those enforced by fire marshals. Thus, State fire marshal activities will not be preempted regardless of whether or not a State 18(b) plan is in effect.

OSHA Policy Statement Concerning State and Local Fire Marshall Activities (March 10, 1972) (Attachment 3). To the same effect is a 1981 Directive, in which OSHA explained how it interpreted the scope of OSH Act preemption on those states without state plans. *The Effect of Preemption on the State Agencies without 18(b) Plans*, OSHA Directive No.

CSP 01-03-004 (March 13, 1981) (Attachment 4). The agency indicated the following would be unaffected by preemption: "State enforcement of standards which on their face are predominantly for the purpose of protecting a class of persons larger than employees . . . when enforced for such a purpose. State and local fire marshal activities [on] behalf of public safety and the protection of property would come within this classification."

Similarly, OSHA rulemaking has long proceeded on the assumption that local building codes exist in parallel to OSHA regulations and are not preempted by them. For example, in the preamble to the final rule on Exit Routes, Emergency Action Plans, and Fire Prevention Plans, OSHA commended the effectiveness of building codes while declining to recognize compliance with building codes as compliance with the OSHA standard. 67 Fed Reg. 67950, 67954 (Nov. 7, 2002).

Indeed, the Secretary's amicus brief in *Gade* expressly stated that building codes are not preempted. Responding to Petitioner's argument that preemption of the state hazardous waste licensing acts would portend disaster for a wide variety of state and local public health and safety legislation, the Secretary emphasized the limitations imposed by the statute and her prior interpretations. Thus, the brief asserts that state fire protection, boiler inspection, and building and electrical code requirements would not typically be preempted, even though there are OSHA standards on these subjects, because they are "laws of general applicability that only incidentally affect[] workers, not as a class, but as members of the general public." Brief for the United States at 24, n. 14 (Attachment 5). *See also* 72 Fed. Reg. 7188 (Feb. 14, 2007) (Preamble to OSHA's most recent electrical safety standard) ("State and local fire and building codes, which are designed to protect a larger group of persons than employees," are not preempted.). Thus, the Secretary's

long-held view is that traditional local building codes do not primarily effectuate worker safety and are not occupational safety and health standards.

Strong policy considerations bolster this understanding. Work practices and conditions pose a variety of serious hazards to the public including mechanical, electrical, chemical and biologic hazards. Local jurisdictions have enacted a network of industrial codes, such as building and electrical codes, and inspection requirements that touch on issues for which there are OSHA standards. If the City's crane laws are preempted because of their incidental impact on worker safety, building and electrical codes, and many other types of local regulation will also be jeopardy. The text and history of the Act give no indication that the Congress intended such a sweeping preemptive effect.

Although the Eleventh Circuit recently found a county crane ordinance preempted, *Associated Builders and Contractors Florida East Coast Chapter v. Miami-Dade County*, __ F.3d __, 2010 WL 276669 (11th Cir. 2010) (per curiam), that court did not hear from OSHA or consider the arguments made here. It is the Secretary's view that the OSH Act does not preempt local building codes that do not conflict with applicable OSHA standards. As administrator of the OSH Act, the Secretary is "uniquely qualified" to advise the Court on the proper scope of preemption. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000); *see also ibid.* ("Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) ("agency is uniquely qualified to determine whether a particular form of

state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted); *see also id*. at 506 (Breyer, J., concurring) (agency has "special understanding of * * * whether (or the extent to which) state requirements may interfere with federal objectives"). The considerations noted above support a ruling that local building codes are an independent exception to the Court's preemption ruling in *Gade*. Alternatively, as explained below, these considerations support broadly construing "laws of general applicability" under the *Gade* framework to include local building codes.

B. *The NYC Crane Ordinances Are Laws of General Applicability.*

The NYC crane operation ordinances also should be considered laws of general applicability. First, in contrast to the dual purpose laws addressed in *Gade*, the stated purpose of the ordinances is *solely* to protect public safety and property; workers are to be protected by federal OSHA standards. The structure of the ordinances supports this stated purpose. The City's crane laws are not designed to protect workers as a class. The laws regulate crane operations only to the extent that they pose a hazard to the public. Thus, the City's laws generally do not apply to the use of cranes or derricks in industrial or commercial plants or yards, or to cranes used on floating equipment. Building Code § 3319.1. The City's laws also omit important precautions contained in the federal OSHA standards that protect workers but do not protect the general public. For example, the City's laws do not address fall protection for workers on crane booms, or the use of cranes and derricks to hoist employees on a personnel platform. *See* 29 C.F.R. §§ 1926.550(c)(2); (g)(2), (3). By the same token, the City laws include requirements for

sidewalk sheds, flaggers, protection of surrounding buildings and the like that affect public safety but are unnecessary for the protection of workers. Building Code § 3319.8.1.

Second, the effect of the ordinances is to protect a group far larger than the workers on the site. As noted above, the operation of a tower crane in the City may pose a hazard to 12 to 15 surrounding buildings and 1,000 to 1,500 nearby persons. Compliance with the ordinances will unquestionably protect the site workers, but such protection is incidental to the protection of all persons who are in the vicinity, regardless of their status as employees or non-employees.

Third, like traffic and fire safety laws, the City crane ordinances comprehensively address a public hazard by imposing obligations on a wide variety of persons without regard to the existence of an employment relationship. Many of these duties are imposed on manufacturers, owners, engineers, designated representatives, and others who need not be employers or employees. The ordinances also impose requirements applicable to operators, climbers and riggers, as well as, with respect to training, to certain tower and climber crane "workers;" these people are presumably employees, but their employment status is not relevant to the enforcement or administration of the laws. Moreover, the federal standards alleged to be preemptive apply only to construction work as defined in OSHA regulations, which relates to the performance of physical trade labor on site and the management thereof, and does not generally include engineers, who are the subject of several of the City provisions. *See Secretary of Labor v. Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851 (finding engineers not engaged in construction work), *aff'd on other grounds*, 3 F.3d 1 (1st Cir. 1993).

It is significant in this context that OSHA was unable to issue a citation for the 2008 crane incident that resulted in two fatalities in the City, because the defect was in the crane, and the crane was supplied by a "bare lessor" who had no employees on site and was not subject to the OSHA construction standards. *See Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 4-5 (1st Cir. 1993) (engineering firm not liable under OSHA standards but only because it had no employees on site); *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1303 (D.C. Cir. 1995) (lessor of crane liable under construction standard because its employee was at worksite). The City's regulations apply to a far broader group of persons. In this sense, the City's crane laws reach substantially beyond the employment relationship and "regulate the conduct of workers and non-workers alike." *Gade*, 505 U.S. at 107. *See Davis v. States Drywall and Painting,* 634 N.E. 2d 304, 309-11 (Ill. App. 1995) (Illinois Structural Work Act law of general applicability because its coverage extends beyond employers and employees.) By contrast, the licensing requirements in *Gade* were enforceable by fines against *employees* who worked without the proper license and *employers* who permitted unlicensed employees to work. *Gade,* 505 U.S. at 93

Finally, the argument that the City's crane operating ordinances are laws of general applicability is bolstered by comparison with fire safety laws, which the *Gade* court recognized as a category of non-preempted "generally applicable" laws, 505 U.S. at 107. The abstract language the Court used to describe laws of general applicability is ambiguous; the concept takes practical shape from the Court's examples. Fire safety laws impose requirements that directly and specifically regulate workplace conduct in order to protect the public and property from fire. Such laws are nonetheless the

paradigmatic exemplar of laws of general applicability. The fact that NYC's crane ordinance similarly regulates workplace conduct is therefore fully consistent with its being a law of general applicability.

For example, both the International Fire Code (IFC), on which many local codes are based, and NYC Administrative Code Title 29 (NYC Fire Code) contain provisions applicable to specific workplaces, such as Aviation Facilities and Operations, NYC Fire Code Chapt. 11, IFC Chapt. 11 (2006 ed.), and Semiconductor Fabrication Facilities, NYC Fire Code Chapt. 18, IFC Chapt. 18 (2006 ed.), and specific work operations, such as Combustible Dust-Producing Operations, NYC Fire Code Chapt. 13, IFC Chapt. 13 (2006 ed.), and Welding and Other Hot Work, NYC Fire Code Chapt. 26, IFC Chapt. 26 (2006 ed.). The NYC and International Fire Codes also contain requirements applicable during the construction of buildings. NYC Fire Code Chapt. 14, IFC Chapt. 14 (2006 ed.). These include requirements for daily disposal of waste and limitations on the use of portable oxygen containers and internal-combustion-powered equipment at the construction site. NYC Fire Code §§ 1404.2, 1406.2.1, 1416**,** IFC §§ 1404.2, 1416.1 (2006 ed.) Like the crane safety laws, these work-related fire safety laws include training, certification and recordkeeping requirements. *E.g.*, NYC Fire Code §§ 1106.4.5, 2107.3 (training); 2201.7-9 (certification, licensing, recordkeeping); 2201.2-3 (hot work authorization). Similarly, state laws typically require special licensing for drivers of commercial vehicles, yet these are no doubt laws of general applicability under *Gade*. *See, e.g.*, N.Y. Veh. & Traf. § 501 (McKinney 2009).

The City's crane laws are no more "occupational" standards than are those fire safety laws specifically applicable to workplaces or work activities. These laws are not

occupational, despite the fact that they directly regulate the conduct of workers, because they are part of a broader scheme to protect the public and their effect on worker safety is incidental to their broader public purpose.[4]

CONCLUSION

The OSH Act does not preempt local building ordinances such as the City's. A variety of factors considered together establish critical differences between the state licensing acts in *Gade* and the crane operating requirements in the New York City building code support different preemption outcomes. First, building safety codes are close to the core of the traditional local police power. Second, municipal ordinances differ from state requirements in crucial ways. There was no question in *Gade* that the environmental licensing acts could have been incorporated in a state plan, and the availability of this option was a primary factor in the plurality's opinion. By contrast, the

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[4] Even if this Court disagrees with the Secretary and concludes both that local building codes may be preempted, and that the City's crane ordinances are not laws of general applicability, plaintiff's request to entirely invalidate the City's crane laws is overbroad. The federal standards here apply only to the employment relationship and to construction work as defined in OSHA regulations. *See* 29 C.F.R. § 1910.12(a). To the extent the City's laws impose obligations on persons or entities not subject to the OSH Act or the applicable crane standards, they are not preempted. There is no duplicative regulation, or overlap, in this situation. In the language of Section 18, such city laws simply do not relate to the issue addressed by the OSHA standards.

Nor is *Industrial Truck Ass'n, Inc. v. Henry*, 125 F. 3d 1305 (9th Cir. 1997), to the contrary. Although the Ninth Circuit held there that the hazard communication standard preempted a state hazard warning law applying to "any person in the course of business," a group larger than employers covered by the standard, the decision rests on deference to OSHA's view of the scope of the issue addressed by its standard and the exceptionally broad preemptive intent expressed by the Secretary in promulgating the hazard communication standard. *Id*. at 1311-1313. By contrast, the issue addressed by the construction crane standard concerns solely the safe work practices of persons subject to that standard, and the Secretary does not intend the standard to have broad preemptive effect. This Court must defer to OSHA's reasonable interpretation of its own standard. *Martin v. OSHRC*, 499 U.S. 144, 150-51, 111 S.Ct. 1171, 1176 (1991).

City's crane requirements are tailored to the unique requirements of a major urban area and are not eligible for submission as a state plan. The absence of a practical state plan option, and the Act's legislative history, support the view that local building codes are not preempted solely because they address issues regulated federally. The agency has long interpreted the Act as permitting overlapping local and federal jurisdiction on building code issues. Finally, the crane laws can reasonably be viewed as laws of general applicability rather than occupational standards. They are analogous to fire safety laws; they regulate the conduct of employers and non-employers alike and only incidentally affect worker safety as necessary to achievement of their public purpose.

WHEREFORE, the Plaintiff's motion for partial summary judgment should be denied, the City's cross-motion for summary judgment granted, and the case dismissed.

Respectfully submitted.

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