No. 13-187

In the Supreme Court of the United States

STEEL INSTITUTE OF NEW YORK,
Petitioner,

v.

CITY OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Steel Institute of New York is a not-for-profit association that does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

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I. THE EXCEPTION FOR LAWS OF GENERAL APPLICABILITY IS DEFINED BY THE CONDUCT REGULATED, NOT THE INTENDED RESULT.

Public safety is a universal goal. But if safety itself were the test of general applicability, no local law intended to promote public safety could ever be preempted by the OSH Act.[1]

The City's argument focuses on the intended result of its crane regulations – public safety. The City cites examples of construction cranes injuring or killing members of the public. The City cites a recent instance of a storm-damaged crane threatening public safety. Politically, the City's conclusion resonates – public safety as an intended result is generally applicable, thus, the City Statutes must be laws of general applicability not subject to OSH Act preemption.

But the laws-of-general-applicability exception to OSH Act preemption cannot be defined by the intended result of the City Statutes. Instead, the exception must be defined by the conduct regulated. Is the conduct regulated fairly characterized as occupational? Is the conduct regulated the conduct of workers performing their occupations, or is it the conduct of the workers acting simply as members of the general public?

Under *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), the City's focus on the public safety purpose of the City Statutes is misplaced. The

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[1] 29 U.S.C. § 651 *et seq.*

City should be focused on the conduct regulated by the City Statutes, and asking: Do the City Statutes "regulate the conduct of workers and nonworkers alike"? *Id.* at 107. Do the City Statutes regulate workers as workers, or do they "regulate workers simply as members of the general public"? *Id.*

A speed limit, to choose a simple example, is a law of general applicability because it regulates the conduct of each and every member of the general public who drives. Although it may have a direct and substantial impact on the safety of workers whose duties include driving, it regulates their conduct not because they are workers, but simply because they are members of the general public. Thus, a speed limit cannot fairly be characterized as "occupational" because it regulates the conduct of all members of the general public, whether or not they are workers. Its impact on workers, however substantial, is incidental to its regulation of the conduct of the public as a whole.

But the same is not true of crane regulations. The City Statutes regulate the conduct of workers as workers. Examples:

- "Lubrication shall be performed under the supervision of the crane operator, oiler or maintenance engineer." RS 19-2 § 17.4.1; App. 402.
- "The operator shall test the brakes . . . by raising [the load] a few inches and applying the brakes." RS 19-2 § 23.3.7; App. 405.
- "The operator shall not leave his position at the controls while a load is suspended." RS 19-2 § 23.4.1; App. 407.

- "Signalmen shall wear high visibility gloves." RS 19-2 § 24.4; App. 410.
- "No crane or derrick operator shall start an operation when the wind speed exceeds 30 m.p.h., or when the wind is predicted to reach 30 m.p.h. before the operation can be completed." RS 19-2 § 25.2; App. 410.
- "No crane or derrick shall be operated in such a location that any part of the machine or its load shall at any time come within 15 feet of an energized power line." RS 19-2 § 25.3.1; App. 411.

All of these provisions are directed at the conduct of workers performing their occupations. All of these provisions regulate *only* occupational conduct. They do not in any manner regulate the conduct of members of the general public who are not crane operators, oilers, maintenance engineers, signalmen, or other crane and hoisting equipment workers.

The City Statutes regulate the conduct of workers as workers, not as members of the general public, even though they are intended to (and do) promote public safety. Thus, they are "dual impact" occupational standards subject to preemption by existing federal standards, and not laws of general applicability.

Analyzing whose conduct is regulated – workers versus the general public – brings into sharper focus the conflict between the Second and Eleventh Circuits.

The Second Circuit focused on the City's intent: "Most importantly, the City regulations are not directed at safety in the workplace. * * * The City

regulations . . . are directed at public safety . . . ." App. 15-16. With that focus, the court concluded that the City's crane regulations "are laws of general applicability, not directed at the workplace, that regulate workers as members of the general public, and are therefore saved from preemption." App. 18. But the Second Circuit did not offer a single example of a provision in the City Statutes which regulates the conduct of the public.

In contrast, the Eleventh Circuit in *Associated Builders and Contractors Florida East Coast Chapter v. Miami-Dade County*, 594 F.3d 1321 (11th Cir. 2010), focused on the question of whose conduct Miami-Dade County's crane ordinance regulated. The County argued – just as the City argues here – that its wind load standards did not regulate an occupational safety issue, but were instead directed at public safety. *Id.* at 1324. The Eleventh Circuit was not persuaded. Because the "wind load standards regulate how *workers* use and erect cranes during the course of their employment," the Eleventh Circuit concluded that Miami-Dade County's crane ordinance was a dual impact occupational regulation subject to OSH Act preemption. *Id.* (emphasis in original).

The Court should grant certiorari to resolve that circuit conflict, and to clarify the distinction between an occupational standard which regulates workers as workers, and a law of general applicability which regulates workers simply as members of the general public.

II. LOCAL CONDITIONS DO NOT CHANGE THE PREEMPTION ANALYSIS.

The City focuses attention on local conditions under which cranes operate in New York City – on or adjacent to busy streets and sidewalks; abutting occupied buildings; in close proximity to traffic and pedestrians. But local conditions do not transform preempted, duplicative occupational regulations into laws of general applicability.

Because of local conditions, New York may seek approval of a state plan that addresses the special needs of New York City and other dense urban areas. That is the purpose of § 18(b) of the OSH Act.[2] See *Gade*, 505 U.S. at 100 (state may develop an occupational safety plan "tailored to its own needs"). But in the absence of an approved state plan, the City may not regulate "an occupational safety or health issue with respect to which a federal standard has been established." *Id.* at 102.

The fundamental question here is the line between regulation of workers performing tasks that are only performed by workers and the regulation of workers performing tasks that are performed by everyone. The City shrouds the real issue by directing attention to local conditions.

III. THIS CASE IS AN IDEAL VEHICLE FOR DECIDING THE QUESTION PRESENTED.

According to the City, "[i]n addition to the general question as to whether the local regulation constitutes

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[2] 29 U.S.C. § 667(b)

an occupational safety and health regulation, one must also ask whether an OSHA standard exists on the same issue," which the City describes as a "complicated and painstaking task." Brief in Opposition, pp. 24-25. That, the City argues, makes this case an inappropriate vehicle for deciding the important question presented.

What the City's argument overlooks is that this task, however complicated or painstaking it may have been, has already been performed by the Second Circuit. The court first reviewed the scope and reach of OSHA crane regulations, App. 4-6, then the scope and reach of the City Statutes. App. 6-10. That examination showed that the City Statutes and the OSHA crane standards regulate the same things, leading the court to conclude: "The City regulations may employ different means, but they nonetheless constitute 'regulation of an occupational safety or health issue with respect to which a federal standard has been established.'" (quoting *Gade*, 505 U.S. at 102). App. 14.

Despite the City's contrary suggestion, this case does not present any uncompleted fact-finding task which would make it an inappropriate vehicle for deciding the important question on which the Second and Eleventh Circuits split: Can state "dual impact" occupational safety and health laws that regulate workers as workers, and not as members of the general public, *simultaneously* be laws of general applicability that are not subject to federal preemption?

This Court should grant certiorari to resolve that question.

Respectfully submitted,

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