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 A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

TONY RACKAUCKAS, District Attorney
COUNTY OF ORANGE, STATE OF CALIFORNIA
KELLY A. ERNBY,*
Deputy District Attorney
Post Office Box 808
Santa Ana, California 92702
Telephone: (714) 834-3600
kelly.ernby@da.ocgov.com
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does the federal Occupational Safety and Health Act of 1970 (the "Act") preempt a cause of action under California's Unfair Competition Law (Business and Professions Code Section 17200) when based on worker safety violations that are part of California's federally approved state plan under the Act?

2. Does the Act preempt a cause of action under California's False Advertising Law (Business and Professions Code Section 17500) based on false and misleading representations about worker safety?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Under the federal Occupational Safety and Health Act, Congress "established a system of uniform federal standards, but gave States the option of preempting the federal regulations entirely pursuant to an approved state plan that displaces the federal standards." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 89, 96-97 (1992). The State of California has long exercised jurisdiction over the enforcement of its own workplace safety laws and regulations under its federally approved state plan. The United States Department of Labor, Occupational Safety and Health Administration ("FedOSHA") in charge of administering the state plan program has long recognized that despite its continuing oversight function, it "has no authority to address . . . non-occupational applications" of California state law, including "consumer" protection laws like California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL"). 62 Fed. Reg. 31159, 31159 (June 6, 1997). Thus, California has broad jurisdiction to regulate and enforce its UCL, FAL and workplace safety laws and regulations without being preempted by the federal Act.

Nevertheless, Petitioners contend state prosecutors should not be permitted to base a California UCL or FAL action on un-preempted violations of California's federally approved state plan because "supplemental enforcement" actions under the UCL and FAL are not independently approved parts of the state plan. In rejecting this argument, the California Supreme Court performed a thorough analysis of the Act under

well-settled principles of preemption recognized by this Court. *Gade*, 505 U.S. at 89, 96-97. Based thereon, the California Supreme Court held that there is no express congressional intent to bar the District Attorney's prosecution here. There is also no implied preemption, as the California Supreme Court further held, because the enforcement action is not within the narrow field of preemption intended in the Act, it is not in conflict with federal law, and it does not interfere with or obstruct any retained federal powers with respect to worker safety.

The California Supreme Court's decision is in conformity with state courts across the country that have ruled on similar preemption questions. The decision is not in conflict with the opinions of this Court, or any decision of any federal circuit, so as to warrant further review. It is also in line with FedOSHA's interpretation of the preemptive scope of the Act. *See* 62 Fed. Reg. 31159, 31170 (June 6, 1997) (explaining that the Act "does not bar the States from adopting supplemental enforcement actions" and it "specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA"). For each of these reasons, and those discussed in more detail below, the Petition should be denied.

———♦———

STATEMENT

Under the federal William-Steiger Occupational Safety and Health Act of 1970 (the "Act"), Congress established the Occupational Safety and Health Administration for the purpose of regulating "commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651. Federal workplace safety laws and regulations were thereafter developed to establish a minimum set of "standards" to be applied across the country, and a federal enforcement program was created. *See* 29 U.S.C. § 655.

A. Federal Standards And Enforcement Mechanisms Under The Act

The Act defines an "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). The federal standards adopted by the Secretary under the Act are currently set forth at 29 C.F.R. Sections 1910.1-1910.1450. 29 U.S.C. § 655; 29 C.F.R. §§ 1910.1-1910.1450. Federal law requires employers to comply with the federal standards and generally to "furnish to each of his employees employment and a place of employment which are free from recognized

hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654. The Act further authorizes administrative penalties, injunctive relief and criminal enforcement actions against employers for certain violations of these federal standards. 29 U.S.C. §§ 658, 659, 662, 666.

B. Option To Displace Federal Law Under Approved State Plan

Notwithstanding the federal program, it has always been the policy of the federal government to encourage "the States to assume the fullest responsibility for the administration and enforcement of their [own] occupational safety and health laws." 29 U.S.C. § 651(11). In accordance with these intentions, "[a]ny States that desire to assume responsibility for development and enforcement therein of occupational safety and health standards" may elect to submit a state plan for approval by the Secretary of Labor "to preempt Federal standards." 29 U.S.C. § 667(b). Pursuant to an approved state plan, the Act authorizes states to "assume responsibility for development and enforcement" of any "issue with respect to which a Federal standard" exists. 29 U.S.C. § 667(b).

Stated simply:

> The Act as a whole demonstrates that Congress intended to promote occupational safety and health while avoiding subjecting workers and employers to duplicative regulation. Thus, it established a system of uniform federal

> standards, but gave States the option of preempting the federal regulations entirely pursuant to an approved state plan that displaces the federal standards.

Gade, 505 U.S. at 89, 96-97.

C. California's Federally Approved State Plan

At the time of the federal Act, California was already engaged in enforcing its own occupational safety and health laws. *See* Susan Ann Meyers, *The California Occupational Safety and Health Act of 1973*, 9 Loy. L.A. L. Rev. 905, 906-09 (1976) (noting California worker safety laws have existed since the early 1900s). Following enactment of the Act, California submitted its state plan requesting federal approval from the Secretary of Labor to maintain responsibility for developing and enforcing its own workplace safety laws and regulations, and its plan was initially approved in 1973. Pet. App. 13a-15a; 29 C.F.R. §§ 1952.170-1952.175. It was most recently approved again, effective October 5, 1989. Pet. App. 15a. As long as the State continues to maintain the minimal protections required under federal law (which it does), California retains exclusive jurisdiction over occupational safety and health standards with few expressly established exceptions. *See, e.g.*, 29 C.F.R. § 1952.172 (reserving, for example, federal jurisdiction over maritime and offshore employers).

The effect of California's state plan approval is "to preempt Federal standards" thereby rendering them

inapplicable. 29 U.S.C. § 667(b); *see also id*. § 667(e) (confirming the "standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the [approved state] plan."). The effect of state plan approval means the state's program is "at least as effective" as federal law requires and that the federal standards "shall not apply with respect to those occupational safety and health issues covered under the [state] plan." 29 C.F.R. § 1902.42(a), (c).

State plan approval renders not only the federal substantive standards preempted, but it also renders legally inapplicable the federal remedies under the Act, including all administrative penalties, injunctive relief and criminal enforcement actions set forth in the Act. *See* 29 U.S.C. § 667(e) (confirming that three years after state plan approval, the federal "provisions of 654(a)(2) [duties of employers], 657 [inspections, except for monitoring of state plan], 658 [citations], 659 [administrative enforcement procedures], 662 [injunctive relief by Secretary], and 666 [penalty provisions] of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan"). In short, "Congress intended to subject employers and employees to only one set of regulations, be it federal or state," and once a state plan has been approved, the state law "displaces the federal standards." *Gade*, 505 U.S. at 99. Thus, "a State may develop an occupational safety and health program tailored to its

own needs, but only if it is willing completely to displace the applicable federal regulations." *Id*. at 100.

In states operating under a state plan, Congress expressly reserved limited discretionary authority for the Secretary of Labor to exercise jurisdiction "with respect to comparable standards" for "at least three years after the plan's approval" and until it has been determined that the state plan meets federal standards in operation. 29 U.S.C. § 667(e). The federal government also retained the power to withdraw approval of any state plan if "there is a failure to comply substantially with any provision of the State plan." 29 U.S.C. § 667(f). As a further "condition for retention of jurisdiction by [the] State," Congress mandated that the Secretary of Labor "shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan" so it can re-assert federal jurisdiction if necessary. 29 U.S.C. § 667(f); 29 C.F.R. § 1952.172(c).

Both 29 U.S.C. Section 667(f) and 29 C.F.R. Section 1952.172(c) expressly confirm that no federal enforcement jurisdiction was retained under this retained oversight authority. Instead, FedOSHA is expressly required to take affirmative steps to "notify the State agency of his withdrawal of approval" of the state plan and "make a prompt recommendation for the resumption of the exercise of Federal enforcement authority" in any area not otherwise expressly reserved when the Secretary of Labor finds it "necessary to

assure occupational safety and health protection to employees in California" during FedOSHA's regular auditing of California's state plan. 29 C.F.R. § 1952.172(b)-(c); 29 U.S.C. § 667(f). Under this express framework, "[a] state with an approved plan may modify or supplement the requirements contained in its plan, and may implement such requirements under State law without prior approval of the change by Federal OSHA." 29 C.F.R. § 1953.3(a).

D. Two Savings Clauses Also Preserve State Jurisdiction

There are two express savings clauses in the Act. Under 29 U.S.C. § 667(a), the Act confirms that: "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. § 653(b)(4) more broadly provides that:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of or in the course of employment.

29 U.S.C. § 653(b)(4).

E. California's UCL And FAL Are Laws Of General Applicability

Currently codified in California's Business and Professions Code (§§ 17200-17210, 17500-17930), the UCL and FAL are laws of general applicability with a long history in California. Pet. App. 31a-33a.

1. The UCL began as a law aimed at curbing trade mark abuse and deceptive, anti-competitive practices in the late 1800s and early 1900s. Cal. Bus. & Prof. Code §§ 17200-17210 (formerly codified in 1933 at Cal. Civ. Code § 3369(3)). Since then, the definition of what constitutes "unfair competition" has broadened greatly to include any type of unlawful, unfair or fraudulent business practice. *Int'l Ass'n of Cleaning & Dye House Workers v. Landowitz*, 126 P.2d 609, 610-11 (Cal. 1942) ("the common law concept of unfair competition has been broadened"); Cal. Bus. & Prof. Code § 17200 (defining "unfair competition" today as any "unlawful, unfair or fraudulent business act or practice").

Under the "unlawful" business practices prong of the UCL, "section 17200 'borrows' violations of other laws and treats them as unlawful practices" independently actionable. *Rose v. Bank of America, N.A.*, 304 P.3d 181, 185 (Cal. 2013). There is no intent to restrict application of the UCL to any particular subset of laws, but rather, an intent to "permit tribunals to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *Barquis v. Merchants Collection Ass'n of Oakland, Inc.*, 496 P.2d 817, 829 (Cal. 1972); *see also Cal-Tech Communications, Inc.*

v. Los Angeles Cellular Telephone Co., 973 P.2d 527, 539 (Cal. 1999) ("the unfair competition law's scope is broad"; "Its coverage is 'sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law.'" (internal citations omitted)).

Workplace safety violations are no exception. Indeed, it has long been recognized in California that: "[t]he employer who violates the working condition laws competes unfairly with other growers and contractors in the business sense as well. By neglecting to provide the facilities required, the employer . . . lowers his cost of production and thereby gains an advantage over his competitor who complies with the law." Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition*, 19 Hastings L.J. 368, 411 (1968) (cited in *Barquis*, 496 P.2d at 830). "Failing to provide the required facilities" for a safe workplace, therefore, is "clearly an unlawful method of competition" intended by the California Legislature – since the 1960s – to be remedied under California's UCL. *Id*. This is precisely the type of unlawful business conduct that is alleged in this case.

Under the UCL, district attorneys have standing to seek injunctive relief, restitution and civil penalties in an amount "not to exceed two thousand five hundred dollars ($2,500) for each violation" of law. Cal. Bus. & Prof. Code §§ 17203-17206.

2. The FAL, set forth in Business and Professions Code Sections 17500-17930, was enacted in 1941

and makes it unlawful for any person or entity to use false and misleading statements or advertising to secure competitive advantages by deceiving the public with respect to their goods or services. Specifically, Section 17500 states:

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, ...

Cal. Bus. & Prof. Code § 17500.

Violations of Section 17500 may be prosecuted by district attorneys either criminally or civilly. Cal. Bus.

& Prof. Code §§ 17500, 17535-17536. Under Sections 17535 and 17536, entities that violate Section 17500 may be enjoined from using false and misleading advertising and charged with:

> a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

Cal. Bus. & Prof. Code § 17536. Penalties under the UCL and FAL are expressly meant to be cumulative of other penalties assessed under any other law. Cal. Bus. & Prof. Code §§ 17205, 17534.5 (stating that "[u]nless otherwise expressly provided," civil penalties are intended to be "cumulative to each other and to the remedies or penalties available under all other laws of this state").

F. Background Of This Action

Following an explosion and death of two workers caused by an unsafe place of employment in Orange County California, among other things, the Orange County District Attorney filed a UCL action against Petitioners based on their unlawful business conduct in relation to the deaths, including violations of the federally approved workplace standards in California's state plan. The District Attorney also filed a FAL cause of action based on false and misleading public

statements by Petitioners regarding their compliance with workplace safety standards. Pet. App. 102a-128a.

Petitioners demurred to both counts on the grounds that the UCL and FAL causes of action were preempted under the Act. The trial court disagreed and overruled the demurrer. Petitioners sought immediate appellate review at the pleading stage by way of a writ of mandate. The appellate court ultimately granted the writ and reversed the trial court, holding both the UCL and FAL causes of action were preempted by the Act. Pet. App. 46a-69a.

The California Supreme Court granted review and unanimously held that the UCL and FAL causes of action were not preempted by the Act. In so holding, the California Supreme Court engaged in a thorough analysis of the Act under well-settled principles of preemption, including the "Federal OSH Act preemption principles announced by [this] high court" in *Gade*, 505 U.S. 88. Pet. App. 16a-25a. Based thereon, it held that:

> [t]he district attorney's use of UCL and FAL causes of action does not encroach on a field fully occupied by federal law, nor does it stand as an obstacle to the accomplishment of the federal objective of ensuring a nationwide minimum standard of workplace protection. In addition, the federal act's structure and language do not reflect a clear purpose of Congress to preempt such claims.

Pet. App. 2a.

More specifically, viewing the federal Act as a whole, it held that the "field preempted" by the Act is "narrow" and that the UCL and FAL actions in this case "do not fall within this narrow field of preemption." Pet. App. 26a-39a. The California Supreme Court further held that any impact of UCL and FAL enforcement actions "based on Cal/OSHA violations . . . is not an obstacle to achieving the congressional purpose, nor are additional enforcement mechanisms an obstacle to establishing at least a minimum level of worker protection." Pet. App. 40a. It held that "the magnitude of the potential UCL and FAL penalties compared with the lesser administrative penalties imposed under the state plan are not inconsistent with the federal scheme," particularly given the Act's savings clause which "explicitly recognized the continuing applicability of state law in the field." Pet. App. 42a (explaining that under the savings clause, state "tort litigation could produce large civil awards and penalties despite the existence of a more modest state administrative enforcement plan"). Finally, the California Supreme Court held that the UCL and FAL causes of action were not expressly preempted by the Act because there is an "absence of a clear and manifest congressional purpose to preempt" such claims. Pet. App. 44a.

THE PETITION SHOULD BE DENIED

The California Supreme Court correctly held that the UCL and FAL causes of action alleged in this case are not preempted by the Act in a well-reasoned

opinion under settled law. The decision is in conformity with numerous other state courts across the country that have analyzed a similar preemption question and the views of the federal agency in charge of administering the state plan program under the Act. Contrary to Petitioners' argument, there is no conflict between the holding in this case and the Ninth Circuit's holdings in two clearly distinguishable cases (*Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305 (9th Cir. 1997); *Kelly v. USS-POSCO Industries*, 101 Fed. Appx. 182 (9th Cir. 2003)) given the vast differences in the claims and issues addressed in those cases. There is no other compelling reason to grant this Petition presented by Petitioners or any amicus party. For these reasons, and as explained in more detail below, the Petition should be denied.

A. The California Supreme Court Followed Well-Settled Legal Principles From This Court In Forming Its Opinion

In holding that the UCL and FAL causes of action alleged in this case are not preempted under the Act, the California Supreme Court relied on the "Federal OSH Act preemption principles announced by the high court" in *Gade v. National Solid Wastes Management Association*. Pet. App. 17a-25a. As such, the decision is not in conflict with this Court's decision in *Gade*, as Petitioners contend, but rather, is fully consistent with

the principles of preemption adopted by this Court.[1] Pet. 18-19. Although the holdings are distinguishable (and rightfully so) given the fact that California has an approved state plan and Illinois did not, the preemption principles and analysis relied upon in both cases are the same.

As the California Supreme Court correctly held, the principles of *Gade* do not support any notion of preemption here. In *Gade*, this Court reviewed attempted state regulatory action in Illinois – a state (unlike California) without an approved state plan. The state intended to adopt a set of workplace safety standards to be enforced on top of the federal minimum standards, leaving state employers subject to governance by both federal and state agencies at the same time.

This Court held that the state's regulation was preempted under the Act because "Congress intended to subject employers and employees to only one set of regulations, be it federal or state." *Gade*, 505 U.S. at 99. Because Illinois had not taken the steps to secure federal state plan approval, the Court held that jurisdiction remained with the federal government entirely. *Gade*, 505 U.S. at 99-100 (reasoning that "a State may develop an occupational safety and health program

---

[1] *See also Wyeth v. Levine*, 555 U.S. 555, 564-65 (2009); *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations").

The question of preemption is very different in a case like this – involving a state with an approved state plan that expressly "displaces the federal standards." *Id*. at 99. As recognized in *Gade*, "Congress not only reserved certain areas to state regulation, but it also, in § 18(b) of the Act, gave the States the option of preempting federal regulations entirely." *Id*. at 97 (noting "[a]bout half the States have received the Secretary's approval for their own state plans . . . [but] Illinois is not among them"). The prohibited "duplicative" or "dual regulation" referenced in *Gade* refers solely to the Act's intent to provide for regulation under federal or state laws, but not both. In accordance with these principles, California operates under its own sovereign powers under its state plan and employers are subject to regulation solely under California law precisely as the Act intends. *Id.* at 89, 96-97.

Additionally, in *Gade*, this Court acknowledged that "state laws of general applicability . . . that do not conflict with OSHA standards and that regulate the conduct of workers and non-workers alike would generally not be preempted" by the Act. *Id.* at 107. Unlike the Illinois regulation at issue in *Gade*, California's UCL and FAL are laws of "general applicability" that do not conflict with federal OSHA standards. As such, in accordance with the historic principles of preemption recognized by this Court, the California Supreme Court properly determined that the UCL and FAL actions here are subject to a presumption against

preemption. Pet. App. 16a; *Gade*, 505 U.S. at 107; *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); *see also In re Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008) (noting "[c]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the state's historic police powers, and therefore are subject to the presumption against preemption"). Under this presumption, "in all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . [the Court] start[s] with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

B. Courts Throughout The Country Are In Agreement

Courts across the country that have addressed this question agree that state supplementary enforcement actions are not preempted under the Act. *See State v. Far West Water & Sewer, Inc.*, 228 P.3d 909 (Ariz. 2010) [Arizona laws not preempted by federal OSHA law]; *Sabine Consolidated, Inc. v. State of Texas*, 806 S.W.2d 553 (Tex. Crim. App. 1991) (Texas law not preempted); *People v. Pymm*, 151 A.D.2d 133 (N.Y. App. Div. 1990) (New York law not preempted); *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989) (Illinois law not preempted); *People v. Hegedus*, 443 N.W.2d 127 (Mich. 1989) (Michigan law not preempted); *State v. Black*, 425 N.W.2d 21 (Wis. Ct. App.

1988) (Wisconsin laws not preempted); *W. Virginia Mfrs. Ass'n v. State of W. Va.*, 714 F.2d 308 (4th Cir. 1983) (West Virginia law not preempted).

In these cases, courts upheld supplemental state enforcement actions against challenges of preemption under the "OSHA Savings Clause" which states that:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of or in the course of, employment.

29 U.S.C. § 653(b)(4). These authorities uniformly hold that there is no Congressional intent to preempt supplemental state actions by prosecutors in the federal Act. As noted in these opinions, such actions do not conflict with the purpose of the federal Act and "surely further OSHA's stated goal" to protect worker safety. *See, e.g.*, *Far West Water & Sewer, Inc.*, 228 P.3d at 919 (quoting *Chicago Magnet Wire Corp*., 534 N.E.2d at 969).[2]

---

[2] Neither the opinion in *Skilled Craftsmen of Tex., Inc. v. Tex. Worker's Comp. Comm'n*, 158 S.W.3d 89, 94-96 (Tex. App. 2005) nor *Ben Robinson Co. v. Tex. Workers' Comp. Comm'n*, 934 S.W.2d 149, 156-58 (Tex. App. 1996) say otherwise. *See* Pet. 28. These opinions did not address supplemental enforcement actions, but rather, the preemption of a state program (like that addressed in *Gade*) that attempted to regulate occupational and safety issues

Moreover, unlike other federal laws, there is nothing in the federal Act requiring uniformity of state standards or enforcement actions across the country. *See, e.g.*, *Coventry Health Care of Missouri v. Nevils*, 137 S.Ct. 1190, 1197-99 (2017) (finding preemption when purpose of federal law is to ensure "uniform administration" of law); *Goboeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936, 945 (2016) (same). In fact, the Act contemplates just the opposite by encouraging and permitting the states to adopt their own state plans, with the only requirement being assurances that the various states will meet the minimum federal standards. *Gade*, 505 U.S. at 97-103; *see also United Airlines Inc. v. Occupational Safety & Health Appeals Bd.*, 654 P.2d 157, 164 (Cal. 1982) (noting: "There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by Fed/OSHA . . . or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by Fed/OSHA. A state is required only to provide a program 'at least as effective' as Fed/OSHA's." (internal citations omitted)); *United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3d Cir. 1985) (similarly noting that "[r]eduction of burdens posed by multiple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous

---

covered by federal standards in a state without an approved state plan.

protection would not be disadvantaged by those that did not.").

C. There Is No Federal Pre-Approval Requirement In The OSH Act That Preempts A State's Supplemental Enforcement Action

In states like California with an approved state plan, there is no federal pre-approval requirement before supplemental enforcement actions may be taken as Petitioners' preemption argument presumes.[3] Pet. 22. Under the express and unambiguous terms of the Act, the approval requirement is aimed solely at ensuring a state plan meets the federal minimum standards and enforcement requirements prior to permitting a state to assume full jurisdiction over enforcing worker safety laws. *Gade*, 505 U.S. at 100; *see also United Airlines*, 654 P.2d at 163-64. Once fully approved, the Act removes federal jurisdiction so the state can enforce its own state plan in the manner it sees fit. *United*

[3] Petitioners acknowledge that there is no prior approval requirement in California, but contend this is not relevant. Pet. 30. Yet, Petitioners' entire preemption argument is based on the idea that the state is preempted from bringing enforcement actions under any laws that were not formally pre-approved by FedOSHA as part of the state plan. The sole premise of their preemption argument is not supported by the Act because there is no pre-approval requirement that is a prerequisite to state enforcement actions in California under the Act. Thus, "even if any new enforcement method that is related to an existing approved standard should be submitted to the Secretary" for approval as Petitioners suggest, the California Supreme Court correctly recognized that "it does not follow that the new method is preempted until approved." Pet. App. 29a.

Airlines, 654 P.2d at 163-64. Since California's plan was approved many years ago, there is no longer any "approval" requirement that must be met before California may exercise its own sovereign jurisdiction under the Act. *Id*.

Moreover, following state plan approval, a state is expressly authorized to make plan changes as it deems necessary "without prior approval." 29 C.F.R. § 1953.3(a); *see also id*. § 1953.2(c) ("Plan change means any modification made by a State to its approved occupational safety and health State plan which has an impact on the plan's effectiveness."). Indeed, in direct conflict with Petitioners' argument, 29 C.F.R. Section 1953.3(a) states:

> Federal OSHA approval of a State plan under section 18(b) of the OSH Act in effect removes the barrier of Federal preemption and permits the State to adopt *and enforce* state standards and other requirements regarding occupational safety or health issues regulated by OSHA. A state with an approved plan may modify *or supplement* the requirements contained in its plan, and may implement such requirements under State law *without prior approval* of the change by Federal OSHA. Changes to approved State plans are subject to subsequent OSHA review. If OSHA finds reason to reject a State plan change, and this determination is upheld after an adjudicatory proceeding, the plan change would [only] then be excluded from the State's federally approved plan.

29 C.F.R. § 1953.3(a) (emphases added). Employers thus have no standing, or other authority under the

Act, to raise the need for a state plan change or public hearing in relation thereto as a basis to shield themselves from enforcement action under the state plan, let alone as a basis to usurp the entire state's jurisdiction to enforce other laws of general applicability (like the UCL or FAL) on the grounds of preemption.

Furthermore, on its face, the "approval" requirement applies only to "occupational safety and health" laws and regulations, not laws of general applicability that govern other concerns like the UCL or FAL. 29 U.S.C. §§ 651, 653(b)(4), 667(b); 29 C.F.R. § 1952.170; 62 Fed. Reg. 31159, 31159, 31163 (June 6, 1997). Under California law, the consumer protection laws are not "mere enforcement mechanism[s]" of other laws. *Rose*, 304 P.3d at 185-86 (explaining that the UCL " 'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable"). Neither the UCL nor the FAL are occupational safety laws or regulations, and they are not being used to "enforce" such laws in this case. As laws of general applicability, they have no place in the state plan, and are thus expressly and intentionally excluded from it. 29 U.S.C. § 667(a).

Under the express terms of the Act, therefore, the California Supreme Court reasonably concluded that there is no "pre-approval" requirement under the Act that preempts the People's UCL and FAL claims.[4] There is no need for further review of this question.

---

[4] Under Petitioners' "approval" theory, if it was correct, *all* of California's non-labor laws would be preempted by the Act

D. FedOSHA Agrees That "Supplemental Enforcement Actions" Are Not Preempted

There is also no need for review by this Court because the question presented has already been answered by the federal agency in charge of approving and monitoring state plans under the Act.[5] A federal "agency's construction of the statue" it is in charge of administering is entitled to great weight by the courts. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005).

According to FedOSHA, "the OSH Act specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The *OSH Act, therefore, does not bar the States from adopting supplemental enforcement mechanisms*." 62 Fed. Reg. 31159, 31170 (June 6, 1997) (emphasis added). FedOSHA has also expressly recognized that it "has no authority to address . . . non-occupational applications" of California state law, including

---

because they are not part of the state plan. There is no congressional intent, or other authority, to support such a broad federal reach under the Act. The California Supreme Court correctly and reasonably rejected such an interpretation of the Act.

[5] Petitioners seek review of the broad question: "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." Pet. I. "At a minimum," Petitioners urge the Court to "seek the views of the United States" with respect to this issue. Pet. 36. As set forth above, review of this question is unnecessary because FedOSHA has already answered this question and there is no authority to the contrary.

"consumer" protection laws like California's Unfair Competition and False Advertising Laws. 62 Fed. Reg. 31159, 31159 (June 6, 1997). "Whether such supplements are a useful or appropriate addition to State plan authority is a matter for the State to decide." *Id*. at 31170.

When addressing a claim of preemption due to the "manner of enforcement" used with respect to California's Proposition 65, FedOSHA declared "that neither a distribution of functions among agencies nor private rights of action are prohibited under State plan provisions." 62 Fed. Reg. 31159, 31167 (June 6, 1997). "[P]rocedural differences" in enforcement, including the "supplemental" use of prosecutors or private parties in the judicial process, are permitted as long as the state effort "remains at least as effective" as the federal law, and the state agency remains responsible for ensuring adequate compliance and enforcement. 62 Fed. Reg. 31159, 31168 (June 6, 1997). This is because "State plans do not operate under a delegation of Federal authority but under their own authority, and therefore they may use methods of enforcement not included under the Federal Act." 62 Fed. Reg. 31159, 31180 (June 6, 1997).

E. There Is No Conflict Between California's Ruling In This Case And The Ninth Circuit's Decisions In Unrelated Circumstances

Petitioners contend review should be granted because the California Supreme Court's decision

conflicts with the analysis in two decisions from the Ninth Circuit. Pet. 19-23 (citing *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305 (9th Cir. 1997) and *Kelly v. USS-POSCO Industries*, 101 Fed. Appx. 182 (9th Cir. 2003)). There is no conflict that warrants further review in this Court.

1. The Proposition At Issue In *Industrial Truck* Is Nothing Like The UCL Or FAL That Were The Subject Of The California Supreme Court's Decision Here

In *Industrial Truck*, the Ninth Circuit was presented with "a narrow but complex question of preemption" involving a portion of California's Proposition 65, otherwise known as the Safe Drinking Water and Toxic Enforcement Act of 1986. "Under the *Gade* framework," the Ninth Circuit held "that any portions of Proposition 65 and the [state administrative] Regs. not included as part of the State Plan relate to the 'issue' of the federal Hazard Communications Standard, and are therefore preempted." *Industrial Truck*, 125 F.3d at 1311. The holding was based entirely on an analysis of the preemptive scope of the federal Hazard Communication Standard "as applied to manufacturers and distributors of industrial trucks." *Id.* at 1314; *see also id*. at 1311-15. The analysis and holding of the Ninth Circuit are consistent with the relevant California published decision that evaluated Proposition 65 for the same reasons in 1990. *See Cal. Labor Federation v. Cal. Occupational Safety & Health Standards Board*, 221 Cal. App. 3d 1547, 1556 (1990) (holding "Proposition 65

is a state law governing occupational safety and health" that "might be deemed preempted . . . unless it is included as a part of the state plan" due to a potential conflict with the federal Hazard Communication Standard). Nothing in the California Supreme Court's holding here conflicts with the courts' prior rulings regarding Proposition 65.

First, there is no federal occupational and safety standard in potential conflict with the enforcement of the UCL and FAL, which prompted the need for federal review and approval of Proposition 65. *See Industrial Truck*, 125 F.3d at 1311-15 [addressing possible preemption based on conflicts with the federal Hazard Communication Standard); *Cal. Labor Federation*, 221 Cal. App. 3d at 1553-54 (same). Indeed, unlike here, there was a "possibility of federal preemption" with respect to Proposition 65's warning requirements:

> because in August 1987 the Hazard Communication Standard (HCS) under Fed/OSHA was amended to require employers to warn employees of potential exposure to certain hazardous materials in the work place. (29 C.F.R. § 1910.1200.) Since the HCS covers the general subject area of employee warnings for exposure to hazardous substances, Proposition 65 might be deemed preempted by 29 United States Code section 667 unless it is included as a part of the state plan.

Cal. Labor Federation, 221 Cal. App. 3d at 1553-54. There is no similar challenge based on conflicts with the Hazard Communication Act raised in this case.

Second, the procedural posture and legal questions addressed by the California state and federal courts with respect to Proposition 65 are not the same as those presented here. In *Industrial Truck*, the plaintiff "manufacturer and distributor of industrial trucks" sought a declaratory judgment and injunction prohibiting enforcement of portions of Proposition 65 that conflicted with federal law before any enforcement action was brought. In ruling on that declaratory relief question, the Ninth Circuit emphasized that its "decision is a narrow one" applicable to "an as applied challenge to only that part of Proposition 65 that was not included in the State Plan." *Indus. Truck*, 125 F.3d at 1315. In *Cal. Labor Federation*, the California court of appeal was presented with a petition for a writ of mandate seeking to compel CalOSHA to: (a) incorporate the newly enacted portions of Proposition 65 "applicable to the workplace" into the state plan; and then (b) submit the amendments to the Secretary for approval. *Cal. Labor Federation*, 221 Cal. App. 3d at 1559. That petition was filed after the California Labor Federation, and others, demanded that CalOSHA amend the state plan to incorporate the new law, but CalOSHA refused to do so. There is no new law, or change in law at issue here, and no party is seeking any similar type of declaratory relief in this case that would warrant such a similar mandate or holding.

Third, Proposition 65 was adopted long after the federal Act was implemented and California's state plan was initially approved. California's Business and Professions Code Sections 17200 and 17500, on the

other hand, are laws of general applicability that predated the Act and have long been enforced under the historic police powers of the state. Pet. App. 31a-34a. Unlike Proposition 65 and the Ninth Circuit's analysis thereof in *Industrial Truck*, the UCL and FAL are laws protected by a presumption against preemption. *Gade*, 505 U.S. at 107; *Rice*, 331 U.S. at 230; *In re Farm Raised Salmon Cases*, 175 P.3d at 1176; Pet. App. 16a, 31a.

Hence, the legal question and preemption analysis in *Industrial Truck* is distinguishable and not in conflict with the California Supreme Court decision here.

2. The Ninth Circuit's Non-Binding, Unpublished *Kelly* Decision Does Not Present A Conflict Warranting Review

Petitioners rely heavily on an outdated, unpublished and non-binding decision of the Ninth Circuit, *Kelly v. USS-OOSCO Industries*, and claim review should be granted because the Ninth Circuit "answered the precise question presented here" and reached a different result. Pet. 22. This is not so. In that opinion, the Ninth Circuit affirmed the dismissal of a *private* right of action under Section 17200 (that was since largely abolished in California) and held that the private party's UCL action was preempted based on the unique circumstances in that case. *Kelly*, 101 Fed. Appx. at 184 (rejecting "unfair" business practice claim vaguely challenging the adequacy of the employer's "training program" as part of a worker's sex discrimination, hostile work environment and

retaliation complaint). The opinion has no bearing on the District Attorney's express authority to pursue public law enforcement actions under the UCL or FAL here. To be sure, the *Kelly* decision says nothing about the FAL at all. Also, private rights of action by employees against their employers for workplace safety violations are statutorily limited and clearly distinguishable under California law. *See, e.g.*, Cal. Lab. Code §§ 2698-2699.5.

Moreover, there is little reasoning or analysis in the Ninth Circuit's Opinion to support its holding in that case. Unlike the lengthy and thorough analysis of the preemption question by the California Supreme Court here, in *Kelly*, the Ninth Circuit devoted a mere two short paragraphs to its analysis and conclusion. Not only is the *Kelly* decision not binding precedent, but it also offers little persuasive value in private rights of action under the UCL given its lack of any meaningful analysis of the preemption question faced in that case. As such, the *Kelly* decision does not give rise to any conflict that needs to be resolved by this Court.

F. The California Supreme Court Did Not Imply That State Law Can Never Be Preempted By The Act

The California Supreme Court did not "imply that OSH Act preemption never applies in jurisdictions with approved plans," as Petitioners contend. Pet. 30. In fact, the opinion expressly notes "that in some

instances, a UCL claim may fall within a field of preemption." Pet. App. 33a. This case simply does not raise any claims within a preempted field.[6] *See, e.g.*, *Parks v. MBNA America Bank N.A.*, 278 P.3d 1193, 1194-1204 (Cal. 2012) 54 Cal.4th 376 (holding state law pre-empted by National Bank Act); *People v. Naegele Outdoor Advertising Co. of Cal., Inc.*, 698 P.2d 150, 158 (Cal. 1985) (holding federal law preempted state enforcement of any laws "on Indian reservations").

G. Speculation Regarding The Amount of Penalties That Could Be Awarded In This Case Is Not A Compelling Reason For Further Review

Citing to misplaced dicta from the state appellate court's opinion in this case, Petitioners and amicus parties urge this Court to grant review because the amount of penalties could be significant in this case. Pet. 32-33; Chamber's Amicus at 2-3; NAM Amicus at 15; NFIB Legal Center Amicus at 9-10. The amount of penalties that may ultimately be awarded, however, is not relevant to the question of preemption, is based on

---

[6] This case does not involve any of the expressly exempted workplaces from California's state plan, which could conceivably fall within the preempted field. 29 C.F.R. § 1952.172(b)-(c). This is also not a case, for example, involving possible interference with interstate commerce which might also give rise to a preemption concern. 62 Fed. Reg. 31159, 31164 (June 6, 1997) (noting "an attack based upon unduly burdening commerce" in relation to a state workplace safety law "is limited to those situations where the product standard applies" (quoting *Florida Citrus Packers v. Cal.*, 549 F. Supp. 213, 215 (D.C. Cal. 1982)); *see also* 29 U.S.C. § 667(c)(2).

pure speculation at this stage of the case, has not yet been decided in the state court, and presents an issue that was not properly raised on the record below. The amount of civil penalties that may properly be awarded in a UCL or FAL action is a matter of state law, and a question that is left to the sound discretion of the trial judge in this case. *See, e.g.*, Cal. Bus. & Prof. Code § 17206(b) (listing numerous factors for trial courts to consider when assessing penalties under the UCL). The federal Act says nothing about limiting the amount of penalties that can be assessed in worker safety actions, let alone any other actions based on non-occupational safety laws like the UCL and FAL. Thus, the unlitigated future penalty that may be assessed following trial in this case does not offer a compelling basis to support review of the question presented here.

H. Unfounded Concerns Regarding The "Impact" Of The California Supreme Court's Ruling On Non-Worker Safety Laws In All 50 States Is Likewise Not A Compelling Basis For Review

Amicus parties argue review is necessary to prevent abuse due to other "State's Broad Unfair Competition Statutes," claiming "the decision invites a proliferation of add-on rules wholly outside of the deliberate process for federally approved state plans. Chamber's Amicus at 15; NFIB Legal Center Amicus at 10-12. Amicus parties also broadly contend review is necessary because "Employers need to know the scope

and force of the regulatory universe they operate in" and state enforcement actions under state laws of general applicability are unpredictable and unforeseeable. Chamber's Amicus at 10. None of these concerns, however, are actually implicated by the California Supreme Court's ruling here.

First, the decision is not binding on any other state, and the alleged concerns are based on pure speculation. Second, the decision addresses causes of action under California state law that have been brought against employers in California for decades. Hence, review by this Court is not required to properly apprise California employers of their legal obligations under the Act, California's state plan and/or the potential penalties (either criminal or civil) that may be assessed under the UCL or FAL for unlawful conduct in California. Any challenges to the intentionally broad scope of California's UCL or FAL (or any of the other similar laws in the 50 states) are matters of state concern that should be raised, if at all, in the state legislatures in question.

CONCLUSION

In the absence of any conflict among the circuit courts of appeals or state high courts of last resort, the California Supreme Court's application of settled law to the causes of action in this case does not warrant

further review by this Court. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

TONY RACKAUCKAS, District Attorney
COUNTY OF ORANGE, STATE OF CALIFORNIA
KELLY A. ERNBY,*
Deputy District Attorney
Post Office Box 808
Santa Ana, California 92702
Telephone: (714) 834-3600
kelly.ernby@da.ocgov.com
**Counsel of Record*

SEPTEMBER 2018