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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Though styled as a brief in opposition, the district attorney's submission provides more reasons to grant certiorari than to deny it. The district attorney does not attempt to downplay the breathtaking scope of the decision below, but affirmatively embraces it. In his view, it makes no difference that California's OSH plan nowhere provides for supplemental enforcement through UCL and FAL actions, see Opp. 1: Once a state has an approved plan, it "can enforce its own state plan in the manner it sees fit," *id.* at 21, regardless of whether the state has even sought to add the mechanism to its plan. And if, as here, state authorities ignore plan limits, employers have no remedy: "Employers * * * have no standing * * * to raise the need for a state plan change * * * as a basis" for a preemption defense. *Id.* at 22-23. Thus, according to the district attorney for the sixth-largest county in America,[1] whose population of over three million exceeds that of *twenty-one states*,[2] California can regulate occupational safety without regard for the terms of its approved state plan, without risk of preemption under the OSH Act.

That sweeping assertion of authority to "deviat[e] from [California's] formally approved plan" (Pet. App. 36a) utterly belies the district attorney's

[1] See Press Release, U.S. Census Bureau, New Census Bureau Population Estimates Show Dallas-Fort Worth-Arlington Has Largest Growth in the United States, Table 1 (Mar. 22, 2018), https://bit.ly/2pwFVFh.

[2] U.S. Census Bureau, *QuickFacts: United States – Chart*, https://bit.ly/2pkIxFy (last visited Sept. 17, 2018).

claim that there is no split. Applying this Court's decision in *Gade* v. *National Solid Wastes Management Association*, 505 U.S. 88 (1992), the Ninth Circuit has squarely held that the OSH Act "preempts all state occupational safety and health laws" relating to all issues covered by federal standards "unless they are included in the state plan." *Indus. Truck Ass'n* v. *Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997). By contrast, the California Supreme Court's self-consciously "narrower reading of the federal OSH Act's preemptive effect," Pet. App. 39a n.6, renders departures from the approved state plan irrelevant to federal preemption because "California's plan was approved many years ago." Opp. 22-23. It is difficult to imagine more diametrically opposed understandings of the statute's preemptive effect.

The district attorney never denies that OSH Act preemption is a frequently recurring issue, and his position that *Gade* is inapplicable to at least twenty-one states with similar approved plans, see Pet. 31, only underscores that this case presents a question of national importance. This Court's intervention is urgently warranted.

A. The Split Is Real

1. The district attorney does not dispute that the decision below *expressly disagreed with* the Ninth Circuit's "relatively broad[]" understanding of OSH Act preemption. See Pet. App. 38a-39a n.6. Instead, he tries to distinguish the Ninth Circuit's contrary case law on the facts. Those efforts fail.

As petitioners explained, the California Supreme Court's efforts to downplay *Industrial Truck* are unpersuasive. Pet. 24-26. Tellingly, the district attorney largely declines to defend the California Supreme Court's proffered grounds for minimizing the split. And none of the district attorney's own proposed distinctions provide any basis to doubt that the Ninth Circuit would have reached the opposite outcome here.

First, the district attorney says "there is no federal occupational * * * safety standard in potential conflict with the enforcement of the UCL and FAL." Opp. 27. Even if true, that is irrelevant. In *Industrial Truck*, the Ninth Circuit *expressly rejected* California's argument that preemption should not apply because its regulations "d[id] not conflict with the Hazard Communication Standard." 125 F.3d at 1313. And it squarely held that "*all* state occupational safety and health laws" relating to federally regulated issues, "*conflicting or not*," are preempted "*unless they are included in the state plan*." *Id.* at 1311 (emphasis added).

Next, the district attorney places weight on *Industrial Truck*'s "procedural posture," i.e., that it involved regulated businesses' pre-enforcement action for declaratory and injunctive relief. Opp. 28. But *Industrial Truck* never suggested its posture mattered; a law is either preempted or it is not, regardless of the procedural posture in which the issue arises. It is likewise irrelevant that Proposition 65 in *Industrial Truck*, unlike the UCL and FAL here, was then a relatively "new law." *Ibid.* The Ninth Circuit's reasoning in no way turned on the challenged law's recent enactment. Rather, the Ninth Circuit reasoned that the

OSH Act "preempts *all* state occupational safety and health laws" relating to issues covered by federal standards "unless they are included in the state plan." *Indus. Truck*, 125 F.3d at 1311 (emphasis added).

Finally, the district attorney attempts to distinguish *Industrial Truck* on grounds that the UCL and FAL are "laws of general applicability" "protected by a presumption against preemption." Opp. 29 (citing *Gade*, 505 U.S. at 107); *see also id.* at 9-12, 17-18, 23. But the district attorney does not engage petitioners' arguments why this carve-out is inapplicable when UCL and FAL claims are premised on violations of state OSH regulations. See Pet. 29-30. In *Kelly* v. *USS-POSCO Industries*, the district court squarely rejected this *precise* argument in a decision the Ninth Circuit unanimously affirmed. See *Kelly* v. *USS-POSCO Indus.*, No. 98-cv-04457, 2000 WL 36732730, at *4 (N.D. Cal. Jan. 12, 2000) (Breyer, J.), *aff'd*, 101 Fed. Appx. 182 (9th Cir. 2003) (Reinhardt, Hawkins, Siler, JJ.). As Judge Breyer explained, the UCL may "not * * * regulate occupational safety and health *on its face*," but a plaintiff that, as here, brings a UCL action explicitly based on alleged violations of workplace safety regulations "seeks to use section 17200 to 'directly, substantially and specifically' regulate occupational safety and health." *Ibid.* (emphasis added) (quoting *Gade*, 505 U.S. at 107). The Ninth Circuit agreed that a UCL claim premised on workplace safety violations "is intrinsically related to occupational health and safety." 101 Fed. Appx. at 184. The district attorney's UCL and FAL claims seek cumulative penalties for alleged violations of workplace-specific regulations. See Pet. App. 124a-127a. In this context,

the UCL and FAL serve only to provide an "end run" around limitations on the district attorney's ability to seek penalties under specific provisions of the California Labor Code. Cf. *Silvas* v. *E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). *Gade*'s ostensible exception for "general[ly] applicab[le]" laws "such as laws regarding traffic safety or fire safety" that apply equally to "workers and nonworkers alike," 505 U.S. at 107, cannot apply in such circumstances.

2. In laboring to distinguish *Kelly*—a case addressing the *precise* preemption question here—the district attorney settles on the trivial fact that *Kelly* involved a private lawsuit. Opp. 29-30. That distinction was irrelevant to the Ninth Circuit's analysis, which was premised on the simple fact that "§ 17200 is not part of California's approved occupational health and safety plan." 101 Fed. Appx. at 184. That rationale applies equally to UCL (and FAL) actions by district attorneys, which are likewise "not part of California's approved * * * plan" (*ibid.*)—a point the district attorney conspicuously fails to contest. Although *Kelly* did not indulge in the same "lengthy * * * analysis" (Opp. 30) as the decision below, it is common for appellate courts to act summarily (and not to publish) when affirming a respected district judge's thorough opinion applying established precedent (*Industrial Truck*) to similar facts. That the Ninth Circuit so readily reached the opposite conclusion on the exact same preemption issue only *emphasizes* the acuteness of the split.

B. The Decision Below Is Wrong

1. The California Supreme Court's decision cannot be reconciled with the OSH Act and *Gade*. The district

attorney disagrees, breezily asserting that "[t]he question of preemption is very different in * * * a state with an approved state plan," Opp. 17; accord Pet. App. 17a-18a, particularly because once a state has an approved plan, there is no threat of "dual" federal and state regulation, Opp. 16-17.

But the OSH Act is not solely concerned with the problem of "dual" regulation: otherwise, it would simply provide a mechanism for states to opt out of the federal program. Instead, § 18 of the OSH Act provides for federal review and approval of state plans and later modifications. 29 U.S.C. § 667(c). Nor is federal review solely concerned with ensuring that states "meet the minimum federal standards." Opp. 20. "State standards that affect interstate commerce will be approved only if they 'are required by compelling local conditions' and 'do not unduly burden interstate commerce.'" *Gade*, 505 U.S. at 100 (plurality opinion) (quoting 29 U.S.C. § 667(c)(2)); *id.* at 113 (Kennedy, J., concurring in part and concurring in the judgment) (similar).

Hence, by "design of the statute," "the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan." *Gade*, 505 U.S. at 99 (plurality opinion). And as the Ninth Circuit explained in *Industrial Truck*, "th[is] state plan approval requirement" at the heart of *Gade* would be "superfluous" if states could "pick and choose which occupational health and safety regulations to submit to OSHA." 125 F.3d at 1311.

2. a. Ignoring this straightforward logic, the district attorney resorts to a series of diversionary tactics. As noted previously, see pp. 4-5, *supra*; Pet. 29-30,

there is no credible basis to maintain that UCL and FAL claims are exempt from preemption as laws of general applicability when premised on violation of workplace safety standards. Contra Opp. 17-18. The district attorney fares no better contending that "[c]ourts across the country * * * agree" with the California Supreme Court, Opp. 18, citing a string of state cases.[3] Those cases did not involve "similar preemption questions," Opp. 2; they addressed preemption of prosecutions under "general criminal laws" (e.g., for negligent homicide) arising out of workplace incidents. *State* v. *Far West Water & Sewer Inc.*, 228 P.3d 909, 917-919 (Ariz. Ct. App. 2010); *id.* at 919 (summarizing same cases). All but one predate *Gade*, and the sole exception—*Far West*—did not cite or discuss *Gade*. The string citation thus accomplishes nothing—except demonstrating that OSH Act preemption arises frequently, reinforcing the importance of this Court's guidance.

The district attorney also references the savings clause in § 4(b)(4) of the OSH Act—discussed in *some* of the cases he cites—and hints that it may apply here. See Opp. 19 (citing 29 U.S.C. § 653(b)(4)). It does not. Pet. 7 n.1. Indeed, the district attorney made the same argument below, see Resp. Cal. S. Ct. Br. 35-36; Resp. Cal. S. Ct. Reply Br. 10, and the California Supreme

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[3] The district attorney also cites one federal case, *West Virginia Manufacturers Association* v. *West Virginia*, 714 F.2d 308 (4th Cir. 1983), but grossly mischaracterizes it. That pre-*Gade* case simply held that a state workplace safety standard was not preempted because it addressed an issue with respect to which there was no federal standard. *Id.* at 313-314; see 29 U.S.C. § 667(a).

Court tellingly did *not* rest its decision on the savings clause.[4] Accord *Kelly*, 2000 WL 36732730, at *4 (finding savings clause inapplicable to UCL preemption). Rightly so. The savings clause is generally understood to save "state laws aimed primarily at compensating the victims of workplace accidents, as opposed to regulating hazards," *Occupational Safety & Health Law* 740 (Gregory N. Dale & P. Matthew Shudtz eds., 3d ed. 2013), notably workmen's compensation and "state tort rules," *Lindsey* v. *Caterpillar, Inc.*, 480 F.3d 202, 209 (3d Cir. 2007) (citation omitted).[5] The savings clause cannot be construed as applying to actions like this, seeking *non-compensatory* civil penalties for workplace-specific safety regulations: if it did, *Gade* would effectively be a dead letter, even in states without plans. Cf. Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 543 n.52 (1987). In any event, given confusion on the precise scope of § 4(b)(4), the district attorney's effort to invoke it is, if anything, a further reason to grant review. See *Ries* v. *Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1160-1162 (3d Cir. 1992) (disagreeing

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[4] The decision below discussed § 4(b)(4), Pet. App. 29a-30a, but only as one of "various elements" supposedly "indicat[ing] that the field preempted" by the OSH Act "is narrow," *id.* at 27a, 30a.

[5] Some courts have treated the savings clause as relevant in addressing preemption challenges to state *criminal* prosecutions, but its bearing on criminal law is dubious at best—as the district attorney's cited cases show. See, *e.g.*, *People* v. *Hegedus*, 443 N.W.2d 127, 135 (Mich. 1989) (expressing doubt as to whether § 4(b)(4) was intended to save criminal laws); *People* v. *Chi. Magnet Wire Corp.*, 534 N.E.2d 962, 968 (Ill. 1989) (section 4(b)(4) saves "[s]tate workers' compensation and tort law").

with First Circuit on extent of § 4(b)(4)'s impact on tort law); *United Steelworkers of Am.* v. *Marshall*, 647 F.2d 1189, 1234 (D.C. Cir. 1980) (stating § 4(b)(4)'s text is "vague and ambiguous").

b. The district attorney next seeks refuge in OSHA's view that "[t]he OSH Act * * * does not bar the States from adopting supplemental enforcement mechanisms," Opp. 24 (emphasis omitted) (quoting 62 Fed. Reg. 31,159, 31,170 (June 6, 1997)), and regulatory language providing that states may implement changes to their approved plans "without prior approval" by OSHA. Opp. 22 (quoting 29 C.F.R. § 1953.3(a)). But even if that reflects an accurate understanding of the statute's preemptive scope, see Pet. 30-31, UCL and FAL claims *are not part of California's plan.* Pet. App. 14a; see Opp. 1. Nor have California regulators sought to "modify or supplement" the state's plan to incorporate such actions, 29 C.F.R. § 1953.3(a), much less submitted a plan supplement to OSHA for approval, see 29 U.S.C. § 667(c); 29 C.F.R. §§ 1953.3(b), 1953.4(d). A hypothetical change state regulators *might* make does not authorize a local official's freelancing outside of that procedural mechanism. The district attorney supports its argument with quotations culled from OSHA's *approval* of supplemental enforcement provisions that California *did* incorporate into its plan and submitted for federal review. See Opp. 1, 2, 24, 25; see also *Indus. Truck*, 125 F.3d at 1308 (describing submission and approval). But the preemption issue in this case arises *precisely because* California did not follow that path here. The district attorney responds that "[e]mployers * * * have no standing * * * to raise the need for a state

plan change * * * as a basis" for a preemption defense. Opp. 22-23. The district attorney offers no authority—save his own *ipse dixit*—for this stunning assertion.

C. This Case Is An Attractive Vehicle For Resolving A Nationally Important Issue

The district attorney identifies no vehicle problems that would keep this Court from resolving what is unquestionably a recurring issue. And far from demonstrating that the issue is inconsequential, the brief in opposition *underscores* its importance.

1. The district attorney makes a halfhearted effort to dispute that "[t]he decision below virtually writes *Gade* out of existence" for the majority of states that have approved plans. Pet. 31. But in doing so, he only confirms that the decision below leaves only a negligible role for preemption. He explains that OSH Act preemption could "conceivably" arise in certain workplaces "expressly exempted" from California's plan, Opp. 31 n.6, a narrow category involving, for example, certain maritime activities, see Opp. 5. And while he suggests that "preemption concern[s]" "might" still arise in cases "involving possible interference with interstate commerce," Opp. 31 n.6; cf. 29 U.S.C. § 667(c)(2), the California Supreme Court itself evidently disagrees.[6] The district attorney quotes the California Supreme Court's statement "that in some instances, a UCL claim may fall within a field of preemption," Opp. 30-31 (quoting Pet. App. 33a), but

[6] See Pet. App. 41a (even if UCL/FAL claims "should be incorporated into the state plan and submitted to [OSHA] for review of any impact on interstate commerce, it does not follow" they are "preempted in the meantime").

fails to note that passage referred to federal preemption *in general*—i.e., under *other* statutes, not the OSH Act. See Pet. App. 33a (citing *In re Tobacco Cases II*, 163 P.3d 106 (Cal. 2007)).

2. The district attorney asks this Court to ignore the "truly massive penalties" (Pet. App. 67a) available under the decision below because the actual penalty amount here has not been determined yet. See Opp. 32. But he never denies that he has asserted authority to seek, in the words of the court of appeal, "an extraordinary jump in the potential civil penalty" for workplace safety incidents. Pet. App. 68a. And to the extent the penalty amount is "discretion[ary]," Opp. 32, that only *underscores* that the decision below exposes "employers * * * to duplicative and wildly unpredictable penalties" beyond the carefully graduated system of penalties in the state's approved plan. NAM Amicus Br. 15; accord Chamber Amicus Br. 10; NFIB & SLF Amici Br. 10.

3. The district attorney does not deny that conflict concerning California alone—a state with a population of nearly 40 million and an economy that accounts for nearly 15% of gross domestic product—is sufficiently important to warrant this Court's review. See Pet. 20, 31-32; U.S. Census Bureau, *QuickFacts: California*, https://bit.ly/2MGSztP (last visited Sept. 17, 2018); cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992). The district attorney dismisses as "speculation" (Opp. 33) the idea that this issue has nationwide implications. But as the district attorney acknowledges, California is hardly alone in having broad unfair competition and deceptive practices laws; there are "similar laws in the

50 states." Opp. 33. And as amicus notes, it is "increasingly common for state prosecutors to use" such laws "to seek additional penalties for conduct that is already regulated under federal statutes." Chamber Amicus Br. 15; see Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209, 209 (2016) (noting "sweeping authority" under such statutes to "target practices already regulated by government agencies"). It is thus undeniable that this case has broad and nationwide implications for OSH Act implementation and beyond.

CONCLUSION

The petition should be granted. At minimum, the Court should seek the views of the United States.

Respectfully submitted.

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