No. 12-276

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEEL INSTITUTE OF NEW YORK,

Plaintiff-Appellant,

v.

THE CITY OF NEW YORK,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

As the head of the federal agency tasked with the administration and enforcement of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (the OSH Act or the Act), the Secretary of Labor (the Secretary) is responsible for "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions…." 29 U.S.C. § 651(b). The Steel Institute, a trade association representing the interests of the steel construction industry, seeks a declaration that the OSH Act preempts various New York City Building Code ordinances governing the operation of cranes within the City because the ordinances regulate issues addressed by OSHA's Cranes and Derricks in Construction standard. The Secretary has a strong interest in presenting her view of the limits of the Act's preemptive scope, particularly as to local building codes.[1] Such codes traditionally include a network of mechanical, electrical, plumbing, and other requirements designed to protect the public from the hazards of poorly constructed buildings. OSHA standards, promulgated solely to protect the health and safety of employees, also touch upon issues addressed by building codes. If the City's crane ordinances are preempted because of their incidental impact on employee safety, building and electrical codes and many other types of local

[1] As used in this brief, "local building codes" includes codes promulgated by states and their subdivisions, including cities and counties, having the force of law and designed to protect public health, safety and general welfare as they relate to the construction and maintenance of buildings.

regulation will also be in jeopardy. The Secretary articulated her position against federal preemption of local building codes in the preamble to the Cranes standard at issue here, and in an amicus brief filed in the district court below. The Secretary submits this amicus brief in support of Appellee New York City pursuant to Fed. R. App. P. 29(a).

SUMMARY OF THE ARGUMENT

The OSH Act does not preempt local building codes like New York City's crane ordinances. 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. In passing the OSH Act, Congress could not have intended to deprive states of the power to protect their citizens from the hazards of poorly constructed buildings, and the Act's legislative history, OSHA's longstanding and consistent interpretation of the OSH Act, as well as important policy considerations, confirm that understanding. The Supreme Court's decision in *Gade* does not compel a contrary result. *Gade* recognized an exception to preemption for laws of general applicability such as traffic and fire safety laws, and the City crane ordinances are 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.

ARGUMENT

The District Court Correctly Determined that Local Building Codes Such as New York City's Crane Ordinances Are Not Preempted by OSHA Standards

A. Congress Did Not Intend that OSHA Standards Would Displace Local Building Codes

It is a fundamental principle that preemption is ultimately a question of congressional intent. *Wyeth v. Levine*, 555 U.S. 555, 565 (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 is squarely within the area of traditional local police power; therefore a finding of preemption cannot be sustained unless that was the clear and manifest purpose of Congress. *Id. See also New York State Restaurant Ass'n. v. New York City Bd. Of Health*, 556 F.3d 114, 123 (2d Cir. 2009).

As the district court found, the principal basis for rejecting the Steel Institute's preemption argument is that it produces a "manifest[ly] absurd[]" result that Congress could not reasonably have intended in passing the OSH Act. *Steel Institute of New York v. City of New York*, 832 F. Supp. 2d 310, 325 (S.D.N.Y.

2011). Acceptance of this preemption argument would threaten virtually the entire New York City Building Code, as well as the building codes of other cities, counties, and States. "It is impossible that Congress could have intended such an extensive vitiation of the States historical police powers, or such a disruptive and dangerous result." *Id*. at 326.

The New York City Building Code was enacted in 1899 with the sole purpose of protecting the public from the hazards posed by poorly constructed buildings. *Id.* at 314; N.Y. City Admin. Code § 28-101.2 ("The purpose of this code is to [regulate] building construction in the city of New York in the interest of public safety, health, welfare and the environment."). Provisions governing the operation of cranes are located primarily in Chapter 33, entitled "Safeguards During Construction or Demolition," which states:

> 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.

N.Y. City Admin. Code § 28-3301.1. Chapter 33 imposes certification and licensing requirements upon crane owners, operators, and riggers to ensure that cranes are designed and constructed in accordance with appropriate industry standards, and are maintained and operated to eliminate hazards to the public and property. *Steel Institute*, 832 F. Supp. 2d at 315. *See also* Brief for Appellee at 8-

19. The public safety hazard posed by the operation of cranes within the City is well established. The district court concluded that in New York City's densely populated environment, accidents involving cranes collapsing or objects falling while being hoisted inevitably cause damage to surrounding buildings and risk injuring people in their homes and on the street. In one five year span there were over 50 incidents of objects falling while being hoisted outside a building in the City, resulting in 21 injuries and 1 fatality. During the same period, there were at least 40 accidents where hoisting machines, including cranes, fell over, resulting in approximately 40 injuries and 9 fatalities. *Id.* at 314 (citing evidence of City engineers);[2] Brief of Appellee at 4-8, 41-42.

The Steel Institute argues that the crane ordinances are "occupational safety and health standards" because they have a direct and substantial impact on worker safety. Brief of Appellant at 10. *See also id.* at 5 (City statutes regulate worker conduct directly by prescribing how workers erect, install, inspect, maintain and use cranes and derricks). The crane ordinances are preempted, the Institute

[2] 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* Sec. Mem. of Law as Amicus in Supp. of Def. (Amicus Mem.), Attach. 1 (comment no. 404.1, Docket ID OSHA-2007-0066 (Dept. of Buildings of the City of New York, June 18, 2009)). A crane accident on March 15, 2008 killed a civilian in a brownstone one block away, destroyed or damaged 18 buildings 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*.

maintains, because they address issues also addressed by OSHA's 2010 Cranes and Derricks in Construction standard and the State of New York has not sought the Secretary's approval under 29 U.S.C. §667 for a state plan incorporating the crane ordinances. *Id*. at 8-9 (citing *Gade v. National Solid Waste Mgmt. Ass'n*, 505 U.S. 88 (1992)). However, the City crane ordinances are no more "occupational safety and health standards" than are the myriad other provisions of the New York Building Code that address issues also addressed in some manner by OSHA standards. It is inconceivable that Congress viewed local building codes as occupational safety and health standards subject to preemption simply because of their "direct and substantial" effect on worker safety. Rather, local building codes are laws of general applicability that cannot reasonably characterized as occupational safety and health standards. See discussion *infra* at p. 15. Acceptance of the Steel Institute's view would threaten to wipe out at a stroke most of the City Building Code since, as the district court found, there is scarcely a code requirement that does not directly and substantially regulate worker safety. *Steel Institute*, 832 F. Supp.2d at 325. All other local building codes in the country would likewise be threatened.

The more plausible interpretation is that Congress intended that local building codes enacted to protect public safety would co-exist with OSHA standards promulgated to protect workers employed on building sites. *New York*

State Restaurant Ass'n, 556 F.3d at 123 ("Given the traditional primacy of state regulation of matters of health and safety, courts assume that state and local regulation related to those matters can normally co-exist with federal regulations."). Indeed, examples of easy co-existence between City Building Code provisions and OSHA standards abounds. The Building Code requires, *inter alia*, that temporary electrical equipment and wiring used during the construction of buildings meet the requirements of the New York City Electrical Code, that all construction and demolition activities affecting fire prevention and firefighting, including the storage and removal of combustible materials, conform to the New York City Fire Code, and that demolition work be conducted in accordance with procedures designed to minimize the hazard to pedestrians and surrounding property. N.Y. City Admin. Code §§ 28-3303.2.3, 3303.4.6, 3303.5.1, 3303.7, 3306.2-3306.9. OSHA construction standards, in effect since at least 1986, impose requirements related to electrical safety, fire protection and demolition to protect workers. 29 C.F.R. Part 1926 Subparts K, F and T. No one has ever supposed that the New York City Electrical and Fire Codes are "occupational safety and health standards" subject to preemption because they "prescribe how workers erect, install, inspect maintain, and use" electrical and fire protection equipment in City buildings. Brief of Appellant at 5. Nor are the City's Department of Health regulations transformed into occupational safety and health standards because they

prescribe how workers must maintain sanitary conditions in restaurants. *Steel Institute,* 832 F.Supp.2d at 326; Brief of Appellee at 47. Rather, local public health and safety requirements, like the City Building Code, have long existed in harmony with OSHA standards.

The Act's legislative history further bolsters the conclusion that Congress did not intend that OSHA standards 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.

Amicus Mem., Attach. 2 (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)). This statement by a principal sponsor of Section 18 reflects his understanding that the OSH Act permits local jurisdictions to continue to enforce their building codes despite the promulgation of federal standards on issues covered by the local codes. "'The case for federal preemption is particularly weak where Congress has

indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [i]s between them.'" *Wyeth*, 555 U.S. at 574-75 (internal citation omitted). *See also Twp. 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); Brief of Appellee at 27-29 (discussing additional cases).

The Steel Institute argues that Rep. Steiger's statement that the applicability of the OSHA standard "would depend on the existence and operation of an applicable State plan" is consistent with a Congressional intent to preempt local building codes in the absence of an approved State plan. That reading is flatly contradicted by the Congressman's prior statement that the Act "will not supplant local building codes." In stating that the applicability of the OSHA standard would "depend on" the existence of a state plan, the Congressman plainly meant that federal standards would not apply at all if the state had an approved state plan, and would apply *concurrently* with local building codes in states without state plans. *See Gade*, 505 U.S. at 102 (States preempt all federal safety and health regulation by developing their own State plans.).

B. The Secretary's Long Standing Interpretation Supports Non-Preemption of Local Building Codes

The Secretary has 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.

Amicus Mem., Attach. 3 (*OSHA Policy Statement Concerning State and Local Fire Marshall Activities* (March 10, 1972)). 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. Amicus Mem., Attach. 4 (*The Effect of Preemption on the State Agencies without 18(b) Plans*, OSHA Directive No. CSP 01-03-004 (March 13, 1981)). The agency indicated that laws intended to protect the general public 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."

In promulgating the current Cranes standard, the Secretary reviewed the rule under Executive Order 13132 on Federalism. Cranes and Derricks in Construction, 75 Fed. Reg. 47,906, 48,128 (August 9, 2010). The Executive Order states that in the absence of an express preemption provision in a statute, Federal agencies shall not construe regulations to preempt State law unless there is some other clear evidence that Congress intended preemption, or the exercise of State authority conflicts with the exercise of Federal authority under the statute. *Id.*

In considering the federalism implications of the standard, the Secretary directly addressed the concerns of commenters regarding the preemptive effect of the new rule, including representatives of New York City. 75 Fed. Reg. at 48,128. The Secretary determined that the new standard would not preempt municipal building codes like New York City's crane ordinances. *Id*. She concluded, after careful examination of the specific provisions and purposes of the City's laws, that they did not conflict with the federal standard and did not pose an impediment to full accomplishment of the Act's purpose. *Id.* The Secretary explained that:

> 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). Strong policy considerations bolster this understanding. Work practices and conditions pose a variety of serious hazards to the

> public, and local jurisdictions have enacted a network of industrial codes, such as building and electrical codes that touch on issues for which there are OSHA standards. If New York City's crane 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 jeopardy. The text and history of the Act give no indication that the Congress intended such a sweeping preemptive effect.

The agency's position that local building codes are not preempted was presented to the Supreme Court in the Department's amicus brief in *Gade*. 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 "law[s] of general applicability that only incidentally affect[] workers, not as a class, but as members of the general public." Amicus Mem., Attach. 5 (Brief for the United States at 24, n.14); *see also* 72 Fed. Reg. 7136, 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.

The district court correctly deferred to the Department's view that the federal crane standard does not preempt the City's crane laws because it is through, consistent and persuasive. *Steel Institute*, 832 F. Supp. 2d at 329 (citing *Wyeth*, 555 U.S. at 577). As administrator of the OSH Act, the Secretary is "uniquely qualified" to advise the courts on the proper scope of preemption. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *see also id*. ("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.*, 518 U.S. at 496 ("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 Steel Institute argues that the Department's opinion is not entitled to deference for three reasons: (1) it was unnecessary for the Secretary to include an express preemption statement in the OSHA standard because preemption is automatic and flows naturally; (2) the preemption statement fails to explain how

the City laws affect the regulatory scheme; and (3) the statement is merely an interpretation of *Gade*. As to the first point, the Secretary considered the preemptive effect of the Cranes standard in accordance with the guidelines set out in the Executive Order on Federalism, and has incorporated explicit preemption statements in prior rules to clarify the issue for rulemaking participants and the public. *See* Hazard Communication, 52 Fed. Reg. 31,852, 31,860 (August 24, 1987). With respect to its second argument, the Secretary considered the specific requirements imposed by the City's crane laws and concluded that they would not impede the effective operation of the federal standard. She gave several reasons for this, including that local building codes have historically operated concurrently with OSHA standards without interfering with federal objectives, that the local and federal laws have different purposes and impose obligations on different classes of persons, and that the City's crane laws operate in the same manner as its Fire Safety Code, a type of local law expressly excluded from preemption under *Gade*. *See* 75 Fed. Reg. at 48,129. Finally, the Secretary's preemption statement is more than a mere interpretation of *Gade* – it reflects her "through understanding of [her] own regulation and its objectives and . . . the likely impact of the [local] requirements." *Geier*, 529 U.S. at 883.[3]

[2] Although the Eleventh Circuit held a county crane ordinance preempted, *Associated Builders and Contractors Florida East Coast Chapter v. Miami-Dade County*, 594 F.3d 1321 (11th Cir. 2010) (per curiam), that court did not hear from

C. The City's Crane Ordinances Are Laws of General Applicability Expressly Excepted from Preemption under *Gade*

The Supreme Court's decision in *Gade* does not compel the conclusion that local building codes such as the City's crane ordinances are occupational safety and health standards subject to preemption under the Act. Brief of Appellant at 10. At issue in *Gade* were two Illinois statutes that regulated the training and licensing of hazardous waste equipment operators and laborers. The stated purpose of these laws was to protect both employees and the general public. *Gade*, 505 U.S. at 93. Before the state laws took effect, OSHA promulgated a hazardous waste operations standard that included less restrictive training requirements. The Court took the case to determine whether "dual impact" state regulations like the Illinois licensing statutes were preempted by the Act and OSHA standards. *Id.* at 91.

By a five-to-four majority, the justices held that the dual impact licensing statutes were preempted; however, no rationale commanded a majority. The Court first considered whether supplementary state regulation is preempted at all. A four-justice plurality found that supplementary state regulation is impliedly

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OSHA or consider the arguments made here. Moreover the *Associated Builders* court was not persuaded that the crane ordinance at issue was in fact a public safety measure, noting that the county failed to identify a single incident in which a crane accident injured a member of the public. *Id.* at 1324. By contrast, the district court found that the evidence presented by the City documenting numerous deaths and injuries, as well as extensive property damage, clearly demonstrated the impact of crane accidents in New York City on public safety. *Steel Institute*, 832 F.Supp.2d at 330; Brief of Appellee at 41-42.

preempted. *Id.* at 98-99. The plurality relied principally on the language of Section 18(b), 29 U.S.C. §667(b). *Id.* at 99-100. 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. *Gade*, 505 U.S. at 99. Justice Kennedy joined in the result, but he, alone among the justices, reasoned that Section 18 of the Act expressly preempts supplementary state occupational safety and health regulation on an issue addressed by an OSHA standard. *Id.* at 109-10. Rejecting the plurality's implied preemption analysis, Justice Kennedy believed that "any potential tension between a scheme of federal regulation of the workplace and a concurrent, supplementary state scheme would not . . . rise to the level of actual conflict described in our pre-emption cases." *Id.* at 110-11.

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 "[a]ny 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. 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.'" *Id.* 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.

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. *Steel Institute,* 832 F. Supp.2d at 315, 327. The structure of the ordinances supports this exclusive 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. N.Y. City Admin. Code § 3319.3(6). 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. §§ 1926.1423 and 1431. 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. *See* N.Y. City Admin. Code § 3319.8.1. [4]

[4] The Steel Institute argues that two decisions of the administrative board upholding violations when the only persons injured were construction workers demonstrates that the crane ordinances "regulate the conduct of workers with a result of protecting both workers and the general public." Brief of Appellant at 15-16. It is undisputed that the crane ordinances govern the actions of owners, operators, riggers and others, some of whom will be construction workers, as that is the only possible way of protecting the public from the hazards posed by crane operations in the City. It is likewise undisputed that compliance with the ordinances will have the result of protecting not only the public but also workers

Second, the effect of the ordinances is to protect a group far larger than the workers on the site. The operation of a tower crane in the City poses a hazard to surrounding buildings and 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 laws 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, and, with respect to training, to certain tower and climber crane "workers;" these

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who may be endangered by crane accidents. That does not change the essential nature of the ordinances as public health and safety regulations. *Gade* acknowledges that laws may have a direct and substantial effect on worker safety yet qualify as laws of general applicability. 505 U.S. at 107. As the City illustrates in its brief at 44, the code requirement that a registered or licensed engineer ascertain whether there are vaults or other subsurface structures before a crane may be placed on a street helps to prevent the collapse of the street and attendant toppling of the crane, while also incidentally protecting the crane operator from injury. Clearly the overriding purpose of the code requirement is to protect public safety and property, and the incidental protection afforded workers does not alter this.

people are presumably employees, but their employment status is not relevant to the enforcement or administration of the laws.

By contrast, the federal standards alleged to be preemptive apply only to construction work which, as defined in OSHA regulations, 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). For this reason, 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 the City's crane laws similarly regulate 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.). 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). 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 2010).

The City's crane laws are no more "occupational" standards than its fire safety laws. Both the crane laws and the fire safety laws are specifically applicable to workplaces or work activities, and both directly regulate the conduct of workers. They are not occupational standards, however, 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.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling that the OSH Act does not preempt the City of New York's crane ordinances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), this is to certify that the foregoing brief complies with the type-volume limitation prescribed in Federal Rule of Appellate Procedure 32(a)(7)(B). It uses Times New Roman 14-point typeface and contains 5,641 words.

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