No. 17-1713

In The Supreme Court of the United States

EMERSON ELECTRIC CO., ET AL.,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Question Presented

Whether the Occupational Safety and Health Act "preempts all state occupational safety and health laws" relating to issues covered by federal standards "unless they are included in the state plan," as the Ninth Circuit has held, *Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997); or whether a state may employ supplemental enforcement mechanisms for workplace safety standards even if not included in the state plan, as the Supreme Court of California held in this case.

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Statement of Interest[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Center

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[1] All parties have consented to the filing of this brief, and the parties were notified of *amici curiae's* intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). In accordance with Rule 37.6, *Amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution to fund the brief's preparation or submission.

seeks to file here because the case raises a question as to whether California district attorneys may bring civil actions against employers for violations of workplace safety standards, in addition to penalties imposed by Cal/OSHA. The small business community is concerned not only that the decision below authorizes California district attorneys to radically ratchet up penalties on non-compliant businesses, but that other states may follow California's lead. More fundamentally, the small business community is concerned about preserving its right to provide public comment on important regulatory changes.

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court. SLF has an interest in this case because the decision of the California Supreme Court may embolden similar ultra vires enforcement actions for OSHA violations in other states.

Summary of Argument

The Occupational Health and Safety Act, 29 U.S.C. §§ 651 et seq. ("OSH Act"), preempts state regulation of workplace health and safety issues where there is already a federal standard in place. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). While the State of California can implement

its own regulatory plan, it may not do so without the express consent of the U.S. Secretary of Labor. *Loskouski v. State Pers. Bd.*, 4 Cal. App. 4th 453, 456 (1992). This limitation protects and benefits the regulated community. It not only gives the Secretary discretion to reject any proposal that would create undue burdens, but it also guarantees an opportunity to provide comment for those who would be affected.

The Supreme Court of California's ruling strips the regulated community of these protections. Its decision allows the State to implement additional penalties without approval from the Secretary and without opportunity for public comment. Neither the Unfair Competition Law ("UCL") or the False Advertising Law, ("FAL") are part of California's approved plan. Yet, in this case, UCL and FAL penalties were enforced on the Petitioners, in addition to the heavy federal penalties already incurred.

California's supplemental penalties should be preempted. The federal OSH Act plainly conditions state regulation on a requirement to obtain express approval from the Secretary of Labor, and a one-time approval, for a specific plan, cannot be construed as a rolling-approval for subsequent changes. The decision below not only blesses supplemental penalties in California but invites other states to follow suit. Therefore, given that over half of the states have approved OSH enforcement plans in place, this is an issue of nationwide concern.

Argument

I. Unapproved Supplemental Regulations Are Preempted Under the OSH Act

Our constitutional system diffuses political power between the states and the federal government to protect individual rights. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Under modern precedent, the states and the federal government maintain concurrent powers to regulate economic affairs. But where state and federal law stand in conflict, the Supremacy Clause of the federal constitution preempts state law. *M'Culloch v. Maryland*, 17 U.S. 316, 427 (1819). Thus, although States generally retain their traditional police powers in most cases, state law cannot be enforced in a way that conflicts with the provisions of a federal statute. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

While the Framers of the United States Constitution were primarily concerned with limiting the conferral of federal powers, the preemption doctrine recognizes that, in some cases, a federal enactment may *preserve* freedom by displacing more burdensome state regulations. *See, e.g., Cipollone v. Liggett Grp.*, 505 U.S. 504, 518 (1992). Where Congress sees fit, it may prohibit state and local authorities from imposing more burdensome regulatory standards and enforcement mechanisms than are authorized by a federal enactment. Thus, federal law can serve as both a floor and a ceiling for regulation.

This Court has already said that the OSH Act preempts supplemental regulation of health and safety standards. *Gade,* 505 U.S. at 98-99. States

cannot "assume an enforcement role" without federal approval, unless no federal standard is in effect. *Id.* at 101. As a result, since the OSH Act already prescribes penalties for the alleged conduct, California's power to impose its own heightened penalties is limited to those that Secretary of Labor expressly authorized in California's approved state plan. And the plan California submitted for approval in the 1970s did not contemplate penalties under either the UCL or FAL.

If the State wishes to obtain authority to impose these additional penalties, it must amend its existing state plan by seeking a new approval from the Secretary of Labor. Congress thought this process was in the best interest of the nation because it advanced both the goal of ensuring health and safety protections for workers and the vital goal of encouraging economic growth throughout the country. 29 U.S.C. §§ 651, 667(b) (requiring a "plan for the development of [workplace safety] standards and their enforcement"). It was Congress' prerogative to balance national interests by requiring that any proposed state enforcement must be expressly authorized by the Secretary—by providing that the Secretary "must be satisfied" that a proposed state workplace health and safety plan meets certain criteria. *Gade,* 505 U.S. at 100. Accordingly, "[s]tate standards that affect interstate commerce will be approved only if they are 'required by compelling local conditions' and 'do not unduly burden interstate commerce.'" *Id*.

But, the California Supreme Court allowed the state to bypass this federal process and to enforce unapproved regulations. The Court essentially ruled that once a state has an approved plan, unilateral

amendments are permissible. Not only does this violate the OSH Act, but it is also contradicts previous decisions by the Ninth Circuit and this Court as well. *See Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1310 (9th Cir. 1997) ("*any* state regulations not submitted to OSHA as part of a state plan run afoul to the Occupational Safety and Health Act because OSHA has no opportunity to review them"); *see also Gade*, 505 U.S. at 103-04 ("If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its *only option* is to obtain the prior approval of the Secretary of Labor . . . .") (emphasis added). Simply put, California's approach runs contrary to what Congress intended.

II. The Federal Administrative Procedure Act Guarantees the Regulated Community the Right to Comment on New Rules and Enforcement Standards

A. The Requirement for Express Department of Labor Approval Ensures the Regulated Community an Opportunity to Voice Concerns Over Unduly Burdensome Standards

The Administrative Procedure Act (APA) requires both notice and an opportunity for comment before enforcement of any legislative rule or regulation. *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). The Ninth Circuit explains that a "legislative rule" is any rule that "creates rights, imposes[s] obligations, or effect[s] a change in existing law pursuant to authority delegated by Congress." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003). The OSH Act gives the Secretary of Labor the power to "effect a change in existing law" with regard to workplace

safety plans, but only through this notice-and-comment process. *Id*. Thus, the Secretary makes his decision about whether to approve or disapprove a state plan only after allowing a meaningful opportunity for public input. This guarantees the regulated community the right to invoke the APA's procedural protections. *See Hall v. E.P.A.*, 273 F.3d 1146, 1162 (2001) (affirming that "with respect to [an agency's] action approving [] revisions [to a state implementation plan], the APA requires that an agency engaging in informal rulemaking provide public notice . . . ." and opportunity to comment.).

This process is important because it gives affected persons a chance to participate in the promulgation of the rules and regulations that they are subject to and enhances the Secretary's knowledge on these matters. *See* 5 U.S.C. § 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public notice-and-comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id*. at 103.

As such, notice-and-comment procedures ultimately result in more rational and workable enforcement standards. Input from the regulated community is vital to the advancement of Congress' goal of formulating a sensible and balanced approach to workplace health and safety issues. *See, e.g.*,

Occupational Safety and Health Admin. Supplement to California State Plan; Approval, 62 Fed. Reg. 31,159, 31,178 (June 6, 1997) (responding to comments from concerned businesses by limiting available enforcement mechanisms). Moreover, adherence to notice-and-comment procedures is important because the modern administrative state yields tremendous discretionary lawmaking power to regulatory agencies. For this reason it is crucial that the policies set forth by these unelected bureaucrats are subject to public comment to secure a sense of both transparency and accountability. Indeed, notice and comment procedures promote democratic values and ensure basic fairness to the regulated community.[2]

Here, California ignored the vital goals of the notice-and-comment process and imposed penalties of over $1,000,000 on the Petitioners for workplace safety violations, despite never affording them an opportunity to comment. *Solus Indus. Innovations, LLC v. Superior Court of Orange Cnty.*, 178 Cal. Rptr.3d 122, 134 (2014) (observing that the district attorney sought to recover penalties "in excess of $1 million per employee, for each cause of action."). This

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[2] An additional problem, in skipping the notice-and-comment process, is that California's approach raises basic questions of fairness. When regulatory changes are proposed through notice-and-comment there is greater opportunity to learn about changes that may affect one's business. Conversely, when regulatory standards are imposed outside this transparent process, newly imposed requirements may easily blind-side small businesses. *Cf. Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (refusing to give deference to the Department of Labor's interpretation of the Fair Labor Standards Act because it would result in an "unfair surprise" to the regulated community).

leaves the small business community vulnerable to excessive standards and penalties, contrary to congressional intent. The decision below subjects even the slightest of infractions to potentially stacking and duplicative penalties. Even good faith mistakes may trigger massive penalties, which may have disastrous results for small businesses operating on narrow margins.[3]

B. The Supreme Court of California's Approach Denies the Public the Opportunity to Participate in the Regulatory Process

Had the State of California proposed amendments to its state workplace safety plan, the Secretary of Labor would have had the opportunity to consider comments and concerns from *amici* and other concerned groups. Without doubt, *amici* would have opposed the amendments that the District Attorney seeks to ratify by judicial fiat. Indeed, if the State had sought express authorization to impose additional penalties under California's UCL and FAL, *amici* would have filed comments emphasizing that these penalties are unduly burdensome to the small business community.

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[3] While it is possible that a district attorney may forebear on bringing an enforcement action under the UCL and FAL for minor violations, that range of discretion is little comfort for a small business owner facing potential fines for an inadvertent mistake. *See Sackett v. EPA*, U.S. Sup. Ct. Case No. 10-1062, Transcript of Oral Argument, 31, http://www.scotusblog.com/case-files/cases/sackett-et-vir-v-environmental-protection-agency-et-al/ (last visited Jul. 17, 2018) (Justice Antonin Scalia: "I'm not going to bet my house on it.").

Amici objects to the proposal to ratchet up penalties under the UCL and FAL because such an approach radically increases business liabilities—far beyond what the current enforcement standards permit. This case demonstrates the point, as the District Attorney imposed "penalties of up to $2,500 per day, per employee, for the period from November 29, 2007 to March 19, 2009." *Solus Indus. Innovations, LLC v. Superior Court of Orange Cnty.*, 229 Cal. App. 4th 1291 (2014). Under this formula, district attorneys could generate shock-and-awe penalties of many millions of dollars under the UCL and FAL for alleged workplace violations—far beyond what Cal/OSHA may impose under California's currently authorized enforcement program.

Amici also emphasize that it is inequitable to penalize a business twice for *the same underlying conduct*, especially where a doubling of penalties would ruin many small businesses. Further, California's UCL and FAL statutes are especially problematic because they create perverse incentives for local prosecutors to impose more severe penalties than necessary, since the proceeds are payable to the local treasury. *See* Cal. Bus. & Prof. Code § 17206(f). These are all concerns that may have weighed into the Secretary's decision-making process, had California followed the proper procedures.

III. The California Supreme Court's Decision Will Embolden Other States to Impose Supplemental Penalties for OSHA Violations

Twenty-six states, Puerto Rico, and the Virgin Islands have OSHA-approved State Plans, with

twenty-two of these covering private employers.[4] Therefore, the decision below may prove influential as other states consider similar claims for consumer protection penalties, on top of OSHA fines. The concern is that businesses will face undue burdens not only in California, but in other jurisdictions following California's lead.

For example, the State of Michigan has an approved workplace safety plan.[5] And, as in California, consumer protection laws generally prohibit deceptive and unfair business. Mich. Comp. Laws § 445.901. The Michigan Consumer Protection Act lists numerous business practices that are deemed unfair or deceptive. *Id.* at § 445.903. This includes such vague rules as a requirement to "reveal [any] material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer."[6] *Id.* at § 445.903(s). In reliance on the decision below, the Michigan Attorney General could initiate suit seeking to impose penalties for up to $25,000—on top of penalties imposed by the Michigan Occupational

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[4] United States Department of Labor, Occupational Safety & Health Administration, State Plans: State Office Programs, https://www.osha.gov/dcsp/osp/ (last visited Jul. 24, 2018).

[5] United States Department of Labor, Occupational Safety & Health Administration, Michigan State Plan, https://www.osha.gov/dcsp/osp/stateprogs/michigan.html (last visited Jul 24, 2018).

[6] Michigan law further confers power upon the Attorney General to specify other acts as deceptive and unfair, which leaves the door open for regulation explicitly authorizing consumer protection lawsuits to penalize businesses for workplace safety violations—on top of official OSHA penalties.

Safety & Health Administration. As in the present case, such a suit would proceed on the theory that a business unfairly deceives consumers when operating out of compliance with established regulatory standards. *Id*. at 445.905.

Likewise, with prior approval from the Secretary of Labor, Washington State enforces a state plan. And, as with California, Washington's plan might be amended through the backdoor, with invocation of state consumer protection laws. Washington defines "unfair competition" broadly as covering "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce…" Wash. Rev. Code § 19.86.010.

In the same vein, South Carolina has a state approved workplace safety plan that might also be subject to unilateral amendment through invocation of South Carolina's Unfair Trade Practice statute. S.C. Code Ann. § 39-5. For that matter, similar consumer protection statutes may be found in most jurisdictions. Therefore, the decision of the California Supreme Court stands (problematically) as persuasive authority for more aggressive penalties for workplace safety violations throughout the country.

Conclusion

For the foregoing reasons this Court should grant the petition for certiorari.

Respectfully submitted,

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