

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BUSINESSES FOR A BETTER NEW YORK, et al.

Plaintiffs,

v.

Civil No. 06-CV-0669

LINDA ANGELLO, in her official capacity as  
Commissioner of Labor for the State of New York, et.

Defendants.

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**MEMORANDUM OF LAW  
ON BEHALF OF PLAINTIFFS**

**PRELIMINARY STATEMENT**

New York's continuing enforcement of Labor Law § 240(1) and § 241(6) (the "Statutes") violates the Equal Protection, Commerce and Supremacy Clauses of the federal Constitution. The Equal Protection Clause violation stems from the disparate treatment of construction businesses which have employees engaged in height-related risks compared to those construction companies that have not. These affected construction companies pay significantly higher premiums for general liability and worker's compensation insurance coverage, bringing their businesses in serious jeopardy. Many construction businesses have failed in recent years; others have struggled barely to survive. While the Statutes were originally enacted for the legitimate purpose of protecting construction workers, New York does not have measurably fewer construction accidents or deaths than its surrounding states; in fact, New York has more. But, New York construction businesses are not the only ones to suffer. The Statutes also apply to non-New York businesses that perform work in New York with height-related risks. This creates an extraterritorial affect, implicating the Commerce Clause. Most importantly, even if

the Statutes in question were otherwise Constitutional, which they are not, they stand in violation of the Supremacy Clause of the federal Constitution, as they have long since been preempted by OSHA.

The Statutes' total inability to help New York achieve its intended purpose of protecting workers shows there is no "rational relationship" between the Statutes and the goal, and thus no justification for treating these construction businesses, which are in the same "class of citizens" for the purposes of the Fourteenth Amendment, differently. Since the Statutes subject both in-state and out-of-state construction businesses with height-related risks to disparate treatment causing financial harm, and because the Statutes have been preempted by OSHA, this Court should ultimately declare that § 240(1) and § 241(6) are unconstitutional, and this Court should enjoin their continuing enforcement.

#### **STATEMENT OF FACTS**

Businesses for a Better New York ("BBNY"), a partnership of Western New York construction companies, insurance brokers, and individual contractors, has commenced this action against the New York State government officials<sup>1</sup> responsible for enforcing Labor Law § 240(1) and § 241(6), in order to have the Statutes declared unconstitutional. See, Plaintiffs Complaint. For years prior to the filing of this complaint, individual members of BBNY lobbied the New York State Legislature to have the Statutes repealed, because their continued enforcement has resulted in an astronomical increase in insurance premiums for construction companies that engage in height-related risk. Although

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<sup>1</sup> Defendants include the Attorney General, Commissioner of Labor, the Superintendent of Insurance, and the Chairman of the Worker's Compensation Board. See Plaintiffs Complaint, 10-6-06.

significant changes to these laws have been proposed, plaintiffs' lobbying efforts have been unsuccessful to date. Thus, BBNY was created, and BBNY filed this suit on October 6, 2006.

**A. History of the Statutes**

New York enacted the first scaffold law in 1885. Called "The Act For the Protection of Life and Limb," the law made it a misdemeanor, punishable by a \$500 fine or six months in a county jail, to "knowingly or negligently furnish or erect unsuitable and improper scaffolding, hoists, stays, ladders, or other mechanical contrivances as will not give proper protection to the life and limb of any person" employed in the "erection, repairing, altering or painting of any house, building or other structure." 1885 Laws of New York, Chapter 314 §1. The ambit of the law included only those persons "employing or directing another to do or perform" labor in the construction business. 1885 Laws of New York, Chapter 314 §1. Over the years, this law has been amended many times. In 1897, the element of negligence was removed from the law, as was the criminal penalty. Instead, the law imposed absolute liability for its violation. 1885 Laws of New York Chapter 314 §1. The law was again amended in 1921 to require additional devices for the protection of laborers subject to elevation-related risks. 1921 Laws of New York Chapter 50 Article 10 § 240(1). An amendment in 1930 included demolition activities under the protection of the law. 1921 Laws of New York Chapter 603 § 240(1).

Beginning in 1962, New York courts, relying on the express language of Labor Law § 241(6), began to require actual direction or control by the owner or contractor as a prerequisite to the imposition of liability. 1962 Laws of New York Chapter 450 § 2. In 1969, the Legislature checked this attempted judicial reform and amended the Statutes to ensure absolute liability on owners and contractors. As New York's Court of Appeals has stated:

In calling a halt to its earlier backtracking, the Legislature minced no words. Referring expressly to both Section 240 and Section 241, its stated purpose in drafting these statutes was to fix “ultimate responsibility for safety practices . . . where such responsibility actually belongs, on the owner and general contractor.”

Hames v. New York Telephone Company, 46 N.Y.2d 132, 136 (1978).

The last significant amendment to Labor Law § 240(1) occurred in 1980 when homeowners of single and two-family houses were exempted from liability for contractors they hire to build their houses. 1980 Laws of New York, Chapter 670 § 240(1) (“owners of one and two family dwellings who contract for but do not direct or control the work”). This amendment arose in response to the seminal case, Allen v. Cloutier Construction Corp., in which a married couple was found strictly liable for the death of a plumbing subcontractor killed while working at their home when a trench caved in and collapsed upon him. 44 N.Y.2d 290 (1978). In its notes to the 1980 amendment, the Law Revision Commission noted, “The Commission believes that . . . the rule of strict liability has a salutary effect in promoting responsibility among those engaged in the business of construction and repair.” 1980 Recommendations of the Law Review Commission, Labor Law 240(1) (1980)

## **B. The Labor Law Statutes Today**

Labor Law § 240(1) now provides, in pertinent part:

§ 240. Scaffolding and other devices for use of employees.

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, or repairing, altering, painting, cleaning, or pointing of a building or a structure shall furnish or erect,

