

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARY GADE, DIRECTOR, ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY, Petitioner V.
NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION

CASE NO: 90-1676

PLACE: Washington, D.C.

DATE: March 23, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARY GADE, DIRECTOR, ILLINOIS :

4 ENVIRONMENTAL PROTECTION :

5 AGENCY, :

6 Petitioner :

7 v. : No. 90-1676

8 NATIONAL SOLID WASTES :

9 MANAGEMENT ASSOCIATION :

10 - - - - -X

11 Washington, D.C.

12 Monday, March 23, 1992

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:02 a.m.

16 APPEARANCES:

17 JOHN A. SIMON, ESQ., Assistant Attorney General of
18 Illinois, Chicago, Illinois; on behalf of
19 the Petitioner.

20 DONALD T. BLISS, ESQ., Washington, D.C.; on behalf of the
21 Respondent.

22 WILLIAM K. KELLEY, ESQ., Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.; on
24 behalf of the United States as amicus curiae,
25 supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-1676, Mary Gade v. National Solid Wastes
5 Management Association. Mr. Simon.

6 ORAL ARGUMENT OF JOHN A. SIMON

7 ON BEHALF OF THE PETITIONER

8 MR. SIMON: Mr. Chief Justice, and may it please
9 the Court:

10 The growing awareness of the dangers posed by
11 work on hazardous waste sites to the general public and
12 the environment prompted the Illinois legislature to enact
13 the Illinois Hazardous Waste Crane Operators Licensing Act
14 and the Illinois Hazardous Waste Laborers Licensing Act.

15 These Illinois licensing acts ensure that only
16 qualified competent people engage in these hazardous waste
17 sites in Illinois by demonstrating through training,
18 testing, and experience their competency. The Seventh
19 Circuit Court of Appeals held the Illinois licensing acts
20 preempted under the OSH Act, the Occupational Safety &
21 Health Act because, in addition to protecting the
22 environment and the public safety, they also protect
23 worker safety -- workers regulated by OSHA.

24 We urge this Court to reverse the decision of
25 the Seventh Circuit because Congress did not intend

1 through the OSH Act to deprive States of their historical
2 power to regulate entry into occupations for the
3 protection of the public. While we also urge this Court
4 to find that the OSH Act does not preempt any supplemental
5 State regulation, I would like first to draw this Court's
6 attention to the fact that the OSH Act does not preempt
7 dual purpose legislation where the State has a purpose in
8 addition to the worker safety for protecting the public
9 and for protecting the environment.

10 Every other court of appeals and the
11 Occupational Safety and Health Administration itself
12 have -- they have considered the question of whether the
13 OSH Act preempts State licensing acts, have limited the
14 preemptive effect of OSHA, and have found OSHA only
15 preempts purely workers' health and safety matters. It
16 does not extend to preempt matters which have as a purpose
17 or effect the promotion of public health and safety and
18 the protection of the environment.

19 QUESTION: Mr. Simon, I suppose Illinois could
20 have submitted a State plan under the statutory scheme.

21 MR. SIMON: Illinois could have submitted a
22 State plan, that's correct.

23 QUESTION: Why did it not do so, if it wants to
24 regulate in this field?

25 MR. SIMON: Illinois does not wish to displace

1 the Occupational Safety and Health Administration
2 standards or enforcement. Illinois does not wish to
3 regulate the process and means by which work is done on
4 hazardous waste sites. Illinois is only concerned with
5 ensuring that competent people engage in this professional
6 in Illinois, and the Illinois requirements do not displace
7 or interfere with the Federal scheme with continues to be
8 in place in Illinois.

9 QUESTION: Well, under your view it sounds like
10 section 18(a) is just superfluous because Illinois can
11 adopt these regulations in any event.

12 MR. SIMON: I believe the section -- the purpose
13 of section 18 is to provide a mechanism whereby States may
14 displace Federal standards and Federal enforcement and a
15 mechanism by which the Secretary and the Federal
16 Government can grant money to the States --

17 QUESTION: What about 18(a) -- subsection (a)?

18 MR. SIMON: Subsection --

19 QUESTION: It would appear that that's just
20 superfluous under your reading.

21 MR. SIMON: I believe that subsection (a) -- in
22 the first place, subsection (a) does not express intent to
23 preempt. Subsection (a) expresses an intent to preserve
24 to the States jurisdiction. I believe that it's -- that
25 section (a) is explained to the States that where OSHA has

1 not promulgated a standard, your regulations in no way
2 conflict with OSHA's regulations.

3 QUESTION: What's the implication if OSHA has
4 adopted regulations that are in conflict?

5 MR. SIMON: Your regulations may conflict. We
6 have to examine your regulations next to the OSHA
7 regulations and if they do conflict, then your regulations
8 are preempted, and that's exactly how we think that the
9 Illinois licensing acts should be judged. If they
10 conflict with an OSHA standard, they are preempted.

11 QUESTION: Well, doesn't Illinois require 4,000
12 hours of experience for a license holder in some area of
13 this hazardous waste business, whereas the OSHA
14 requirement would be 40?

15 MR. SIMON: That's correct. OSHA actually does
16 not require any experience hours. OSHA only requires
17 training hours. The Illinois licensing act for crane
18 operators, hazardous waste crane operators, does contain a
19 4,000-hour requirement.

20 The 4,000-hour requirement serves the legitimate
21 public purpose of ensuring that crane operators don't
22 receive their training on hazardous waste sites. The OSHA
23 standard does not also require this, but it is not
24 impossible to comply with the Illinois regulations and the
25 OSHA regulations and that does not create an actual

1 conflict under this Court's preemption jurisprudence.

2 The --

3 QUESTION: Well, certainly there is a very
4 arguable negative implication, Mr. Simon, from subsection
5 (a) that where there is an OSHA standard in effect there
6 is preemption.

7 MR. SIMON: And that's a negative implication.
8 This Court has found, however, in its jurisprudence that
9 if you're going to have express preemption it has to be
10 expressed, and if you're going to have implied preemption
11 the structure and the language of the act and the purpose
12 of the act have to support that -- that inference -- and
13 in this case the structure, language and purpose do not
14 support that.

15 The purpose of the OSHA act is to provide for
16 every working man and woman in the Nation a safe and
17 healthful conditions of work. The purpose is not to
18 eliminate duplicative regulation or to remove from
19 jurisdiction areas of State concern.

20 QUESTION: So you say we should analyze this
21 case as one of implied preemption, not express preemption.

22 MR. SIMON: That's correct. The --

23 QUESTION: You still are saying, though -- I
24 still -- I don't entirely understand your response to
25 Justice O'Connor as to subsection (a). You're saying that

1 nothing in the chapter prevents any State agency from
2 asserting jurisdiction under State law over any
3 occupational safety or health issue with respect to which
4 a standard is in effect. There is jurisdiction even when
5 a standard is in effect. The only thing you cannot do is
6 contradict it, right -- is conflict with it?

7 MR. SIMON: That's right. You cannot conflict
8 with a standard. That's all that section says.

9 QUESTION: Well that -- it doesn't say that. I
10 mean, the section says nothing shall prevent any State
11 from asserting jurisdiction with respect -- over any issue
12 with respect to which no standard is in effect. Why would
13 they say that?

14 MR. SIMON: I think that section 18 of the act
15 is explaining to States how they can -- that they
16 should -- it's encouraging States to come in and take a
17 role in the occupational area, and it's saying where
18 there's no Federal standard in place you're not precluded
19 by any -- I would make an analogy to a dormant commerce
20 clause type thing.

21 There's no -- because OSHA has not worked here
22 we're not saying that therefore it's precluded to States.
23 Go ahead and do it. You're not in conflict because
24 there's nothing there, and where there is something there
25 then we'll look to whether there's a conflict. I think

1 that that's a fair reading of this section 18(a). I think
2 that section 18(a) does not expressly say or expressly
3 preempt supplemental State laws. I think that the --

4 QUESTION: Why would a State proceed under (b)
5 if it -- why would a State want to proceed under (b), that
6 is, assume its own responsibility for development and
7 enforcement of health standards with respect to which a
8 Federal standard already exists?

9 MR. SIMON: Two good reasons. One of them is
10 that they then displace the Federal regulations and the
11 Federal enforcement, and they do that themselves. The
12 second -- and States who were sensitive to being told what
13 to do by the Federal Government would enjoy this control
14 over their own occupational safety and health concerns.

15 QUESTION: But you're telling us that the
16 Federal Government doesn't control it anyway. You're
17 saying even without going into subsection (b) a State can
18 supplement the Federal regulation any way that it wants.

19 MR. SIMON: But it may not conflict with the
20 regulation. Any Federal regulation as its written, as its
21 provided, is going to be enforced by the Federal
22 Government.

23 QUESTION: Well, you don't think that OSHA's
24 going to let any plan that they approve conflict with
25 Federal regulation either, do you? I mean, as a practical

1 matter they're not going to get anything approved under
2 (b) that conflicts with the Federal regulations.

3 MR. SIMON: The OSHA regulations then do not
4 apply in a State with a State plan. The State regulations
5 apply in a State --

6 QUESTION: I understand that, but I think it
7 most unlikely that OSHA is going to approve any State plan
8 that conflicts with a Federal regulation. They may
9 approve some that supplement it, but I can't imagine that
10 they're going to approve any that conflict with it.

11 MR. SIMON: When you say conflict with it, I
12 believe you mean anything that provides less safety
13 protection for the employees --

14 QUESTION: Right. Right.

15 MR. SIMON: And that's correct, but you may
16 provide more protection in a different way.

17 QUESTION: But you don't have to go in under (b)
18 to do that. You can let the Feds issue their regulations.
19 You can let them spend their enforcement money, and if you
20 want anything in addition, you just issue supplemental
21 reg -- there's no reason to use (b).

22 MR. SIMON: The second reason is the grant to
23 the States, which is a very important reason, I submit,
24 that the State that submits a State plan gets 90 percent
25 of the cost of developing a State plan from the Federal

1 Government and it gets 50 percent of the cost of operating
2 a State plan from the Federal Government, which is a very
3 powerful motivation, and that was the motivation that
4 Congress offered here to encourage the States to submit
5 the State plans, was the Federal money.

6 QUESTION: May I ask on that point, if there's
7 no Federal -- excuse me. If there's no Federal standard
8 in effect in, say -- in an area, and the State wanted to
9 develop its own plan under (a), could it get Federal money
10 doing that?

11 MR. SIMON: Not under the -- not as I read the
12 grants to the States.

13 QUESTION: Only if they're replacing a Federal
14 standard.

15 MR. SIMON: If they're submitting a State plan,
16 and they only submit a State plan if they want to regulate
17 a matter regulated by OSHA.

18 QUESTION: What's the provision that governs
19 that? Is that in your appendix here?

20 MR. SIMON: I do not include in my appendix the
21 grant to the States. I believe that's 672. It's towards
22 the end.

23 QUESTION: Yes, it's in your appendix on page
24 13, I think -- your brief appendix. You have 672 in
25 there.

1 MR. SIMON: Yes.

2 QUESTION: You have really an identical problem
3 in explaining the provisions of 667(h), do you not? I
4 don't understand what the necessity for 667(h), the first
5 clause, is under your view.

6 MR. SIMON: 667(h) gives the Secretary authority
7 to allow a State to enforce less restrictive State
8 standards even after Federal standards are in place while
9 the State is attempting to come into compliance and get
10 its State plan approved by the Secretary. So we're not
11 trying to enforce less restrictive State requirements. We
12 want OSHA to continue to enforce the OSH requirements in
13 Illinois.

14 QUESTION: But it doesn't say less restrictive,
15 and if it's less restrictive -- is it your view that a
16 less restrictive legislation would displace an OSHA
17 regulation?

18 MR. SIMON: If it conflicts with it, certainly
19 it would -- no, a less restrictive regulation on the
20 subject, if OSHA says that workers have to wear helmets
21 and States say they have to wear goggles, workers can't do
22 both, certainly the OSHA requirement supersedes the State
23 requirement, but under (h) the Secretary could agree that
24 that State could just require goggles.

25 Section (h) -- it says that the Secretary may

1 enter into an agreement with the State under which the
2 State will be permitted to continue to enforce one or more
3 occupational health and safety standards in effect in such
4 State until final action is taken. The Seventh Circuit
5 went back and looked at the legislative history and found
6 that an earlier draft had said that the Secretary could
7 agree that they could enforce more restrictive argument.

8 When they took out the more restrictive, now (h)
9 means that you can enforcement less restrictive
10 requirements. The Secretary can agree to that. That is
11 an accommodation to the States. It is not -- and it makes
12 sense because they don't want -- if the State's going to
13 have a State plan, it's going to have State standards,
14 there's no sense making them adjust to the Federal for
15 2 years until their plan goes back and then they can go
16 back to their own plan.

17 QUESTION: So under your view, the Secretary can
18 agree to suspend OSHA regulations under (h).

19 MR. SIMON: For the period while the State plan
20 approval is pending.

21 QUESTION: Where is (h) set out, Mr. Simon? The
22 Government refers that as a transitional --

23 MR. SIMON: That's correct.

24 QUESTION: That expired in 1972.

25 MR. SIMON: Exactly, Your Honor, and it doesn't

1 have any more continuing effect.

2 QUESTION: Well, did it expire in '72, or was
3 that the minimum period of its application. I thought it
4 applied whenever a State government proposed a supplanting
5 plan of its own.

6 MR. SIMON: I think the terms of it state
7 specifically what the answer to that question is, and I
8 thought it was set --

9 QUESTION: It's at the bottom of page 12 of your
10 appendix, of your blue brief.

11 QUESTION: At page 12 and 13 of the appendix it
12 says that the period covered would be until final action
13 is taken by the Secretary with respect to a plan submitted
14 by a State under subsection (b), or 2 years from
15 December 29, 197 -- ah, whichever is earlier. Okay.

16 MR. SIMON: The Illinois licensing acts which
17 promote public safety and environmental protection in
18 addition to occupational safety should not be preempted by
19 the OSH Act. The -- if this Court does find preemption in
20 some cases, the Court nevertheless should not preempt a
21 dual purpose statute like licensing acts. It should
22 rather consider whether it has a legitimate purpose and
23 whether it has selected a means which is plausibly related
24 to that legitimate purpose. This squares with the
25 approach of the other circuit courts that have addressed

1 this issue and it also squares with this Court's precedent
2 and jurisprudence in preemption cases.

3 The case that I'm thinking of where I drew this
4 test from is the Northwest Pipeline case, where this Court
5 recognized the permissible purpose of regulating
6 production of natural gas and this Court recognized an
7 impermissible purpose of regulating the sale and
8 transmission of natural gas in interstate commerce.

9 The Kansas statute in that case this Court found
10 had a permissible purpose of regulating production and a
11 means which plausibly was related to that purpose, and it
12 affirmed the validity of that Kansas regulation
13 notwithstanding the fact that it impacted on the sale and
14 transmission of natural gas in interstate commerce, the
15 area prohibited.

16 The Illinois licensing acts similarly have a
17 permissible purpose. Clearly OSHA did not preempt States
18 rights to regulate its environment in public safety.

19 QUESTION: But the reason you regulate entry
20 into this occupation is partly for safety, is it not?

21 MR. SIMON: That's correct.

22 QUESTION: But you say it's a different kind of
23 safety than OSHA is supposed to provide.

24 MR. SIMON: The occupational -- OSHA regulates
25 occupational safety exclusively. The Secretary of Labor

1 has in fact disclaimed any responsibility or any authority
2 to regulate public health and safety or the environment,
3 yet public health and safety and environmental concerns
4 are clearly present on hazardous waste sites and Illinois
5 is attempting to address these concerns which also further
6 OSHA's purpose of worker safety with these licensing acts
7 by requiring competency in the individuals that engage in
8 these professions.

9 QUESTION: So what is Illinois getting in
10 addition to what OSHA gets by these regulations, say at a
11 hazardous waste site?

12 MR. SIMON: Illinois gets -- one, that it gets a
13 superior form of enforcement, because it's very easy to
14 enforce. Licensing acts are a superior means --

15 QUESTION: Yes, but you could say that about an
16 Illinois regulation governing the work place, that you
17 require 4,000 hours and we require more than OSHA does,
18 but I think that would be very arguably preemptive.

19 MR. SIMON: I think that the -- Illinois, when
20 it's regulating its environment, is not limited to accept
21 what OSHA does to regulate workers, and Illinois here
22 wants a licensing scheme because that's the way in which
23 Illinois historically regulates public safety for
24 professionals.

25 QUESTION: But who benefits from the Illinois

1 regulation that wouldn't benefit from the OSHA
2 regulations?

3 MR. SIMON: The Illinois regulation -- I believe
4 the public benefits more from the Illinois regulation, and
5 I believe the environment benefits more from the Illinois
6 regulation.

7 QUESTION: Why is that?

8 MR. SIMON: Illinois require -- training
9 requirements will be implemented by the Illinois
10 Environmental Protection Agency which will approve
11 training courses and they have as their principal concern
12 environmental concerns, whereas the OSHA certification of
13 training would go towards exclusively matters to protect
14 workers.

15 QUESTION: But these are -- we're talking about
16 the same hazardous waste site that is regulated by both
17 OSHA and by the Illinois act.

18 MR. SIMON: Yes. They -- many -- most of them
19 are on the same sites, and we don't want to discount the
20 fact that we believe we do benefit from those regulations,
21 but we don't think the fact that we benefit from that
22 precludes us from requiring the additional training which
23 we think furthers our public health and safety
24 environmental purposes.

25 Not only does Illinois submit that as dual

1 . purpose legislation the Illinois licensing acts are not
2 preempted by the OSH Act, but we submit that a careful
3 reading of the language and the structure of the OSH Act,
4 in light of this Court's preemption jurisprudence, reveals
5 that States -- that no supplemental legislation is
6 preempted provided it does not conflict with the OSH Act.

7 This Court begins its preemption analysis with
8 the presumption that States' historic exercise of their
9 police powers to protect their safety is not to preempt it
10 unless that was the clear and manifest purpose of
11 Congress. Illinois' licensing acts enjoy this presumption
12 of validity. This Court finds express preemption only
13 when the explicit preemptive language is used in the
14 Statute. No explicit preemptive language is used in this
15 OSHA act anyway.

16 QUESTION: But there is some preemption, or once
17 you have a scheme in which there is some preemption on its
18 face, do we give any deference to the agency's
19 determination of what the precise scope of that preemption
20 is?

21 MR. SIMON: You do if Congress delegated that
22 authority to the agency. In this case, Congress did not
23 delegate authority to the agency to preempt, and in this
24 case OSHA did not attempt to preempt with the hazardous
25 waste operation standard.

1 QUESTION: Suppose the OSHA regulation said at
2 the end of it, moreover no State shall have other
3 regulations dealing with training necessary for workers.
4 Would that make a difference?

5 MR. SIMON: I don't believe it would make a
6 difference under the argument that I make, because I don't
7 believe that Congress delegated authority to OSHA to
8 preempt a State supplement --

9 QUESTION: No, no, I'm saying -- I'm saying
10 assuming that we agree that there is some preemption,
11 assuming we vote against you on that, and just as to the
12 issue of the scope of preemption, whether it preempts not
13 only State laws directed at the same values but also
14 preempts State environmental laws, why shouldn't we listen
15 to OSHA on that?

16 MR. SIMON: I think that in matters of the --
17 the case that I found that directly answers this question
18 was United States v. North Dakota, where this Court said
19 that in matters of whether Congress has given power to the
20 State or to the Federal Government to preempt, the Court
21 looks to the command of Congress directly and does not
22 give deference to the agency's interpretation of the
23 command of Congress, and I think this Court should do that
24 in this case as well.

25 QUESTION: That would work the other way, too.

1 That is, if OSHA says notwithstanding these regulations
2 the States shall be free to issue contrary --

3 MR. SIMON: That's correct.

4 QUESTION: Contrary regulation we would ignore
5 that, and we would --

6 MR. SIMON: If that were --

7 QUESTION: We would require the OSHA rule to
8 preempt even though OSHA doesn't want it to preempt.

9 MR. SIMON: If that were the command of
10 Congress, then I think you have to follow the command of
11 Congress.

12 QUESTION: It seems very strange to me.

13 MR. SIMON: Well, in this case it's not a
14 question, because in this case the agency -- OSHA has not
15 asked the Court to interpret this -- their regulation as
16 preempting supplemental State regulation.

17 QUESTION: I thought the Government is on the
18 other side of this case.

19 MR. SIMON: The Government has taken a position
20 in this case which is contrary to the historic position
21 taken by the Occupational Safety and Health
22 Administration. In an instruction interpreting the
23 preemptive effect of section 18(a) on State without State
24 plans, the Occupational Health and Safety Administration
25 took the position that their State law, which was on its

1 face directed at a class of persons larger than employees,
2 was not preempted by an OSHA occupational standard.

3 I think that their position in this case is a
4 litigation position, and even if the position of OSHA
5 should be given deference it would be their historic
6 position interpreting their own --

7 This Court has recognized that there is room for
8 supplemental State legislation over matters of
9 occupational safety as recently as 1985. In Metropolitan
10 Life Insurance Company v. Massachusetts, where this Court
11 stated that States possess broad authority under their
12 police powers to regulate an employment relationship to
13 protect workers within the State, child labor laws,
14 minimum and other wage laws, laws affecting occupational
15 health and safety are only a few examples.

16 The OSH Act is not intended to remove the area
17 of occupational safety and health from the State
18 legislation, and it should not be -- and a clear reading
19 of the language of the act does not support any preemption
20 of supplemental law which does not conflict with OSHA.

21 QUESTION: Even though it has the effect of
22 regulating job site safety practices.

23 MR. SIMON: That's correct. If it has the --
24 well, excuse me. If it has the effect of regulating job
25 site safety practices then I would concede that that would

1 be an occupational standard, but I do not believe that an
2 occupational standard, if it does not conflict with the
3 OSHA act, is preemptive. I'd point out that our training
4 requirements are not occupational standards, because
5 OSHA -- the Congress gave authority to regulate
6 occupational -- gave authority to promulgate standards
7 under 655, whereas it gave authority to the Secretary to
8 issue training requirements under 670.

9 QUESTION: Would you agree that your standards
10 do regulate job site safety practices?

11 MR. SIMON: No, I do not agree that our
12 standards regulate job site safety practices. I do not
13 agree that we have standards, either. Ours is a licensing
14 act, which I think is distinct from a standard. It does
15 not displace any of the OSHA standards.

16 I would ask this Court to reverse the decision
17 of the Seventh Circuit.

18 QUESTION: Very well, Mr. Simon. Mr. Bliss.

19 ORAL ARGUMENT OF DONALD T. BLISS

20 ON BEHALF OF THE RESPONDENT

21 MR. BLISS: Mr. Chief Justice, and may it please
22 the Court:

23 This morning I hope to establish three points.
24 First, the language, structure, and purpose of the OSH Act
25 expressed Congress' intent to allow States to duplicate or

1 supplement an OSHA standard only pursuant to an approved
2 State plan.

3 Second, the preemptive reach of the OSH Act as
4 applied by the court below is narrow. It applies only to
5 State occupational health and safety standards that
6 clearly directly and substantially intrude upon the OSHA-
7 regulated employer-employee obligations in a specific work
8 place.

9 And third, when a State occupational standard
10 also serves other purposes, for example environmental
11 protection, the Seventh Circuit test would preclude only
12 those provisions of State law that directly intrude upon
13 the federally regulated work place. Under State law
14 severability analysis, other provisions would remain
15 valid.

16 Unlike the other circuits that have addressed
17 this issue, the Seventh Circuit avoids weighing the
18 legitimacy or substantiality of various State legislative
19 purposes, and it focuses instead on the effect of the
20 State standard on the OSHA-regulated work place. It is
21 important here to look at what Illinois actually did, in
22 addition to what Illinois purports to be the purpose of
23 these statutes.

24 These Illinois statutes establish training,
25 experience, and certification conditions specifically for

1 workers at hazardous waste sites who already are subject
2 to comprehensive OSHA standards that address the very same
3 topics for the very same employees.

4 QUESTION: May I ask, Mr. Bliss, if a driver or
5 an operator of one of these cranes complied with all the
6 OSHA standards but nevertheless had an accident of some
7 kind, could an injured party sue at common law on the
8 theory that he was inadequately trained?

9 MR. BLISS: Yes, he could, Justice Stevens.

10 QUESTION: So they could have a common law rule
11 that was more protective than the --

12 MR. BLISS: The OSHA act specifically reserves
13 to the State common law remedies. They are not preempted,
14 and a common law remedy is not a standard, and therefore
15 it would not be preempted by the OSHA act, and
16 section 4(b)(4) provides another reason to demonstrate
17 that when Congress decided to reserve specifically powers
18 to the State it said so quite precisely, and common law
19 tort actions arising out of employment was one of the
20 areas expressly reserved to the States by the statute.

21 QUESTION: What is the statutory section that
22 you refer to?

23 MR. BLISS: It's section 4(b)(4). You'll find
24 that in the appendix to the Respondent's brief 2(a),
25 653(b)(4).

1 The trial court below found, as a matter of
2 fact, that --

3 QUESTION: Of course, that section isn't just
4 limited to common law. It's common law of statutory
5 rights, and so forth.

6 MR. BLISS: That's correct, Your Honor.

7 QUESTION: But you say that it means to draw a
8 distinction between common law rules and statutory rules.
9 I mean, (4) (b) (4), it says affect in any other manner the
10 common law or statutory rights, and so forth.

11 MR. BLISS: And those are preserved to the
12 State --

13 QUESTION: Well then, why isn't this statutory
14 right preserved?

15 MR. BLISS: These are statutory rights and
16 duties that arise out of injuries, disease, or death of
17 employees arising out of employment, and it's specifically
18 intended to address those rights to which you referred in
19 which you may have a personal right to bring an action for
20 negligence and so forth, and they do not address the OSHA
21 standards --

22 QUESTION: Could a State pass a law saying that
23 it shall be negligent for any employee to operate a crane
24 if he hasn't had 40,000 hours of time on similar
25 equipment? Could it be negligence as a matter of law?

1 MR. BLISS: That certainly would be a closer
2 question, but in our view if it establishes a standard
3 that directly regulates worker health and safety it would
4 be preempted by the OSHA act.

5 QUESTION: If it's in the statute, but not if
6 it's a common law rule.

7 MR. BLISS: That's correct.

8 QUESTION: I must say I don't understand your
9 answer at all, because this provision, as Justice Stevens
10 points out, covers statutes as well as common law. It
11 refers to both, and he gives you an example that is
12 precisely this case. It's a statute. It does exactly
13 what this case does, and for some reason you say a statute
14 is not covered but the common law is. Why? What's the
15 basis for the distinction. It's not in the text of the
16 statute.

17 MR. BLISS: The basis for the distinction is
18 that if the State statute establishes a standard that
19 regulates worker health and safety by establishing
20 conditions of employment that constitute a standard, then
21 it would be preempted by the OSHA act expressly.

22 QUESTION: But not conditions for liability.

23 MR. BLISS: Conditions for liability would raise
24 a separate and more difficult question, but it, too, would
25 be preempted if the direct, substantial effect of it is to

1 intrude into employer-employee obligations in the work
2 place as they are regulated by the OSHA standard.

3 QUESTION: Well, I would think that that's your
4 answer, and that would be the same whether it's common law
5 or statute, wouldn't it?

6 You mean, if the common law court finds that you
7 need 4,000 hours of training or else it's negligent,
8 that's okay, but not if there's a statute, even though
9 this section says common law or statutory rights, duties,
10 or liabilities?

11 MR. BLISS: The standard would regulate
12 prospectively. It would establish the standards against
13 which the employee's practices should be measured, and
14 that would be preempted. The common law action under tort
15 claiming negligence would be a remedial action that would
16 be preserved by this section 4.(b)(4).

17 QUESTION: So all the State really has to do is
18 do all this regulation through the courts rather than
19 through the statute. That's what the Federal Government
20 was concerned about, doing it through statutes.

21 MR. BLISS: That is the direction -- that is the
22 purpose of the express preemption of OSHA. However, the
23 State cannot avoid the congressional reach of preemption
24 simply by choosing a different form over substance.

25 The Court has to look specifically at what the

1 State actually does, and if the effect of a State's action
2 is, as it is here, to directly and substantially intrude
3 into employer-employee obligations that are already
4 governed by OSHA standards, then regardless of the form of
5 the State action, it would be preempted, but the Court
6 would look at the form and the direct effect of what the
7 State does on operation of Federal law, not the
8 characterization that the State may ascribe to the action
9 that's taken.

10 Here, the Illinois statute states on its face an
11 articulated purpose to promote job safety and to protect
12 life, limb, and property.

13 Let me turn to the first point -- express
14 preemption. Simply because Congress has not chosen to use
15 mandatory words of prohibition does not make its intent
16 less clear. Read in its entirety, section 18 of the OSH
17 Act sets forth an explicit framework for cooperative
18 federalism in which States may regulate freely in areas
19 where there is no Federal standard, but where there is a
20 Federal standard they may assume responsibility for
21 developing and enforcing standards only by obtaining
22 Federal approval of a State plan.

23 QUESTION: You don't mean to say that this
24 language expressly preempts Illinois, do you, because I
25 think we've analyzed a little differently in cases where

1 there's express preemption and implied preemption.

2 MR. BLISS: Mr. Chief Justice, we believe that
3 the language of section 18 in its entirety is explicit
4 language that expressly preempts OSHA standards regulating
5 worker health and safety relating to the issue addressed
6 by the Federal standard.

7 QUESTION: So you say this is a case of express
8 preemption.

9 MR. BLISS: This is very definitely a case of
10 express preemption.

11 QUESTION: Where's your preemptive language? I
12 mean, you've read Judge Easterbrook's opinion, I'm sure.
13 He doesn't find preemptive language, and I don't, either.

14 MR. BLISS: The preemptive language is in
15 section 18(a), where it specifically reserves to the
16 States --

17 QUESTION: It says nothing shall prevent State
18 agencies from so forth --

19 MR. BLISS: Except where no standard is in
20 effect.

21 QUESTION: Right, and it implies that if a
22 standard is in effect there may be preemption. Of course,
23 if there's a conflict there'll be preemption, but it
24 doesn't say there must be preemption.

25 MR. BLISS: Reading section 18(a) and

1 section 18(b) together, and section 18 --

2 QUESTION: Well, section (b) deals with the
3 situation where the State wants to preempt the Federal
4 Government.

5 MR. BLISS: But it makes clear that if the State
6 wishes to develop any standard -- it doesn't say exclusive
7 responsibility, but if the State wishes to develop any
8 standard, it must submit a plan for approval by the
9 Secretary, and reading 18(a) and (b) together, the only
10 logical conclusion that can be drawn from it is that the
11 States, if they wish to regulate in areas subject to a
12 Federal standard, must seek approval of a plan, and this
13 is further supported by subsection (h).

14 QUESTION: Well, why isn't a perfectly logical
15 reason to say under (b) if they want to displace the
16 Federal plan they've got to get an approval, but if they
17 merely want to supplement it, there's no objection.
18 There's nothing in the statute that provides an objection
19 to a supplement, is there?

20 MR. BLISS: The statute has no provision to
21 allow for supplementation. Indeed, Congress considered
22 language in OSHA legislation that was introduced by -- or
23 proposed by the Nixon administration that specifically
24 would have provided for supplemental --

25 QUESTION: No, there's nothing in it that

1 expressly permits it, but there's nothing in it, either,
2 that expressly prohibits it.

3 MR. BLISS: The explicit prohibition we find can
4 be inferred from the language structure and purpose of the
5 act. The purpose of the act clearly was to ensure
6 coordinated, cooperative federalism. It was to ensure
7 that where the States --

8 QUESTION: But that's a different argument from
9 an express preemption argument. That's an implied
10 preemption argument.

11 MR. BLISS: Implied -- express preemption can be
12 derived from the language of the statute, even if there is
13 not the magic word of prohibition. If the language of the
14 statute clearly speaks, and the structure and purpose of
15 the statute clearly speak to preempt the States from
16 issuing supplemental regulation, we believe that is a form
17 of express preemption.

18 QUESTION: Do you have any case authority for
19 the proposition that you just stated?

20 MR. BLISS: Well we -- for example, in Pacific
21 Gas and Electric at 461 U.S. at 210, we believe the
22 reservation of authority to the States concerning
23 everything except radiological safety hazards was
24 construed to mean that the States were preempted and
25 regulated --

1 QUESTION: Did the court treat that as a case of
2 express preemption?

3 MR. BLISS: In that context, the language in the
4 court supports that proposition, and we think in other
5 cases like Jones v. Rath Packing the language of the court
6 does not expressly prohibit action, and yet the inference
7 has been made from the language that --

8 QUESTION: Well, we have held many State
9 statutes and regulations impliedly preempted and reached
10 the result that you want us to reach in this case, but I
11 don't think it helps jurisprudence to try to push
12 something over into the field of express preemption where
13 really the language isn't expressed. As you answered
14 Justice Stevens, you have to infer something from two
15 other provisions. I would think that is not express
16 preemption.

17 MR. BLISS: Well, Mr. Chief Justice, we would
18 hope that you would look at this first as explicit
19 language in the statutes and in the structure of section
20 18 and indeed in other provisions, such as (4)(b)(4), that
21 demonstrate the clear intent of Congress, that State
22 worker health and safety standards should be preempted.
23 This has been the longstanding interpretation of OSHA.

24 It has been the position taken by every lower
25 court, including six different circuits who have addressed

1 the issue. Indeed, it's the position taken by the amicus
2 State Attorney Generals and the AFL-CIO in briefs
3 supporting the State of Illinois, and the State of
4 Illinois itself took this position before the Seventh
5 Circuit below on page 14 and 15 of the briefs they filed
6 in the Seventh Circuit.

7 QUESTION: Well, Mr. Bliss, just how clear is it
8 that Congress wanted to prevent a State from adopting some
9 heightened worker safety requirement that technically
10 could be complied with along with any lesser requirement
11 of the Federal regulation. I mean, how clear is the
12 statute as to that?

13 MR. BLISS: Justice O'Connor, we think it's
14 absolutely clear, because Congress -- the one thing
15 Congress intended to accomplish was coordination of
16 standard-setting in related issues, and that would be
17 totally undermined by what Illinois has done here.

18 QUESTION: Well then --

19 MR. BLISS: If the State can go off and regulate
20 piecemeal without coordinating with the Federal
21 Government, then the purpose is totally frustrated -- the
22 objective and purpose of section 18 is totally frustrated.
23 So you can reach the same result --

24 QUESTION: But the whole thrust of section 18 is
25 to indicate that a State can have greater requirements

1 than the Federal.

2 MR. BLISS: Absolutely, and a path is set for
3 the State to do that precisely by submitting a plan for
4 approval by the Secretary of Labor.

5 That will ensure the Secretary of Labor will
6 have to review it and ensure that it is at least as
7 effective as the Federal standard, and in the face of
8 products in interstate commerce the Secretary will have to
9 make the judgment whether it's necessary to meet local
10 compelling conditions and does not pose an undue burden
11 on interstate commerce under section 18(c).

12 All of that would be rendered meaningless if the
13 State can regulate piecemeal and ignore the explicit
14 process set forth by Congress that requires the State, if
15 it wishes to supplement, to file a plan with the Secretary
16 of Labor.

17 QUESTION: No, but (b) doesn't talk about
18 supplementing, (b) talks about displacing the Federal
19 regulation.

20 MR. BLISS: (b) talks about assuming
21 responsibility for developing --

22 QUESTION: Assuming entire responsibility --

23 MR. BLISS: And enforcing standards.

24 QUESTION: And if they comply with (b) then the
25 Federal Government's out of the picture entirely, isn't

1 it?

2 MR. BLISS: Over a period of time, but it would
3 be a 3-year conditional period in which there would be --

4 QUESTION: I don't think (b) provides the answer
5 to the question. Say you've got a lot of regulations
6 about operating these cranes, but there's just nothing
7 said about whether they have to wear protective gloves or
8 goggles or a helmet or something, and the States let's say
9 omitted this, we think they ought to wear gloves, and it
10 doesn't conflict with anything, and you say they can't do
11 that.

12 MR. BLISS: That's correct, and we think it's a .
13 combination of subsection 18(a) and (b) read together
14 along with subsection (h) --

15 QUESTION: And even if there's not even the
16 remotest possibility of conflict between the two systems.
17 I mean, as I say, an example, you have to wear a helmet
18 when you're out on the job site, and that's just not in
19 the OSHA regulation. You say you can't do that.

20 MR. BLISS: That's correct. It does not have to
21 be a conflict. It's simply -- the State simply has to
22 have a standard that intrudes directly into the employer-
23 employee obligations that are already regulated by the
24 OSHA standard, and we think that test is indeed a narrow
25 and appropriate test, because it asks first has the State

1 issued a worker health and safety standard, and OSHA
2 defines a standard in part as conditions reasonably
3 necessary or appropriate to provide safe or healthful
4 employment and places of employment. Well, that's exactly
5 what Illinois has done here. It's established conditions
6 of training and experience necessary in Illinois' judgment
7 to provide a healthful place of employment.

8 QUESTION: Mr. Bliss, assuming that that would
9 qualify within -- to be covered by the text of
10 subsection 18(b), isn't it also the case that the heading
11 to 18(b), the bold print, suggests a somewhat narrower
12 scope, because the bold print refers specifically to State
13 standards to preempt applicable Federal standards. Isn't
14 that a rather more narrow category than the text of that
15 section might suggest?

16 MR. BLISS: Justice Souter, we don't believe
17 that the heading would narrow the plain language and
18 meaning of the actual --

19 QUESTION: Well, what if it isn't plain?

20 MR. BLISS: Section 18(b), but in any event we
21 accept that the purpose of 18(b) is to allow States to
22 displace Federal regulation, and we accept that Congress
23 in --

24 QUESTION: Well, if that's the case, then the
25 mere fact that you have a State standard addressing the

1 same issue as a Federal standard is not enough to get you
2 to a point of preemption. If the object of (b) is
3 displacement of the Federal scheme, then the mere fact
4 there may be two standards, one State, one Federal
5 addressing the same issue, does not get you to the
6 conclusion of preemption, isn't that correct?

7 MR. BLISS: We believe it gets us to that
8 conclusion if you read 18(a) and (b) together, and it
9 leaves the --

10 QUESTION: Oh, but 18(a) can be read simply to
11 mean that the act itself does not -- or the mere passage
12 of the act does not exclude the possibility of State
13 regulation. I mean, it refers explicitly to nothing more
14 than the case in which there is no Federal regulation.

15 MR. BLISS: If you take 18(a) and (b) and (h),
16 (h) for example, which provided for this transitional
17 period that States indeed could supplement Federal
18 standards but only for a 2-year period and only if the
19 Secretary agreed --

20 QUESTION: Isn't (h) probably your strongest
21 argument?

22 MR. BLISS: I think (h) helps -- I think (h)
23 helps, (f) helps -- you have to read the entire statute in
24 context, and together it leaves us with no other logical
25 conclusion but that the States, if they wish to develop a

1 standard relating to an issue addressed by a Federal
2 standard they must do it through the planned process.

3 OSHA leaves the States three options. They can
4 regulate in areas where there is no Federal standard.
5 They can regulate the environment and public safety
6 directly and not by the means of regulating corporate
7 health and safety, or they can submit a State plan. They
8 have three alternatives.

9 In this case, Illinois has rejected all three
10 alternatives and done the one thing that section 18 would
11 deny it, namely to regulate piecemeal in an area without a
12 State plan where there is a Federal standard already in
13 place, and indeed in this case the second question that
14 the Seventh Circuit would ask is does the State standard
15 regulating worker occupational safety relate to an issue,
16 and OSHA can define that issue with an effort to
17 accommodate federalism.

18 As you know, under Federal executive order OSHA
19 seeks to try to accommodate the State's interest to the
20 greatest extent possible and can define the standard in a
21 narrow way so as not to intrude on general purpose or
22 obligation State laws, and here, however, the issue is the
23 regulation of hazardous waste workers at hazardous waste
24 sites, which is precisely the issue that Illinois
25 addresses. Indeed, Illinois statute is more narrow than

1 the OSHA standard, because it doesn't apply to all the
2 hazardous waste sites that would be subject to the Federal
3 standard.

4 Finally, the Seventh Circuit through its
5 severability analysis would seek to preserve those
6 elements of the State law which regulate the environment
7 or other issues that are not directly and substantially
8 impacting the operation of the Federal law.

9 On the dual purpose regulation issue, what we
10 have in this case is all the public benefit that Illinois
11 ascribes to its State laws derived from workers' safety.
12 It's only when you hire a crane operator who has 4,000
13 hours of experience, and that crane operator presumably
14 then operates safely and has fewer accidents, that there
15 may be a public benefit that flows from that, so that the
16 public benefits attributed to the Illinois statute are
17 exclusively derived from the workers' safety practices
18 which are precisely what is regulated by OSHA, and that's
19 why this law must be preempted.

20 In conclusion, the Illinois acts constitute
21 worker health and safety standards that address the very
22 same topics -- training, experience, competency and
23 certification -- that are addressed comprehensively by the
24 OSHA standard. The Illinois acts apply only to hazardous
25 waste workers who are subject to the OSHA standard.

1 Therefore, under section 18, Illinois may not duplicate or
2 supplement the OSHA standard without filing a State plan.

3 Illinois claims an exemption from this process
4 merely because it has asserted an additional public
5 purpose for what is plainly worker-oriented, narrow
6 legislation, but as I've mentioned, the public benefits
7 from the Illinois training and experience provisions are
8 derived solely from safe conduct in the work place, which
9 is precisely the issue addressed by OSHA.

10 QUESTION: Yes, but I -- is -- never mind.
11 You're time's up.

12 QUESTION: Thank you, Mr. Bliss. Mr. Kelley,
13 we'll hear from you.

14 ORAL ARGUMENT OF WILLIAM K. KELLEY
15 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
16 SUPPORTING THE RESPONDENT

17 MR. KELLEY: Mr. Chief Justice and may it please
18 the Court:

19 I will first try to allay the Court's concerns
20 regarding the express preemption question. The position
21 of the agency from day 1 has been that the act is
22 expressly preempted. We believe that is correct.
23 Section 18(a) does not make sense on the State's
24 interpretation. It's entirely superfluous.

25 It does not say that the State is free to

1 enforce a standard that's not in conflict with existing
2 Federal standards. It says the States are free to enforce
3 standards if no Federal standard exists. Those are far
4 different propositions, in our view, and that reading of
5 section (a) is confirmed by the rest of section 18,
6 including section 18(b), section 18(f), and section 18(h).

7 QUESTION: Mr. Kelley, where do you find
8 language in those sections that says in so many words that
9 a State shall not regulate in a particular area?

10 MR. KELLEY: Your Honor, section 18(b) says that
11 if a State wishes to assume responsibility for enforcing
12 an occupational safety standard relating to an existing
13 OSHA standard, it shall submit a State plan. It seems to
14 us that a supplemental State regulation nonetheless
15 relates to an existing Federal OSHA standard if it's
16 connected.

17 QUESTION: But that section doesn't say what the
18 consequence is of failure to submit a plan.

19 MR. KELLEY: We believe that section 18(a),
20 which says that a State may enforce if there is no Federal
21 standard in place, is properly read to mean that the State
22 has to follow the rest of the procedures provided in
23 section 18 if a Federal standard is in place.

24 QUESTION: But you derive that by implication.
25 I'm not saying by perfectly sound implication, but you

1 derive it nonetheless by implication, not by express
2 language.

3 MR. KELLEY: Mr. Chief Justice, our view is that
4 the statute can only be read -- can only be made sense of
5 if it is preemptive, and in that sense we believe the
6 statute is expressly preemptive. It is not --

7 QUESTION: But I don't think -- your sentence is
8 a non sequitur. There are many statutes that you come to
9 the conclusion that it can only make sense if this
10 particular State action is preemptive, but nonetheless,
11 you don't say it's expressly preemptive. Express means in
12 so many words, not clearly or positively.

13 MR. KELLEY: Mr. Chief Justice, this Court has
14 said that express preemption is demonstrated if that is
15 the clear and manifest reading of the statute. I would
16 grant that whether one wants to call this express or
17 implied, the result should be the same here. When we same
18 this is not implied preemption, we don't mean that in a
19 historical sense of occupying the field.

20 On the State's interpretation of section 18,
21 section 18(h) does not make sense, nor does section 18(f).
22 Section 18(f) says that when the Secretary withdraws plan
23 approval the State plan will cease to be in effect, but
24 that the State may continue to assert jurisdiction over
25 cases that were commenced prior to withdrawal of plan

1 approval.

2 On the State's theory of the case, the only
3 effect of withdrawal of the plan approval should be that
4 the Federal standard becomes operative again. It should
5 have no effect on the operation of the State standards.
6 That plainly, though, is not the case.

7 QUESTION: Mr. Kelley, maybe we should have
8 three categories. Maybe we should have statutory
9 preemption that is express, statutory preemption that is
10 implicit, and what you might call occupation of the field,
11 where the text does not give you any particular indication
12 of preemption except in the sense that it demonstrates
13 such a total regulation of the area that you are willing
14 to leap to the conclusion of preemption.

15 MR. KELLEY: Your Honor, we would not object to
16 that. That, in short, is our reading of the statute, and
17 on the States theory, a State would be entitled to
18 entirely duplicate the Federal scheme and enforce it
19 alongside the Federal scheme, and it seems to us that that
20 is inconsistent with what Congress enacted in the act. It
21 seems plain that the act envisions one enforcement
22 authority, and only one, once OSHA has acted, and the
23 State has the option to reassert its authority if it
24 wishes under the State plan process.

25 QUESTION: Mr. Kelley, are you going to address

1 the meaning of section 653(b)(4), which says that nothing
2 in the chapter will affect common law or statutory rights,
3 duties, or liabilities of employers and employees under
4 any law with respect to injuries, diseases, or death of
5 employees?

6 MR. KELLEY: Your Honor, we believe that section
7 4(b)(4) further supports our reading in the statute as
8 preemptive. With respect to the question of statutory
9 rights being included in that section, we don't believe
10 that that means that a State may -- we don't believe that
11 that should be read to entirely undermine what section
12 18(b) erects.

13 It is not the same thing to say that a statutory
14 regulation providing that people shall order their affairs
15 in a certain way is the same as a statute providing a
16 right to someone who's been harmed retrospectively, and
17 quite simply, if the statute is read as broadly as the
18 State has suggested, at least if that section is, then
19 section 18(b) would be entirely undermined and, moreover,
20 on our view if a common law cause of action would
21 constitute an occupational safety standard within the
22 meaning of section 18(b), it also would be preempted.

23 QUESTION: I'm not sure I understand what
24 you're saying 653(b)(4) does. What kind of thing does it
25 say is not preempted?

1 MR. KELLEY: It says, Your Honor, that -- I
2 believe the particular focus of section 4(b)(4) was to
3 preserve State Worker Compensation schemes. Now,
4 obviously the language went further than that, but that
5 was the background to that section.

6 . With respect to the common law preservation of
7 remedies, that section seems to us as properly read not to
8 displace the cause of action on the part of an employee
9 who's been injured in the work place.

10 QUESTION: But it says duties as well as
11 remedies. It doesn't say just remedies. Statutory --
12 common law statutory rights, duties, or liabilities of
13 employers, so that would include the duty for training
14 your coworkers a certain number of hours, I assume.

15 MR. KELLEY: It could be read that way, Your
16 Honor, but we don't believe it should be read that way for
17 a two reasons: 1) if it were read that way, it would
18 undermine entirely the notion of occupational standards
19 under the act, and secondly, if you did read it that way,
20 we believe nonetheless that a statutory duty would -- in
21 the meaning of section 4(b) would not be the same thing as
22 not -- I'm sorry, could be the same thing as an
23 occupational standard within the meaning of section 18,
24 section 18 meaning the definitional section, section 3(8).

25 QUESTION: Well, literally read, I suppose

1 under -- in that section 4, it would even save from
2 preemption a State standard that conflicted with the --

3 MR. KELLEY: It would, Your Honor --

4 QUESTION: And --

5 MR. KELLEY: And that is the reason that we --

6 QUESTION: Let me just ask you more. It says
7 the -- it won't diminish in effect in any manner the
8 common law or statutory rights or duties or liabilities
9 under any law. That's really -- what's going to be --
10 what does it refer to, under any law? Statutory rights
11 under any law, common law duties under any law?

12 MR. KELLEY: Justice White, you're pointing out
13 that -- the problem with reading that section as broadly
14 as one possibly could, and if one were to read that, it
15 would seem to me that not only the State but every court
16 that's considered this issue would have had no need to
17 address section 18 at all, and would have read section
18 4(b) entirely to preserve State authority in every
19 instance, and that clearly is not the proper reading.

20 OSHA has not changed its position on this issue,
21 contrary to what the State has asserted here. From day
22 one, OSHA has said that the act is preemptive. From day
23 one, OSHA has said that dual purpose regulations, if they
24 affect workers -- I'm sorry, if dual purpose regulations,
25 if they affect a class outside of workers and only outside

1 workers are not preempted to that extent, that is not the
2 same thing as saying that a dual purpose regulation that
3 regulates worker safety but has an incidental effect
4 outside the work place are not preempted and are not
5 worker safety standards within the meaning of the act.
6 OSHA's position from day one has been that, and that is
7 what we are here today saying.

8 QUESTION: From the outset.

9 MR. KELLEY: That is true, Your Honor, but we
10 believe that it certainly is a reasonable reading of the
11 act, and --

12 QUESTION: It might be consistently wrong.

13 MR. KELLEY: It may be consistently -- we don't
14 believe it was consistently wrong, but it certainly has
15 been consistently reasonable, and we believe therefore is
16 entitled to deference from this Court.

17 QUESTION: Well, is it clear that we should
18 defer to State agencies in matters of this kind of
19 preemption?

20 MR. KELLEY: It has not been a proposition that
21 has been clearly established with respect to preemption,
22 Your Honor. We believe that deference in that context
23 would be appropriate, and this Court has frequently
24 deferred to an agency's interpretation of whether a
25 regulation is preemptive as opposed to whether a statute

1 • is preemptive, and we don't believe there is a significant
2 difference between the two.

3 QUESTION: Thank you, Mr. Kelley. Mr. Simon,
4 you have 4 minute remaining.

5 REBUTTAL ARGUMENT OF JOHN A. SIMON

6 ON BEHALF OF THE PETITIONER

7 MR. SIMON: Thank you, Mr. Chief Justice.

8 I think that the Solicitor General is correct
9 when he was saying he's asking the Court to create a new
10 category of preemption, and I really think that the
11 State -- that this Court's jurisprudence on preemption has
12 been clear that you're not to preempt -- that Congress
13 does not preempt State law unless there was the clear --
14 its clear manifest purpose, and it say so expressly, or if
15 it is evident under the categories of implied preemption
16 which this Court has traditionally set forth and been
17 consistently followed.

18 I think that to create a new category of
19 inferred express preemption would not only create
20 confusion in the jurisprudence of the Court, but it would
21 certainly expand the preemptive effect of Federal
22 regulations, and we would have lower courts preempting
23 State laws left and right because of inferring express
24 preemption, and I strongly discourage the Court from
25 following that path.

1 The Illinois licensing acts are a historic
2 exercise -- or, an exercise of the State's historic police
3 power to protect the public and the environment, and this
4 means of requiring competency for those engaged in these
5 hazardous occupations is a longstanding mechanism to
6 accomplish its public safety purpose, and it was not the
7 intent of Congress in enacting the OSHA act to preclude
8 States from pursuing this means to protect the public
9 safety.

10 QUESTION: Mr. Simon, you haven't -- one of the
11 things that troubles me about the State's position here is
12 I don't understand why 667(c)(2) would be so concerned
13 about making sure that any plan that the Secretary
14 approves will not unnecessarily disrupt interstate
15 commerce.

16 MR. SIMON: 66 --

17 QUESTION: 667(c)(2), which are the conditions
18 for approval of the plan, and it says the Secretary has to
19 make sure that the plan won't needlessly -- when
20 applicable to products which are distributed and used and
21 they are required by compelling local conditions and they
22 do not unduly burden interstate commerce. That is one of
23 the conditions.

24 That seems very strange, to put that next to a
25 system which says, however, if you don't want to have a

1 State plan, you can burden State commerce all you like,
2 regardless of local conditions, up to the point where the
3 commerce clause is violated.

4 MR. SIMON: The section that you just read
5 starts out with when -- it talks about products in
6 interstate commerce, so we talk about -- we're dealing
7 with products there.

8 QUESTION: Right.

9 MR. SIMON: The Illinois hazardous wastes
10 licensing acts do not deal with products whatsoever. I
11 don't think that (c)(2) --

12 QUESTION: Oh, I'm not saying it applies to your
13 act, but it does go to whether the whole act should be
14 interpreted as preemptive or not.

15 MR. SIMON: I believe that a product -- a
16 requirement on a product to be manufactured differently
17 than the product is required in all of the other States, I
18 believe that that would be a conflict, and I believe that
19 what they're saying there is that under a State plan where
20 the States are entitled to enact conflicting legislation
21 if the Secretary agrees that it provides at least as much
22 worker safety, they're saying except with regard to
23 products in interstate commerce.

24 Those products, the Secretary cannot approve
25 them if they're going to create a conflict because those

1 products can't circulate to other States.

2 The purpose of the OSH Act is to provide safe
3 and healthful working conditions for every working man and
4 woman in the country. That purpose is not frustrated by
5 the Illinois licensing acts, it's furthered by the
6 Illinois licensing acts. The training, competency and
7 testing requirements of the Illinois licensing acts do not
8 conflict with any of the requirements of the OSH hazardous
9 waste operation standard, which will remain in place,
10 enforced by OSHA.

11 For these reasons, I ask the court to reverse
12 the decision --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Simon.
14 The case is submitted.

15 (Whereupon, at 11:02 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-1676 - MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY, Petitioner V. NATIONAL SOLID WASTES
MANAGEMENT

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)