No. 13-187

In the
Supreme Court of the United States

STEEL INSTITUTE OF NEW YORK,

Petitioner,

-against-

CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondent
100 Church Street,
New York, New York 10007.
(212) 356-0847
tsadrieh@law.nyc.gov

LEONARD J. KOERNER*
EDWARD F.X. HART,
KAREN SELVIN,
TAHIRIH M. SADRIEH,
of Counsel.
*Counsel of Record

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PRELIMINARY STATEMENT

By this litigation petitioner seeks a declaratory judgment finding 77 separate New York City Building Code provisions and reference standards preempted by the federal Occupational Safety and Health Act ("OSH Act"), contending that they are all occupational safety and health standards for which there is an Occupational Safety and Health Administration ("OSHA") standard in effect. Such a judgment would wipe out decades of legislation in the area of crane safety, much of it in effect decades prior to the enactment of the OSH Act.

The issue presented is whether the City of New York may enact and enforce regulations to protect public safety and property, both public and private, from the hazards posed by improperly maintained or operated cranes and hoisting devices placed on and adjacent to city streets and sidewalks; or whether such regulations are preempted as "occupational safety" regulations by OSHA regulations governing crane operators and their employers.

In *Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88 (1992), this Court found that state and local occupational safety and health regulations for which there is an OSHA standard in effect are preempted by that standard, even if the local regulation has "some additional effect outside the workplace" such as public safety. *Id*. at 107. In the same case, however, this Court also specifically stated that the OSH Act does not preempt laws of general applicability, such as fire safety laws, even if such laws have a substantial impact on worker safety. Id.

The regulations at issue here have the clear purpose of protecting public safety and property. Not only is this their declared purpose, but such purpose is also evident in the design and content of the regulations, which specifically exclude situations where cranes are used on enclosed work sites. Given the density of the City and the resultant proximity of working cranes to surrounding buildings, streets and sidewalks, the need for such regulations can hardly be questioned. The record here amply documents the hazards posed by the use of cranes in such circumstances. Further, if the City is not permitted to regulate to protect its citizens from these hazards, there is no other entity that can do so. As the Court of Appeals properly found, while these regulations may also protect crane workers, they are laws of general applicability comparable to the fire safety laws identified in *Gade*.

Based on these facts, there is no reason for the Court to grant *certiorari* review.

STATEMENT OF THE CASE

A. The Use of Hoisting Machines in New York City.

New York City is a densely populated city. Buildings are immediately adjacent to each other, and often rise many stories into the air. As such, construction sites in New York City are generally not contained locations. Rather, they are the places where buildings are going up, abutting structures occupied by residents and businesses, surrounded by busy streets and sidewalks (J.A. 136).[1] Accordingly, cranes are almost always operated on or adjacent to city streets and sidewalks, abutting buildings occupied by residents and businesses (J.A. 136).

A variety of hoisting machines, including cranes, derricks, material hoists, personnel hoists, rope and pulley systems, and custom engineered hoisting machines are used to construct, repair, and maintain buildings across the five boroughs of New York City (J.A. 136). Such machines can operate from the street, lifting objects over sidewalks and into job sites, onto the roofs of existing buildings, or through windows and into apartments or they can operate from inside a construction site reaching over the sidewalk and street to lift materials into the site (J.A. 137).

Hoisting machines operating from a street or within a construction site have collapsed,

[1] Unless otherwise indicated, parenthetical references to "JA" refer to pages of the Joint Appendix in the Court of Appeals.

overturned, broken, or dropped materials being hoisted, injuring members of the public (J.A. 137). Between 2004 and 2009, there were 18 instances of objects falling while being hoisted outside a building, resulting in injuries to 8 members of the public and 13 workers, and one worker fatality (J.A. 135). During the same period, there were 33 other instances of objects falling while being hoisted outside a building, often hitting a bus or taxi in the street or landing on the sidewalk but, miraculously, resulting in no injuries or fatalities (J.A. 135).

Objects can fall while being hoisted for a variety of reasons: a worn rope or sling snaps, the engine or mechanical system of the hoisting machine malfunctions, the object is not properly secured for hoisting and comes loose, or the operator loses control of the hoisting machine causing the object to fall (J.A. 135).

In addition, the hoisting machines themselves can overturn, collapse or break due to a variety of causes, such as improper repair, lack of maintenance, faulty installation or setup of the machine, high winds, or operator error (J.A. 136). Between 2004 and 2009, there were 15 instances of a hoisting machine overturning, collapsing, or breaking, resulting in injuries to 27 members of the public and 15 workers, and fatalities to 8 workers and 1 member of the public (J.A. 136). During the same period, there were 33 other instances of a hoisting machine overturning, collapsing, or breaking, but miraculously resulting in no injuries or fatalities (J.A. 136).

Mobile cranes (*See* J.A. 155-156) frequently operate from City streets, separated from traffic by

only traffic barriers or cones (J.A. 138, 157). Given the tight confines of space in New York City, even when a mobile crane operates within a property line, it often directly abuts the street or sidewalk (J.A. 138, 161). The largest mobile cranes operating in New York City can lift weights of up to 825 tons, and reach 750 feet in the air (J.A. 138). Mobile cranes have overturned or collapsed (*See* J.A. 158-160), injuring members of the public (J.A. 138).

Tower cranes (*See* J.A. 162-163) are located within a jobsite separated from the public by a fence (J.A. 138, 164). However, tower cranes are often located against a public street or sidewalk and swing over surrounding streets and buildings (J.A. 138, 165). The largest of the tower cranes operating in New York City can lift weights of up to 115 tons and stands nearly 1,800 feet in the air (J.A. 138). Tower cranes have collapsed and overturned, falling outside of the jobsite onto the street or adjacent properties, crushing adjoining buildings, injuring and killing members of the public (J.A. 138, 166-167).

Tower cranes also pose particular risks because of the way that they are put together. Tower cranes arrive at a jobsite as a set of pieces which must be assembled at the start of the job and disassembled at the end of the job (J.A. 146). As a building under construction rises in height, the tower crane must also rise, a process known as jumping (J.A. 146). To assemble, jump, or disassemble a tower crane, the huge pieces that make up the crane must be lifted and lowered directly from the streets of New York, next to traffic and surrounding buildings (J.A. 147, 183-187). This poses a risk to the public (J.A. 147).

One particularly terrible accident involving a tower crane occurred on March 15, 2008. On that date, a tower crane being jumped at 303 East 51st Street in Manhattan, collapsed, killing 6 construction workers and 1 member of the public (J.A. 147). The civilian, a visitor to New York City from Florida, was a full block from the crane (J.A. 147). She was inside a four story brownstone crushed by the collapsing crane (J.A. 147). In addition to the tragic loss of life, several surrounding buildings were heavily damaged (J.A. 147). A steel beam from the crane impaled the side of a building, landing in a person's kitchen (J.A. 147). Eighteen buildings had to be fully vacated, including three multi-story apartment buildings (J.A. 147, 188-189).

Personnel hoists are elevators that run along the exterior of a building under construction (J.A. 151). They attach to the side of the building and can climb dozens of stories in the air (J.A. 151, 193). Personnel hoists can collapse or overturn, and objects from the hoist or the hoist tower can fall onto the streets below (J.A. 151).

On July 21, 1998, a 50-story tall personnel hoist at 4 Times Square collapsed, crushing a building across the street and killing a member of the public in her apartment (J.A. 151). The collapse injured 14 others, although New York City Department of Buildings' ("DOB") records do not specify whether the injured individuals were construction workers or members of the public (J.A. 151).

Between 2004 and 2009, there were 3 incidents of a personnel hoist breaking or a part of the hoist falling, resulting in injuries to 2 workers

and 2 members of the public (J.A. 151). During the same period, there were 8 instances of a personnel hoist breaking or a part of the hoist falling, often landing in the street or sidewalk, but miraculously resulting in no injuries or fatalities (J.A. 151).

B. City Statutes

The City of New York has regulated cranes and hoists since at least 1928 (J.A. 339, 537-541). The City increased its regulation in this area in 1940 (J.A. 339, 543-548), and again in 1969 (J.A. 339, 342-428).

The challenged statutes are largely contained within Chapter 33 of the New York City Building Code ("BC"), Title 28, New York City Administrative Code, §§ 101, *et seq*. The articulated purpose of the Building Code is to regulate "building construction in the city of New York in the interest of public safety, health and welfare." BC § 101.2.

Chapter 33 of the Building Code is entitled "Safeguards During Construction or Demolition." Section 3301.1 of that chapter defines the chapter's scope as follows:

> 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.

The challenged statutes constitute a comprehensive scheme designed to further this purpose.

The Building Code provides that a crane or derrick must have a certificate of approval as to the specific make and model before it is used in the City. BC §§3302.1, 3319.4. The owner of a crane must obtain a certificate of operation indicating that it "is in a safe operating condition." BC §3319.5(1). Such a certificate must be renewed each year. BC §3319.6(1). Before a crane or derrick is used at a particular job site, it must be issued a certificate of on-site inspection. An application for such a certificate must

> be accompanied by plans showing proposed locations of the crane or derrick, pertinent features of the site such as assumed soil bearing values, ground elevations and slopes, vaults or other subsurface structures, supporting platforms or structures, and the swing of the crane or derrick." Reference Standard ("RS")[2] 19-2 § 8.1.1.

In addition, a licensed engineer or registered architect must certify, among other things, "that he has explored the existence of any sheeting or retaining walls supporting soil adjoining any excavation which may be affected and certifies as to

[2] The DOB has also promulgated Reference Standards 19-2, which pertains o power operated cranes and derricks. This reference standard is set forth in the appendix to Title 27 of the New York City Administrative Code.

its adequacy." RS 19-2 § 8.1.1(c). "If the crane or derrick is to be on the street," the engineer or architect must also certify "that he has explored the existence of vaults or other subsurface structures which could impair the bearing value of the street or sidewalk." RS 19-2 § 8.1.1(d).

The Code requires that the assembly, jumping and disassembly of a tower crane be planned by a licensed engineer, for the plan to be reviewed and approved by DOB, and for a safety meeting to be held prior to assembly, jumping and disassembly operation. BC §§3319.8, 3319.9 and 3319.10.

Additional regulations govern the design, construction, maintenance and operation of hoisting equipment in general, and require that the Commissioner of Buildings be notified in the event of an accident. B.C. §3316.

Many of these regulations do not involve particular worksites or individuals involved in an employer-employee relationship. In addition, the regulations exclude from their purview situations where members of the public and property are unlikely to be affected, such as where the work is taking place entirely within an industrial yard or operating at least a boom's length from an adjoining property. BC §3319.3(6), RS §8.1.3.1 Further, some of the regulations, such as the prohibition against carrying loads over occupied buildings unless the top two floors are vacated (RS §23.3.5), have little or no impact on worker safety.

C. DOB's Enforcement of City Statutes.

A major aspect of DOB regulation of cranes and hoists is the certificate of on-site inspection. The application for a certificate of on-site inspection is reviewed by DOB plan examiners (J.A. 141). DOB plan examiners often find mistakes in plans and calculations submitted by the filing engineer in support of an application for a Certificate of On-site Inspection (J.A. 143).

On one occasion, DOB discovered a proposed tower crane foundation that would have been overstressed by 260%, leading to immediate collapse of the crane (J.A. 143). Another proposed tower foundation was found to be 40% overstressed, seriously compromising safety (J.A. 143). With regard to mobile cranes, in one instance, DOB reviewed a proposed use that, if allowed, would have inadvertently overloaded a street, potentially collapsing through the ground and rupturing a steam main (J.A. 143). Another mobile crane, if used as proposed, would have placed significant stress on a 19th century stone foundation, potentially collapsing it and the building it supported (J.A. 143). All of these mistakes were caught by DOB, forcing the engineers to correct their designs, and thus averting possible accidents (J.A. 143).

After an application is reviewed and approved by DOB, the crane can be set up at the jobsite. Before it is permitted to operate, the crane must pass an inspection performed by either the engineer who submitted the plans to DOB or by a DOB inspector (J.A. 143). This inspection verifies that the crane is set up and located in accordance with the approved plans (J.A. 143). After the crane

passes this inspection, it is issued a Certificate of On-site Inspection and allowed to work (J.A. 143). Cranes not set up in accordance with the approved plans have collapsed through the ground and overturned (J.A. 144, 177).

During the course of the operation of a crane at a jobsite, DOB will conduct inspections, separate and apart from the inspection conducted for the Certificate of On-site Inspection or the annual inspection for the Certificate of Operation, to ensure the crane has been maintained and is operating safely (J.A. 145). The job site inspection is based on a standardized checklist (J.A. 145).

Such inspections have uncovered a wide range of problems. DOB jobsite inspections have uncovered cranes leaking hydraulic fluid (J.A. 145, 178), bent or damaged structural components on the crane (J.A. 145, 179), and cranes hoisting objects over the heads of pedestrians (J.A. 145). DOB inspectors have found bent tower crane foundations (J.A. 145, 180). Checks of the connection points holding cranes together have revealed loose bolts and pins (J.A. 145). Inspections of tower crane tie-in connections have uncovered loose bolts, defective welds, and lack of reinforcement in the building (J.A. 145-146). DOB inspectors have found cranes that have malfunctioned, leaving objects suspended in midair (J.A. 146, 181), and requiring emergency repairs overseen by DOB (J.A. 146). DOB inspectors have also found defective hooks and rigging (J.A. 146, 182).

In 2009 alone, DOB inspectors issued violations to 189 cranes operating in New York City, requiring that the crane be repaired or

operations brought into conformance with DOB regulations, thus preventing potential accidents (J.A. 146).

When a hazardous condition is discovered at a job site by a DOB inspector, the crane owner or crane equipment user is issued a notice of violation, which may involve a civil penalty. If the condition is immediately dangerous to public safety, a stop work order is also issued, which prohibits operation of the crane until the condition is remedied and the stop work order is lifted by DOB (J.A. 146).

D. OSHA Regulations

Congress established the Occupational Safety and Health Act in 1970. The need for the Act was based on a congressional finding that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce…." 29 U.S.C. 651(a). Its purpose is "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). In pursuit of this purpose, the OSH Act places duties on employers and employees. 29 U.S.C. 654.

The OSH Act authorizes the Secretary of Labor to promulgate federal occupational safety and health standards. 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, method operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. 652(8).

The Secretary of Labor has delegated certain statutory responsibilities under the OSH Act to the Occupational Safety and Health Administration.

("OSHA"). OSHA has promulgated occupational safety and health standards relating to many industries. One set of OSHA regulations relates to the use of hoisting equipment, such as cranes and derricks. See 29 C.F.R., Part 1926, Subpart CC. These regulations address a broad swath of occupational safety and health issues involved in the operation of cranes and other hoisting equipment.

E. Position of United States Department of Labor on Interaction of OSHA Crane Regulations and City Statutes.

The OSHA Crane Regulations were amended during the course of this litigation, and published in their current form on August 9, 2010, with an effective date of November 8, 2010. In the preamble to its new OSHA rules, the Labor Department states, in a section entitled "Federalism," that local building laws, such as the New York City crane statutes at issue in this case, are generally applicable regulations not preempted by the federal rules (S.A. 117-118).[3] It specifically notes that "[t]he Secretary has interpreted the Act as not preempting laws such as building codes and OSHA rulemaking has long proceeded on the assumption that local building codes exist in parallel to OSHA regulations and are not preempted by them" (S.A. 118).

The Department of Labor also submitted an amicus brief in support of the City's position to the

[3] Unless otherwise indicated, parenthetical references to "S.A." refer to the pages of the Special Appendix in the Court of Appeals.

District Court and in the Court of Appeals. See Docket Nos. 31, 70.

THE DECISION BELOW

In a unanimous opinion, the Court of Appeals for the Second Circuit affirmed the United States District Court for the Southern District of New York's (McMahon, J.) dismissal of the action on summary judgment.

The Court of Appeals noted that the instant case is governed by this Court's ruling in *Gade v. National Solid Waste Managemnt Ass'n*, 505 U.S. 88 (1992). Pursuant to that case, a state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety" is preempted under the OSH Act with respect to any issue for which a federal standard has been established. *Id*. at 102, 107. This is true, even with respect to dual impact statutes. *Id*. at 10-5. Importantly, however, this Court recognized an exception for state and local regulations that are of "general applicability." App. 12.

The Court of Appeals found that the City's crane regulations are "dual impact" regulations. While the purpose of the regulations is to protect public safety and welfare, and while they have such an effect, another direct and immediate effect of the regulations is to protect workers at the site. App. 13. However, the Court found that the City's crane regulations are saved from preemption as they are laws of general applicability that do not conflict with OSHA standards, and by their terms, apply to the conduct of workers and nonworkers alike.

In particular, the Court noted that, unlike the statute at issue in *Gade*, the City's crane regulations are not directed at workplace safety. App. 15. The regulations apply all over the City, and are not limited to work places or construction sites. Indeed, to the extent that hoisting activity is confined to a workplace, it is expressly excluded from the scope of the City's regulations. App. 16. As such, the City's regulations are directed at public safety, even though this goal is achieved, in part, by regulating the conduct of workers. The Court further noted that police powers that protect everyone will naturally regulate some workers, but can nonetheless be considered laws of general applicability. They are specific applications of a general prohibition on conduct that endangers the populace. Indeed, it is difficult to imagine a crowded city without such regulations. App. 16.

The Court of Appeals did not defer to the Department of Labor's views on whether the City's crane regulations are preempted, but it did give some weight to the agency's explanation of how state or local laws may affect the federal regulatory scheme. The Court was "reassured by OSHA's view—to the extent that it is based on OSHA's long experience in formulating and administering nationwide workplace standards—that the City's regulations … do not interfere with OSHA's regulatory scheme. App. 19.

REASONS FOR DENYING THE WRIT

Petitioner seeks review primarily on the ground that the Court of Appeals' decision finding that public health and safety laws which regulate worker conduct are laws of general applicability, even if worker safety is also protected, creates a

conflict with *Gade v. National Solid Wastes Management Association,* 505 U.S. 88 (1992) (Pet., at 7) and the Eleventh Circuit's decision in *Associated Builders and Contractors Florida East Coast Chapter v. Miami-Dade County, FL*, 594 F.3d 1321 (11th Cir. 2010). These allegations of conflict are largely illusory, however, and thus do not provide a basis for granting *certiorari*.

Petitioner's interpretation of *Gade* as prohibiting any local regulation of worker conduct that has an impact on worker safety, no matter the broader impact of the statute at issue, is ultimately irrational. The effect of such a holding would be to decimate the police power of state and local governments to protect their citizens. There is no indication in the text of the opinion that this Court intended such a dramatic result. Further, this decimation of local police power would be by implication. Accordingly, in addition to resulting in potentially disastrous real world consequences, such a holding would be contrary to the large body of this Court's precedent on the issue of preemption and local police power.

Perhaps for this reason, although more than twenty years have passed since this Court's decision in *Gade*, the City has not found any Court of Appeals' cases dealing with the preemption of local police power regulations by OSHA other than the *Associated Builders* case. As such, the issue has not been the subject of simmering debate.

Further, while on its surface, there is a conflict between the decision of the Second Circuit in this case, and that of the Eleventh Circuit in *Associated Builders*, the differences are noteworthy. In *Associated Builders*, the Eleventh

Circuit addressed a challenge to a single regulation based on a limited record, and without the input of the agency responsible for administering the OSH Act and its regulations. The Second Circuit, on the other hand, addressed a challenge to an entire section of the New York City Building Code on an ample record of the public purpose behind the regulations at issue, with the benefit of the Labor Department's views on the issue.

In sum, this case does not present a conflict with this Court's decision in Gade, and does not present any meaningful conflict among the circuits on an issue of significance. Accordingly, this case does not merit the attention of this Court, and certiorari should be denied.

I. THERE IS NO CONFLICT WITH THE COURT'S DECISION IN *GADE*.

In *Gade,* this Court held that OSHA regulations on a particular issue preempt state occupational safety and health regulations on the same issue, even when the state law also has some additional purpose. *Id*. at 99-100, 105. The Court further stated that a state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety" should be considered an occupational safety and health regulation for purposes of preemption analysis. *Id*. at 105. The Court modified this general pronouncement, however, stating as follows:

> 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. *Id.*

In arguing that the City's crane regulations are preempted, petitioner relies on a mechanistic reading of this language. Petitioner argues that the crane regulations have a direct and substantial impact on worker safety and, at least some of the regulations, regulate workers as workers, not as members of the general public. While there is a superficial plausibility to this argument, it ignores the fundamental issue presented by the above discussion. That is, OSHA regulations do not preempt laws of general applicability, even when such laws have a substantial impact on worker safety. This proviso is made necessary by the limited nature of the OSH Act and its regulations, which apply only to issues of workplace safety and only to the conduct of workers and their employers. *See Lindsey v. Caterpillar*, 480 F.3d 202, 208 (3d Cir. 2007).

Notably, the Court's above quoted language appears to have been influenced by a discussion in the amicus brief submitted by the Department of Labor in support of preemption in that case. In response to the State of Illinois' argument that preemption of its hazardous waste licensing statute would lead to preemption of a variety of state and local health and safety legislation, the federal

government emphasized the limitations of the OSH Act and its regulations. It represented that "[a] state law of general applicability that only incidentally affects workers, not as a class, but as members of the general public, cannot fairly be described as an 'occupational' standard" (J.A. 254). The Labor Department further stated that the OSH Act would not preempt "state fire protection, boiler inspection, or building and electrical code requirements, even though there are OSHA standards on these subjects, because the state standards do not aim to protect workers as a class, and do not have that primary effect." *Id*.

The salience of this point is clarified by the Court's reference to fire safety and traffic safety regulations. As the Court of Appeals discussed, while such regulations are for the protection of the general public, as a practical matter, such regulations often regulate workers as workers, and have a direct and substantial impact on the safety of such workers. App. 17. This is because certain activities which have the potential to cause widespread damage are generally only undertaken by specialized workers. Thus, much of the New York City Fire Code deals with the regulation of fire hazards in particular industries. *See* e.g. 29 Admin. Code 316 (Automotive Wrecking facilities): 29 Admin. Code, chap. 11 (Aviation facilities and Operations); chap. 12 (Dry Cleaning) chap. 26 (Welding and Other Hot Work). Pursuant to petitioner's formulation, such statutory sections would likely be preempted under *Gade*. Yet, *Gade* specifically refers to fire safety codes as exempt from preemption as laws of general applicability.

Accordingly, while *Gade* provides guidance as to what constitutes a law of general applicability

and what constitutes an occupational safety and health regulation, the question to be answered remains whether the local regulation at issue can fairly be characterized as an occupational health and safety standard. As the Court of Appeals cogently explained, regulations that are not directed at workplace safety are not occupational safety and health standards. App. 15-16. Local laws which regulate industry practices in order to protect public safety and property are not occupational safety and health standards. "They are specific applications of a general prohibition on conduct that endangers the populace…." App. 16.

As the Court of Appeals discussed, the City's crane regulations are not directed at workplace safety; they are directed at public safety and the protection of property. While worker safety and public safety are often intertwined in the operation of cranes in New York City, this is not always the case. A vivid example of a situation where this was not true occurred during Hurricane Sandy in October 2012. In the midst of the storm, a crane collapsed and dangled over West 57th Street for close to a week. Several blocks surrounding the site were closed and numerous buildings evacuated at the height of the storm. New York City DOB inspectors were the ones who monitored and inspected the securing of the collapsed crane and thus ensured that it was safe for residents of the neighboring buildings to return to their homes. *See* App. 13, n. 7 and articles cited therein. Notably, crane workers were not on site, and thus not at risk, when the crane collapsed.

This incident also illustrates the Court of Appeals' formulation of regulation of industry in the interest of public safety as a specific application

of the general rule that one must do no harm. As a general rule, individuals are prohibited from endangering their neighbors and their neighbors' property. Specifically, here, they should not dangle enormous objects over their neighbors' heads. If they do, the City is permitted to make them stop. The fact that the only people capable of safely removing the danger are trained workers should not limit the City's power to ensure that the danger is removed.

Petitioner's contention that *Gade* requires such a result is an irrational interpretation of this Court's ruling. Further, it runs directly contrary to the great body of precedent that this Court has produced on the issue of preemption.

When Congress passes legislation in a field that is traditionally reserved to the states, the presumption is against preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). *See also Wyeth v. Levin*e, 555 U.S. 555, 565 (2009). This is because it is the states that are vested with the responsibility to protect the health, safety and welfare of their citizens. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Accordingly, "[i]n areas of traditional state regulation, [courts] assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

This is particularly true in cases involving implied preemption. This Court has stated that it is "reluctant to infer preemption." *Bldg. & Constr. Trades Council v. Associated Builders and Contrs.*, 507 U.S. 218, 224 (1993)(internal citations omitted). "[I]nference and implication will only

rarely lead to the conclusion that it was the clear and manifest purpose of the federal government to supersede the states' historic power to regulate health and safety." *Id*. (internal quotation marks and citations omitted).

Here, petitioner argues that in enacting federal occupational safety and health standards, Congress intended, by implication, to preclude state and local governments from enacting laws for the protection of its citizens which also regulate OSHA-regulated workers. Petitioner has pointed to no evidence to support this argument, much less evidence that makes such an intent "clear and manifest." Further, the argument that, in enacting legislation to ensure the health and welfare of the nation's workers, Congress intended to preclude localities from stopping work that presents a danger to the public, and from requiring contractors to prove that a crane and its loads will not damage City streets and underlying infrastructure before permitting them to be placed there strains credulity.

As such, the Court of Appeals' ruling here does not conflict with *Gade* and accordingly, does not merit the attention of this Court.

II. THERE IS NO MEANINGFUL CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL ON AN ISSUE OF SIGNIFICANCE.

While there is a technical conflict between the Second Circuit and the Eleventh Circuit regarding whether wind load standards for cranes are preempted by OSHA, there is no meaningful

conflict among the circuits on any issue meriting the attention of this Court.

First, the posture of the issues presented to the two courts differs significantly. The Eleventh Circuit was asked to decide only whether a particular regulation is preempted, while the Second Circuit was asked to decide whether an entire section of the City's Building Code is preempted. In the Eleventh Circuit case, the record apparently indicated that cranes are used in closed worksites, and further did not establish a single instance of a member of the public being injured by a crane during a hurricane. *Associated Builders*, 594 F.3d at 1324. Accordingly, the Eleventh Circuit appeared to find that any protection to the general public is tangential to the protection provided to workers at their worksites. *Id*. By contrast, the record here establishes that, in New York, cranes are generally used on and adjacent to public streets, placing them, and the loads they carry, in immediate contact with members of the public. The record further establishes that crane accidents have not only injured, but killed, members of the public on a number of occasions, and that the work of DOB inspectors has uncovered errors which could have led to injuries or property damage in many others. It also does not appear that the Eleventh Circuit considered whether the Miami-Dade regulation at issue there could be saved from preemption as a law of general applicability. Finally, the Eleventh Circuit's decision addressed a prior version of the OSHA regulations. That version did not contain the Labor Department's explicit statements regarding its views of the interplay between OSHA's crane regulations and local building code provisions governing cranes. As the Labor

Department did not otherwise participate in the Eleventh Circuit case, the Court there also did not have the benefit of the Labor Department's views on this subject.

Further, although more than twenty years have passed since this Court issued its decision in *Gade*, the City has been unable to locate any other Court of Appeals opinion addressing the interplay between local public safety regulations and OSHA regulations addressing the same subject area. As such, this is not an area where there has been a well developed discussion of the issues that has led to conflicting views which require resolution by the Court.

III. THIS CASE PRESENTS A DIFFICULT VEHICLE THROUGH WHICH TO ADDRESS ANY AMBIGUITIES IN THE MEANING OF *GADE* OR CONFLICT WITH THE ELEVENTH CIRCUIT.

To the extent petitioner raises any questions regarding potential conflicts with *Gade* or *Associated Builders*, the instant case does not present a viable vehicle for resolving those issues.

The question of whether OSHA regulations preempt local regulations turns on a number of discrete inquiries. In addition to the general question as to whether the local regulation constitutes an occupational safety and health regulation, one must ask whether an OSHA standard exists on the same issue, and thus might be subject to a savings clause. One must also ask whether the local statutes regulate workers or their employers, as opposed to manufacturers, owners, or others who are not covered by OSHA regulations.

The answers may be different with respect to each specific statute challenged.

Here, however, petitioner is not challenging a limited number of statutes; petitioner is challenging virtually an entire code section, consisting of 77 different statutes and reference standards. Each of these governs a different aspect of the use and maintenance of cranes in the City. Each applies to different actors. Some apply to crane manufacturers; some to crane owners; some to crane operators; some to licensed engineers. Accordingly, a thorough analysis of each of these statutes and reference standards and how they relate to specific OSHA standards is a complicated and painstaking task. As such, this case cannot provide a clean factual basis for a discussion of overriding principles regarding the interplay between federal OSHA standards and local public safety regulations.

Accordingly, even if petitioner raises some issues of conflict, this case does not present an attractive vehicle for deciding any issues of significance to the nation as a whole.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondent,
100 Church Street,
New York, New York 10007.
(212) 356-0847
tsadrieh@law.nyc.gov

LEONARD J. KOERNER*
EDWARD F.X. HART,
KAREN SELVIN,
TAHIRIH M. SADRIEH,
of Counsel.
*Counsel of Record